THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

Record No. 2021/933 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

Ballyboden Tidy Towns Group

Applicant

And

An Bord Pleanála,
Ireland and the Attorney General
and
South Dublin County Council

Respondents

And

Ardstone Homes Limited

Notice Party

Judgment of Mr Justice David Holland, delivered 21 December 2023

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INTRODUCTION & ISSUES

1. By Order[1] made on 16 September 2021 under s.4 of the 2016 Act,[2] An Bord Pleanála ("the Board") granted Ardstone Homes Limited ("Ardstone") planning permission ("the Impugned Permission") for a Strategic Housing Development ("SHD") of 114 Build-to-Rent[3] apartments[4] in six apartment and duplex blocks of up to six storeys ("the Proposed Development") on a 2.2 hectare site south of Stocking Avenue, Rathfarnham, Dublin 16[5] ("the Site"). The Board decided to grant permission generally in accordance with its Inspector's recommendation ("the Inspector").

2. The South Dublin County Council Development Plan 2016 – 2022 ("the Development Plan") and Ballycullen-Oldcourt Local Area Plan 2014[6] ("the BOLAP") applied to the Impugned Permission.

3. The Site is at the eastern extremity of the BOLAP area and Stocking Avenue runs east-west along its northern border. The Proposed Development is Phase 5, "White Pines Cen, of the wider White Pines development.[7]

- White Pines North (172 dwellings, north of Stocking Avenue), White Pines South (106 dwellings, south-west of the Site and including White Pines Park and White Pines Dale) are built and occupied.
- White Pines Retail, a neighbourhood centre west of the Site and consisting of a convenience retail unit and a creche building, was in construction when the SHD application was made and is since completed, occupied and trading.
- Planning permission for White Pines East (north of Stocking Avenue) is the subject of separate judicial review proceedings brought by BbTTG.

4. The applicant for judicial review, Ballyboden Tidy Towns Group ("BbTTG"), objected to the planning application on grounds including excessive density and building height, removal of hedgerows, encroachment on a powerline wayleave, discrepancies in the application documents (including as to the number of proposed bicycle spaces, the width of the powerline wayleave and the failure to properly identify it) and failure to give public notice that 3 vehicular entrances to the Site are proposed.

[1] ABP-310398-21.
[2] Planning and Development (Housing) and Residential Tenancies Act 2016.
[3] Defined as "Purpose-built residential accommodation and associated amenities built specifically for long-term rental that is managed and serviced in an institutional manner by an institutional landlord." §5.2, Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities issued under Section 28 of the Planning and Development Act, 2000 (as amended) December 2020. §5.5 provides that "The provision of dedicated amenities and facilities specifically for residents is usually a characteristic element . …… scheme. This provides the opportunity for renters to be part of a community and seek to remain a tenant in the longer term, rather than a more transient development characterised by shorter duration tenancies that are less compatible with a long term investment model."
[4] 32 one-bed, 53 two-bed units and 29 three-bed Build to Rent units.
[5] Principally bounded by White Pines South to the south, White Pines Retail to the west, Stocking Avenue to the north and greenfield lands to the east.
[6] Extended in duration to June 2024.
[7] See generally, Ardstone's Planning Statement Figure 1.2.

5. The Planning Authority, South Dublin County Council ("the Council"), recommended refusal of permission for, inter alia,

- material contravention of specific objectives of both the BOLAP and the Development Plan as to building height, density and unit mix.
- non-provision of childcare facilities – contrary to §3.3.1 of the Childcare Facilities Guidelines 2001.[8]

6. Having abandoned other grounds, and the case against the State and the Council standing adjourned generally, BbTTG now seeks to have the Impugned Permission quashed on the following grounds, briefly described:

- **Ground 1**[9] – Failure to recognise, and hence failure to justify permission despite, **material contravention** of **Development Plan objective RES-N** ("*New Residential - RES-N - To provide for new Residential Communities in accordance with approved Area Plans*").
  (Note, as the BOLAP in 2014 preceded the 2016 Development Plan, it refers to the previous, but identical, iteration of this objective as "A1". For convenience I will refer to the objective as "RES-N" and amend accordingly references to documents which cited objective as A1.
  Essentially, BbTTG assert that, given the Board recognised material contraventions of the BOLAP as to Building Height, Density, Dwelling Mix and Phasing,[10] it follows that the Proposed Development was not "*in accordance with"* the BOLAP within the meaning of Development Plan Objective RES-N such that there was a material contravention of Development Plan Objective RES-N as well as of the BOLAP.

- **Ground 3** – **inaccuracy of the SHD Planning Application form**, contrary Article 297(1) and Schedule 3, Form 14 PDR 2001,[11] as to the **number of proposed bicycle parking spaces and the number of proposed vehicular entrances** to the Site, such that the Board was obliged, but failed, to invalidate, and decline to decide, the planning application.

- **Ground 4** – Failure to recognise, and hence failure to justify permission despite, **material contravention of BOLAP by encroachment** of the Proposed Development on the 110Kv **electricity line wayleave** which traverses the Site. Essentially, BbTTG assert that whereas the BOLAP stipulates[12] that "*the ESB require*" "*a minimum lateral clearance of 23 metres from the centre line on either side of the 110kV lines*"[13], the Proposed Development allows only 17 metres.

- **Ground 5** – Failure to recognise, and hence failure to justify permission despite, **material contravention of BOLAP** Objective DI13 by removal of about 70% of the only hedgerow on site, which was identified by the BOLAP as a significant hedgerow.[14] **BOLAP** Objective DI13 is to

[8] Guidelines for Planning Authorities on Childcare Facilities, 2001.
[9] Ground numbering is taken from the Statement of Grounds.
[10] i.e. as to the intended order in which BOLAP lands would be developed.
[11] The Planning and Development Regulations, 2001 as amended.
[12] §2.11.
[13] To avoid confusion, and as they all follow the same route, I will generally refer to the "110kV line" in the singular.
[14] BOLAP Figure 4.2.

"Create an integrated network of green corridors … by way of linking, preserving and incorporating hedgerows … wildlife corridors, SUDS features and existing streams."

- **Ground 8** – inadequacy of reasons by way of failure to engage with residents' objections,
  - that, in justifying the omission of a creche from the Proposed Development despite §4.7 of the Apartment Guidelines 2020,[15] Ardstone had significantly overestimated the availability of off-site childcare.
  - by explaining why it preferred the Developer's estimate of the availability of off-site childcare to that provided by the residents.

- **Ground 8A** – **SEA**.[16] This ground asserts that as the Impugned Permission granted planning permission for the Proposed Development in material contravention of plans – the BOLAP and the Development Plan – which had been subjected to SEA, the Impugned Permission constituted a modification of those plans such that a screening of the planning application, qua modification of the BOLAP, for SEA – for likely significant effect on the environment – was required but, it is common case, was not done.

MATERIAL CONTRAVENTION – S.9(6) OF THE 2016 ACT AND S.37(2)(B) PDA 2000

7. A number of grounds of challenge allege, essentially, failure by the Board to recognise material contraventions of planning policy and failure accordingly to activate the statutory processes which would have enabled a valid grant of permission despite such material contraventions. It is convenient therefore to identify at this point those statutory processes.

8. **S.9(6) of the 2016 Act** provides as follows:

(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where

[15] Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities December 2020 - issued under S.28 PDA 2000.
[16] Strategic Environmental Assessment pursuant to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment and the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004.

it considers that, if section 37(2)(b) of the Act of 2000[17] *were to apply, it would grant permission for the proposed development."*

9. So, s.9(6)(b) prohibits material contraventions "*in relation to the zoning of the land*" whereas s.9(6)(c) allows, in certain circumstances, for material contraventions "*other than in relation to the zoning of the land*". The phrase "*the zoning of the land*" means the designation of lands for particular use types – such as those inexhaustively listed in s.10(2)(a) PDA 2000: "*residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses*". As McDonald J. said in **Highlands Residents**,[18] *"… zoning relates to the use for which lands are designated".* The uses for which lands may be zoned may be identified with greater or lesser particularity and/or by way of sub-categories of use (for example, distinguishing types of retail development) and/or by way of explicit inclusion, exclusion or allowance for the possibility of particular uses or sub-categories of use. The types of development, by way of works, permissible on lands is determined by the uses for which it is zoned. A single zoning objective in a development plan may include both zoning and non-zoning elements. So, as Humphreys J pointed out in **O'Donnell**,[19] a zoning objective may zone lands for residential use, but also regulate detail by reference to factors, such as scale, design, density or the like, which differentiate developments within a land use type but do not change a permissible use from one type to another. Those factors are generally not zoning in nature – though differences between developments beyond detail in such regards may create exceptions to the general rule. So, as Humphreys J said, *"A provision of a plan regarding density is not a provision regarding zoning, even if it is included within the literal terms of a zoning objective in a particular plan."*

10. S.10(3)(b) of the 2016 Act provides that where the Board grants a permission in accordance with s.9(6)(a), the decision shall state *"the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be, …"*

11. S.37(2) PDA 2000, as relevant, provides that:

> *"(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)*[20] *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*

[17] PDA 2000.
[18] Highlands Residents Association v. An Bord Pleanála [2020] IEHC 622, [2020] 12 JIC 0201.
[19] O'Donnell v. An Bord Pleanála [2023] IEHC 38.
[20] (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

not clearly stated, insofar as the proposed development is concerned,

(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."

GROUND 1 – MATERIAL CONTRAVENTION OF DEVELOPMENT PLAN OBJECTIVE RES-N

PLEADINGS

12. As refined at trial,[21] BbTTG plead that:

- Ardstone's Material Contravention Statement, the Board's Inspector[22] and the Impugned Permission identify material contravention of the BOLAP as to unit mix, density and phasing.[23] (The cited element of the Inspector's report also found material contravention as to building height – I think it would be unfair to exclude that from consideration on pleading grounds).

- Therefore, the Impugned Permission permits a proposed development in material contravention of Development Plan objective RES-N – "*to provide for new Residential Communities in accordance with approved Area Plans*"[24] in that, being in material contravention of the BOLAP, it is not "*in accordance with"* the BOLAP.

- Accordingly, the Impugned Permission is invalid for failure to justify, under s.9(6)(c) of the 2016 Act and s.37(2)(b) PDA 2000,[25] that material contravention of Development Plan objective RES-N.

13. The Board pleads that it concluded that permission would give rise to a material contravention of the BOLAP as to building height, residential density, dwelling mix and phasing strategy and explained the justification for permission by reference to s.37(2)(b) PDA 2000. The Applicant's plea "*is therefore not understood".* This clearly pleads inadequacy of BbTTG's pleading of

[21] A plea as to material contravention of specifically a zoning objective was abandoned in light of O'Donnell v An Bord Pleanála [2023] IEHC 381.
[22] Inspector's report §6.4.2.
[23] i.e. as to the intended order in which BOLAP lands would be developed.
[24] Development Plan, Table 11.1: Land Use Zoning Objectives. Table 11.3 details the uses permitted, open for consideration and not permitted. BOLAP is such an "area plan". BOLAP in 2014 preceded the 2016 Development Plan, it refers to the previous, but identical, iteration of this objective as "A1". Though pleaded as "A1", I will refer to it as "RES-N".
[25] The Planning and Development Act, 2000.

Ground 1. It also pleads that those material contraventions of the BOLAP does not amount to a material contravention of Development Plan zoning objective Res-N.

THE ARGUMENTS & DECISION

14. For the purpose of Ground 1, BbTTG relied on the material contraventions of the BOLAP which the Board had identified, rather than on those additional material contraventions which BbTTG alleged, for the purposes of advancing other Grounds, that the Board had failed to identify.

15. Given the fact that the discrete respects in which the Proposed Development would not be "*in accordance with*" the BOLAP, as required by Development Plan Objective RES-N, had been discretely identified by the Board and permission despite them had been justified by the Board in respects which BbTTG had not challenged, the question remained: what of substance, as opposed to of form, remained of Ground 1? That is essentially the gravamen of the Board's plea cited above.

16. The Board submitted that:

- BbTTG, in effect, asserted that the Board should have *twice* addressed the specific material contraventions of the BOLAP: once as to their contraventions of the BOLAP itself and again, with the same reasoning and justification, as to Objective Res-N.

- It would be irrational for the Board to take a different view as between those two analyses.

- BbTTG's prescription is for needless, formalistic, duplication to no useful purpose and would be a distortion of the statutory scheme.

17. In response to this obvious difficulty, BbTTG shifted ground at trial. It submitted that material contravention of Development Plan Objective RES-N required, in addition to the discrete justifications of discrete material contraventions of the BOLAP (which BbTTG accepts the Board did), a "global" or "cumulative" analysis of those discrete material contraventions of the BOLAP. BbTTG takes them collectively as what it called a "wholesale breach" of RES-N by reference to a general criterion of "*accordance with*" the BOLAP set by RES-N. This "cumulative" analysis, BbTTG says, the Board failed to do. BbTTG's submission was that the outcome of this cumulative analysis could be a finding of material contravention of RES-N substantively distinct from the individual findings of material contravention of the BOLAP. In turn, BbTTG argued, that material contravention of RES-N would require distinct justification in accordance with s.9(6)(c) of the 2016 Act.

18. In my view BbTTG advanced this argument,

- at an abstract level.

- without reference to any alleged actual substantive planning concern
  - allegedly not captured by the analysis which resulted in the finding and justification of the material contraventions of the BOLAP and
  - which would have been captured by the posited "cumulative" analysis by reference to Development Plan objective RES-N.
- without making any concrete or substantiated suggestion that the outcomes of the two analyses could have been different.

Though they are issues of law, BbTTG bore the evidential onus of proof of both contravention of Development Plan objective RES-N and the materiality of any such contravention. Ardstone correctly asserts that BbTTG attempted to discharge neither onus, but it seems to me best to confine myself to the latter - as it relates to evidence of a "global" or "cumulative" materiality beyond the sum of the parts consisting of the identified material contraventions of the BOLAP.

19. There is considerable attraction in the Board's argument that BbTTG is, in effect, suggesting that the Board should twice address, by way of needless duplication, the material contraventions of the BOLAP: once qua contraventions of the BOLAP itself; and again qua contravention of Development Plan Objective RES-N. That argument by the Board is especially attractive in light of the abstract nature of the BbTTG argument to which it responds.

20. BbTTG has pleaded failure by the Board to express its conclusions on the four heads on which it found material contravention of the BOLAP, without additional analysis or substance, as conclusions also of material contravention RES-N. Put that simply I agree with the Board that this is form not substance and I reject this challenge thus put. Essentially, the pleading point taken against BbTTG is that it now makes an unpleaded additional argument that additional analysis and substance was required of the Board – to consider those four heads of material contravention cumulatively as against the requirements of RES-N.

21. The extensive caselaw as to the centrality in judicial review of the necessity for clarity and precision of pleadings is well-rehearsed and need not be repeated – see for example **ETI**.[26] In my view, and on a fair and reasonable reading of its Statement of Grounds, clarity and precision on the real case BbTTG ultimately sought to make on this Ground – a requirement of "cumulative" analysis by reference to Development Plan objective RES-N – became apparent only in its submissions. The caselaw is clear – that will not suffice and the pleading difficulty it creates for BbTTG is jurisdictional – **Casey**.[27] Accordingly I must dismiss this ground.

22. If I am wrong in that regard, I would also dismiss this ground on the basis that, as the Board argues, its Impugned Permission in fact discloses reasoning which amounts in substance to the sort of cumulative analysis BbTTG belatedly says is required. It found that permission could materially

[26] Environmental Trust Ireland v. An Bord Pleanála [2022] IEHC 540, §211 et seq.
[27] Casey v. Minister for Housing [2021] IESC 42 (Supreme Court, Baker J, 16 July 2021).

contravene both the Development Plan and the BOLAP as to building height, and the BOLAP as to density and dwelling mix, and phasing strategy. But it concluded that such permission could be justified under, inter alia,

- s.37(2)(b)(i) PDA 2000 as development of strategic importance. The Inspector addressed this issue[28] in terms of the key priority, identified in the Housing Action Plan,[29] of accelerated delivery of housing - the implementation of which is facilitated by the 2016 Act and pillar four of which plan identifies provision of Build-to-Rent units as a key action. The Inspector considered that the Proposed Development will contribute to the national strategic objective of delivery of housing.

- s.37(2)(b)(iv) PDA 2000 and as to each of the issues of heights, densities, dwelling mix, and phasing, by reference to the pattern of development and permissions granted since the adoption of the BOLAP. (It is true that the pattern discerned as relevant to phasing was a different pattern to that discerned as to the other matters, but I do not think that determines the issue. And if I am wrong in that, the strategic importance justification remains).

Importantly, these conclusions are not impugned in these proceedings.

23. The point is that each of these two justifications, taken alone, clearly and necessarily applies to each, and to all taken together in cumulation, of the material contraventions of the BOLAP and so, in substance to the alleged material contravention of the RES-N requirement that the Proposed Development be "*in accordance with*" the BOLAP. To put it another way, I find that the Board in fact and in substance did that which BbTTG say it ought to have done but did not do. Certiorari should be refused accordingly.

24. If, in turn, I am wrong also in holding that the Board in fact and in substance did that which BbTTG says it ought to have done but did not do, I agree with the Board that I should refuse relief as a matter of discretion. On any view, the Board did so much of that which BbTTG says it ought to have done but did not do that, in the absence of anything but a high level abstract argument barren of the identification of substantive planning concerns, it cannot be said that BbTTG has discharged its burden of showing that any error is of substance rather than merely of form and has done harm.[30] As I have said, as it relates to a "global" or "cumulative" materiality beyond the sum of the parts consisting of the identified material contraventions of the BOLAP, BbTTG has not even attempted to adduce any evidence. It would be disproportionate in those circumstances to quash the Impugned Permission on this Ground. In this regard, I agree with the Board's reliance on the obiter observation of Woulfe J for the Supreme Court in **Save Cork City**[31] in which he saw "*a great deal of force*" in a similar submission, albeit in that case what was in issue was a "*technical procedural error*". I am not sure the present case would, if I am wrong in my earlier bases of dismissal of this ground, fall quite

[28] Inspector's report §10.3.1.
[29] Rebuilding Ireland, An Action Plan for Housing and Homelessness, July 2016.
[30] See generally cases cited in Fordham, Judicial Review Handbook, 6th Ed'n §4.1.1. & §4.3.
[31] Save Cork City Community Association CLG v An Bord Pleanála [2022] IESC 52, at §60.

into that category of error. Nonetheless, I am reminded of a supposed distinction between pure maths and applied maths – that in the latter it suffices to get "*as near as makes no difference*".

25. As, on this Ground, I have decided for the Board on the bases set out above, I need not decide its "gaslighting" argument that no-one in the planning process had argued for the need for a distinct analysis of material contravention of RES-N in addition to analysis of material contravention of the BOLAP, much less argued for the form of "cumulative" assessment canvassed above. That argument was based largely on the **NGGSPS** case.[32] However, I will say that I do not think that NGGSPS is inconsistent with the following analysis:

- The Board here accepted that there were no facts relevant to that issue of material contravention of RES-N which were unknown to it when making the Impugned Permission.

- The Board's autonomous duty to identify material contraventions subsists where the alleged material contravention is not drawn to its attention by others, unless the Board was not on notice – actual or constructive - of the relevant facts. In identifying facts of which it is on constructive notice one must have regard to the inquiries it ought to have made having regard to its autonomous duty of inquiry. That a process is inquisitorial not adversarial is a burden on a decisionmaker - not an absolution. That inquisitorial obligation is born of the primarily public nature of the interests protected by planning and environmental law (though it protects private interests also) and is evident, for example, in that planning applications may be (and often are) refused in the absence of any objection – including on material contravention grounds.

- The Board's position rested in appreciable part on its being allegedly gaslit by an argument as to a point of law - and the more so by its novelty. But objectors need not hire lawyers to object to planning applications and cannot be penalised or estopped for not having done so or for not making novel points of law in objecting. The Board is expected to know its planning law. I appreciate that novel points may push that principle towards its limit and that there are downsides to doing so given judges' decisions may not be quite as predictable as we imagine (few cases on affidavits would run if they were). But failing to push it that far would wreak a greater injustice on objectors and indeed, depending on circumstances, developers and the public, than pushing it that far would wreak on the expert Board.

Accordingly, I have considerable doubts as to the applicability of anti-gaslighting principles to Ground 1. But I can leave their resolution to another case, if it arises.

26. On reflection, and given the virtual ubiquity of its deployment in argument by the Board in recent judicial reviews, I confess to wondering whether "gaslighting" is the appropriate analytical concept in these cases. In saying so I am conscious that I have on occasion adopted the concept myself. There is something unreal in the vast majority of cases about depicting the Board as the vulnerable dupe of the sustained subterfuges of a malevolent actor. Use of the term may do a

[32] North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241.

disservice to both the Board and those genuinely gaslit in the circumstances in which the term is more traditionally and accurately deployed. Also, and again on reflection, I am not convinced that the idea of procedural fairness to the Board should necessarily be the primary concern. While obligations of fairness to a decision-maker of course subsist and may at times affect the outcome of a judicial review, fairness more generally and primarily arises as a basis for deciding issues in judicial review by way of justice inter partes rather than as between party and decision-maker. After all, the Board has no private, much less partisan, interest in its decision or in having its decisions upheld – **Saleem**.[33] Its proper interest in judicial review is in the correct result – as to the legality or illegality of its decision. That is the view of the Treasury Solicitor across the water, whose guidance[34] to public bodies is that their purpose in judicial review of their decisions is not "*to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration"*. This principle was recognised in **Murtagh**[35] as based on a view of judicial review as a partnership between the courts and public bodies *"based on a common aim, namely the maintenance of the highest standards of public administration".*[36] But, again, resolution of these considerations is not required in this case.

27. For now, it suffices to dismiss Ground 1 for the reasons stated above.

GROUND 3.1[37] – APPLICATION FORM INACCURACY – BICYCLE SPACES

PLEADINGS

28. BbTTG plead that,

- The site notices, newspaper notices and SHD planning application form describe the Proposed Development as providing 198 bicycle parking spaces.

- Article 297(1) PDR 2001[38] requires that the application form be filled out. Schedule 3 Form 14[39] stipulates that form. It includes the following:

> *"Failure to complete this form or attach the necessary documentation, or the submission of incorrect information or omission of required information, will lead to the Board refusing to deal with your application."*

[33] Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55; Cooke J citing Donaldson MR in R v Lancashire County Council (ex parte Huddleston) [1986] 2 All ER 941, [1986] NLJ Rep 562.
[34] Treasury Solicitor's Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010).
[35] Murtagh v Kilrane [2017] IEHC 384.
[36] Citing Graham v Police Service Commission [2011] UKPC 46, R v Lancashire CC ex p. Huddleston [1986] 2 AER 941 and Secretary of State for the Home Department v The Special Immigration Appeals Commission, AHK and ors [2015] EWHC 681 (Admin).
[37] I have split Ground 3 for convenience.
[38] The Planning and Development Regulations, 2001. Art. 297(1) states "An application shall be in the form set out at Form No. 14 of Schedule 3."
[39] Form of application to An Bord Pleanála in respect of proposed strategic housing development" substituted by Article 99(j) of S.I. No. 296/2018 European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018.

- Ardstone's Planning Report, Statement of Consistency[40], Traffic and Transport Report and EIAR[41] describe 238 bicycle parking spaces.

- The Inspector noted that discrepancy and himself counted only 213 bicycle parking spaces on the application drawings.[42]

- The application form is inaccurate as the Proposed Development contains 213 spaces not 198.

- The Inspector
  - considered that the discrepancies as to the number of bicycle spaces were not "*so material as to render the application invalid or to prejudice third party rights or access to information.*"
  - considered that, given the proposed level of on-Site car parking provision and the stated intent to encourage alternative travel modes, the provision of adequate cycle parking *"assumes greater importance".*
  - noted that 213 spaces would fall short of the 282 spaces identified under the Apartment Design Guidelines.[43]
  - Recommended that any permission include a condition requiring additional cycle parking spaces.

- The inaccuracy as to bicycle parking spaces in the application form is a material error of law sufficient to vitiate the Board's grant of permission.

- There was no effective public participation for the purposes of Article 6(4) of the EIA Directive.

29. BbTTG's plea that Condition 13 as to bicycle spaces is void for uncertainty was, in my view correctly, abandoned.

30. The Board's pleadings do not dispute the factual sequence pleaded by BbTTG. Rather, it disputes the legal significance of those facts – it upholds the Inspector's view in that regard. It pleads that BbTTG made submissions on the issue of the number of bicycle spaces and the Board considered them. So BbTTG was not prejudiced by the error. The error does not warrant certiorari.

31. Ardstone pleads that there was no error in the application form – that its obligations were substantially fulfilled. It adds to the confusion, perhaps accurately, by pleading that:

[40] i.e. the statement required by S.8(1)(a)(iv) of the 2016 Act setting out how the proposal will be consistent with the objectives of the relevant development plan or local area plan, or where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in section 37(2)(b) of the Act of 2000.
[41] Environmental Impact Assessment Report in accordance with the EIA Directive - Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. See EIAR Chapter 14.
[42] Inspector's report §10.2.6.
[43] Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities issued under Section 28 of the Planning and Development Act, 2000 (as amended). December 2020.

> *"The public notice describes the total quantum of secure bicycle parking spaces, at 198. The public notice does not state the total quantum of all bicycle parking proposed in the application, at 238, which includes both secure / long stay spaces and visitor / short stay spaces. ……. The EIA report identified and described the environmental effects of the provision of the higher number of 238 bicycle spaces."*

It adds, accurately, that the permitted development, in accordance with condition 13, and the Apartment guidelines, will provide 282 spaces.

THE INSPECTOR'S REPORT AND CONDITION 13

32. Certain content of the Inspector's report is recorded above and I will address more below. At this point I note that, citing a discrepancy between Ardstone' public notices and its Housing Quality Assessment and its Planning Report[44] the Inspector listed[45] the "*main development parameters as described in the application*" as including yet another figure – 224 bicycle spaces – "*190 secure and 34 visitor*" as derived from Ardstone's Housing Quality Assessment[46]. As stated, the Inspector found 213 spaces on the drawings,[47] noted that 213 spaces would fall short of the 282 spaces identified under the Apartment Design Guidelines[48] and recommended that any permission include a condition requiring additional cycle parking spaces.

33. Condition 13 of the Impugned Permission reads as follows:

> *"Bicycle parking spaces shall be provided within the site in accordance with the provisions 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. Revised details of the number, layout and design, marking demarcation and security provisions for these spaces shall be submitted to and agreed in writing with the planning authority prior to commencement of development.*
>
> ***Reason:** To ensure that adequate bicycle parking provision is available to serve the proposed development, in the interest of sustainable transportation."*

It is agreed that, in substance, this imposes a requirement of 282 bicycle spaces.

[44] Which asserted 238 spaces – see §5.3.8.
[45] Inspector's report p5.
[46] Ardstone's Housing Quality Assessment's p6.
[47] Inspector's report p52 & 87.
[48] Inspector's report p87.

DISCUSSION & DECISION

34. To be clear, the Application Form did not say, as Ardstone plead, that the 198 spaces would be secure spaces as opposed to any other kind or that the total number of spaces would be greater. It baldly proposes 198 "*bicycle parking spaces*". The EIAR uses exactly the same phrase – "bicycle parking spaces" in recording a figure of 238.[49] While the explanation may lie in a distinction between secure and other spaces, the fact remains that both descriptions cannot be correct and the "*lack of clarity*" cited by the inspector and the resultant confusion is of Ardstone's own making. It cut a rod for its own back and it is difficult to have much sympathy for it. But that is not the point.

35. Logically, one could say that either the Application Form prevails and the application is for 198 bicycle spaces and is inevitably correct in that regard or the drawings prevail at 213 spaces and the Application Form is incorrect, or, indeed, that the EIAR prevails at 238 spaces and even reflects a correct counting of the spaces on the drawings. (This latter observation is no criticism of the Inspector who should not have been put to the necessity of trying to find and count the spaces in the drawings.)

36. The Board's view is that 213 is correct and that the Application Form was, as BbTTG asserts, incorrect in asserting 198. As this essentially concedes as to fact the error asserted by BbTTG, I will approach the matter on that basis.

37. BbTTG cite **Atlantic Diamond**[50] in which Humphreys J drew attention to the warning in Form 14[51] which is cited above and held that "*The clear and express terms of the statutory instrument indicate an intention that the details required are mandatory*." However, that case concerned specifically required details : §16L of the form enquired whether "*any statutory notices*"[52] applied to the site or buildings thereon and, if so, required details. The Developer answered "yes" – statutory notices did apply – but failed to supply the required details. Unsurprisingly, given the clear breach of an explicit and specific requirement, Humphreys J quashed the permission on the basis that the application was invalid. He explained not merely on the basis that the details required were mandatory but also on the basis that:

> *"The notice party calls such a result formalism, but formalism is not always to be condemned where it might contribute to making a better decision or could make a difference. I don't think one could say that no reasonable board could have taken account of the enforcement information had it been provided. So one can't say that it couldn't have made any difference."*

[49] EIAR §7.2 & EIAR NTS §3.2.3.
[50] Atlantic Diamond v An Bord Pleanála [2021] IEHC 322.
[51] Failure to complete this form or attach the necessary documentation, or the submission of incorrect information or omission of required information, will lead to the Board refusing to deal with your application. Therefore, ensure that each section of this application form is fully completed and signed, entering n/a (not applicable) where appropriate, and that all necessary documentation is attached to the application form."
[52] "(e.g. Fire Safety, Enforcement, Dangerous Buildings, Derelict Sites, Building Control)".

38. BbTTG submit that *"The issue before the Court in Atlantic Diamond was inadequate information – the fact of statutory notices being relevant was identified, but not the details of those notices. In this case the default is more significant – the information in the application form is simply wrong."* While attractive at first glance, on consideration this submission lacks substance.

39. The Board points out, correctly, that the Application Form does not expressly require enumeration of bicycle parking spaces. Its argument, based on that observation, that Ground 3.1 must, merely on that account, be bad is a non-sequitur for two reasons. First the form's stipulations as to specific content of the description of the nature and extent of a proposed development are clearly not exhaustive of the requirement. That requirement is a general one to briefly describe the nature and extent of the proposed development – albeit one constrained by the practicalities of the form and informed by the reality that the accompanying documents will elaborate considerably on the description given in the form. Second, as completed by Ardstone, the form purported to state the number of bicycle spaces – whether or not voluntarily or in excess of requirements. It might be one thing to leave out the number. It's clearly a different thing to positively insert the wrong number.

40. However, while the Board's argument based on a non-sequitur is incorrect, that is not to say that the Board is generally incorrect in its reliance on the fact that the application form requires a brief, rather than a detailed, description of the proposed development and does not expressly require enumeration of bicycle parking spaces. These factors are relevant to the significance of an error by reference to the **Alf-a-Bet**[53] criteria – expressed by Henchy J as follows as to planning permission:

> *".. which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."*

41. In Alf-a-Bet, the issue was compliance with the duty to describe the proposed development in the site notice. The Notice referred only to 'alterations and improvements' to the premises whereas the application was for permission to change the user of the premises from a drapery shop

[53] Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] I.L.R.M. 64, Supreme Court.

to a betting office and amusement arcade. Also the notice's heading did not refer to the name of the city, county or town to which the application referred. Henchy J. faulted for vagueness the "*veiled and misleading notice*".

42. The ultimate question seems to me to be whether the notice, despite the inaccuracy, served the function in respect of bicycle parking spaces which it was intended by regulation to serve. That function is to alert the public to issues which might ground an objection to the planning application. The discrepancy here as between 198 and 213 spaces is of 15 bicycle parking spaces too few in the planning application form – that is a discrepancy of 7%.[54] However, from a planning point of view the more significant observation is clearly that, whether 198 or 213, the proffered number of spaces fell far below that indicated in the guidelines – shortfalls of 30%[55] and 24.5%[56] respectively. A similar calculation can be done based on the EIAR figure of 238 spaces but results in a lesser shortfall. It is impossible to suggest (nor, indeed, does BbTTG suggest) that an objection that too few spaces were to be provided would be appreciably more or less forceful as between 198 and 213. The essential point is the same, even roughly the same in degree. And bicycle spaces are likely to be regarded as, generally, a case of the more the better. In asserting 198 as opposed to 213, Ardstone did itself a disservice rather than the contrary in terms of inadequacy of provision of spaces and shortfall from the number of spaces indicated in the guidelines. Clearly, 198 spaces, as opposed to 213, would have tended to prompt rather than discourage objections and public scrutiny of the remainder of the planning application documents, including the EIAR, as they related to bicycle spaces. It cannot be said that the error undermined public participation in the process.

43. The Inspector summarises the four observations made in the appeal. None complain, in terms of proper planning and sustainable development, of the proposal of too few, or too many, bicycle spaces – though any could easily have done so by taking the various figures supplied sequentially and mounting a critique of each. If mounted, as it predictably would have been, by reference to requirement of the Apartment Design Guidelines, the critique would have been essentially the same. The same can be said of any other member of the public reading the site notice and/or the application form. Indeed, that is exactly what the planning application enabled BbTTG to do.[57] It made the purely formal complaint of the inconsistencies as to bicycle spaces numbers described above. It makes its substantive planning complaint on this issue by reference to the figure of 198 spaces as compared to "*the required 282 no. bicycle parking spaces*". But, having explicitly noted the EIAR figure of 238, BbTTG could just as easily have made its substantive planning complaint by reference to that figure. That it did not do so is perfectly understandable (and proper) and reflects the fact that BbTTG, far from being discommoded by the figure of 198 spaces in the application form, clearly regarded it as advantageous to its opposition to the Proposed Development. It predictably wielded the rod cut by Ardstone.

[54] 15/213 x 100.
[55] (282- 198)/282 x 100.
[56] (282- 213)/282 x 100.
[57] See Marston Planning Consultancy submission of BbTTG to the Board dated 6 July 2021, p13.

44. All and any of the numbers of bicycle spaces proposed by Ardstone fell far below the number recommended by the guidelines – such that all were open to criticism on that account, I am of the view that no-one was discommoded by the error – in fact opponents of the project were advantaged by it. In these admittedly unusual and, it has to be said, surprising, factual circumstances which one would certainly hope not to see repeated, it is nonetheless the case, on balance, that for the reasons just indicated and having regard to the purposes of the application form and, indeed, the purposes of the site notices and other planning application documents, the errors can be regarded, as to the issue of proper planning and sustainable development, as inconsequential. That is so not merely in hindsight given the imposition of Condition 13, but was so in prospect given the error was advantageous to opposition to the Proposed Development. There is no evidence, or even reason to suspect, that the error undermined public participation in the process. For these reasons I consider that *"the error… was a purely venial one, not otherwise affecting the integrity of the decision"* – **Pembroke Road**.[58]

45. In these somewhat unusual circumstances, I have come to the view, not without some hesitation, that the error can properly be regarded as, in the words of Henchy J, *"otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."*

46. Accordingly, I dismiss this ground of challenge as to bicycle space numbers.

47. However, that done, I cannot refrain from the observation that many person-hours have been needlessly wasted by the Inspector, BbTTG and the lawyers involved by reason of these unexplained discrepancies in Ardstone's application documents as to the simple matter of the number of bicycle spaces proffered. In different documents they have been put at 198, 224, 238 and, if the Inspector correctly counted them off the drawings in a task to which he should not have been put, 213.

48. Finally, I note that the Board pleaded as to the bicycle spaces error that it was not that the Board was required to refuse to deal with the application. The Board did not explicitly plead s.8(3)(a) of the 2016 Act but that did not prevent the Board's reliance on it – **Eco Advocacy**[59] as it pleaded the absence of the alleged requirement. And there would be little unfairness in permitting such reliance as BbTTG, for purposes of Ground 4 as to failure to mark the power line wayleave in yellow on the site location map, itself pleaded s.8(3)(a) for an alleged obligation on the Board to refuse to deal with the application. S.8(3)(a) of the 2016 Act appears, at least at first blush, to be permissive rather than mandatory: "*The Board <u>may</u> decide to refuse to deal with any application*" where the permission application, EIAR[60] or NIS[61] "*is inadequate or incomplete …*" However, the point was not argued as to

[58] Pembroke Road Association v. ABP [2022] IESC 30, [2022] 2 ILRM 417, §64.
[59] Eco Advocacy v An Bord Pleanála & Keegan Land [2023] IEHC 644 §69 & 70.
[60] Environmental Impact Assessment Report for purposes of Environmental Impact Assessment pursuant to the EIA Directive.
[61] Natura Impact Statement for purposes of Appropriate Assessment pursuant to the Habitats Directive.

whether, and if so in what degree, s.8(3)(a) allows the Board a discretion to deal with an application despite its being inadequate or incomplete. And, in some statutory contexts "may" can mean "must".[62] I note also that in **Balscadden**[63] Humphreys J commented that a breach of the requirement to submit drawings in accordance with the regulations is not cured by some sort of implicit acceptance of the application by the Board as s. 8 "*does not confer a jurisdiction to proceed despite breach of mandatory requirements, and even if it did that would have to be exercised expressly"*. And s.8 "is *by no means a blanket setting-aside of mandatory statutory requirements at the discretion of the board …"*. Accordingly, as I do not need to decide the issue, I prefer not to.

GROUND 3.2[64] **– APPLICATION FORM INACCURACY – VEHICULAR ENTRANCES**

49. Essentially, BbTTG says Ardstone's SHD Planning Application Form was misleading in describing only one vehicular access point to the Proposed Development from Stocking Avenue, via White Pines Dale, as three are in fact proposed. Thereby, it says public participation was undermined.

50. The Board and Ardstone do not dispute the factual sequence pleaded by BbTTG. Rather, they dispute that it constitutes error in the Application Form and dispute the legal significance of those facts and dispute that public participation was undermined. It pleads that BbTTG made submissions on the issue of vehicular access and that the Board considered them. So BbTTG was not prejudiced by any error. The error does not warrant certiorari.

51. In my view, this ground is easily dismissed for want of any factual basis. The dispute is best understood by reference to the figure below.

52. The Site Notice states that "*the main vehicular access to the scheme will be from Stocking Avenue, via White Pines Dale"*. On **XJS**[65] principles of interpretation as if by the intelligent, informed layperson that is, simply, correct. BbTTG's fallacy is to read the words "*the main*" as implying a single access point whereas, properly read, it simply refers generally to the means of access. That is, as stated, from Stocking Avenue, via White Pines Dale. One might suggest, I think harshly, that the description is incomplete in that it will provide three access points – but that does not render it incorrect as far as it goes. It must be remembered that the Site Notice is intended to provide a relatively brief but informative description of the Proposed Development.

[62] E.g. O'Donnell & Ors -V- South Dublin County Council & Ors [2015] IESC 28 §71; Davy V Financial Services Ombudsman [2010] IESC 30, [2010] 3 IR 324 §24 citing U*niversity of Limerick v Ryan* (Unreported, High Court, Barron J, 21st February 1991).

[63] Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála & Crekav Trading GP Limited [2020] IEHC 586.

[64] I have split Ground 3 for convenience of analysis.

[65] Re XJS Investments Limited - [1986] IR 750. See e.g. Carman's Hall Community Interest Group v. Dublin City Council [2017] IEHC 544.

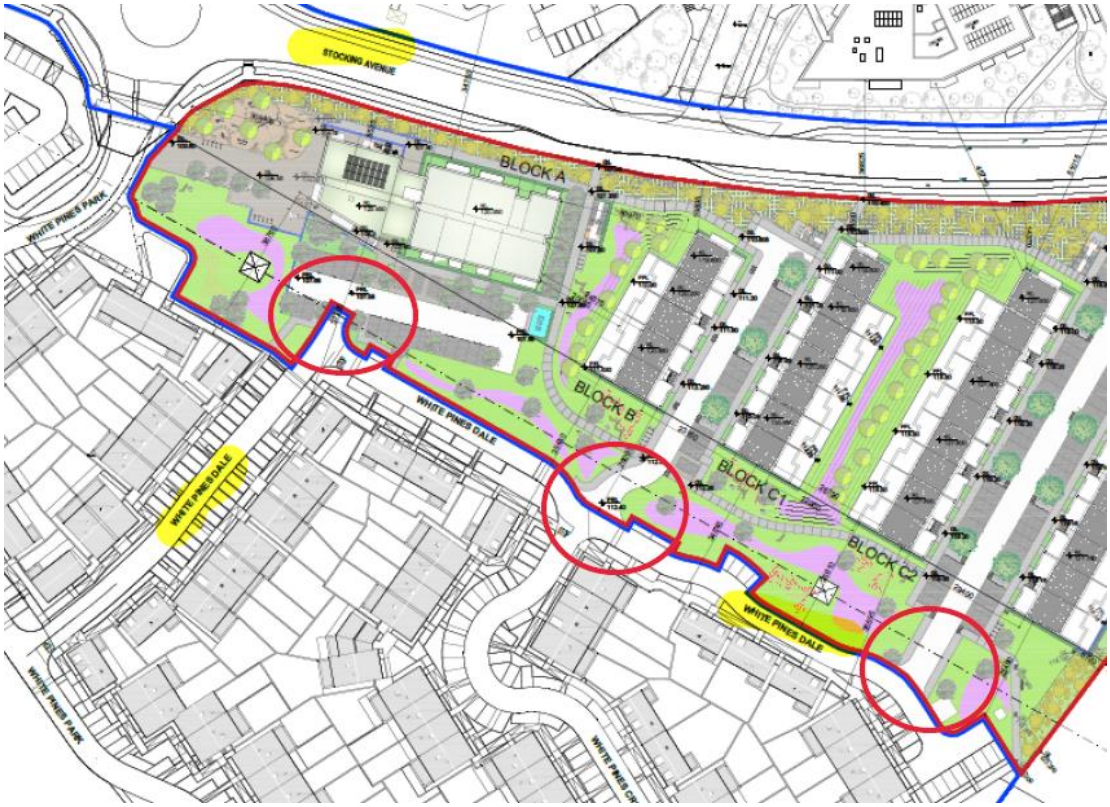

Figure 1 – Extract From Ardstone's Site Plan

- Stocking Avenue runs east/west along the northern boundary of the Site.
- To access the site from Stocking Avenue one will turn south at the roundabout in the top left corner of the figure and travel (off the edge of the figure) via White Pines Park (part of White Pines South) turning left into White Pines Dale (also part of White Pines South) via which one travels north-east to the first vehicular access to the Proposed Development and then east/south-east to the other two – again via White Pines Dale.
- I reject BbTTG's submission that the plan is deficient in that the vehicular access points are not marked as such. I have highlighted the names "Stocking Avenue" and "White Pines Dale" and circled the three vehicular access points to the Proposed Development in red. However, even without my added markings the Site Plan is perfectly clear as to the means and location of the intended vehicular access to the Proposed Development.

53. True, as compared to the Site Notice, the Application Form is in slightly different terms – which I tabulate below: [66]

9.Description of the Proposed Strategic Housing Development
"Please provide a brief description of the nature and extent of the proposed development ….."
The development will be served by a vehicular access from Stocking Avenue via White Pines South on the western side of the site.
A layout plan is enclosed

[66] Edited for ease of exposition.

16. Strategic Housing Development Details:
(b) Details of vehicular access are enclosed.

54. While the reference in the Application Form to "a" vehicular access is perhaps not quite as apposite as the description in the Site Notice, I do not think it incorrect either. It is clear that a single road via White Pines Dale provides the main vehicular access to the Proposed Development. The reader is explicitly told that the description in the form is brief, that details of the vehicular access are to be had and are enclosed, and is directed to the Plans. The intelligent, informed layperson will be well aware, and if not is explicitly told, that a proper and more detailed understanding of the proposal in general and of the vehicular access in particular will require resort to the documents, not least the maps, accompanying the Application Form.

55. In my view it would be impossible for the intelligent, informed layperson, who must be presumed to have at least a basic ability to read a map, (even without my markings thereon) to fail to correctly understand Ardstone's intentions as to vehicular access to the Proposed Development. Indeed, that is exactly what BbTTG itself did and it made submissions accordingly - to the effect that "*Public notices fail to identify that 3 no. vehicular entrances are proposed ….*"[67] BbTTG spotted the 3 access points. Even assuming (contrary to my finding) an error in the site notice or the Application Form, it was not misled. In my view there is no reason to believe that anyone else was.

56. With or without the map, I hold that at no point, bearing in mind the purposes in the planning process of the various documents in which descriptions of such access appear, did Ardstone misdescribe or insufficiently describe the vehicular access to the Proposed Development. Accordingly, this ground falls away and must be dismissed.

GROUND 4 – ELECTRICITY LINE WAYLEAVE WIDTH - MATERIAL CONTRAVENTION OF BOLAP

57. The Proposed Development will leave undeveloped a lateral clearance area of 17 metres either side of a 110kV power distribution line ("the 110kV line") which traverses the Site. Ardstone says that the ESB[68] requires only 17 metres. BbTTG says this is a material contravention of the BOLAP which, it says, requires 23 metres. It also says the lateral clearance area is a wayleave which was inadequately depicted in Ardstone's planning application so as to invalidate it.

[67] Inspector's report p33.

[68] This is not the place to tease out the various organs now involved in the electricity transmission and distribution systems. I refer to the "ESB", perhaps not precisely accurately, but compendiously as including all relevant organs. Some account of these structures is given in Hamwood et al v ESB et al [2023] IEHC 173.

PLEADINGS[69]

58. BbTTG pleads that the Impugned Permission is invalid in that:

- Contrary to Article 297(2)(c)(iii) PDR 2001, the Site Location Map submitted with Ardstone's SHD planning application did not refer to an existing 110kV overhead power line wayleave that traverses the Site and/or

- The Impugned Permission permits development,
  - within 23 metres of the 110kV line, contrary to the requirements of the wayleave.
  - in material contravention of §2.11 of the BOLAP, but was not made pursuant to s.9(6)(c) of the 2016 Act and s.37(2)(b) PDA 2000.
  - contrary to the requirements of proper planning and sustainable development.

59. By way of particulars, BbTTG pleads that:

- Ardstone's submitted Site Location Map does not identify the 110kV line wayleave in yellow – contrary to the mandatory requirement of Article 297(2)(c)(iii) PDR 2001 such that the Board was obliged to either refuse to deal with the application pursuant to section 8(3)(a) of the 2016 Act or in the alternative to refuse permission. Marston Planning Consultancy, for BbTTG, specifically brought this issue to the Board's attention.

- The Inspector, having noted the inconsistencies in application documentation raised by observers and in particular the failure to identify the powerline wayleave on the site location map, erred in law in concluding:

  > *"… that these inconsistencies may be regarded as de minimis and not material, and that they have not prejudiced third parties in the application. I note that the Commission for Energy Regulation made no submission on the application."* [70]

- The Board has no,
  - power to waive a statutory requirement or to deem clear non-compliance *de minimis.*
  - basis for the conclusion that the non-compliance has not prejudiced third parties, where the deficiency includes the absence of critical information. For example, CRU, Eirgrid or ESB Networks would not have been aware of the presence of the wayleave as it was not included on the Site Plan.

- The Proposed Development is in material contravention of §2.11 of the BOLAP in that,
  - the BOLAP requires a 23-metre clear zone either side of the 110kV line.
  - Ardstone's Design Statement incorrectly allows a 17-metre clear zone and its Site Plan makes clear that apartment blocks C1, C2 and D are not set back the requisite 23 metres.

[69] I have edited these pleas for clarity but, on a fair and reasonable reading, they convey the meaning I have set out.
[70] Inspector's report §13.

- Ardstone's Material Contravention Statement does not identify that material contravention.

60. I note that there is no plea of loss of quantum of green area by reduction in the wayleave area.

61. The Board and Ardstone, other than traverses, plead that:

- There is no breach of Article 297(2)(c)(iii) PDR 2001 – or no such breach as to vitiate the Impugned Permission - in that:
  - Any error in the Site Location Map is limited to the wayleave not being marked in yellow and any misdescription was immaterial and de minimis.
  - The 110kV line corridor was located in yellow in the Architectural Design Statement.
  - The existence and location of the 110kV line pylons and the wayleave corridor were identified in the application documents – including the Site Location Map and other maps - and were apparent to the Board and to BbTTG.
  - BbTTG was aware of the location of the wayleave and suffered no prejudice from any omission in the application documents. Nor was it hindered in its ability to make a submission on the application.

- There was no contravention or material contravention of the BOLAP in that the width of the 110kV line lateral clearance area,
  - is consistent with or in excess of that on adjacent lands (with which the lateral clearance area is continuous[71]).
  - was not the subject of objection by the Council or the CRU.[72]

62. Ardstone also plead that:

- The requirement of Article 297(2)(c)(iii) PDR 2001 as to colour only arises where there is no physical expression of the structure above ground. It applies specifically to pipes and conduits located below ground where their location cannot be identified on the land or does not appear above the land. Here, the 110kV line is fully visible on Site and is identified on the lodged plans.

- There is no wayleave.
  - The 14-metre and 17-metre lateral clearance areas required in the vicinity of the 110kV line were prescribed by the ESB and agreed as a matter of private law with ESB by Ardstone's predecessor in title.
  - Accordingly, the entire of White Pines estate was designed with a 17-metre clearance to preserve maintenance access for ESB. White Pines North, White Pines South and White Pines Retail are built and occupied accordingly.

[71] Parenthesis added by me for clarity.
[72] Commission for Regulation of Utilities.

- The BOLAP does not stipulate the wayleave as a development objective. It merely sets out what ESB's requirements are understood to be.

- BbTTG is "estopped" from reliance on this ground as
  - the issue was the subject matter of a submission by it to the Board – it was at all material times aware of the relationship of the Proposed Development to the 110kV line and was not misled by the planning application.
  - the Inspector considered that submission and concluded that any inconsistencies in the planning application were *de minimis*, immaterial and had not prejudiced third parties.

It is convenient to say now that this "estoppel" argument fails. The whole point of judicial review is to consider whether the decision-maker erred in law.

ART 297 PDR 2001

63. Art 297 PDR 2001 provides as to SHD Planning Applications, inter alia, that,

> (1) An application shall be in the form set out at Form No. 14 of Schedule 3.
> (2) An application in sub-article (1) shall be accompanied by—
> (c) a location map … marked so as to identify clearly:
> (iii) in yellow, any wayleaves,

64. Form No. 14 of Schedule 3 is entitled "*Form of application to An Bord Pleanála in respect of proposed strategic housing development"* and includes the following text:

> *"Failure to complete this form or attach the necessary documentation, or the submission of incorrect information or omission of required information, will lead to the Board refusing to deal with your application."*
>
> *"Declaration*
> *I hereby declare that, to the best of my knowledge and belief, the information given in this form is correct and accurate and fully compliant with the requirements of the Planning and Development Act 2000 and Chapter 1 of Part 2 of the Planning and Development (Housing) and Residential Tenancies Act 2016 and the Regulations made thereunder."*

BOLAP ON THE 110KV LINE, THE LATERAL CLEARANCE AREA AND CONTRAVENTION THEREOF

65. The BOLAP records that the BOLAP lands are "*traversed by a number of important utility lines including overhead electrical transmission lines*".[73] Two are depicted. A 220kV line crosses the western end of the BOLAP lands and the 110kV line traverses the eastern end, including the Site. Of

[73] §2.11 and Figure 2.6.

the former, the BOLAP states: "*ESB requires a minimum lateral clearance of 30 metres on either side of the centre line* ..". Of the latter, BOLAP states in the very next sentence: *"The 110KV lines that traverse the eastern section of the plan lands require a minimum lateral clearance of 23 metres from the centre line on either side."*

66. Though the latter sentence is in the passive tense and despite BbTTG's urging me otherwise, I am satisfied that, as to lateral clearance of the 110kV line, the BOLAP records ESB requirements as opposed to any other requirements, including more general planning requirements. In short, the BOLAP requires 23 metres because the Council thought in 2014[74] that the ESB required 23 metres.

67. Ardstone urges that this text in the BOLAP merely records the ESB requirement rather than adopting it as an objective of the BOLAP. Ardstone notes that the issue is not addressed in Appendix 1 of the BOLAP which lists its objectives and so there is no material contravention involved in not meeting the ESB requirements. However, this is to misunderstand both,

- the BOLAP read as a whole, and
- the concept of material contravention.

68. The BOLAP rationale categorises BOLAP lands "*as a first step to developing a sequenced rationale. The lands are either categorised as highly constrained, partially constrained or relatively unconstrained*."[75] The "*highly constrained*" lands, coincide with, inter alia, the "*major constraints presented by utility line wayleaves*" and specifically the 110kV line. In a manner entirely unsurprising, the utility lines inform the BOLAP at a basic and strategic level. They are part of its starting point.

69. The "*broad plan objectives*" of the BOLAP[76] include a Green Infrastructure Framework that will integrate inter alia, open spaces and the BOLAP records that open space will be provided on the basis, inter alia, of "*the existence of significant utility lines that requires extensive wayleave setbacks*."[77] The BOLAP designates much of the power line lateral clearance area on the Site as open space.[78] Ardstone says that is merely a case of the Council's opportunistically making lemonade when presented with lemons (in the form of the wayleave). Accordingly, Ardstone argues that the provision of less than 23 metres by way of lateral clearance of the 110kV line cannot constitute contravention of the BOLAP.

70. I essay the following observations,

- First, while the Council may make lemonade when presented with lemons, that tends to incentivise it to make it an objective to hold onto the lemons for that purpose. Indeed, the

[74] When the BOLAP was made.
[75] §4.
[76] §4.2.2.
[77] Executive Summary.
[78] Figure 4.2

generation of local planning policy could fairly be described as an exercise in identifying opportunity (even in constraint) and planning to realise it. The analogy does not assist Ardstone.

- Second, where, for good reasons made known by the ESB, a lateral clearance area is desirable along a power line, that is, at least as a general proposition, a legitimate planning consideration fit for adoption in a local area plan. Power lines are essential infrastructure required for the public good, the facilitation of the provision and maintenance of which is clearly a legitimate planning aim. Suggesting the contrary, one might as well suggest that zoning land for residential purposes merely reflects the needs of developers rather than constitutes an objective of the plan. As all objectives[79] have opportunity cost, such an objective is also a constraint which the plan, and development proposals made under the plan, must recognise and around which it must work.

- Third, as to the precise subject-matter of material contravention, s.34(6)(a)(i) PDA 2000 requires that the relevant public notice of a material contravention *"shall specifically state which objective of the development plan local area plan … would be materially contravened by granting this permission".* However for the following reasons, it is clear that this use of the word "objective" is not confined to objectives "labelled" as such. The introductory terms of s.34(6)(a) PDA 2000 are phrased quite generally in addressing the grant of permissions by a planning authority where "*the development concerned would contravene materially the development plan or local area plan*". S.37(2) PDA 2000 addresses the grant of permissions by a planning authority where "*the development concerned would contravene materially the development plan or local area plan*". As to SHD permissions s.9(6) of the 2016 Act uses the phrases "*contravenes materially the development plan or local area plan*" and "*would materially contravene the development plan or local area plan*". S.8 (1)(a)(iv)(II) of the 2016 Act, of the relevant development plan or local area plan uses the phrase "*where the proposed development materially contravenes the said plan …*" One may also cite s.178(2) PDA 2000: *"The council of a city shall not effect any development in the city which contravenes materially the development plan."*

- Fourth and in any event, the Board agreed, correctly, that the concept of material contravention of a plan is not limited to contraventions of objectives of the plan explicitly labelled as such. [80] Whether a requirement is labelled an objective in a development plan or local area plan is not decisive of the question of whether it is a requirement of the plan contravention of which may be material. As McDonald J observed in **Highlands Residents**,[81] citing **Redmond**,[82] albeit specifically as to zoning objectives: *"The court will consider the substance of the relevant development plan policy or objective in order to determine its true nature."* That interpretive exercise is performed on **XJS**[83] principles of interpretation as if by the intelligent, informed layperson.

[79] Using that word in its general sense as opposed to in the sense of explicitly labelled objectives of a plan.
[80] Transcript Day 3 p71/72.
[81] Highlands Residents Association v. An Bord Pleanála [2020] IEHC 622.
[82] Redmond v. An Bord Pleanála [2020] IEHC 151.
[83] Re XJS Investments Limited [1986] IR 750. See e.g. Carman's Hall Community Interest Group v. Dublin City Council [2017] IEHC 544.

- Fifth, in finding in **Killegland**[84] that local authorities' obligations to comply with national policy were limited to the express objectives of those policies expressly identified as objectives,[85] Humphreys J contrasted the position as to material contravention of development plans in the following terms:

> *"The applicant submits that the caselaw on material contravention doesn't distinguish between contravention of text of a development plan and the objectives of a development plan: ….."[86] But that's comparing apples and oranges. The issue is what is a council free to do, and in what way is it constrained. The issue of an individual decision contravening what the council decides to adopt is completely different and of course is not limited to the objectives of any given plan."*[87]

71. In my view, in accordance with the observations set out above, the BOLAP requires a 23-metre lateral clearance area either side of the 110kV line across the Site and the provision of less is a contravention of the BOLAP. That is how the intelligent, informed layperson would understand its plain meaning. S(he) would consider the contrary argument to be lawyers' sophistry setting a trap for the unwary. The public must be able to rely on the plain meaning of a Development Plans and Local Area Plans and the protections they afford. I will later consider the question of whether the contravention is material.

IS THERE A WAYLEAVE?

72. As recorded above, the PDR 2001 requires that the planning application include a "*location map*" … marked so as to "clearly" identify any "wayleaves", in yellow. So, the question arises whether there is associated with the 110kV line across the Site a "wayleave" within the meaning of the PDR 2001. The BOLAP clearly identifies the 110kV line as on a "wayleave".

73. Ardstone says that,

- there is no wayleave as to the 110kV line – there is merely an expression by the ESB of requirements with which Ardstone is willing to comply.
- this is an instance not of legal obligation but merely of realpolitik.[88]
- in practice and ceteris paribus, a developer may decide not to seek, and may in any event find it difficult to get, permission to build closer to a power line than the ESB would like.

In my view, it is not difficult to allow that, at least as a matter of practical reality, the planning system plays a role in policing such matters as a matter of planning concern - as opposed to as a matter of title or ESB's precise rights. Ardstone's submission necessarily implies, and implies an acceptance

[84] Killegland Estates Limited v. Meath County Council [2022] IEHC 393 §151.
[85] This is not intended as a complete description of the view taken by Humphreys J.
[86] He cites Ballymac Designer Village Ltd. v. Louth County Council [2002] IESC 59, [2002] 3 I.R. 247, Redmond v. An Bord Pleanála [2020] IEHC 151, Carman's Hall Community Interest Group v. Dublin City Council [2017] IEHC 544.
[87] Emphasis added.
[88] Ardstone's word. This judgment is written shortly after the death of Henry Kissinger.

that, as in fairness is obvious, the question how close to a power line a developer may build is a legitimate and practical planning consideration more or less independent of the precise legal nature and extent of any rights of the ESB.

74. As far as I can see, and in this context, three distinct issues arise as to power lines. First is the right to run the lines across the land. Second is the right of access to maintain, repair and upgrade them. Third is the question of a lateral clearance area preventing development on either side of the line. The first two rights are secured to the ESB by s.53 of the Electricity (Supply) Act, 1927 as amended. However, s.53 does not secure a lateral clearance area.

75. **Bland**[89] sensibly states that the mere presence of a power line carries with it the likelihood of inhibition of development. He cites s.20 of the Electricity (Supply) (Amendment) (No. 2) Act 1934 as prohibiting building with 25 yards of a power line save on 2 months' notice to the ESB. On receipt of such notice, the ESB can then apply to the Minister for a building prohibition order under s.19 of that Act. Bland states that these procedures had not been applied for at least 30 years.[90] He says this is probably due to concerns as to the constitutionality of s.19, which lacks a compensation provision. Instead, absent agreement to step back development from power lines, the ESB threatens complaint to the Health and Safety Authority. I have not established that this situation has changed since Bland was published in 2015. However, and whatever the position as to the ESB's availing of s.19, it seems to remain the case that by s.20 of the 1934 Act it is an offence to erect a building within 25 yards of a "transmission wire" save on 2 months' prior notice to the ESB. By s.20(3), "*transmission wire*" means an overhead power line *"forming part of the transmission system or of the distribution system".* I am told, and no-one disagreed, that the 110kV line crossing the Site is part of the distribution system. It seems that, by this somewhat indirect de jure system, the de facto position, recognised in planning practice and policies such as Development Plans and Local Area Plans, is that the ESB is in a position to insist on a lateral clearance area.

76. There is no weighty evidence before me of the legal basis on which, and terms on which, the 110kV line was first put across these lands – whether by agreement with the then-landowner and/or in exercise of powers under s.53 of the 1927 Act. Ardstone say that, as far as they are aware, the line was placed on foot of a personal agreement by their predecessor in title, by which agreement they are not bound and that, in any event, any allegedly resultant burden is not registered on their title.[91]

77. Ardstone's replying affidavits in the proceedings asserted that, as to the 110kV line, the Proposed Development was designed in a manner acceptable to and "*agreed with*" the ESB. As to a matter within the peculiar knowledge of Ardstone and in the absence of any material addressing this question in the planning application or exhibits verifying the agreement of the ESB, these were no more than bare and inadequate assertions.

[89] Easements, 3rd Ed. 2015 §3.22 fn51.
[90] As, Bland says, confirmed by written answer of the Minister on 17 April 2013.
[91] Ardstone, by liberty granted at trial, exhibited the folios comprising the Site, on none of which a wayleave in favour of ESB was registered.

78. However, by sensible agreement of the parties, Ardstone during the trial exhibited[92] extracts from a response dated 20 February 2015 by its predecessor in title, Deane Homes Limited, to a request for further information by the Council in respect of a planning application for development at White Pines North.[93] The Council's request sought a letter from the ESB confirming consent to the proximity of that proposed development to the 110kV line as it traversed that site. Deane enclosed with its response to that request an undated letter from the ESB. It did not assert a formal wayleave or like legal right but purported to require a "minimum lateral clearance" of 14 metres either side of the 110kV line in certain areas and 17 metres in others. It said that "the area under the line may be used for roads, car parking, open space/landscaping", but not for private gardens. The ESB attached a map depicting, incidentally, the 110kV line and the pylons on the Site. Deane also enclosed with its response a "red line" map[94] of the site of that planning application which depicted the provision by the development proposed in that case of 17m of "wayleave" where 14m was required and 20m where 17m was required. It also depicted those dimensions of the wayleave as it passed through both White Pines Retail and White Pines North. These maps depicted 14m as required for most of the length of the line as it crossed the Site the subject of the present application and 17m as provided across the entire Site. Deane's response to the Council cites this drawing as one on which the "*The ESB wayleave is clearly shown*" and states explicitly that "*this wayleave is as approved*" under Permission SD04A/0393. The Inspector identifies Permission SD04A/0393 as having included the Site and as having been subject to an overall masterplan. In other words, Deane was here asserting, if only incidentally, that the 14/17-metre wayleave widths had already been established across the Site by 2015. Deane's response refers to the enclosed ESB Documents as clearly indicating the ESB's required "wayleave" dimensions.

79. It is, frankly, difficult to see why this obviously relevant material was not proffered to the Board and why it was not exhibited in these proceeding in a timely manner. Doing so might have avoided the predictable dispute as to material contravention now before me. I accept that their exhibition during trial did not end the dispute, but such disputes tend to gather momentum if not headed off at the pass.

80. S.11 of the Land and Conveyancing Law Reform Act 2009 identifies legal interests in land as including "*a wayleave or other right to lay cables, pipes, wires or other conduits*". There is no statutory, or other, general definition of the term "wayleave", but the word "*other*" in s.11 necessarily includes in its scope a "*right to lay cables, pipes, wires or other conduits*". That clearly includes power lines. The term is not defined in the PDR 2001. Notices issued by the ESB pursuant to s.53(3) of the Electricity (Supply) Act, 1927, exercising their power to run power lines over private land, are commonly called a 'wayleave notice'.[95] But the 1927 Act does not use the term 'wayleave'.[96] S.72 of the Registration of Title Act 1964 allows that certain specified unregistered wayleaves (but

[92] Affidavit of Mark Forrest sworn 30 November 2023.
[93] SD14A/022 - See inspector's Report §4
[94] Drawing SV/2015/AI025.
[95] E.g. Electricity Supply Board and EirGrid v Killross Properties [2018] IESC 22 [2018] 3 IR 690.
[96] ESB v Good [2023] IEHC 83.

not including those held by the ESB) affect registered land but that Act does not otherwise define the concept of those wayleaves which, inferentially, require registration to be effective.

81. Bland[97] states that the term "wayleave" suffers from imprecision in its use. It is commonly used without discrimination to describe rights to install and to use services or utilities on, over, or under land, and to have access to the land for the purpose of repair, maintenance, inspection, and removal. He considers wayleaves an anomalous category of creatures of their parent statutes, and that a jurisprudence as to their general characteristics has yet to develop. He prefers the term "statutory easement"[98]. He identifies the most important wayleaves as including those as to power lines but says that the legal status of such wayleaves for power lines – at least as to the extent to which such wayleaves inhibit development of lands in their vicinity and the extent to which personal agreements with landowners (as opposed to the ESB's exercise of statutory rights) bind their successors in title.[99]

82. It seems to me that in light of the imprecision of the use of the word "wayleave", its use in the PDR 2001 may be considered somewhat ambiguous and therefore susceptible to purposive interpretation in light of the planning purposes of the PDR 2001. The serious consequence of invalidity of a planning application may put some limits on such purposive interpretation – planning applicants are entitled to clarity as to what they must do to make a valid planning application. But it seems to me clear that, whatever those limits may be, planning constraints imposed by power lines lie well within them as a paradigm example of what one would expect to be encompassed by the word "wayleave". What matters seems to me to be planning significance as opposed to precise nature in terms of title. Planning authorities, developers and others involved in the planning process are concerned with the presence of power lines and any practical constraints they impose on development – as opposed to the legal nature of the rights whereby the power lines come to be there. They are, par excellence, "facts on the ground" to which all must accommodate. Ardstone's acknowledgment of the realpolitik implies acceptance of that analysis. Indeed, as we shall see, Ardstone's own planning documents repeatedly refer to the "wayleave" for the power lines and repeatedly recognise its importance in planning terms.

83. Accordingly, I find that, as a planning concept within the meaning of the PDR 2001 and whether or not as a matter of title, the 110kV line across the Site represents a wayleave which required to be "clearly" marked in yellow on Ardstone's site location map. It was also correctly recognised as a wayleave in the BOLAP.

[97] Bland, Easements, 3rd Ed., 2015 Ch3.
[98] Though accepting that, not least for want of a dominant tenement, such rights are not easements at common law.
[99] Bland, Easements, 3rd Ed., 2015 Chapter 3 fn 51 – states as to lateral clearance areas that "This inhibition is due to what the Board calls its "safety restrictions". Section 20 of the Electricity (Supply) (Amendment) (No. 2) Act 1934 also prohibits building with 25 yards of an electric line without two months' notice to the Board, who can then apply to the Minister for a prohibition order under s.19 of the Act of 1934. These procedures have not been applied for at least 30 years, as confirmed by written answer of the Minister on 17 April 2013. This is probably due to concerns as to the constitutionality of s.19, which lacks a compensation provision. Instead, the Board threatens complaint to the Health and Safety Authority if there is no agreement to step back development from electric lines."

WAYLEAVES AND THE SHD PLANNING APPLICATION

84. Ardstone's Site location map depicts the 110kV line by three drawn lines. A middle line represents the power line itself, on which are marked the two pylons on the Site. A parallel line to the north-east represents one edge of the lateral clearance area. A parallel line to the south-west, representing the other edge, is obscured by the north-eastern edge of White Pines Dale[100] which is already in place. However, there is no legend or other indicia on the Site location map identifying three drawn lines as the 110kV line or its lateral clearance area and there are no markings disclosing the width of the lateral clearance area. Someone familiar with the Site, or with planning maps, would as a matter of high probability infer the meaning of the three lines. But that meaning might well escape an ordinary member of the public – though such a person would at least divine that the three drawn lines meant something.

85. More particularly, the 110kV line wayleave is not marked in yellow on the Site location map as is required by Art. 297 PDR 2001. Accordingly, the planning application is in breach of Art. 297.

86. BbTTG submits that the lines on the Site Location Map depicting the power line and wayleave *"are simply unexplained lines on a map which contains a vast number of other lines."* Strictly, that is correct as far as it goes. But it ignores the fact that these particular lines are quite noticeable and that anyone looking at the Site location map would notice them. Even assuming a lack of prior familiarity with the Site and with the existence of the 110kV line, assuming the interest and curiosity of someone concerned to know if (s)he should object to the planning application, such a person would inevitably ask himself/herself what they represented. On the evidence before me and as a matter of probability, I infer that any such person looking at this Site location map would be prompted thereby to further inquiry which would, by the other planning application documents and the BOLAP, readily reveal both the 110kV line and pylons and the issue of the wayleave width.

87. The other documents accompanying the planning application are informative as to the 110kV line and wayleave.

- My attention was drawn to a drawing[101] which reads "110kV" close to the power line. As it is in very small typescript which could very easily be missed (even allowing for large original maps), I do not consider that it improves Ardstone's case.

- Though Figure 4.1 of Ardstone's Planning Report identifies the wayleave no more informatively than did the Site Location Map, earlier text does refer to "*the wayleave for the power lines, as*

[100] Part of White Pines South.
[101] Drawing 3.2_012 Site Plan Ground Floor Block A First Floor Block C, C1, C2, D. – in exhibit GL1.

shown in Figure 4.1 below."[102] And later the Planning Report refers to "*the area of open space proposed beneath the wayleave for the power lines*."[103]

- Ardstone's Design Statement includes two drawings[104] captioned "Overhead Power Line Corridor", depicting the wayleave in yellow in a manner which would have sufficed for purposes of Art. 297 PDR 2001 had the Site location map been so marked. These drawings are accompanied by text as follows:

  "The subject site is located within the 'wayleave of 110kV overhead transmission lines', although a constraint, …."[105]

  "The yellow strip in the diagram to the right indicates a neutralised strip of land - overhead electric corridor, with no buildings on it. This strip is 34m wide (17m each side of the electricity line). …… The area below the electric corridor will be landscaped to maximise the amenity value to the adjacent apartment units."[106]

- A further Design Statement drawing[107] very clearly depicts the "*110kV 34 Meter clear zone*"[108] - albeit in orange not yellow and by reference to an alternative layout of buildings. It is accompanied by the following text:

  "The powerline requires a 34 meter clear zone below for safety reasons. The zone extends 17 meters either side of[109] *the centre line to the towers. This requirement sterilises a significant portion of the site, as no structures may be placed within this zone."*

- Ardstone's Design Statement also, and inter alia, identifies,
  - "First Principles – Concept Design",[110] the first of which is, "*Recognise the impact the power lines have of the development potential of the site, in particular the pinch point created by the 110 KV*[111] *clearway*." That content also refers to the "*public open space meadow below the power line*".
  - "Key Design Principles" including "*Landscaped space below power lines acts as buffer/amenity to both White Pines Central and White Pines South Residential developments*."
  - As to White Pines South and the Proposed Development:
    "A critical element to the success of the proposed White Pines Central development is the careful consideration of the relationship between both developments. The clearway below the 110KV power line dictates a min distance of 34 meters to be maintained between the developments. This requirement is generally exceeded between both residential developments .."[112]

[102] §3.3.1.
[103] §5.3.6.
[104] At pp38 & 42.
[105] p38.
[106] p42.
[107] p50.
[108] i.e. 2 x 17m.
[109] Sic.
[110] p47.
[111] Sic.
[112] P65

- *" … the overhead powerline clearway (34m) to the south …"*[113]
- "*Landscaped green spaces under powerlines*" by reference to a further drawing.[114]

88. It can certainly be said that, in substance and taking all of Ardstone's planning documents into account, they are perfectly clear that the 110kV line exists and that its design allows a lateral clearance area of 17 metres either side of it rather than the 23 metres envisaged in the BOLAP. These features are marked prominently in drawings and text such that no-one, certainly on reading the Design Statement, could fail to know what Ardstone intended.

89. In that light, it seems to me that a considerable factor in a view whether the undoubted omission of yellow colouring from the Site Layout Plan invalidated the planning application is whether it is likely to have resulted in anyone perusing it only missing the existence of the 110kV line such as to result in his/her failing to examine the remainder of the planning application in which the position as to the 110kV line was made plain. I have no hesitation in inferring that knowledgeable persons in bodies such as the ESB, CRU and the like, proficient in interpreting planning maps and, at least in the case of the ESB who may be presumed to know the location of their transmission lines, would not have been prejudiced by the error.

90. Certainly, neither BbTTG nor White Pines North Residents Group – both representing multiple local residents – were prejudiced by the error. BbTTG complained to the Board not merely of the procedural error as to the yellow marking but of the substantive reduction of the width of the lateral clearance area from 23 to 17 metres. The White Pines North Residents Group complained that this reduction was a material contravention of the BOLAP. The Council noted objections as to the shortfall in wayleave width but did not identify a material contravention of BOLAP or recommend refusal of permission on that account. In the proceedings, no-one has been identified in the proceedings as having been prejudiced by the error. Nor, in my view, is there any appreciable risk that anyone was so prejudiced.

THE BBTTG & WHITE PINES NORTH OBJECTIONS TO THE BOARD & AS EXHIBITED

91. Indeed, BbTTG pleads its objection to the Board as to the 110kV line wayleave issue. BbTTG objected to the planning application by letter dated 6 July 2021 issued by Marston Planning Consultancy ("Marston") on its behalf. Marston for BbTTG allege the breach of the PDR 2001 in that the Site Location Map fails to identify the Wayleave in yellow.[115] Marston reproduces the drawing from Ardstone's Design Statement depicting the wayleave in yellow and notes the identification of the 110kV line and its pylons in Ardstone's planning application documents. It notes, correctly, that

[113] P105 & 138.
[114] p116.
[115] Marston incorrectly cites Art. 22(2)(b) PDR 2001. It is the equivalent for "ordinary" planning applications to Art 297 as to SHD applications. In my view nothing turns on that error.

Ardstone failed to address or explain the discrepancy between the 46-metre corridor to which the BOLAP referred as a constraint and the 34-metre corridor indicated in the planning application. Marston questions whether Ardstone has engaged "with the relevant body" as to the adequacy of the 34-metre corridor – as I have observed, a predictable question which could easily have been "headed off at the pass".

92. Marston submit for BbTTG that the 110kV line is a significant constraint and the fact that allocated amenity space is within this corridor illustrates the poor overall quality of the proposed layout. They cite CGI[116] images in the application documents in asserting that the 110kV line and its two pylons will be highly dominant and obtrusive when viewed from the residential blocks, the open space areas and the playground areas that they will oversail, will detract visually from the Proposed Development and will have a profoundly negative impact on the usability of the amenity area. However, I note that these assertions are not made on the basis that the reduction from 23 to 17 metres makes any difference to the acceptability of the layout or appreciably exacerbates these alleged detriments. Specifically, there is no complaint of loss of quantum of green area in this regard. Nor, indeed, is there, in terms, a complaint of material contravention in this regard.

93. In a report for BbTTG dated 14 December 2021 exhibited in the proceedings, Marston essentially repeat their analysis as set out in their objection to the Board and add identification of specific buildings of the Proposed Development which will lie within 23 metres of the 110kV line as depicted in a planning application drawing.[117] This is not disputed. Marston add an assertion of material contravention of the BOLAP in that regard. Again, there is no complaint of loss of quantum of green area in this regard.

94. For completeness, I observe that the White Pines North Residents Group's objection to the Board also, and in brief terms, objected to a material contravention of the BOLAP as the proposed wayleave does not observe the 23 metres wayleave required by the BOLAP.

THE INSPECTOR ON THE POWER LINE WAYLEAVE

95. The Inspector noted the relevant content of the objections. He identified the omission – the failure to identify the 110kV line wayleave in yellow on the site location plans as required by Art. 297(2)(c)(iii) PDR 2001.[118] He considered that the presence of the overhead line and the treatment of the wayleave is otherwise described clearly in the application documents – noting the content of the planning application documents as described above – and considered both evident to any interested party reading those documents or familiar with the site. In this he was undoubtedly correct.

[116] Computer Generated Images.
[117] Drawing no. 3.2_002. The encroachment seems to have been marked up on this drawing by Marston as opposed to depicted in the original.
[118] Inspector's report §10.2.6.

96. He said, *"I do not believe that this technical omission from the site location map has prejudiced any third party in terms of participation in the planning process. I believe that the Board may take the view that this matter is de minimis and not fundamental to the consideration of the application."* In his conclusions and recommendations he notes "in *particular the failure to identify the powerline wayleave on the site location map*" and states *"I have concluded that these inconsistencies may be regarded as de minimis and not material, and that they have not prejudiced third parties in the application. I note that the Commission for Energy Regulation made no submission on the application."* [119]

97. As to Observers' identification of a number of inconsistencies in the planning application documents, the Inspector said:

> *"The application identifies a requirement for a 34m wayleave / clear zone centred along the overhead powerlines. The 2014 LAP[120] refers to a requirement for a minimum lateral clearance of 23 metres from the centre line on either side of the 110kV lines that traverse the eastern section of the Plan lands (46m wayleave). This reduction is not identified in the application; however, I note that the planning authority have not raised any issues with the development in this regard. The proposed 17m separation from the centre of the line is reflected in existing layout of White Pines Dale to the south of the site, and furthermore I note that significantly reduced separation is provided along the route of this line further to the north. This application was referred to the Commission for Energy Regulation who did not make a submission on the application."*[121]

98. I reject the Board's submission[122] that it is *"important there to look at the language the Inspector used, "the LAP refers to a requirement". He doesn't say the LAP requires."* First, interpretation of the BOLAP is for the court. Second, the Board's submission is lawyers' parsing of a nuance likely to be missed by most people, rather than XJS interpretation.

99. That said, the Inspector clearly took the view that the 17-metre wayleave width had already been established in White Pines Dale and in, it seems, White Pines Retail and White Pines North. The Inspector was correct in this regard.[123] While he did not frame his view in explicit terms of contravention of the BOLAP and the materiality of any such contravention, having regard to the lesser wayleave width provided than that stipulated in the BOLAP, for reasons which he makes obvious, it is impossible to understand his report save to the effect that the issue is not material.

[119] Inspector's report §13.
[120] i.e. the BOLAP.
[121] Inspector's report §10.2.6.
[122] Transcript Day 3 p70.
[123] Affidavit of Mark Forrest sworn 30 November 2023.

CONTRAVENTION OF ART 297 PDR 2001 – WAYLEAVE MARKED IN YELLOW ON SITE LOCATION MAP - DECISION

100. BbTTG cites **Balscadden**[124] and **Southwood Park.**[125] In the former, the impugned decision was quashed for failure to comply with Articles 297 and 298 PDR 2001 in that the application drawings failed to adequately depict largely *"subterranean sheet piling structures, which consist of five huge structures up to 15 metres high. The only drawings are sketches with incomplete dimensions that are for proof of concept purposes only and not as construction drawings. This is not an academic issue. The board has purported to grant permission in accordance with the drawings, but those drawings don't define where the structures are located, in particular how close to the boundary with dwellings on Asgard Park, or what size they are to be."* Humphreys J commented that "*The language of the 2001 regulations is mandatory*" and cited **Alf-a-Bet**[126] for his view that:

- A significant departure from a proper description renders an application a nullity.

- Departure from a mandatory requirement regarding a description would normally go to validity unless
  - the matter was covered by the de minimis principle, or
  - the party concerned had "*substantially complied with the obligation*".[127]

- (As I noted above) s.8 of the 2016 Act[128] "*is by no means a blanket setting-aside of mandatory statutory requirements at the discretion of the board …*" and "*does not confer a jurisdiction to proceed despite breach of mandatory requirements, and even if it did that would have to be exercised expressly"*.

101. In **Southwood Park** the planning applicant had submitted an incorrect version of a bat survey. Simons J quashed the decision – rejecting a submission that there was little difference between the versions in question. The differences were significant, could not be discounted as insubstantial, and they "*had the potential to mislead members of the public*" such that *"Such a person might — on the basis of this mistake — decide not to object to the proposed development*." This risk was "*not fanciful*" and so it "*undermined*" public participation in the process. Simons J cited Kelly J in **McAnenley**[129] to the effect that *"It is difficult to treat non-compliance with an express statutory requirement on a de minimis basis."* In McAnenley, the decision was quashed for the failure of the planning authority to furnish its decision to the Board even though it had forwarded its notification of that decision to the interested parties. Simons J observed that *"The breach in McAnenley was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form. This has an obvious resonance with the present case*."

[124] Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála & Crekav Trading GP Limited [2020] IEHC 586.
[125] Southwood Park Residents Association v. An Bord Pleanála [2019] IEHC 504.
[126] Monaghan U.D.C. v. Alf-a-Bet Promotions Ltd. [1980] I.L.R.M. 64.
[127] Citing McDonald J. in Dalton v. An Bord Pleanála [2020] IEHC 27.
[128] s. 8(3)(a) of the 2016 Act provides that "[t]he Board may decide to refuse to deal with any application made to it under section 4(1) where it considers that the application for permission, … is inadequate or incomplete, having regard in particular to the permission regulations and any regulations made under section 12, or section 177 of the Act of 2000, or to any consultations held under section 6 ."
[129] McAnenley v. An Bord Pleanála [2002] 2 I.R. 763.

Simons J observed as to the mandatory nature of the regulations, and contrasting the law as to fair procedures:

> *"The legal position is entirely different where, as in the present case, the decision-maker has no discretion. In such circumstances, it is inappropriate for either the decision-maker, or for the court, to embark upon a detailed examination of the content of the material with a view to determining whether or not it is significant or otherwise. This is because the Oireachtas has ordained, albeit mediately through Ministerial Regulations, that all documentation in respect of a planning application must be posted on a dedicated website. In truth, therefore, the position is closer to that analysed …. in McAnenley …. It … the breach in McAnenley was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form."*

102. However, that failure was not the only failure in McAnenley and Kelly J also said: "*That is not to say that, notwithstanding non-compliance with the provisions of s. 6(c), in an appropriate case certiorari might be withheld as a matter of discretion, if that were the only lacuna involved and no injustice would result."* That was not so in McAnenley for reasons Kelly J explained.

103. Simons J cited **Alf-a-Bet**[130] for the proposition that "*The jurisdiction of the courts to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited"* and *"before a breach can be waived, it must be technical, trivial, peripheral or otherwise insubstantial."* In **Southwood Park,** Simons J was satisfied that "*the differences between the two versions of the bat survey are significant, and can certainly not be dismissed as trivial, technical, or insubstantial."*

104. The Board also cites Alf-a-Bet - but for the application of the de minimis rule on the facts of this case. It and Ardstone seek to distinguish Balscadden and Southwood Park on their facts and cite **Ní Chonghaile**[131] as an example of its application. In that case, a site map of the scheme was inaccurate as a small piece of land where the entrance roadway was situate was omitted. Alf-a-Bet was cited. The de minimis rule was applied as nobody was misled by the error and certiorari on this ground was refused.[132] As was the case in Alf-a-Bet, these issues have tended to arise as to the content of public notices of planning applications. Another example is **Byrnes**[133] in which Baker J refused to quash an impugned decision and in doing so considered whether the aim of the regulation in question had been achieved. She considered Alf-a-Bet and cited a **Blessington** case[134] in which Kelly J. asked whether the notice was "*sufficient*" to "*alert any vigilant interested party to what was contemplated*" and *"If they wished to have further information as to precisely what was envisaged, they could have inspected the plans submitted with the planning application."* Baker J cited

[130] See the passage of the judgment of Henchy J cited above.
[131] Ní Chonghaile v. Galway County Council [2004] 4 I.R 138.
[132] Though granted on another ground.
[133] Byrnes v. Dublin City Council [2017] IEHC 19.
[134] Blessington & District Community Council Ltd v. Wicklow County Council [1997] 1 I.R. 273.

Ratheniska[135] in which Haughton J described the advertisement as having led the large number of persons who had made objections on foot of the notice, "*to further and more detailed documents and information*". She concluded that what is envisaged by the legislation is that a notice should alert a "*vigilant or potentially interested*" party to the general nature of what is proposed. The intention is to give sufficient information to lead a person to make enquiries and thereafter to consider whether to make objection to the proposed development. Issues as to content of notices arose as to matters of degree of description of the proposed development - as to which "*a common sense approach to informing the public should be adopted*".

105. In some contrast, the present case is one of breach of a very clear and specific requirement to colour the wayleave yellow on the site location map – no doubt specifically to draw attention to it. Yet the underlying question remains relevant – did what was done suffice to serve the purpose of the regulation? Or, to put it another way, was the regulation complied with in substance? Notably, in Byrnes, Baker J said: "I *consider it relevant that the applicant has not said on affidavit that he personally was misled by the notices*." His and other submissions to the Council reflected "*sufficient knowledge of the type of accommodation proposed to make submissions with regard to its suitability*". She said, "*The applicant has not persuaded me that the notices were defective on account of a failure to describe the details of the proposed work.*"

106. In my view, the present facts bear some analogising to those in Ní Chonghaile and Byrnes, and to those of one of the issues in **Dunne**.[136] The argument in that case, that the elevation drawings did not, as required by the PDR 2001, show a contiguous dwelling – the home of the second applicant – was rejected for want of proof of contiguity. But the judgment makes clear that it would have been rejected anyway as a matter of discretion as the site map clearly showed that home and the second applicant was not prejudiced by any technical breach.

107. Given the specificity of the requirement that the wayleave be depicted in yellow, this case is close to the line. But in the end there is no evidence or reason to believe that any "*vigilant or potentially interested"* person was prejudiced by the error. The 110kV line and its wayleave were depicted, albeit inadequately, on the site location map. In my view, the interested reader of that map, curious as to whether (s)he should object to the planning application, would have readily seen that depiction of the wayleave by the three drawn lines. If the reader was unsure or unaware of what by the three drawn lines represented, s(he) would have made further inquiry to ascertain what they represented. That inquiry would – by the other planning application documents and the BOLAP – readily have revealed, including as depicted in yellow, both the 110kV line and pylons and the issue of the wayleave width. In that way, it seems to me that the Site Location map did serve the function required of it by Art 297 and I therefore decline to quash the Impugned Permission on that account. If necessary, I do so as a matter of discretion.

[135] Ratheniska Timahoe and Spink Substation Action Group & Anor. v. An Bord Pleanála [2015] IEHC 18.
[136] Dunne (applicant) v An Bord Pleanála [2006] IEHC 400

CONTRAVENTION OF THE BOLAP AS TO THE POWER LINE WAYLEAVE – MATERIALITY – DECISION

108. I have found that the Proposed Development contravenes the BOLAP by substituting a 34-metre[137] 110kV line wayleave for the 46-metre wayleave.[138] However as any encroachment to the South is by White Pines Dale, any loss is only on the north-eastern side of the wayleave - an effective loss of 6 metres' width.

109. It seems to me that the BOLAP is clear that, while the 110kV line wayleave presents an opportunity as to green space, it is primarily viewed as a constraint on development necessitated by the requirements of the ESB. Indeed the material contravention pleaded – specifically of §2.11 of the BOLAP – relates precisely to that constraint. It is equally clear that the requirements of the ESB are in fact satisfied by a 17-metre wayleave and that this position had been established in two prior planning permissions – for White Pines Retail and White Pines North – which reflect the proximate extension of the Wayleave from the Site to the north-west.

110. In my view, the objection is well-made that BbTTG did not plead materiality of contravention by reference to loss of green space envisaged in the BOLAP and cannot make that argument now. I note also the Council's view that "*The areas of public open space provide under and adjacent to the overhead ESB powerlines is not considered usable or functional by the Public Realm and will not be considered or include part of the overall public open space provision calculation for the proposed development.*"[139]

111. The test of materiality of a contravention was set in **Roughan** and considered in many cases since including, recently, in another **BbTTG** case[140] and in **Jennings**.[141] I will not repeat the law in that regard here. Certainly, and by reference to the Roughan test, it is notable that BbTTG and the White Pines North Residents objected that the wayleave was a narrower than envisaged in the BOLAP. But there is no indication that they, or anyone else, were concerned to vindicate its underlying purposes: the interest of the ESB or safety concerns. It was merely an occasion, rather than a cause or a concern, of their objections. They merely asserted the fact of the contravention and its materiality. They identified no planning or other detriment likely to result in consequence. As the Board submits, the contents of §2.11 of the BOALP reflect the requirements of the utility providers and whether the development proposal is acceptable is primarily a matter for those entities. No objection was raised to the development by ESB or the CRU (though I am not clear the latter much matters). Nor was this an issue as to which the Council expressed any concern. Further, the adequacy of the 17-metre wayleave had been twice established in adjacent prior permissions.

[137] 2 x 17m.
[138] 2 x 23m.
[139] See Public Realm Planning Report attached to the report to the Board by the CEO of the Council.
[140] Ballyboden Tidy Towns Group v. An Bord Pleanála & Shannon Homes [2022] IEHC 7 §140 et seq.
[141] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §65 et seq.

112. I consider that there was here a contravention of the BOLAP as to the width of the power line wayleave but not a material contravention. While that is a matter for the Court, I am encouraged in that view by my inference that the Council and the Inspector were of the same view. The purpose of the allegedly contravened requirement of §2.11 of the BOLAP – to protect the interests of utilities, and specifically the position of the ESB – will not be imperilled by the Proposed Development by reason of the adoption of a narrower wayleave than that envisaged by the BOLAP. I dismiss this ground of challenge.

113. Two further comments may assist:

- No-one at trial was able to tell me whether the CRU had any function relevant to the question of the width of a lateral clearance area along a distribution system power line. It does not seem to me self-evident that more or less weight is to be given to the absence of an objection in that regard by the CRU unless one knows what its functions are. While the clue may be in the name, it is only a clue. It may, for example, take the view that such issues are for the ESB. But in the absence of a plea of consideration of irrelevant matters and given the presumption of validity, the location of the onus of proof in judicial review and the Board's expertise, it is clear that I need consider any question in that regard no further.

- I reject the plea that the requirement of Article 297(2)(c)(iii) PDR 2001 as to colour only arises where there is no physical expression of the structure above ground. The wording of that article is clear enough to the contrary. There is certainly nothing in that wording favouring that plea. It is grounded only in misplaced assumptions as to the rationale of the requirements of the PDR 2001 as to planning application documents and that what can be seen on a site visit need not be depicted on application documents. Interested members of the public are not expected to trespass on the planning application Site to decide whether or not to participate in a planning proces**s**. Though I accept that the 110kV line in this case would readily have been visible without trespass, that may not be generally so as to other potential bases of objection. Indeed, the facts of this case – the dispute as to width of the wayleave, (which width on the Site side would not have been apparent from a site visit) and the paucity of the depiction of the wayleave on at least some of Ardstone's application papers – demonstrate the rationale of the requirement and that the plea is misconceived.

GROUND 5 – HEDGEROW REMOVAL – MATERIAL CONTRAVENTION OF BOLAP

INTRODUCTION

114. Ardstone's EIAR identified a "prominent hedgerow" in the eastern part of the Site. Ardstone's Arboricultural Report describes it as primarily a "hawthorn" hedge. The Arboricultural Report includes an old aerial photo[142] showing that hedge linked to the local network of hedges in the

[142] Image 1. Site overview.

BOLAP area south of the Site. But that photo has clearly been overtaken by development, including of White Pines South and White Pines Retail. It is very clear that, for good or ill, these developments and Stocking Avenue have, permanently and irrevocably isolated the hedgerow on the Site from the rest of what remains of the hedgerow system in the BOLAP area. That is certainly so at its south-western end and is clearly discernible in other aerial photos.[143] What remains therefore is a more-or-less isolated hedgerow – at very least a "dead end", or as counsel for Ardstone put it, a "road to nowhere", in the sense that it is unconnected at its south-western end to the rest of the remaining hedgerow system. This can be seen in figure 2 below.

Figure 2 – extract from Landscape Architects Report Figure 2 - Aerial Image highlighting Application boundary (red)

- The remaining hedge can be seen in the eastern end of the Site, running north-east to south-west but no longer reaching the south-western Site boundary. True, that at least could be more or less remedied.
- But at the adoption of the BOLAP, this hedge was perhaps double its present length. It extended further to the south-west through what is now developed as White Pines South and was linked to the substantial green corridor running roughly south-east to north-west which presumably forms part of the integrated green network envisaged by the BOLAP.
- It is very clear that this link was irrevocably broken by the development of White Pines South. As White Pines South received planning permission, it must be presumed that the breaking of this link was an acceptable outcome as a matter of planning judgment.

115. Ardstone's arboricultural report discloses that the remaining hedgerow is about 130 metres long and that Ardstone proposes to remove 90 metres at the south-western end where it protrudes into the Site – i.e. at the "dead end". That will leave 40 metres in place more or less along the Site edge – which is also the edge of the BOLAP area. That 40 metres, to a somewhat unclear degree, will remain connected at its north-eastern end to the hedgerow system outside the BOLAP area. What is

[143] E.g. Ardstone's Design Statement p2 & p19. Ardstone's Landscape Architect's Report, Figure 2; Ardstone's Biodiversity Management Plan, Figure 2. Site outline and location.

perfectly clear however is that, while the loss of 90 metres of hedgerow will represent a loss of its intrinsic value as a biodiversity habitat, it will not represent any loss of biodiversity corridor or network as, being a dead end, the stretch to be lost is already incapable of fulfilling that function.

Figure 3 – extract from Arboricultural Impact Drawing 102

- The 40 metres of hedge to be retained at the north-eastern end is marked green.
- The 90 metres of hedge to be removed at the south-western end is marked blue.
- However it seems clear from a comparison of this map and the more up-to-date of the aerial photographs that the 90 metres may be an overestimate as the hedge, in its present form, no longer reaches the south-western boundary of the Site.

PLANNING POLICIES

116. Development Plan policies include the following:

- G2 Objective 2 "*To protect and enhance the biodiversity value and ecological function of the Green Infrastructure network.*"[144]

- G2 Objective 6 *"To protect and enhance the County's hedgerow network, in particular hedgerows that form townland, parish and barony boundaries, and increase hedgerow coverage using locally native species."*

- G2 Objective 9 *"To preserve protect and augment trees, groups of trees, woodlands and hedgerows within the County by increasing tree canopy coverage using locally native species and*

[144] Material contravention of G2 Objective 2 was not pleaded. I have set it out as it was noted in Ardstone's Landscape Architect's report and its Biodiversity Management Plan.

by incorporating them within design proposals and supporting their integration into the Green Infrastructure network".

117. The BOLAP in 2014 adopted a "Green Infrastructure Strategy". Its Objective GI13 is to:

> *"Create an integrated network of green corridors and wetland areas (a minimum of 15 metres wide) by way of linking, preserving and incorporating hedgerows (especially townland and parish boundaries), wildlife corridors, SUDS features and existing streams."*

118. The BOLAP records that, as of 2012, "*The hedgerow and stream networks that permeate the Plan Lands are relatively undisturbed and potentially rich in biodiversity. Article 10 of the EU Habitats Directive recognises the importance of such ecological networks as corridors and stepping stones for the movement of wildlife. These networks are considered imperative in connecting areas of biodiversity ……. There has been removal of some sections of hedgerow and field boundaries on the eastern side of the Plan Lands to facilitate housing developments. This partial removal of the biodiversity network has potentially fragmented habitats*."[145] BOLAP Figure 3.1, which "*illustrates the connectivity and corridors created between these mapped hedgerows and treelines within the Plan Lands*", shows the hedgerow in question as connected to that network at its south-western end, BOLAP Figure 4.3 identifies it as a "*Significant Hedgerow*" and BOLAP Figure 4.1 identifies the area in which the hedgerow sits as "*Partially Constraine*d" – it would seem due to the presence of and intention to preserve the hedgerow as part of the intended integrated network of green corridors. However, and as stated above, the hedgerow is no longer connected to that network at its south-western end. While there may be some connection to hedgerow outside the BOLAP area to the north-east, it is clear that the hedgerow is isolated from the "*integrated network*" "*that permeate*" the rest of the BOLAP area.

ARDSTONE'S APPLICATION REPORTS

119. Ardstone's Landscape Architects Report,

- noted Development Plan policies G2 Objectives 2 and 9.[146] But it does not note G2 Objective 6.
- recorded landscape design objectives as including to retain existing trees and hedgerows where possible and to establish a tree and hedgerow planting structure across the site.[147]
- included a Landscape Masterplan which provides for boundary tree planting of a woodland belt which will be "*hubs of biodiversity once established*".[148]

[145] §3.3.3.
[146] P5- 1.0 STATUTORY REVIEW.
[147] P19 - 7.0 DESIGN STATEMENT, Landscape Design Description.
[148] P17.

120. Despite its stated design objective to retain existing trees and hedgerows, the Landscape Architects Report did not record,

- the BOLAP "Green Infrastructure Strategy" or its designation of the hedgerow as "Significant" or Objective GI13.

- the existing hedgerow on Site. Indeed, the report states "*The site contains no significant vegetation*".
  - I observe that as a conclusion this may arguably be correct as the BOLAP, as to the significance of the hedgerow, has been overtaken by events since 2014. Nonetheless, as a bald statement it is surprising, given the BOLAP explicitly deems the hedgerow significant. One would at least expect a brief explanation of why it is no longer significant despite the BOLAP, if that is the view taken. That said, it adds "*For further information on the existing trees and vegetation please see the arboricultural report and accompanying drawings*".

- the proposed quantum of hedgerow removal.

- the proposed quantum of hedgerow retention.

- any illustration of the hedgerow retention as illustrated in the arboricultural impact drawing.

121. Indeed, the Landscape Masterplan Drawing illustrates no hedgerow retention and illustrates woodland replanting at the locus where the Arboricultural Report drawing illustrates 40 metres of hedgerow retention.

122. Ardstone's Biodiversity Management Plan, Figure 5[149] likewise does not envisage hedgerow retention. Nor is that mentioned in its description of the proposed treatment of the "Northern and Eastern Woodland Boundary". This is despite its recording[150] that the Council had requested a Biodiversity Management Plan to "*indicate how biodiversity and green infrastructure is to be protected, enhanced and developed on this site"* taking account of listed matters, the first listed of which was *"(a) The protection of hedgerows".* I have found no account in that plan of any protection of the only significant hedgerow on site – rather it is to be removed and replaced by new planting.

- "….. *there is a hedgerow to the east of the site. It is proposed to remove this hedgerow and replace it with a woodland planting*".[151]

- *"As outlined in the biodiversity chapter of the EIAR, the proposed development area will involve the removal of a hedgerow."*

[149] It is an excerpt from the landscape masterplan drawing.
[150] P4.
[151] P15.

In common with the other Ardstone Plans, there is here no account of the necessity of removal of the hedgerow or of any efforts to design the Proposed Development around it. Nor is there any assessment of its biodiversity value.

123. Appendix I of the Biodiversity Management Plan contains a fuller account of the Development Plan Green Infrastructure Objectives. Yet this plan too gives no account of the BOLAP's Green Infrastructure provisions or the designation of the hedgerow as significant.

124. Chapter 7 of Ardstone's EIAR, entitled "Biodiversity", on asserted bases as to fact set out therein, considered the impact of hedgerow removal.

- It did not mention the BOLAP, its "Green Infrastructure Strategy", its Objective GI13 or its designation of the hedgerow as "Significant".
  - This is difficult to understand. It is possible that these matters were noted elsewhere in EIAR in content not exhibited. However, even in that event, the omission of mention of them in the chapter on ecology, would remain difficult to understand.

- It stated that the Site has "*no intact terrestrial biodiversity corridor*" to other designated conservation sites.[152]

- It identified the hedgerow[153] and referred, somewhat incidentally, to its "*permanent removal*" and to "*the removal of the hedgerow*".[154]

- It did not record quantum of hedgerow removal. It reads as if all the hedgerow is to be removed.
  - Even if that is so one would have expected quantification of the removal.

- Amongst "*Additional measures to be carried out to prevent impacts on Habitats, Botany and Avian Ecology*"[155] it identified *"Boundary vegetation. Linear features such as hedgerows and treelines serve as commuting corridors for bats (and other wildlife) and the onsite boundary vegetation should be retained and/or replaced once construction ends. Native species should be chosen in all landscaping schemes. Planting schemes should attempt to link in with existing wildlife corridors (hedgerows and treelines), both onsite and off, to provide continuity of wildlife corridors. <u>Retention of boundary hedgerows</u>[156] and treelines will also serve to screen the development."*

- As to "Residual Impacts" it stated: "*The overall impact on the ecology of the proposed development will result in a long term slight neutral residual impact on the existing ecology of the*

[152] §7.3.1.
[153] Figure 7.6. Habitats and Table 7.3 Habitats and species noted on site. WL1
[154] Pp7-16 & 7-17.
[155] P7-26
[156] Emphasis added.

site and locality overall. This is primarily as a result of the loss of a[157] *single hedgerow on site, supported by the creation of additional terrestrial biodiversity features, mitigation measures and a sensitive native landscaping strategy*."

- Given this should have referred to the loss of "*the*" single hedgerow on site, it is difficult to reconcile with the reference to "*Retention of boundary hedgerows".*

- The recorded impact varied as between different forms of effect but it seems fair to characterise the EIAR as contemplating, at worst, mild to mild-to-moderate effects. The operational effect[158] on Habitats, Botany and Avian Ecology, taking proposed landscaping into account, is described as *"Neutral (positive and negative), localised, Slight to Moderate; Permanent."* [159] It also stated, *"The proposed development is expected to have Minor Negative/Not Significant impact on biodiversity, primarily and solely as a result of the removal of the hedgerow on site."*[160] As to "*Interactions and Cumulative Impacts*" it stated that, *"Loss of hedgerow will have impacts on local biodiversity and landscape character. Some positive impacts are identified from landscaping and biodiversity enhancement measures. Long-term significant negative impacts are not anticipated."*[161]

THE COUNCIL, THE INSPECTOR AND THE BOARD.

125. The Council's public realm planning report[162] understood the application to be for removal of 90 metres of hedge – in other words, removal of only part of the hedge. It cited the BOLAP's designation of this hedgerow as significant but did not recommend refusal of permission on that account or that hedgerow removal be conditioned out of the Proposed Development. Nor did the Council's CEO do so – that report recommended conditions as to the timing of the hedgerow removal.[163]

126. The Inspector,

- approached the matter on the basis that EIA was required.[164]

- noted objections that hedgerow and tree removal will cause net biodiversity loss.

- noted EIAR content as the hedgerow – as summarised above.

- did not mention the BOLAP "Green Infrastructure Strategy", its Objective GI13 or its designation of the hedgerow as "Significant".

[157] Emphasis added.
[158] i.e. ongoing effect once the proposed Development is completed and occupied.
[159] P7-18.
[160] P7-17.
[161] Chapter 16 – cited in Inspector's report p112.
[162] Appended to its report to the Board made under s.8(5) of the 2016 Act.
[163] Accepting suggestions in this regard by the Department of Housing, Local Government and Heritage. Condition 2 of the Impugned Permission encompasses that requirement in
imposing the mitigation measures from §§7.26 and 17.3 of the EIAR.
[164] Inspector's report §11.1.1. It records that Ardstone submitted a sub-threshold EIAR "having regard to the extent of recently completed and planned development on the surrounding lands".

- did not note any objections of material contravention by reason of hedgerow removal.
  - nor is it asserted in these proceedings that any such objections were made.

- recorded without comment Ardstone's response to the Board's pre-application Opinion[165] as stating that the Landscape Architects Report "*details how*"[166] the design seeks to retain trees/hedges, where possible.[167]
  - In fact, the Landscape Architects Report did not do so. It stated the design objective but not how it is realised or identify where and why it has not proved possible – at least as to retaining hedges.

- did not identify or resolve the contradiction between Ardstone's Arboricultural Report on the one hand and its Landscape Design Report and EIAR on the other as to whether removal would be of the entire or of part only of the hedgerow.

- considered the information and assessments in the EIAR satisfactory and that *"The identified environmental impacts are not significant and would not justify refusing permission for the proposed development or require substantial amendments to it."*

127. In doing its EIA, the Board adopted the Inspector's report and conclusions. It does not add to or subtract from them as to the issue of hedge removal – nor does it itself mention that topic.

THE PLEADINGS

128. BbTTG plead that the Impugned Permission granted permission in material contravention of Objective GI13 of the BOLAP and G2 Objectives 6 and 9 of the Development Plan which was not made pursuant s.9(6)(c) of the 2016 Act and s.37(2)(b) PDA 2000. Though I have set it out above, material contravention of G2 Objective 2 was not pleaded. [168]

129. The Board's Opposition amounts to a simple disputing of the Ground – a denial that removal of the hedgerow would be a material contravention.

130. Ardstone plead that the obligations of the planning policy objectives pleaded by BbTTG, are

- Positive only – e.g. to "create" integrated network of green corridors. They do not preclude hedge removal.

[165] Issued under s.6(7) of the 2016 Act.
[166] Emphasis added.
[167] Inspector's report P12. Ardstone's response §4.9.1.
[168] I have set it out as it was noted in Ardstone's Landscape Architect's report and its Biodiversity Management Plan.

- Focussed on hedgerows that form townland, parish and barony boundaries. None such are affected by the Proposed Development.
- Not materially contravened – inter alia given the content of the EIAR and the Board's EIA to the effect that hedgerow removal would not give rise to any likely significant effects.
- Framed such that, in the context of the development proposal, there was no issue that the Inspector or the Board were required to but failed to consider.

SUBMISSIONS

131. Beyond repeating the relevant policy content of the Development Plan and the BOLAP, BbTTG's submissions state that:

a. The hedge to be removed is the only hedge on Site.

b. The EIAR describes it as a prominent hedge[169] but neither it, nor any other application document, states a rationale for the removal of 90m of it as being required by the Proposed Development.

c. The Inspector noted that this issue had been raised, *inter alia,* in the Developer's EIAR (§11.3.3) but neither he nor the Board otherwise considered whether the removal of the hedgerow was a material contravention of either the BOLAP or the Development Plan.

d. While the gross loss of hedgerow is lower than in **Four Districts**[170] the relative loss is higher at about 66% of the only hedgerow on the Site – as shown in the Arboricultural Map.

132. The Board and Ardstone's submissions largely overlap. They can be summarised together:

a. BbTTG's submission to the Board by Marston complained, as to the loss of 90m of hedgerow, of loss of diversity but not of material contravention. In that light, **Reid**[171] and **NGGSPS**[172] render it, according to the Board, "questionable" whether BbTTG can now raise material contravention by hedgerow loss. Ardstone pitches that argument higher: it says BbTTG's raising that issue now is impermissible "gaslighting" of the Board.

b. The first question is of interpretation of the Development Plan as *"One cannot discern contravention or non-contravention of a plan unless one first knows what it means"* – and that is a question of law.[173] BbTTG's submissions do not engage with that question.

[169] Table 9.4
[170] Four Districts Woodland Group v An Bord Pleanála [2023] IEHC 335.
[171] Reid v An Bord Pleanála [2021] IEHC 230.
[172] North Great George's Street Preservation Society v. An Bord Pleanála [2023] IEHC 241.
[173] The Board cites Jennings v An Bord Pleanála [2023] IEHC 14 and states that interpretation of a development plan is a question of law and it falls to be carried out by reference to a reasonably informed, intelligent person - citing, Tennyson v. Dun Laoghaire Corporation [1991] 2 I.R. 527 at p.535, Heather Hill Management Company clg v. An Bord Pleanála (No. 2) [2019] IEHC 450, Redmond v. An Bord Pleanála [2020] IEHC 151 and Clonres CLG v. An Bord Pleanála [2021] IEHC 303.

c. BbTTG's reliance on Four Districts is misconceived as
   - the facts were entirely different.
   - it concerned the interpretation and alleged material contravention of different Development Plan objectives - G2 Objectives 1, 2 and 3. Those objectives were "*in quite specific terms"*. In contrast, the present case concerns G2 Objectives 6 and 9 and BOLAP Objective GI13.
   - the objectives at issue in Four Districts were concerned primarily with fragmentation of the green infrastructure network - a real risk given the quantum of hedgerow to be lost. No such issue is pleaded or arises here.
   - BOLAP Objective GI13 establishes a *positive* obligation to *create* a network of green corridors. Development Plan G2 Objectives 6 and 9 are also framed in positive terms with a view to increasing hedgerow and tree canopy coverage. None preclude the removal of part of any hedgerow from any particular site nor are they framed as restrictions on development.
   - Accordingly, BOLAP Objective GI13 and Development Plan G2 Objectives 6 and 9 are not engaged by the Proposed Development.

d. Alternatively, if those objectives are engaged by the Proposed Development, no contravention arises. The application of those objectives is a matter of planning judgment. Their terms are general and broad and they contain no specific standards against which a development is to be assessed. Nothing in their terms suggests that the removal of *any* hedgerow contravenes them and so the assessment of whether the removal of a *specific* hedgerow contravenes them is a matter to be determined by the Board in the exercise of its planning judgment. They are of the type identified **Jennings**[174] as leaving discretion to the Board, calling for the exercise of planning judgment and reviewable as to merit only for irrationality.

e. Alternatively, any contravention is not material – **Roughan** and cases which followed it are cited[175] as is **Jennings***,*[176] and it is argued that:
   - The loss of hedgerow is much more limited than in Four Districts.
   - In **Ballyboden TTG v An Bord Pleanála & Shannon Homes**[177] and in **Byrnes**[178] the number of persons who raised the material contravention issue in the public consultation process was considered relevant in testing the materiality of the contravention.
   - Nobody in the planning process suggested that the loss of hedgerow amounted to a material contravention.
   - The Council's non-identification of a material contravention by hedge loss is of particular importance – citing **ETI**[179] as to the particular weight and attention the Board must accord to Councils' reports given its constitutional role and its statutory role under s.15 PDA 2000 as to securing the objectives of the Development Plan.[180]

[174] §108.
[175] Roughan v Clare County Council (unreported, High Court, Barron J 18 December 1996), Maye v. Sligo Borough Council [2007] IEHC 146, Byrnes v. Dublin City Council [2017] IEHC 19, Heather Hill Management Company v An Bord Pleanála [2019] IEHC 450, Ballyboden Tidy Towns v An Bord Pleanála & Shannon Homes [2022] IEHC 7 and Four Districts Woodland Group v An Bord Pleanála [2023] IEHC 335.
[176] Jennings v ABP [2023] IEHC 14, §108.
[177] [2022] IEHC 7.
[178] Byrnes v. Dublin City Council [2017] IEHC 19.
[179] Environmental Trust Ireland v. ABP [2022] IEHC 540, §136.
[180] 15.—(1) It shall be the duty of a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan.

- The hedgerow is not part of a townland or parish boundary, such as to attract the particular protection of Objective GI13.

f. The issue is not whether the Board identified a material contravention or gave a reasons for not identifying it. The pleaded issue is whether there was a material contravention – which is for the court to decide.

DISCUSSION & DECISION

What does the Planning Application permit as to hedge removal?

133. The first question is, what is proposed and permitted as to the hedge? The Arboricultural Report envisages and illustrates retention of 40 metres. The Landscape Architects report fails to address the issue, illustrates no hedge retention and illustrates new woodland planting where the Arboricultural Report illustrates retention of 40 metres. The EIAR assumes removal of all hedges. The Arboricultural Report on the one hand and the Landscape Architects report and EIAR on the other are clearly contradictory in this regard, rendering the planning application ambiguous.

134. But if the EIAR considered the removal of the entire hedge and that was considered environmentally acceptable, it necessarily follows that removal of part of the hedge is environmentally acceptable.

135. While the interpretation of a public document such as a planning permission is for the court rather than the parties, I observe that this is the interpretation of the Impugned Permission adopted by BbTTG, the Council and the Board and is that adopted also in Ardstone's written submissions, which refer to the "*loss of 90m of hedgerow*".

136. With some hesitation, it seems to me proper to adopt the interpretation of the planning application and of the resultant Impugned Permission which minimises environmental impact and the possibility of material contravention of the Development Plan and the BOLAP. As to this interpretive approach see **Fernleigh**.[181] That implies interpretation of the Impugned Permission as providing for the part-retention of the hedge as envisaged in the Arboricultural Report and illustrated in Figure 2 above – i.e. the north-eastern 40 metres is to be retained. I hold that to be the meaning of the Impugned Permission and the obligation of Ardstone pursuant thereto.

Hedge Removal – EIA

[181] Fernleigh Residents Association v. An Bord Pleanála [2023] IEHC 525, §14.

137. Despite what seems to me to be a considerable paucity of analysis, apparent in the account set out above, in both the application documents and their assessment, I do not suggest that a challenge to the EIA here would have succeeded, given the considerable deference afforded to the Board's decisions in such regards. I express no opinion on that question. It is important to state that there is here no challenge to the adequacy of the EIA as it relates to the issue of hedge removal. The consequence is that the EIA is valid and, given that the material contravention issue as to hedge removal relates to entirely environmental concerns, it is relevant in considering the issue of material contravention to have regard to the essentially reassuring conclusions of the EIA as recorded above.

Hedge Removal – Material Contravention – the Issue.

138. The starting point seems to me to be that the BOLAP explicitly identified the hedge as significant to the green infrastructure network. However, while with appreciable justification BbTTG points to an absence of expressed rationale for removal of the hedger and a paucity of analysis by the Inspector as to the hedger removal issue, it is important to state that the pleaded issue is not of reasoning. It is of the existence of a material contravention. This distinction was made in **Four Districts**.[182] Also, the applicant in Four Districts was confined to its allegations of material contravention of the pleaded Development Plan G2 objectives 1, 2 and 3, and was excluded from reliance on, inter alia, G2 objectives 6, 9.[183] Likewise, BbTTG are confined to the particular objectives of the Development Plan – G2 objectives 6, 9 – and BOLAP Objective G13 which they have pleaded.

Hedge Removal – Development Plan

139. In my view, the Development Plan objectives invoked by BbTTG are framed at a high and general level. They do not protect individual hedges or deem the removal of any and every hedge to be a contravention of the Development Plan, much less a material contravention. Such a policy, which would have very far-reaching practical implications, would require much clearer and more explicit expression in the Development Plan. That is by no means to criticise the objectives in question. No doubt they were intended as exactly what they are – general and high level expressions of policy. No doubt as a matter of planning judgment they might inform a refusal of permission or a grant conditioned as to hedges in an appropriate case. They are the kind of objectives as to which decisions on material contravention or not are reviewable for irrationality rather than correctness – as to which see **Jennings**.[184] In my view and on the facts here, the generality of the Development Plan objectives invoked by BbTTG is such that the question of contravention does not even arise.

[182] Four Districts Woodland Group v An Bord Pleanála [2023] IEHC 335, §160.
[183] Four Districts Woodland Group v An Bord Pleanála [2023] IEHC 335, §162.
[184] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14 §65 et seq.

Hedge Removal – BOLAP

140. As to contravention of the BOLAP, the position seems to me to be different. I reject the Board's and Ardstone's submission that Objective GI13 of the BOLAP merely establishes a positive obligation to create a network of green corridors and that it does not, by its own terms, preclude the removal of part of any hedge from any particular site nor is it framed as a restriction on development. That view is incompatible with a reading of the BOLAP as a whole, in which context Objective GI13 must be read.

141. I consider that excessive emphasis and literalism is being applied by the Board and Ardstone – inconsistently with interpretation on **XJS** principles – to the word "create" in Objective GI13. The core aim of Objective GI13 is *"an integrated network of green corridors and wetland areas … by way of linking, preserving and incorporating* (inter alia) *hedgerows"*. Clearly, the BOLAP considered that the basis at least of such a network already existed in the BOLAP area. That is why it designated certain hedges as significant – including that hedge part of which would have to be removed to effect the Proposed Development. It is very clear that the creation contemplated by the BOLAP is to build upon the existing hedges in the BOLAP area. Accordingly, removal of existing hedges may well contravene Objective GI13 – especially if it is a hedge, such as that in issue, which the BOLAP explicitly identifies as significant.

142. Further, it is in my view clear that Objective GI13 of the BOLAP may well operate to restrict development. Put simply, the ground on which a hedge sits, cannot be built upon. A hedge may well get in the way of a posited development. That is perfectly clear, if illustration be needed for such a simple proposition, from the arboricultural drawing which superimposes the hedge line on the Proposed Development layout. The protection as part of the "*integrated network of green corridors"* of the hedge explicitly deemed significant by the BOLAP is incompatible with the Proposed Development layout for all but 40 metres of its length. They cannot co-exist. Indeed the operation of the hedge in question as a constraint on the development of the Site appears to be the very reason that the area of the hedge is deemed by the BOLAP to be "Partially Constrained Land".[185]

Materiality of Contravention

143. Assuming for the sake of argument contravention of Objective GI13 of the BOLAP, the first thing to be said, it seems to me, as to the question of materiality of such contravention, is that it falls to be considered specifically by reference to the function identified for the hedge by Objective GI13. That intended function is clearly to form part of the "*integrated network of green corridors".* This observation has the following implications as to the issue of materiality.

[185] BOLAP Fig. 4.1 Development Areas Rationale & §4.3.3. Part of the land on which the hedge lies is deemed "Highly Constrained" but that is clearly due to the 110kV power line rather than the hedge.

144. First, materiality falls to be assessed by reference to the effect of the contravention on the integrated network of green corridors in the BOLAP area as a whole rather than by reference to considerations confined to the Site or effects on the Site. In that light, the fact that it is the only hedge on the Site and that a greater proportion of it will be lost than was lost in Four Districts diminishes in importance. In contrast, the absolute loss of 90 metres can be favourably contrasted with the 674 metres lost in Four Districts. However I should not overstate the significance of that comparison and I am not to be taken as suggesting that loss of 90 metres is necessarily or even generally immaterial in all contexts. Context is very important.

145. Second, and as to that context and given the purpose of Objective GI13, materiality falls to be assessed not in terms of isolated or intrinsic value of the hedge as a static habitat within the Site. Rather, materiality falls to be assessed in terms of the functioning of the hedge as part of the integrated network of green corridors in the BOLAP area as a whole.[186] Here it seems to me very clear that the already established, permanent and irrevocable isolation of the hedge, by earlier development, from the remainder of the hedge system in the BOLAP Area is such that it has been rendered impossible that the hedge can serve the function, which is the purpose of Objective GI13, of forming part of the integrated network of green corridors in the BOLAP area. As materiality falls to be assessed by loss of that function and as that function is already irretrievably lost prior to the contravention, it is difficult to see how such a contravention can be material.

146. The long-established **Roughan**[187] test of materiality of a contravention was noted in **Jennings**[188] to be,

> *"… a question of law considered by reference to the test set in Roughan and approved and applied since in such as Maye, Byrnes, Heather Hill #1 and Ballyboden and centring on the 'the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention.'"*

147. Baker J. in **Byrnes**[189] observed:

> *"Materiality can be tested in the light of objections made to a planning application. Sixty three third party objections were made to the subject application, albeit thirty nine were in identical form. That these raised matters of a planning nature would suggest that the grounds of objections were material from a planning point of view …"*

[186] I appreciate that, to considerable degree, the first and second implications overlap in substance but there seems to me to be value nonetheless in identifying them distinctly.
[187] Roughan v Clare County Council (unreported, High Court, Barron J 18 December 1996)
[188] Jennings v ABP [2023] IEHC 14, §108.
[189] Byrnes v Dublin City Council [2017] IEHC 19, [23].

That passage was cited in another **BbTTG case**[190] in which it was considered relevant to the issue of materiality that large numbers of objectors had objected on grounds relevant to the material contravention issue.

148. In seeking to apply the Roughan test to the present case, I think it important to observe that the material contravention pleaded is specifically of BOLAP Objective GI13. It seems to me that, in that context, the Roughan test is not to be applied in terms of a general question whether the element of the Proposed Development in contravention of the BOLAP was, in general terms, likely to provoke opposition. It must be applied in terms of the question whether the element of the Proposed Development in contravention of the BOLAP was likely to provoke opposition specifically alleging material contravention of BOLAP Objective GI13.

149. It is of some relevance here to note that Clarke J in **Maye**,[191] applying the **Roughan** test[192] as to whether a contravention is material, found a material contravention specifically as to an objective to create a linear park and commented as follows:

> *"…….. what is sought to be achieved is, so far as possible, a continuous pleasant walking area running from Sligo centre along the river towards the outskirts of the town. In that context it is not the percentage of the length which is key but rather the extent to which any such walkway might be interrupted by areas which do not meet the linear park criteria specified in the objective. In that sense it seems to me that the interference with the objectives specified[193] in the development plan is material."*

150. In assessing materiality, Clarke J in Maye concentrates on the functions of the land in question as identified for that land in the development plan. This passage also seems to me to support the application of the Roughan test specifically by reference to the question whether the element of the Proposed Development in contravention of the BOLAP was likely to provoke opposition specifically alleging material contravention of BOLAP Objective GI13 – as opposed to opposition for other reasons. Addressing that question, the following points may be made.

151. If, as I hold, the hedge is incapable, whether or not the Proposed Development proceeds, of fulfilling the function which is the aim of BOLAP Objective GI13 – forming part of the integrated network of green corridors in the BOLAP area – it becomes,

[190] Ballyboden TTG v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §141.
[191] Maye v Sligo Borough Council [2007] IEHC 146
[192] Roughan v. Clare County Council 2 I.R. 527. Barron J stated: "What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."
[193] Emphasis added.

- very difficult to see that real or substantial planning or planning law grounds, based in BOLAP Objective GI13, could arise for opposing the Proposed Development by reference to the loss of the hedge.

- easy to see why no-one objected to the loss of the hedge on grounds of material contravention of BOLAP Objective GI13. Put simply, there was no reality in objecting to the loss of a function of the hedge already and irrevocably lost by reason of earlier development.

152. The fact that the Council in particular did not object on grounds of material contravention of BOLAP Objective GI13 is significant. The Roughan test is whether objection by local interests on this ground might reasonably be expected. I think the "*local interests*" elements is not essential to the test. I doubt it ever was but, in any event, Roughan was decided at a relatively early stage of the evolution of wider public participation, including by NGOs, in planning and environmental matters. If, to paraphrase Tip O'Neill, all planning and environmental matters were ever local, they are no longer so. Indeed, via the EU, they are to a great degree continental.

153. Even so, on a broad view of the phrase, "*local interests*", I think the Council can be seen as representing local public interests within the meaning of the test. S.15 PDA 2000 obliges the Council to seek to secure the objectives of the development plan. It does not mention local area plans. But given that,

- local area plans are adopted by planning authorities,[194]
- a local area plan must be consistent with the objectives and core strategy of the relevant development plan,[195]
- local area plans are, in essence, a more highly focussed and detailed expression, as to a particular area much smaller that the functional area of the planning authority, of the planning policy of that authority as more generally expressed in its development plan,
- the rules as to material contravention apply to local area plans as to development plans,

it may be said, whether or not by analogy with s.15, that a planning authority may reasonably be expected to seek, at least generally, to secure the objectives of its local area plans and to object to proposed developments in material contravention thereof. So, that the Council in particular did not object on grounds of material contravention of BOLAP Objective GI13 is, as I say, significant to the issue of materiality – though of course not necessarily decisive.

154. It is also significant that no-one complained in the planning process of material contravention of BOLAP Objective GI13. In one sense that becomes the more striking given there were objections to the loss of hedgerow on general grounds of "*net biodiversity loss*". These concerns were discounted in EIA (the validity of which is not challenged) and the obvious explanation for the absence of complaint of material contravention of BOLAP Objective GI13 is that its substantive objective as to the hedge – that it function as part of the integrated network of green

[194] Under s.18 PDA 2000.
[195] s.19(2) PDA 2000.

corridors in the BOLAP area as a whole – was already incapable of achievement due to prior development. The objection would have been pointless in practical terms.

Four Districts & Material Contravention of the Development Plan

155. Before I leave this issue, I should address BbTTG's reliance on **Four Districts**[196] – a case decided by Humphreys J on the basis of the same Development Plan as applies in this case. The judgment is notable for its survey of the cases as to material contravention and resulting summary of the law. It essentially agrees with the view taken in **Jennings**[197] as to material contravention of, respectively, plan provisions affording significant scope for planning judgements to the decision-maker and those which do not. Humphreys J says that, as to material contravention, if the plan provision,

- confers significant judgement on the decision-maker, its decision on the issue is reviewable, as to merit, only for irrationality.
- does not confer significant judgement on the decision-maker, the issue of contravention is also generally one of law for the court, and a contravention will arise if the decision-maker does not comply with the requirements of the plan as interpreted by the court.

As I understand this, and in other words, if the plan provision, does not confer significant judgement on the decision-maker, the court will make its own assessment whether a material contravention arises and substitute its view for the decision-maker's if they differ.

156. Four Districts was a challenge to an SHD permission which permitted removal of about 674 metres of hedges – that is 48.9% of the hedges on the site. Most of the trees on site were for removal also. It is not possible here to repeat more than parts of the reasoning of Humphreys J.

157. In Four Districts the Council considered that the proposed layout failed to sufficiently adapt the design of dwellings and streets to the existing physical attributes of the site. That is a notable reminder of both the expectation of such adaptation and the need for the developer to explain and the decision-maker to assess the necessity of hedge removal. Depending on the terms of the relevant Development Plan, hedges constrain development – to which constraint development proposals are expected by the Development Plan to conform. As will be seen, Humphreys J confirms that that is so even if at the expense of a degree of inefficiency of site usage in terms of quantum of development attainable. As a general observation, Development Plan provisions protecting hedges are rendered meaningless and misleading if, ceteris paribus, they are inevitably trumped by considerations of greater rather than lesser quantum or "efficiency" of development.

[196] Four Districts Woodland Group v An Bord Pleanála [2023] IEHC 335.
[197] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14 §65 et seq.

158. Indeed, and as an aside, it strikes me that in the planning context the word "efficiency", while a useful shorthand, likely involves a multifactorial assessment by reference to interrogable standards. Its use may risk euphemistically occluding rather than illuminating the precise issues at stake in a given case and may risk degeneration into a catch-all justification of maximising quantum of development. Of course, in a given case, maximising quantum of development may be a legitimate aim. However, it may be that I have misunderstood a term the precise meaning of which may be defined and well-understood by planners. If so, its authoritative elucidation by the profession would assist its understanding by other stakeholders and interpretation of planning policy documents on XJS principles.

159. Humphreys J was illuminating on the difference between protection of hedges and mitigation of their loss by replacement planting. He said, for reasons much of which I will not repeat,

> *"It is also true that the inspector regarded the overall impact as minimal, having regard to the mitigating measures. Nonetheless it is just not possible to see how removing 680 metres of hedgerows, even with mitigating measures, protects and enhances the biodiversity value and ecological function of the green infrastructure network, reduces fragmentation, or restricts development that would fragment or prejudice the network, bearing in mind that hedgerows in the county are defined as being part of the network.*
>
> *It could not be assumed that any given meterage of hedgerow can be removed as long as a similar amount of hedgerow is planted. ….. Mature or indeed ancient hedgerows are just not equivalently replaceable by freshly created ones … hedgerows are not a fungible item that can simply be removed and replaced with fresh vegetation.*
>
> *Therefore "mitigating" measures – the planting of new hedgerows – just don't have the same value in replacing the losses, especially if the hedgerows being culled have any degree of maturity. Even taking it that ecological value of the particular hedgerows here was low (a conclusion which was not challenged by the applicants in their pleadings), we still need to consider the question of whether the hedgerow removal constitutes a contravention of the development plan."*[198]

160. Humphreys J continued:

> ***"*** *Unfortunately, the board's argument involves reading quite a lot into the development plan that is not there. There are no qualifications on the objectives which set out any appreciable flexibility, discretion or planning judgement that would apply in such a way as to permit the destruction of 680 metres of hedgerows, even with mitigating measures, or the felling of almost all of the trees.*
>
> *The inspector thought that loss of hedgerows was justified having regard to the need to ensure*

[198] §163 et seq.

the efficient use of the site ….. But this is not something that qualifies the green infrastructure network objectives in the development plan itself. Even the mitigating measures are ones which will only offset the negative effects of habitat laws arising from the development "over time". That implies that the initial impact will be negative, a situation which does not particularly assist the argument that there was no deviation from the objectives of protection of the green infrastructure network as set out in the development plan.

Given that the quantity of removal is virtually 50% of the hedgerows on site, and that almost all of the trees will also be removed, this cannot but constitute the sort of "fragmentation" envisaged by the objectives of the plan.

…… the inspector and the board did not pause to consider whether the plan was being contravened, and if so whether this would be material, but rather proceeded directly to the question of whether permission should be granted. The fact that the inspector considered that the ecological impact was minimal was phrased as an answer to that problem, rather than addressing the question of material contravention at all.

Also relevant to materiality is the quantum of removal of hedgerows and trees relative to the quantum of hedgerows and trees on the site. In that context the removals are clearly very substantial. There is an analogy with Maye v. Sligo Borough Council where Clarke J. held that a loss of land reserved for a linear park was material even though, as David Browne puts it "the amount which would be lost was relatively small relative to its entire length"[199]

161. Clearly, in the present case, the main issue at stake in Four Districts does not arise: for presumptively good reasons and by the terms of the planning permission issued as to White Pines South and the effecting of development on foot thereof, the hedge on this Site is already isolated from the network and so questions of fragmentation of the network do not arise. While I would not overly emphasise it as context is important, there is also at least appreciable validity in contrasting the loss in the present case of 90 metres of hedge with the loss of over 7.5 times that quantum in Four Districts. Four Districts would seem to have been a case, as contemplated in **Jennings**,[200] of compulsion of fact. I do not think the present case falls into that category.

Decision

162. For the foregoing reasons, I hold that if (as I do find) the hedge removal in this case is a contravention of BOLAP Objective GI13, it is not a material contravention. So, Ground 5 must be dismissed. Accordingly, I need not decide the issue whether there is a contravention or whether the gaslighting objection should be upheld.

[199] Simons on Planning Law, 3rd ed. (Dublin, Round Hall, 2021) p. 21.
[200] Jennings & O'Connor v An Bord Pleanála & Colbeam, 2023 IEHC 14 §89 – 92.

GROUND 8 – CHILDCARE – FAILURE TO ENGAGE WITH RESIDENTS' OBJECTIONS

CONTEXT

163. This ground relates to adequacy of childcare provision in and near the Proposed Development. The Childcare Facilities Guidelines 2001,[201] as to dwellings generally, adopted a standard of 1 childcare facility per 75 dwellings in new housing areas. However, as to apartments specifically, the Apartment Guidelines 2020 provide that the threshold for provision of childcare facilities in a proposed apartment scheme should be established having regard to its scale and unit mix, the geographical distribution of existing childcare facilities and the emerging demographic profile of the area. Ardstone's Childcare Demand Assessment concluded that the Proposed Development would generate demand for about 49 to 90 childcare places.[202] That is not disputed.

164. Ardstone proposes to provide no childcare facilities in the Proposed Development, arguing that they are not needed. Ardstone's Childcare Demand Assessment estimated that a 136-place childcare facility already under construction[203] in the nearby White Pines Retail centre would supply 65 or more[204] places to serve the demand generated by the Proposed Development. That is not disputed.

165. It follows, as BbTTG agreed in argument, that a pessimistic view indicates a shortfall of 25 places[205] to be filled in other childcare facilities in the neighbourhood. In the end, there is no dispute but that a greater number than 25 places is likely to be available in childcare facilities in the neighbourhood other than that in the White Pines Retail centre.

PLEADINGS

166. BbTTG plead that the Board breached its obligations under to Article 3 of the EIA Directive to identify, describe and assess environmental effects of the Proposed Development on population and human health, and under Article 6(4) as to effective public participation and/or acted irrationally or unreasonably and/or breached BbTTG's rights to fair procedures and a reasoned decision in its assessment of proximity and/or availability of childcare provision near the Proposed Development.[206] Essentially it asserts that investigations by residents of White Pines North cast serious doubt on the accuracy of Ardstone's Childcare Demand Assessment of the availability of childcare places locally but their doubts were ignored.

[201] Childcare Facilities Guidelines for Planning Authorities June, 2001 - issued under S.28 PDA 2000.
[202] While estimates are just that, I confess to some surprise that the higher figure is 50% greater than the lower – but nothing turns on it.
[203] And, I am told, since completed.
[204] The precise number may vary for reasons irrelevant here.
[205] 90 – 65 = 25.
[206] This plea was originally as to a wider range of social infrastructure but, as the case ran, was confined to childcare provision.

167. BbTTG plead the High Court decision in **Balz**[207] (presumably as to the obligation to consider submissions of substance)[208] and **Mallak**.[209] Presumably they plead Mallak for the view of Fennelly J that the rule of law requires reasons as a bulwark against unreasonable, unreasoned, autocratic, arbitrary or capricious decision-making and to aid in achieving the underlying objective of fair, open and transparent decision-making. They cite these cases to the effect that, as BbTTG plead,

> *"the information submitted by observers is entitled to the same level of weight and respect from the Board as the information submitted by the Developer, and if the Board wished to prefer the latter over the former it was required to give reasons in that regards. Further and/or in the alternative it is the Applicant's case that public participation is not effective for the purposes of Article 6(4) of the EIA Directive unless the Board engage with the submissions made and provide a reason as to why they have been considered and rejected."*

168. The Board, beyond traverses, pleads the Inspector's report and that no issues of public participation, fairness of procedures or reasons arise as to BbTTG as it made no submissions to the Board on the childcare issue and cannot raise these issues now. Ardstone, beyond traverses, pleads a factual account of its Childcare Demand Assessment and the Inspector's consideration thereof and entitlement to form the judgment he formed. As did the Board, it denies BbTTG's standing on the issue.

INSPECTOR'S REPORT, ARDSTONE'S CHILDCARE DEMAND ASSESSMENT, THE WHITE PINES NORTH RESIDENTS' OBJECTION & COMMENT THEREON

169. The Inspector gave a detailed account of Ardstone's Childcare Demand Assessment as yielding an estimate of 170 places available in other childcare facilities in the neighbourhood. In some contrast, he said of objectors'[210] reply merely that they "queried" this estimate. That was an anodyne and minimalist description of what the objectors, White Pines North Residents – not BbTTG – had done. They did appreciably more than query Ardstone's Assessment: they positively said that it was in factual error. By essentially the same means as Ardstone's consultants had used for some facilities – personal contact with the service providers by phone and email – and within some weeks of Ardstone's survey, they ascertained what they understood to be the factual situation as to availability of childcare places in three of existing childcare facilities in the neighbourhood identified by Ardstone as having a large number of places available. I tabulate an anonymised version of the results below.

[207] Balz v An Bord Pleanála [2018] IEHC 309. However, and unsurprisingly, BbTTG's submissions cite, not the High Court but the Supreme Court decision in Balz- [2020] IESC 22.
[208] Balz v An Bord Pleanála [2018] IEHC 309 §68.
[209] Mallak v Minister for Justice Equality & Law Reform [2012] 3 I.R. 297 et al.
[210] These objectors were the White Pines North Residents Group – not BbTTG.

Childcare Facility[211]	**Reported Places Available**		**Difference**
	Ardstone - (Tusla Inspection Data 2001)	**WPN Residents**[212] **- (Personal Inquiry)**	
#3	38	0 + waitlist	38 +[213]
#6	57	0 + waitlist	57 +
#27	44	0	44
Total Places available[214]	177	38	139

170. The White Pines North Residents objection commented as follows:[215]

> *"Upon calling one of the local creches (#27) one of the residents was told that based on the square meters of the building they could have more children but that they did not have staff for it and did not plan to hire more staff. The White Pines North Residents Group feels that just because a creche could allow for a certain number of children it does not mean this is the number of available spaces, and therefore the report is misleading and should be considered as such by the Board. The local residents also called (#6) and they also confirmed they have a waitlist in place. The residents also got in touch with the managing director of (#3) (which owns 3 of the facilities listed in the 1,5 km radius), the director … disputed the numbers and was at loss as to why the report listed 57 spaces for (#3) while in reality there is a waiting list."*

The submission also included a screenshot of an e-mail from that director which read as follows:

> *"You can certainly quote as disputing the figures quoted.*
> *But the report cannot be based on the sq metres for the facility.*
> *Regardless of sq footage each centre must have full planning permission stating the maximum numbers allowed.*
> *So even if Tusla came in and said that based on sq footage we could have 100 children - service providers must the number*[216] *to the official planning permitted numbers which could be 75".*

171. I emphasise that I have no opinion as to which version of the factual availability of childcare places is the more accurate, reliable or relevant. But it can at least be said that neither is clearly outlandish, fit to be swatted aside. There may possibly have been a difference of method as to the significance of building size – as to which either view may be preferable to the Board. But, as matters

[211] Numbering per Table 5.3 of the Childcare Demand Assessment.
[212] White Pines North Residents Group.
[213] I have added the + symbol to represent the existing excess demand represented by the alleged waitlist. However I ignore it in the calculation.
[214] Includes all places in all facilities considered by Ardstone – not just the three listed above.
[215] I have anonymised the content.
[216] Sic.

turned out and for reasons I will explain, neither the Inspector's view nor the Impugned Permission turn on the question which version should be preferred.

172. However, the fact remains that the Inspector took the trouble[217] to record the developer's view on that question and chose not to record the contrary view of the objectors – merely mentioning that they held a contrary view. In my view, the objectors are entitled to wonder why that choice was made. They are also entitled to wonder why Ardstone's figures were preferred to theirs. As I read the Inspector's report, in basing his view on "*the analysis provided*"[218] the Inspector was clearly referring to Ardstone's assessment. He does not interrogate the differences between that assessment and the information provided by the objectors. This observation is given added force by the view of the Council, recorded by the Inspector elsewhere in his report[219] but not engaged with by him, that:

> *"The Board will need to satisfy itself as to the accuracy of the childcare demand assessment. The Planning Authority would not treat the assessment as a sound basis for avoiding the need for additional childcare spaces in this location and would view the non-provision of childcare facilities to be contrary to section 3.3.1 of the Guidelines for Planning Authorities on Childcare Facilities (2001)."*[220]

Taken in context, this view of the Council is not merely based on 2001 Guidelines, which may have been overtaken by the Apartment Guidelines of 2020: it is grounded also on the Council's noting that,

> *"Third parties have queried the accuracy of this assessment and provided some evidence that the apparent capacity in some local facilities, mentioned in the applicant's assessment does not reflect the reality …. The existence of waiting lists for facilities listed in the Assessment as having generous capacity is corroborated by facility management themselves in the observation submitted by the White Pines North Residents Group"*[221]

173. The Board must be independent, objective and impartial and must positively be seen to be so. It is in the Board's interest and in the public interest to demonstrate that. As was said by O'Donnell J in **Balz**,

> *"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public*

[217] Inspector's report §10.7.2 p79 & 80.
[218] Inspector's report p80.
[219] Inspector's report §8.3 p41
[220] Emphasis added.
[221] SDCC CEO Report sub headings "Non-Residential Uses", "Creche Provision". Emphasis added. It is disappointing to note that this report, running to 70 pages including numerous appendices, is neither paginated nor indexed nor are a contents list and paragraph numbers used. Such features, so easily included, are vital to the practical use and legibility of such documents.

more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."[222]

174. This concern arises all the more so, perhaps, as what was between the protagonists were fairly simple facts – as to which the expertise of Ardstone's consultants gave them no particular advantage of reliability. In that sense, the objectors' sense of grievance may have been all the stronger than was the case in another case brought by BbTTG,[223] in which the following was said:

"254. What matters is not that MPA Technical Note[224] *was right or wrong but that its criticisms were, as I have characterised them, expert, detailed, swingeing and fundamental. The MPA Technical Note was written by presumably reputable expert traffic engineers. And in the Board's considering a Planning Application, the Developers' experts have no presumed superiority over those retained by observers. As between the respective sides' experts, the starting point is parity of esteem.*

255. It was not necessary that the MPA Technical Note be upheld, or that it be addressed in a detailed narrative judgment. But it was necessary that it be treated with a seriousness commensurate with its expert provenance and the importance of the issues it raised. It is entirely possible that the MPA Technical Note would have been properly rejected outright and the DBFL TTA preferred in every respect – indeed, by implication that is what happened – but the objectors were not told why.

256. Given the parity of esteem to which I have referred, and by way of rhetorical illustration, is it conceivable that the inspector in this planning application and in a report leading to refusal of permission on traffic grounds, would give no analysis of the DBFL TTA save to say he had had regard to it and that, on such a basis, Shannon Homes could have been expected to be satisfied with the reasons given – satisfied that the Board had "directed its mind adequately to the issue before it" - a fundamental required by Hardiman J in ***Oates v Browne****.*[225] *Obviously not. And as Hardiman J makes plain, it does not suffice that the Board show that it directed its mind to the matter: it must show that it did so "adequately"."*

175. To that observation of Hardiman J one may add the Supreme Court's observation in **NECI**[226] that:

"The reasons had to be sufficient, therefore, not just to <u>satisfy</u> the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large, that the Labour Court had <u>truly engaged</u> with the issues which were raised, so as to accord

[222] Balz v An Bord Pleanála [2019] IESC 90, [2020] 1 I.L.R.M. 367.
[223] Ballyboden Tidy Towns Group v. An Bord Pleanála & Shannon Homes [2022] IEHC 7.
[224] Commissioned by BbTTG.
[225] [2016] IESC 7.
[226] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2021] IESC 36; [2021] 2 I.L.R.M. 1.

with its duties under the statute."[227]

MacMenamin J also said in **NECI:**

"The judgment in Balz contains a number of observations which strike home in this case. The judgment makes the point that the imbalance of resources between objectors and developers, on the other, means that an independent expert body, carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function".

"Balz made clear that when an issue had arisen where it was suggested that the Inspector, and the Board, had not given consideration to a particular matter, it was also unsettling that the issue raised should be met by the bare assertion that such consideration was given and nothing had been proven to the contrary"

176. I would at least question whether an essentially pro forma recitation that Ardstone's figures had been "queried" was likely to "satisfy" that the Board had "truly engaged". We are blessed with a population whose anxiety to participate in public affairs (doubtless motivated in greater or, often, lesser degree by their private interests – but there is nothing wrong with that) is not merely protected in domestic, EU and international law[228] but is demonstrated in practice time and again in many and varied ways, including participation in planning processes via a legal regime which in effect and in considerable degree, crowdsources environmental protection.[229] Importantly, these members of the public are not merely motivated and active. They are a generally well-, and often highly-educated population. Reasons which might have satisfied in former more deferential times may well not satisfy such participatory citizens. It is sensibly said that many objectors will never agree with a result that goes against them – no matter what reasons are given - and that to attempt to get them to agree is a "*fools errand*".[230] But reasons are not intended to persuade objectors to agree with the decision. They are intended to help them to reconcile themselves to it - to assure them that their views have been not merely heard but listened to and considered and to help them to accept the legitimacy of the decision and live with it. Failure to provide reasons adequate to that task, especially to a modern, informed and well-educated populace, breeds disillusionment, cynicism and lack of faith in the process. And maintaining public faith in the planning process is a vital public interest and was the very reason the Board was founded in the 1970's.

177. However, the foregoing remarks are obiter. I will leave to another case the possibility of any necessity to reconcile, as to the duties of detailed scrutiny and to "truly engage" with objectors' submissions, and the giving of main reasons on main issues, the decision in **O'Donnell**[231] and the

[227] Emphases added.
[228] As to international law, most notably by the Aarhus Convention.
[229] Atlantic Diamond Limited V An Bord Pleanála & EWR Innovation Park Limited [2021] IEHC 322; Jennings v An Bord Pleanála [2022] IEHC 249.
[230] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[231] O'Donnell v An Bord Pleanála [2023] IEHC 381, citing Balscadden Road SAA Residents Association Ltd v An Bord Pleanála, [2020] IEHC 586.

cases cited therein, with **Sliabh Luachra**[232] to the effect that it is "*crucial … that the points made in submissions should be addressed*",[233] the decision in **O'Brien**[234] that the Board's task is not "*primarily*" the resolution of disputes and the view of the importance of the Supreme Court's decision in **Balz**[235] taken by the Supreme Court in **NECI**.

THE ISSUES IN DISPUTE DID NOT INFORM THE BOARD'S DECISION & DECISION

178. I have the happy opportunity to defer further consideration of those issues as, in the end, the difference between the respective figures for childcare availability locally did not inform the main reason for the Board's resolution in Ardstone's favour of the issue as to childcare provision.

179. I agree with Humphreys J in his observation in **O'Donnell**[236] that, whatever the nuances and questions of degree discernible in the caselaw, there is agreement that, fundamentally, what is required are the "*main reasons on the main issues*".

180. The Inspector concluded that the "*likely childcare demands arising from the development would be satisfied within the wider White Pines development*." That refers to 65 of the places to come available in that creche. He was satisfied that "*any additional demands arising could be met within the wider area*". As I have said, based on Ardstone's unchallenged figures, and on a pessimistic view, those additional demands are estimated as being in the region of 25 places. Even the WPN residents'[237] critique implicitly accepts that about 37 places are available. In the end, and as discussed at trial, their critique falls short even in its own terms.

181. But it seems to me in any event that the "*main reason*" for the Impugned Decision on this issue, is that the "*likely childcare demands arising from the development would be satisfied within the wider White Pines development*." And nothing has impugned that reasoning.

182. This turns out to be a case in which the decision in **O'Brien**,[238] that the Board's task is not "*primarily*" the resolution of disputes, applies. The resolution of the dispute in question as to quantum of childcare availability locally turns out not to have been necessary to the determination of the issue as to childcare as, on either side's view, the actual availability suffices.

[232] Sliabh Luachra against Ballydesmond Wind Farm Committee v. An Bord Pleanála [2019] IEHC 888.
[233] Albeit not expressly by reference to each individual submission in which the same points are repeated.
[234] O'Brien v An Bord Pleanála & Draper [2017] IEHC 733.
[235] Balz v An Bord Pleanála [2019] IESC 90, [2020] 1 I.L.R.M. 367.
[236] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[237] White Pines North Residents Group.
[238] O'Brien v. An Bord Pleanála & Draper [2017] IEHC 733.

183. With some sense that the Board cut a rod for its own back on this issue, I nonetheless conclude that the challenge to the Impugned Permission on this ground must be dismissed.

GROUND 8A – STRATEGIC ENVIRONMENTAL ASSESSMENT

PLEADINGS

184. BbTTG pleads that the Impugned Permission is invalid as contravening Articles 1 and 3 of the SEA Directive[239] by granting planning permission in material contravention of the Development Plan and the BOLAP as identified at Grounds 1,[240] 4,[241] and 5[242] above.[243] Essentially, BbTTG pleads that:

- The Development Plan and the BOLAP required and were subjected to SEA.
- The Development Plan and the BOLAP set the framework for future planning permissions. Planning permissions as to sites covered by the Development Plan and the BOLAP are part of the implementation thereof.
- Articles 1 and 3 of the SEA Directive require that planning permissions be granted within the framework of the Development Plan and the BOLAP.
- Permissions, such as the Impugned Permission, in material contravention of the Development Plan and the BOLAP amount, at least, to "*minor modifications*" of the Development Plan and the BOLAP and so, by SEA Directive Articles 3.3 and 3.5, require screening for SEA. This seems to me to be BbTTG's essential point.
- The Impugned Permission is therefore defective as granted in material contravention of the Development Plan and the BOLAP and for want of such screening.
- The Board was obliged to disapply any Irish law which allowed such a defective permission.[244]

185. The Board and Ardstone plead, beyond traverses, that:

- The Statement of Grounds fails to plead the basis of the alleged breach of the SEA Directive.

[239] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment
[240] Alleged material contravention of Development Plan objective RES-N "to provide for new Residential Communities in accordance with approved Area Plans".
[241] Alleged material contravention of BOLAP requirement of a wayleave lateral clearance area of 23 metres either side of the 110kV power line.
[242] Alleged material contravention of BOLAP by hedgerow removal.
[243] Ground 2 was also pleaded but Ground 2 was not proceeded with.
[244] Citing Case 378/17 Minister for Justice v Workplace Relations Commission, Judgment of the CJEU of 4 December 2018, ECLI:EU:C:2018:979, §50 & Petecel v The Minister for Social Protection [2020] IESC 25.

- A planning permission is not a plan or programme within the meaning of the SEA Directive, so SEA does not arise.

- BbTTG erroneously conflates SEA of a plan or programme with EIA of a project.

- The description of a grant of planning permission as the "implementation" of the Development Plan or Local Area Plan is not accurate and does not reflect the fact that the statutory framework permits the grant of permission in material contravention of a Development Plan or Local Area Plan. It is therefore denied that the possibility of such grants was not in the contemplation of the SEAs of the Development Plan or Local Area Plan.

- Alternatively, if the possibility of the grant of permission in material contravention was not taken into consideration in such SEAs, while this might have grounded a challenge to the adoption of the Development Plan or the BOLAP, there is no such challenge in the present case and collateral attack by means of a challenge to the Impugned Permission is impermissible.

- Permission in material contravention of a Development Plan or Local Area Plan does not
  - modify the Development Plan or Local Area Plan.
  - undermine the purpose or intent of the SEA Directive.

- The SEA Directive does not require SEA of planning permissions in material contravention of a Development Plan or Local Area Plan – it does not preclude permissions for projects which do not strictly comply with every aspect of a plan or programme which has been subjected to SEA.

- In granting permission, the Board had regard to certain ministerial guidelines each of which was subjected to SEA.

SUBMISSIONS

186. Beyond repeating its pleas and establishing, which is undisputed, that the Development Plan and the BOLAP required and were subjected to SEA, BbTTG submits that it is entitled to rely on the SEA Directive – citing **Wasserleitungsverbund**.[245] On the substantive issue, it cites **NJ & OZ**[246] by analogy. It characterises that case as one in which a project-specific masterplan was adopted under the development plan and emphasises its holding that the concept of a modification of a plan or programme includes *"acts which, without amending a plan or programme, nevertheless allow derogation from certain elements of the framework for future development consent of projects".* Accordingly, BbTTG says

[245] Case C-197/18, Wasserleitungsverbund Nördliches Burgenland and Others, Judgment of the CJEU of the 3 October 2019, ECLI:EU:C:2019:824, §34 and the case law cited.
[246] Infra.

- the route to achieving a derogation, whether via another plan or through a material contravention, is immaterial to the logic of the CJEU in NJ & OZ – which is based on the protection of the objectives of the SEA Directive,

- so, a development consent which, by material contravention, derogates from a development Plan or Local Area Plan, is a modification of such plan for purposes of the SEA Directive and, at least, requires SEA screening on that account.

187. BbTTG also cites the **Aalter and Nevele Wind Turbines** case[247] for the view that is implicit that development consents for EIA projects may not derogate from the plan or programme within the framework of which they are taken. It cites **Thybaut**[248] to the effect that EIA is not substitute for SEA. It cites **Bund Naturschutz in Bayern C-300/20**[249] also, as to the SEA Directive concept of "*plans and programmes*".

188. The Board and Ardstone submit that:

- BbTTG's argument is misconceived as conflating the SEA Directive concept of "*plans or programmes*" with that of development consents for projects. This conflation was rejected as "*obviously incorrect*" in **O'Donnell**,[250] which BbTTG ignores.

- Development Plans and a Local Area Plans can only be modified[251] in accordance with ss.13 and 18(5) PDA 2000 respectively. A planning permission may materially contravene either, but cannot modify it.

- **Nomarchiaki**,[252] **Walton**,[253] and **O'Donnell** are authority that that the SEA Directive is limited to plans and programmes and does not apply to development consents for individual projects.

- There is no analogy here with **NJ & OZ**, which concerned SEA of a masterplan, not of a planning permission. And the CJEU states in that case that "*plans and programmes*" includes "*acts which, without amending a plan or programme, nevertheless allow derogation from certain elements of the framework…"*. This captures plans or programmes which *allow* the derogation, not the development consent which is, itself, the derogation.

- BbTTG's argument that development consents may not derogate from plans subjected to SEA and under which the development consent is given is in substance an argument impugning the validity of the statutory scheme and the fact that it permits the material contravention of a

[247] Case C-24/19 A and Others (Wind turbines at Aalter and Nevele), Judgment of the CJEU of 25 June 2020, ECLI:EU:C:2020:503.
[248] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §42.
[249] Case C-300/20 Bund Naturschutz in Bayern v Landkreis Rosenheim, Judgment of the CJEU of 22 February 2022, ECLI:EU:C:2022:102.
[250] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[251] Or varied, to use the statutory language.
[252] Case C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Judgment of the CJEU of 11 September 2012, ECLI:EU:C:2012:560, §92- §96.
[253] Walton v Scottish Ministers [2012] UKSC 44.

Development Plan and Local Area Plan. That statutory scheme is not challenged on the pleadings and the argument was in any event, rejected in **O'Donnell**.[254]

DISCUSSION & DECISION

No Material Contravention – No Preliminary Reference

189. As stated, BbTTG's complaint is of a want of SEA of the planning application which, complaint is premised on modification of the Development Plan and the BOLAP which premise is in turn premised on alleged material contraventions identified at Grounds 1,[255] 4,[256] and 5[257] above. However, I have found that the Impugned Permission does not effect the material contraventions alleged at Grounds 1, 4, and 5. So, as its premise fails, Ground 8A must fail.

190. As it follows that a determination of Ground 8A and of the proceedings does not turn on any EU Law issues as to whether a development consent, such as a planning permission, can constitute a modification of a plan or programme within the meaning of the SEA Directive, it further follows that a reference of that or any associated question to the Court of Justice of the European Union is appropriate.

191. However, lest I am in error in my conclusions as to Grounds 1, 4, and 5, I will consider Ground 8A further.

The SEA[258] Directive[259] & SEA Regulations 2004[260] & some caselaw thereon

192. The SEA Directive requires of certain plans and programmes that, before their adoption, an assessment of their effects on the environment be done. *"Although the word 'strategic' does not appear in its title or its text, the directive is usually known as the 'Strategic Environmental Impact Assessment Directive' because it places such an assessment at a higher (more strategic) level than that provided for in the EIA Directive."* - Campos Sánchez-Bordona AG in **Aalter & Nevele Wind Turbines**.[261] This observation is entirely consistent with a view that SEA is for plans and programmes,

[254] §116- §125.
[255] Alleged material contravention of Development Plan objective RES-N "to provide for new Residential Communities in accordance with approved Area Plans".
[256] Alleged material contravention of BOLAP requirement of a wayleave lateral clearance area of 23 metres either side of the 110kV power line.
[257] Alleged material contravention of BOLAP by hedgerow removal.
[258] Strategic Environmental Assessment.
[259] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.
[260] Planning And Development (Strategic Environmental Assessment) Regulations 2004 S.I. 436/2004. These took effect largely by amending the PDR 2001.
[261] Case C-24/19 A and Others (Wind turbines at Aalter and Nevele), Opinion of 3 March 2020.

not for development consents - which are at the lowest level in the hierarchy implied by Campos Sánchez-Bordona AG, and for which EIA is provided.

193. **Thybaut**[262] is authority that the provisions of the SEA Directive which delimit its scope "*in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly*".

194. **Article 1** describes its objective as to,

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

195. **Recital 4** clarifies, if clarification be needed, that the effects envisaged are those of the implementation of the plans and programmes. Recital 4 prescribes SEA,

> *"… because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption".*

196. **Recital 10** records that,

> *"All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed in Annexes I and II* (of the EIA Directive) *…. and all plans and programmes which have been determined to require assessment pursuant to* (the Habitats Directive) *are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When <u>they</u>[263] determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment."*

Recital 10 indicates that, as to projects potentially requiring EIA, plans and programmes are documents prepared for "sectors" and set a framework for future development consent of projects. The underlined word "they" also implies that modifications to plans and programmes will themselves be plans and programmes. So, at least ordinarily, development consents are not plans and programmes.

[262] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §40 – citing Case C-290/15 D'Oultremont and Others, §40 and the case-law in turn cited therein including Case C-567/10 Inter-Environment Bruxelles and Others [2012] ECR, §37.
[263] Emphasis added.

197. **Article 2** defines '*plans and programmes'* as meaning plans and programmes which "*satisfy two cumulative conditions"* – **Thybaut**.[264] Those conditions are that the plans and programmes be,

- *"subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government,"*
  and
- *"required by legislative, regulatory or administrative provisions".*

The definition includes "*any modifications*" of such plans and programmes.

Satisfaction by a planning permission of these "*two cumulative conditions"* is not disputed, but that is far from the end of the question whether a development consent can be a plan or programme for purposes of the SEA Directive.

198. **Article 3** of the SEA Directive relates to the scope of that Directive and Article 3(1) requires SEA, in accordance with Articles 4 to 9, of plans and programmes referred to in Article 3(2), (3) & (4) and which are likely to have significant environmental effects. Article 3(2) & (4) in effect require of SEA of plans and programmes which set the framework for future development consent of projects requiring EIA[265] or which require AA[266] or are otherwise likely to have significant environmental effects. As the Proposed Development required and was subjected to EIA, I set out Article 3(2)(a):

> *"2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,*
> *(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and <u>which set the framework for future development consent of projects</u> listed in Annexes I and II to Directive 85/337/EEC."*[267]

Slightly inaccurately I will refer for convenience to "*projects listed in Annexes I and II to*" the EIA Directive as "EIA projects".

199. **Thybaut**[268] is also authority that Article 3(2)(a) requires a "systematic" environmental assessment is to be carried out for all plans and programmes which,

- first, are prepared for certain sectors and,
- second, set the framework for future development consent of projects.

[264] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §42.
[265] Environmental Impact Assessment pursuant to the EIA Directive.
[266] Appropriate Assessment pursuant to the Habitats Directive 92/43/EEC.
[267] The EIA Directive in force in 2001. Now read as Directive 2011/92/EU as amended by Directive 2014/52/EU.
[268] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §46.

And 'town and country planning or land use' is one of those "sectors".[269] In Article 3(2)(a) we see established the contemplated relationship between, and contradistinction of, plans and programmes on the one hand and development consents on the other – at least as to projects requiring EIA, such as the Proposed Development.

200. **Thybaut**[270] also establishes that, as to EIA projects and plans and programmes "*prepared for …. town and country planning or land use*", it is a "*condition*" of the applicability of the SEA Directive that the plan or programme in question "*set the framework for future development consent of projects".* Thybaut cites **D'Oultremont**[271] which states that "*the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned[272], a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment".[273]* Notably, and as to **D'Oultremont**, I observe that, as the "*the grant … of one or more projects*" does not quite make literal sense, it seems to me to mean the grant and implementation of development consent for one or more projects.

201. **D'Oultremont** in turn cites, **Nomarchiaki**[274] which states that a plan or programme is "*a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny"*. Humphreys J in O'Donnell[275] cited **Nomarchiaki** for the proposition that "*The distinction between a plan and a project is clear*."

202. **Nomarchiaki** in turn cites an **Inter-Environment Bruxelles** case[276] which identifies,

> *"the directive's aim of establishing a procedure[277] for scrutinising measures likely to have significant effects on the environment, which define the criteria and the detailed rules for the development of land and normally concern a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures."* [278]

203. One may also refer to **Case C-110/09 Terre Wallonne ASBL**[279] as to the function of a plan or programme as setting the framework for development consent for an EIA Project and **Case C-321/18**

[269] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §47 & 48.
[270] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §50 & 54.
[271] Case C-290/15 D'Oultremont and Others, EU:C:2016:816, §49.
[272] i.e. as listed by Article 3(2)(a) the sectors of agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use,
[273] Emphases added.
[274] Case C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, Judgment of the CJEU of 11 September 2012, EU:C:2012:560, §95.
[275] O'Donnell v. An Bord Pleanála [2023] IEHC 381, §122.
[276] Case C-567/10 Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale, Judgment of the CJEU of 22 March 2012, ECLI:EU:C:2012:159.
[277] i.e. SEA.
[278] Emphases added.
[279] Joined Cases C-105/09 & C-110/09, Terre Wallonne ASBL & Inter-Environnement Wallonie ASBL v Région Wallonne, Judgment of the CJEU of 17 June 2010, ECLI:EU:C:2010:355.

Terre Wallonne ASBL[280] as making clear that the requirement of SEA as to plans and programmes for EIA projects "*is dependent on whether the plan or programme in question sets the framework for future development consent of projects*". In that case that very consideration excluded the impugned Belgian decree from SEA.

204. It is clear that the Impugned Permission in the present case does not satisfy the condition of Article 3(2)(a) that it "*set the framework for future development consent of projects*". Rather it is itself a development consent. And, to any extent it may provide a precedent influential in the decision of any future development consent application, that seems to me to fall far short of "*setting the framework*" for such a decision. It certainly does not define *"rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment"* - **Thybaut.**[281]

205. In my view, these authorities are consistent with the contradistinction established by Article 3(2)(a) of plans and programmes on the one hand and development consents on the other – at least as to projects requiring EIA, such as the Proposed Development.

206. This view also seems consistent with the view of Kokott AG in her opinion in a later **Inter-Environment Bruxelles** case in which she envisaged SEA as applicable to measures generally higher in a hierarchical regulatory model. She said:

> *"The establishment of a framework for subsequent decisions is characteristic of measures which form part of a regulatory hierarchy. In that regard, the provisions are specified in increasingly greater detail in the run-up to the final decision on the individual case, for example a development consent. At the same time, however, any margins for manoeuvre in the decision on the individual case are, generally, already limited by higher-ranking measures; in the case of development consent, for example, rules on the possible development or use of certain areas. In this hierarchical model, the SEA Directive is intended to ensure that specifications which are likely to have significant effects on the environment are made only after those effects have been assessed."* [282]

This view was, in effect, echoed by Campos Sánchez-Bordona AG in **Aalter & Nevele Wind Turbines**[283] in his explanation of the term "strategic environmental assessment" which I have cited above.

[280] Case C-321/18, Terre Wallonne ASBL v Région Wallonne, 12 June 2010, ECLI:EU:C:2010:355, §40, 43.
[281] §54, citing D'Oultremont §49.
[282] Case C-671/16 Inter-Environnement Bruxelles ASBL Opinion of Advocate General Kokott of 25 January 2018, ECLI:EU:C:2018:39, §21.
[283] Case C-24/19 A and Others (Wind turbines at Aalter and Nevele), Opinion of 3 March 2020.

207. **Article 3(3)** provides that plans and programmes which determine the use of small areas at local level and "*minor modifications*" to plans and programmes shall require SEA only where the Member States determine that they are likely to have significant environmental effects. Article 3(5) permits this determination to be made "*either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches*". It requires for this purpose that the criteria set out in Annex II be taken into account *"in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive."* In other words, minor modifications" to plans and programmes require SEA screening. Article 3(7) requires that such SEA screening determinations be made public.

208. The SEA Directive was given domestic effect by the SEA Regulations 2004.[284] These took effect largely by amending the PDR 2001. Their validity is not challenged for the purpose of this judgment.

O'Donnell

209. **O'Donnell**[285] was a challenge to an SHD planning permission on the basis, inter alia, that the statutory provisions allowing the grant of planning permission in material contravention of Development Plans were incompatible with the SEA Directive in that material contraventions themselves required SEA. That is in essence the same point as is made here. Humphreys J rejected that challenge as follows:

> *"117. This[286] implies either that:*
> *(i) the legislative framework for an SEA-assessed plan can't itself provide for derogations (possibly unless there is a re-assessment of the plan including the derogation from it); or*
> *(ii) an individual consent should be assessed as if it was a plan merely because it deviates from a plan.*
>
> *118. No EU-related authority from any jurisdiction has been brought forward to support the first proposition. Anyway, it is pointless if the derogating project is itself assessed. The second option is obviously incorrect.*
>
> *119. The submissions add a further, unpleaded twist at para. 84: "the grant of permission, without any modification of the LAP or CDP, authorises development of a sort that — by definition — cannot have been contemplated in the environmental assessment that preceded the adoption of the relevant plan." This implies that for a derogation to be effective, the plan itself has to be modified. Apart from the pointlessness of such a procedure, there is again no authority produced to make it plausible.*

[284] Planning and Development (Strategic Environmental Assessment) Regulations 2004 as amended.
[285] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[286] i.e. the ground of challenge put up by the applicants by reference to the SEA Directive.

120. The applicants rely by analogy on two cases, Case C-411/17 Inter-Environnement Wallonie ASBL,[287] …… and Case C-160/17 Thybaut[288] …… .

121. There is no analogy here. Thybaut holds that the adoption of a plan that allows derogation from a previous plan which had been subjected to SEA is itself required to be subjected to SEA. That does not have the effect that, where a plan subjected to SEA allows individual decisions to derogate from it, those decisions have to be treated as plans for the purposes of the SEA directive. They don't. Thybaut is basically destructive of the applicants' whole argument because it acknowledges that a plan subject to SEA can itself provide for derogations.

122. The EIA directive applies to "projects": art. 4. The SEA directive applies to "plans and programmes": art. 2(a). The habitats directive applies to both a "plan or project": art. 6(3). This is a project, not a plan, so SEA does not apply, even if the project is a derogation from a plan which had previously been subjected to SEA. The distinction between a plan and a project is clear: Case C-43/10 Nomarchiaki[289] ……. The issue here is acte clair, or acte éclairé, no doubt arises and thus there is no question of a reference. The one thing the applicants have got right is to point out that "[t]he correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved" if "the matter is equally obvious to the courts of the other Member States and to the Court of Justice" (Case C-283/81 Srl CILFIT[290] …….). But they haven't gone on to ask the obvious question – is there anything in the caselaw of any other current or former member state, or of the European courts, that illustrates any such doubt? If there is, they haven't produced it in this case.

123. Unfortunately for the applicants, there are only a finite number of possibilities:

(i) EU law does not allow SEA-assessed plans to provide for derogations at all. There is no authority for that, and such a view is inconsistent with Thybaut.

(ii) EU law does not allow SEA-assessed plans to provide for derogations without re-assessment. There is no authority for that, and it would be pointless because the derogation is subject to potential assessment, at least under EIA/AA.

(iii) EU law does not allow SEA-assessed plans to provide for derogations without the plan being amended. There is no authority for that, and it would also be pointless.

(iv) EU law allows SEA-assessed plans to provide for derogations, which are

[287] Case C-411/17, Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderan ASBL v. Council of Ministers, Judgment of the CJEU of 29 July, 2019, ECLI:EU:C:2019:622.
[288] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401, §42.
[289] Case C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias v. Ipourgos Perivallontos, Judgment of the CJEU of 11 September 2012, ECLI:EU:C:2012:560.
[290] Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, Judgment of the CJEU of 6 October 1982, ECLI:EU:C:1982:335, 16.

themselves to be assessed as plans. That is totally misconceived as explained above.

(v) EU law allows SEA-assessed plans to provide for derogations, which are themselves to be assessed as projects. That is the position but it doesn't help the applicants because this was assessed, or at least screened, as a project."

210. Though BbTTG in its written submissions cited O'Donnell as to other grounds of challenge, it did not do so as to Ground 8A – much less articulate a **Worldport**[291] basis on which I might depart from it. It is not clear why BbTTG in its written submissions did not address these issues – though they were urged on me briefly and orally. In any event, I decline to depart from O'Donnell as:

- A court should not lightly depart from a previous decision of the same court unless there are strong reasons – a clear basis – in accordance with the Worldport jurisprudence, for so doing. That is not merely a matter of judicial comity – it flows also – arguably primarily - from the weighty requirement of certainty in the law.

- O'Donnell is a very recent decision of a judge of the same court as this court.

- O'Donnell is relatively briefly expressed but for all that is no less, and no less clearly, a considered and reasoned decision.

- It is far from clear that BbTTG is correct in asserting that O'Donnell was not based upon a review of significant relevant authority. Indeed, the opposite is clear from the cases cited.

- O'Donnell is not, or so it seems to me, in "*clear error*". On the contrary, I agree with it. At its simplest it says, *"This is a project, not a plan, so SEA does not apply ….."*

211. As I consider myself bound by O'Donnell, I follow it in dismissing this ground.

212. However, lest I am wrong in that regard also, I consider the matter further below – including BbTTG's reliance on the decisions in **NJ & OZ** and the **Aalter and Nevele Wind Turbines** case, which are not cited by the Court in O'Donnell, and to an argument that Humphreys J was in error in O'Donnell in holding that SEA would be pointless where EIA was done in any event, as EIA is not a substitute for SEA.

[291] In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189; Kadri v. Governor of Wheatfield Prison [2012] IESC 27; A v. Minister for Justice [2020] IESC 70.

The Relationship between SEA and EIA

213. As Gulmann AG observed in a **Bund Naturschutz in Bayern** case in 1994,[292] in effect observing that even purposive interpretation of EU legislation in light of the general principle of a high level of environmental protection has its limits, Member States are not always bound to choose the environmentally optimal solution in implementing a directive which gives them choice as to its implementation. A fortiori, the EU is not bound to choose the environmentally optimal solution when legislating by directive. Directives, like any legal instrument, derive from political action and represent, in varying degrees, the compromises between differing political views, interests and priorities, policy choices and pragmatic choices. As to specifically environmental legislation, I would add that the aim of Article 191 TFEU - a high level of environmental protection - while it is of very considerable importance in purposively interpreting EU environmental protection legislation, is not a trump card playable to crack open the proper boundaries of such legislation.

214. That a high level of environmental protection is an "aim" is significant. **Kingston et al**,[293] while recording its considerable influence, nonetheless observe:

> *"Despite its frequent appearance throughout the text of the TEU, TFEU and Charter, the aim of achieving a "high level of environmental protection" remains profoundly ambiguous in character. Indeed, as with many of the broad aims of the Union, this is perhaps the key to its success as an aim with which all Member States can agree, despite significant ongoing differences in opinion as to the relative importance of environmental policy as compared to, say, economic policy. It is clear, for instance, that the aim does not require Member States to strive for the "highest" level of environmental protection. ….. The need for a certain flexibility of environmental aims is also inherent in the wording of Article 191(2) TFEU itself: the aim is to achieve a high level of protection taking into account the diversity of situations in the various regions of the Union."*

215. Second, the starting point of interpretation of EU legislation must be that such legislation is the legitimate expression of the chosen means of achieving that aim. There may be some analogy here with the presumption of constitutionality of Irish legislation. Third, such a trump card would degrade the achievement of legal certainty.

216. SEA and EIA share essentially that same "aim" of a "high level" of environmental protection set in Article 191 TFEU[294] and the respective EIA and SEA Directives must be presumed to represent a generally coherent and complementary set of legislative choices by the EU. But that does not necessarily imply a precisely logical and watertight fit. As stated, valid political and pragmatic considerations may have intruded.

[292] Case C-396/92 Bund Naturschutz In Bayern v Freistaat Bayern, Opinion of Advocate General Gulmann of 3 May 1994, §§66, 67.
[293] European Environmental Law, Cambridge, 2017 p10.
[294] Treaty on the Functioning of the European Union.

217. So, that the scope and content of SEA and EIA may not be precisely aligned (assuming BbTTG's assertion in this respect to be correct) does not per se prevent the EU from legislating distinctly and discretely for SEA of plans and programmes on the one hand and EIA of projects to inform development consents on the other. That seems to me to be so even where a development consent may depart from the plan or programme under which it is given. Any other solution would be highly impractical and likely unworkable, especially when one remembers that a development consent may be given by reference to multiple plans and programmes at various levels in the hierarchy of plans and programmes, not all of which may be precisely aligned. A development consent may involve preferring or prioritising the aims of one plan or programme over the aims of another or may involve reconciling such aims. The fine judgments involved in discerning whether such a development consent modified one or other, or indeed many of, such plans such as to require SEA, and the task of monitoring all such resultant modified SEAs in later development consent processes would amount to little more than a legalistic trap. And, given that the premise of at least the question arising in this case, set by Article 3(2)(a) of the SEA Directive, is that the projects in receipt of development consent require EIA, it would be a trap largely pointless from the point of view of environmental protection. Its purpose would be to require that, as to every project requiring EIA, SEA, or at least SEA screening, would also be done if any question arose of departure from the terms of a plan or programme under the aegis of which the development consent is to be granted. In this view of pointlessness, I agree with Humphreys J. I take that view even if one accepts BbTTG's assertion that the scope and content of SEA and EIA may not be precisely aligned and that the latter is not a substitute for the former - where a plan or programme is in issue.

218. Indeed, the inherently somewhat speculative and imperfect nature of SEA of a plan or programme, as compared to even EIA of a particular project (which is also an inherently, but less, imperfect exercise in prediction), reinforces such a view. As Kokott AG observed in **Thybaut**, noting that the urban land consolidation area order in question would facilitate "*projects that cannot yet be anticipated*", SEA "*cannot ensure that the subsequent effects on the environment that in fact occur are measured precisely*". But she considered nonetheless that it "*can attempt to describe the environmental effects that are realistically possible*" – which *"would contribute significantly to transparency because it would force authorities to clarify which future developments they permit through the establishment of the urban land consolidation area."*[295] So, the aims of SEA are ambitious but realistic.

219. Kokott AG also observed in Thybaut that *"classification of an urban land consolidation area as a plan or programme is also not precluded by the fact that, in principle, it would be possible to consider any derogation from existing planning requirements fully in the context of an assessment of subsequent projects under the EIA Directive."*[296] But that says no more than that EIA in a development consent process is no substitute for SEA of a plan or programme. That is a conclusion evident from the mere fact of two distinct directives. And, as the CJEU observed in Thybaut,[297]

[295] Case C-160/17 Thybaut v Région wallonne, Opinion of Advocate General Kokott of 25 January 2018, ECLI:EU:C:2018:40.
[296] §36.
[297] §63 et seq.

- That conclusion is in any event required by Article 11(1) of the SEA Directive which specifies that an SEA is to be without prejudice to any requirements under the EIA Directive.
- EIA cannot lead to an exemption from the obligation to carry out SEA to address the environmental aspects particular to the SEA Directive.

In my view, these observations do not imply that a development consent process must, or even may, be deemed a plan or programme or a modification of a plan or programme such as to require SEA.

220. See also **Genovaite Valciukiene**[298] to the effect that, at least generally, EIA is not a substitute for SEA – though it could be, depending on circumstance. That EIA in a development consent process is not a substitute for SEA of a plan or programme and cannot be used to circumvent the obligation to do SEA to address environmental aspects specific to the SEA Directive was stated also in **Inter-Environnement Bruxelles Case C-671/16**.[299] The context is illuminating: the observation was made in rejecting the possibility that EIA in future planning permission applications as to projects could substitute for SEA of a plan or a programme establishing the framework within which those projects will subsequently be authorised. I do not see that this assists BbTTG here as it is grounded in the distinction between SEA of plans and programmes and EIA in development consent processes as to projects.

221. Though not binding on me, **Walton**[300] is of high authority in support of the distinction, for SEA purposes, between plans and programmes, on the one hand, to which SEA applies and on the other hand, development consents, to which it does not.

222. In that case, Mr Walton asserted that a regional transport strategy – the "MTS" – was a plan or programme within the meaning of Article 2(a) of the SEA Directive and that a later decision to construct a particular road – "the Fastlink" – was a modification to that plan or programme: the MTS. Though there are three judgments, the UKSC unanimously disagreed with Mr Walton. It cited, inter alia, Inter-Environnement Bruxelles ASBL (Case C-567/10), Inter-Environnement Wallonie ASBL (Case C-41/11), and Terre Wallonne ASBL (joined cases C-105/09 and C-110/09).[301] Not least, Lord Reed, taking a purposive view, held that the decision to construct the Fastlink did not set or modify the framework for future development consent of projects and so the SEA Directive did not apply to the decision.[302] The effects of the Fastlink on the environment were capable of being fully assessed in accordance with other applicable EU legislation, including the EIA Directive. And he held that a reference to the CJEU on the question was unnecessary. Lord Reed accepted that the concept of "plans and programmes" was to be broadly, not narrowly, construed and, on a purposive approach,

[298] C-295/10 Genovaite Valciukiene And Others V Pakruojo Rajono Savivaldybe [2011] All ER (D) 54 (Oct).
[299] Case C-671/16 §65.
[300] Walton v Scottish Ministers [2012] UKSC 44.
[301] Case C-567/10 Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale, Judgment of the CJEU of 22 March 2012, ECLI:EU:C:2012:159; Case C-41/11 Inter-Environnement Wallonie ASBL v Région Wallonne, Judgment of the CJEU of 28 February 2012, ECLI:EU:C:2012:103; Joined cases C-105/09 and C-110/09 Terre Wallonne ASBL v Région Wallonne Judgment of the CJEU of 17 June 2010, ECLI:EU:C:2010:355.
[302] §57 et seq.

the complementary nature of the objectives of the SEA and EIA Directives must be borne in mind. A headnote[303] reads, in part,

> *"(1) that the Strategic Environmental Directive was concerned with the establishment of legal and administrative frameworks for the grant of future development consent for specific projects; that the modification of any such specific project was covered by other European Union legislation such as that concerning environmental assessment of the effect of projects; that the decision of the Scottish Ministers to construct the Fastlink had not altered the framework for future development but had been taken in the course of executing a specific project and related solely to that project; and that, accordingly, the decision had not been the modification of a plan or a programme within the meaning of article 2(a) of the Strategic Environmental Directive"*

223. Lord Reed cites the EU Commission's guidance on SEA[304] as helpful to the following effect:

> *"It is important to distinguish between modifications to plans and programmes, and modifications to individual projects, envisaged under the plan or programme. In the second case, (where individual projects are modified after the adoption of the plan or programme), it is not [the SEA Directive] but other appropriate legislation which would apply."*

<u>Material Contravention grounded in policies subjected to SEA & Modification in Domestic law.</u>

224. The Board argued that material contravention of a planning policy which had been subjected to SEA is not problematic inasmuch as material contraventions often flow from other policies which have been subjected to SEA. That may or may not be a good argument in a given case but it seems to me by no means inevitable that the basis for a material contravention will derive from a policy which has been subjected to SEA. For example, in the present case at least one material contravention as to height is grounded in the strategic nature of the project having regard to Rebuilding Ireland Action Plan for Housing and Homelessness 2016. It is not apparent that this Action Plan was subjected to SEA. Neither is it clear to me how material contravention permissions granted, as in this case, having regard to the pattern of development and permissions granted since the adoption of the relevant development plan or local area plan fits into such a proposed analysis. I would not rule out the possibility of such an argument based in an analysis of the specific policy basis for a specific material contravention in a particular case but there was no such analysis here – the Board pitched the argument at a very general level and with, it seemed to me, some diffidence.

[303] [2013] PTSR 51.
[304] Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment (2003) (para 3.9).

225. The Board submits that Development Plans and Local Area Plans can only be modified[305] in accordance with ss.13 and 18(5) PDA 2000 respectively and that a planning permission may materially contravene either, but cannot modify it. It is unnecessary to rule on this submission – though it strikes me that the relevant concept of "modification" here, invoked by the SEA Directive, is unlikely to be a domestic law concept but rather is one having an autonomous meaning at EU Law.

Is a Development Consent in Material Contravention a Derogation from or a Modification of a Plan for purposes of the SEA Directive?

226. In my view the answer to this question, whether a development consent in material contravention of a Development Plan or a Local Area Plan is a derogation from such plan for purposes of the SEA Directive, is "no".

227. At first blush, it seems counterintuitive that a "contravention" for purposes of the PDA 2000 is not a "derogation" for purposes of the SEA Directive. However, one must have regard to the legislative scheme of the PDA 2000 pursuant to which Development Plans and Local Area Plans are made. The possibility of material contravention is inherent in that legislative scheme, which makes explicit provision for material contravention (s.34(6) PDA). It seems to me to follow that the possibility of their material contravention is inherent in Development Plans and Local Area Plans. I understand Humphreys J to have taken the same view, slightly differently put, in O'Donnell. The extent to which, if at all, SEA of such plans must take the prospect of their material contravention into account, does not arise here (and I say nothing as to whether such a challenge might have succeeded) but certainly a collateral challenge to the SEAs of the Development Plan and the BOLAP is impermissible in this case. Indeed those SEAs were not even before me.

228. I will now consider some of the case law but it bears first observing that I have not been referred to any case in which it has been held that SEA of a development consent was required.

Thybaut – 2018

229. **Thybaut**[306] considered whether SEA was required of an urban land consolidation area order in Belgian Law. The Belgian regulatory structure seems to have been a complex. The application for an urban land consolidation area order had to be accompanied by an urban development plan. The urban land consolidation area order set the geographical boundaries of the application of that urban development plan. That urban development plan would form the subject of a later planning permission. But that urban land consolidation area order applied, not merely to that planning permission application but to any other planning permission application in the area including

[305] Or "varied", to use the statutory language.
[306] Case C-160/17 Thybaut v Région wallonne, Judgment of the CJEU of 7 June 2018, ECLI:EU:C:2018:401.

projects that could not yet be anticipated, a simplified planning consent procedure derogating from existing planning policies.[307] Thybaut is authority that because of that possibility of derogation, the urban land consolidation area order came within the SEA Directive concept of 'plans and programmes' likely to have significant effects on the environment and so required SEA.

230. However, in Thybaut, the derogation from existing planning policies was constituted by the urban land consolidation area order. It was clearly a "plan of programme" within the meaning of the SEA Directive. Notably, Thybaut did not consider whether, much less decide, that the necessary subsequent development consent application would require SEA.

Aalter & Nevele Wind Turbines – 2020

231. **Aalter & Nevele Wind Turbines**[308] concerned the validity of a development consent for the turbines – but not on the basis that SEA of the development consent was required. The challenge was grounded in the failure to do SEA of an order of the Flemish government and a circular on the installation and operation wind turbines – on the basis of which order and circular the development consent had been granted. As the Supreme Court noted in **FIE**,[309] *"The question was whether the Circular and Order were plans and programmes within the meaning of the SEA Directive."* BbTTG cites specifically §§76 and 77 of the judgment in the Aalter & Nevele Wind Turbines case for its submission that is implicit in the SEA Directive that development consents for EIA projects may not derogate from the plan or programme within the framework of which they are taken. I do not see that implication. In §§76 and 77 the CJEU merely inferred that the Flemish law circular at issue in that case was binding in Flemish law, as opposed to being a provision of purely indicative value. This was suggested by the fact that the development consent specified that the project must meet the conditions set out in that circular at all times. That is far from the proposition for which BbTTG contends.

Bund Naturschutz in Bayern C-300/20 – 2022

232. Campos Sanchez-Bordona AG in **Bund Naturschutz in Bayern C-300/20**[310] noted that the case raised issues similar to those raised in the Aalter & Nevele Wind Turbines case in which, he recalled, he had stated that:

- The assessment of the effects of certain 'projects' or certain 'plans and programmes' on the environment is one of the key instruments available under EU law for attaining a high level of protection of the environment.
- The environmental assessment of *projects* is governed by Directive 2011/92/EU.[311]

[307] §12, "a sectoral plan, a municipal development plan, local planning rules or an alignment plan."
[308] Case C-24/19 A and Others (Wind turbines at Aalter and Nevele), Judgment of the CJEU of 25 June 2020, ECLI:EU:C:2020:503.
[309] Friends of the Irish Environment CLG v. Government of Ireland [2022] IESC 42, §87.
[310] Case C-300/20 Bund Naturschutz in Bayern v Landkreis Rosenheim, Opinion of Advocate General Campos Sanchez-Bordona of 16 September 2021, ECLI:EU:C:2021:746, §§1-3.
[311] Italicised emphasis in original.

- The environmental assessment of *plans and programmes* by Directive 2001/42/EC.[312]
- The two directives complement one another: because the latter is intended to bring forward the environmental impact assessment to the strategic planning stage of the actions taken by national authorities. The study of the environmental effects required is, therefore, broader or more comprehensive than that relating to a specific project.

233. Campos Sanchez-Bordona AG observed that the questions posed in Bund Naturschutz in Bayern C-300/20 rendered it "*necessary to provide an even more precise definition of when a plan or programme contains a reference framework for the preparation of projects covered by Annexes I and II to the EIA Directive and therefore requires a prior SEA*."[313] In the particular circumstances of that case, he suggested that the German law regulation in issue – intended to protect nature and landscape – even though it provided for certain measures relating to activities forming part of projects within Article 3(2)(a) of the SEA Directive as requiring EIA, laying down general prohibitions (with exceptions) and obligations to obtain development consent, nonetheless was not a plan or programme within the SEA Directive. It did not, in her view, contain sufficiently detailed rules on the content, preparation and implementation of such projects. Even while noting the broad scope of the SEA Directive as required by the TFEU aim of a high level of environmental protection, and that modifications of plans and programmes came within that scope, the CJEU agreed with the conclusion reached by Campos Sanchez-Bordona AG.

234. I do not see this Bund Naturschutz in Bayern case as advancing BbTTG's net proposition that development consents may require SEA. That proposition was not at issue in that case and, if anything, the case undermines BbTTG's net proposition. I have cited Campos Sanchez-Bordona AG above as to the different subject matters of the EIA Directive and the SEA Directive. The CJEU observed that as to EIA projects within Art 3(2) of the SEA Directive, it was a condition of identification of a plan or programme requiring SEA that it "*must set the framework for future development consent of projects*".[314] This is consistent with the condition, set by Art. 3(2), of identification of a plan or programme requiring SEA that it apply to one or more of the "sectors" Art. 3(2) lists. Bund Naturschutz in Bayern describes that list as a list of "sectors" [315] – which appears to me to contrast with the concept of "projects". While, I suppose, it is theoretically possible that, in a very particular regulatory structure, a development consent could itself "*set the framework for future development consent of projects",* such a proposition was not argued here and it is clearly not the regulatory structure generally assumed by Art. 3(2) or provided at Irish law. In my view, Bund Naturschutz in Bayern is authority that, such theoretical possibilities aside, the SEA Directive applies to plans and programmes and not to development consents for projects requiring EIA. To those development consents, the EIA Directive applies.

[312] Italicised emphasis in original.
[313] §5.
[314] Case C-300/20 Bund Naturschutz in Bayern, Judgment of the CJEU of 22 February 2022, ECLI:EU:C:2022:102, §62.
[315] Case C 300/20 Bund Naturschutz in Bayern, Judgment of the CJEU of 22 February 2022, ECLI:EU:C:2022:102, §60.

NJ & OZ – 2023

235. **NJ & OZ**[316] concerned an application to quash a planning permission, in which the applicants sought a declaration that s.28 PDA 2000 (which empowers the Minister to promulgate planning guidelines) was invalid as contrary to EU law. Inter alia,

- The impugned planning permission was based on a "schematic" masterplan prepared jointly by the developer and the planning authority and adopted by the latter.
- Though not legally binding, the masterplan had been expressly envisaged by the development plan as "area-specific guidance".
- The development plan had been subjected to SEA.
- The masterplan envisaged permission of developments inconsistent with and derogating from the development plan, in particular as to the height of the buildings.
- The masterplan had not been subjected to SEA. NJ & OZ alleged that on that account, the Board had erred in having regard to it.
- S.28(1C) PDA 2000 required the Board to comply with SPPR3[317] of the Height Guidelines.[318] NJ & OZ alleged this infringed the EIA Directive 2011/92 by unlawfully limiting the competent authority in performing EIA.

236. BbTTG state, correctly, that in the judgment of Humphreys J in O'Donnell, NJ & OZ was not cited. In Kerins, sub nom NJ & OZ, the CJEU answered in March 2023 certain questions posed it by Humphreys J. On 24 April 2023, Humphreys J decided Kerins in light of those answers. He decided O'Donnell on 5 July 2023. I would be highly reluctant to conclude that Humphreys J decided O'Donnell ignorant or unmindful of NJ & OZ. It seems highly implausible that, had NJ & OZ been thought to shed new light on the issue arising in O'Donnell and in this case, it would not have featured in O'Donnell. Very fairly and properly, counsel for BbTTG informed me that NJ & OZ was cited to Humphreys J in O'Donnell. Notably, the CJEU, proceeded to judgment in NJ & OZ without a written opinion from Kokott AG. That course is often taken where the reference raises neither a difficult nor a novel point and the CJEU purports merely to apply earlier caselaw. In that light, it is unsurprising that Humphreys J did not see the need to refer in O'Donnell to NJ & OZ and it is unlikely that NJ & OZ would invalidate his decision in O'Donnell.

237. Humphreys J in Kerins adopted the Board's syllogistic summary of the effect of the CJEU decision, sub nom NJ & OZ, on the SEA point:[319]

- only if the masterplan is binding on the Board under Irish law, would the masterplan come within the scope of the SEA Directive,
- the masterplan is not itself binding on the Board under Irish law,
- the masterplan therefore does not come within the scope of the SEA Directive.

[316] Case C-09/22 NJ & OZ v An Bord Pleanála Judgment of the CJEU of 9 March 2023, ECLI:EU:C:2023:176. This case corresponds to Kerins v. An Bord Pleanála & Anor (No. 1) [2021] IEHC 369, (No. 2) [2021] IEHC 612, (No. 3) [2021] IEHC 733, and (No.4) [2023] IEHC 186. I have supplemented the description of the case given in NJ & OZ.
[317] Specific Planning Policy Requirement 3.
[318] Urban Development and Building Heights Guidelines for Planning Authorities (December 2018)
[319] Kerins & Anor v. An Bord Pleanála & Anor (No.4) [2023] IEHC 186 §35. I have edited it somewhat.

238. Inter alia, the CJEU in NJ & OZ:

- Was considering a masterplan providing for development consents – not a development consent.

- Noted that by s.15 PDA 2000 it is the duty of a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan.[320]

- Held, citing Case C-300/20 Bund Naturschutz in Bayern, that "*the concept of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment"*.[321] As I have said, Case C-300/20 maintains the distinction between plans and programmes within the SEA Directive and development consents without that directive.

- Repeated that, by Art. 3(2)(a) of the SEA Directive, plans and programmes relevant to EIA projects require SEA only if they are
  - both prepared for the "sectors" referred to in Article 3(2)(a)
  - and they set the framework for future development consents of EIA projects.

239. It is in this light that one must understand the observation of the CJEU in NJ & OZ that the objective of the SEA would be undermined if it were possible to derogate from the framework defined by a plan or programme which has been subjected to SEA, without such a derogation being subject, at least, to SEA Screening. It is not authority that a <u>development consent</u>, which does not alter that framework, is subject to SEA. Rather it answered the question whether a "*<u>plan</u> comes within the scope of*"[322] the SEA Directive.

240. In short, I have seen no basis in the caselaw for the suggestion that SEA Directive may apply to a development consent.

<u>SEA – Conclusion</u>

241. For the reasons set out above, I dismiss the challenge made on SEA grounds on the bases that:

- Absent the material contraventions on which Ground 8A is premised, I must do so.
- I am bound by O'Donnell to do so.
- I reject the argument that development consents are subject to SEA.

[320] §33.
[321] §38.
[322] Emphasis added.

OVERALL CONCLUSION

242. As, for the reason set out above, I have dismissed all grounds of challenge, I dismiss the proceedings. I am provisionally of the view that there should be no order for costs in the case. The case will be listed for mention on 12 January 2024 for mention only with a view to final orders.

David Holland
21/12/23