[2023] IEHC 381

THE HIGH COURT
JUDICIAL REVIEW

[2021 No. 251 JR]

IN THE MATTER OF SECTIONS 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

ALICE O'DONNELL, COLIN ACTON, SEÁN GOFF, EVELYN CAWLEY, DECLAN MORRIS, CIARA MAN, GARETH MADDEN, AILEEN LENNON, KEITH SCANLON AND CARINA HARTE-HOLMES

APPLICANTS

AND

AN BORD PLEANÁLA, MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

AND

DRUMAKILLA LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 5th day of July, 2023

1. Like *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January, 2023), this case relating to the proposed construction of residential units and associated works at the former Carmelite monastery at Delgany, County Wicklow is another window on the rise and fall of the Catholic Church in Ireland.

2. The central section of the monastery, according to the National Inventory of Architectural Heritage (NIAH), was originally a country house built around 1810. The Carmelites took possession of the house in 1844. According to other public domain material (wicklowheritage.org), the building of the monastery church was delayed by the Famine. The foundation stone was laid in 1851 and the first Mass was celebrated in 1853. The same source describes the church as having been called "a little gem of gothic architecture".

3. According to the NIAH, a large two and three-storey wing to the south was built around 1860 and a school was held within the monastery until 1896. Wicklowheritage.org states that:

> "In recent times, due to diminishing numbers in the Order, the Carmelite Sisters decided to sell the monastery and move the small remaining congregation to a Carmelite monastery in Stillorgan Co. Dublin. The bishop instructed that the church be deconsecrated and religious artefacts be removed before the property was vacated ... the final Mass in the church was celebrated in February 2019."

4. In anticipation of the development consent application, an application for a bat derogation licence was made to the National Parks and Wildlife Service (NPWS) on 17th January, 2020. The licence was issued on 4th March, 2020.

5. On 16th July, 2020, a request was made to amend the licence to include the brown long-eared bat. That was granted and an amended licence issued on 21st July, 2020.

6. Pre-application consultation took place on 23rd July, 2020, which resulted in a board order identifying issues to be addressed dated 12th August, 2020.

7. The application for planning permission under s. 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 was submitted on 21st October, 2020. The revised derogation licence was appended to the application documentation, so the application date was the first date on which the applicants could have known about it.

8. The applicants made submissions on the application. The board's inspector then prepared a report recommending grant of permission with conditions dated 3rd February, 2021. The board broadly accepted this recommendation and granted permission on 15th February, 2021.

Procedural history

9. Proceedings challenging the board's decision and the derogation licence were issued on 25th March, 2021.

10. On 19th April, 2021, I granted leave to seek judicial review and a stay on the works. I gave case management directions on 14th May, 2021. An issue then blew up because one of the points being made by the applicants was covered by the *Waltham Abbey v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021) proceedings and the matter was then delayed pending a resolution of that issue.

11. On 28th March, 2022, the directions were amended and were further amended on 9th May, 2022 by agreement of the parties. There were then further revised directions by agreement on 20th June, 2022 and further agreed adjournments on 25th July, 2022 and 3rd October, 2022. Ultimately,

following completion of the exchange of pleadings and affidavits, a date was fixed in the list to fix dates on 30th January, 2023 and the matter was heard on 9th to 11th May, 2023. On the latter date, an additional affidavit exhibiting further material that was before the board was admitted without objection.

12. Following the CJEU judgment in Case 721/21 *Eco Advocacy CLG v. An Bord Pleanála* (Court of Justice of the European Union, 15th June, 2023, ECLI:EU:C:2023:477), the matter was listed for mention on 19th June, 2023 for any further submissions arising from that case. It was then adjourned on consent to 26th June, 2023, at which point some further argument was offered in relation to pleadings issues. The applicants wanted to reserve the right to yet a further reply so the matter was adjourned to 27th June, 2023 for that purpose. At that point some discussion arose as to whether the court could give a judgment on most of the issues but indicate provisionally any views or difficulties that arose in respect of aspects of the derogation licence arguments and invite further submissions on those. That was not particularly objected to and judgment was formally reserved on the basis that such an option would be available.

Reliefs

13. The reliefs sought by the applicants are as follows:

> "1. An order of certiorari quashing the decision of the Respondent granting planning permission for the construction of 232 residential units and associated works at the site of the former Carmelite Monastery Lands, Delgany Co. Wicklow on 15th February 2021 (ABP Ref 308467-20) (the 'Decision').
>
> 2. An order of certiorari quashing the Derogation Licence (DER/BAT 2020/9) (the 'Derogation Licence') granted by the Second Respondent in respect of bats and issued to the Developer in respect of the proposed development on 21st July 2020.
>
> 3. Such declaration(s) of the legal rights and/or legal position of the applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondents as the court considers appropriate.
>
> 4. A declaration that (to the extent that they are not capable of bearing a conforming construction) sections 5, 6, and 7 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ('the 2016 Act[']) are incompatible with Article 6(4) of Directive 2011/92/EU and/or the requirements of fair procedures and natural and constitutional justice.
>
> 5. A declaration that (to the extent that it is not capable of bearing a conforming construction) section 5(6) and 9(6)(c) of the 2016 Act are incompatible with Articles 3 and 4 of the Strategic Environmental Assessment Directive, Directive 2001/42/EC.
>
> 6. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.
>
> 7. An order that section 50B of the Planning and Development Act, 2000 (the '2000 Act'), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act, 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.
>
> 8. Costs."

14. Since core ground 1 was withdrawn, relief 4 falls so the preliminary objections at paras. 6 and 7 in the State's statement of opposition does not arise.

Core grounds

15. Core ground 1 states as follows:

> "The Decision is invalid as the statutory pre-consultation procedures provided in sections 5 and 6 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the '2016 Act') are incompatible with Article 6(4) of Directive 2011/92/EU (as amended) (the 'EIA Directive') and/or the requirements of fair procedures and natural and constitutional justice."

16. As noted above, this ground was not pursued.

17. Core ground 2 states as follows:

> "The Decision is invalid because the Board granted planning permission for the proposed development in contravention of a zoning objective or an objective in relation to the zoning of land contrary to section 9(6)(b) of the 2016 Act."

18. This is dealt with below as a domestic law issue.

19. Core ground 3 states as follows:

> "The Decision is invalid because the Board failed to identify any basis pursuant to section 37(2)(b) of the 2016 Act as to why it was entitled to grant permission notwithstanding that the proposed development constitutes an acknowledged material contravention of the relevant Development Plan and Local Area Plan."

20. This is also addressed below as a domestic law issue.

21. Core ground 4 states as follows:

"The Decision is invalid as the material contravention procedure provided by the Minister in section 5(6) and/or 9(6)(c) of the 2016 Act is incompatible with the requirements of Directive 2001/42/EC ([`]the SEA Directive') and/or that the Board was required to but failed to ensure the effectiveness of the law of the European Union."

22. This is a tortuously and inaccurately phrased point because obviously a provision of primary statute law is not a "procedure provided by the Minister". Essentially, this is a complaint about statutory validity which is best dealt with on a reach-constitutional-issues-last-basis.

23. Core ground 5 states as follows:

"The Decision is invalid because the Developer and the Board failed to comply with Article 299B of the Planning and Development Regulations 2001."

24. This ground was not pursued.

25. Core ground 6 states as follows:

"The Decision is invalid because the Board erred in failing to have any, or any adequate regard for the protection of bat fauna for the purposes of Annex IV and Article 12 of the Habitats Directive and/or section 23 of the Wildlife Act 1976 (as amended)."

26. This is an EU law point which is best postponed until after dealing with domestic law issues.

27. Core ground 7 states as follows:

"The Derogation Licence issued to the Developer by the Second Respondent is invalid because the decision maker failed to establish that there is no satisfactory alternative and/or where the rationale for granting it is wrong in law and fact and/or is so unreasonable that no reasonable decision maker could have arrived at it."

28. This is the sole core ground relating to the challenge to the derogation licence.

29. Core ground 8 states as follows:

"The Decision is invalid as the Board breached the EIA Directive and/or acted irrationally or unreasonably and/or breached the Applicants' rights to fair procedures and reasoned decision making in its assessment of traffic impacts from the proposed development on the greater Delgany area."

30. This is a partly domestic and partly EU law point.

31. Core ground 9 states as follows:

"A stay, if necessary, on works being carried out pursuant to the impugned grant of planning permission pending the resolution of these proceedings."

32. That is flawed drafting in that it doesn't constitute a ground, but rather a claim for relief. As noted above, that was granted when leave was sought.

Domestic law issues regarding the development consent

33. There are essentially three domestic issues raised going to the validity of the development consent, which can be summarised as follows:

(i) core ground 8 – reasons regarding traffic;
(ii) core ground 2 – material contravention regarding zoning; and
(iii) core ground 3 – material contravention regarding apartments.

Core ground 8 - reasons regarding traffic

34. As an initial point in favour of the applicants, the notice party complains that this point is not sufficiently particularised (statement of opposition para. 55), but while the cry of non-particularisation has a lot more resonance in relation to other parts of the applicants' case, I think the point the applicants are trying to make under the traffic reasons heading is acceptably clear.

35. However, insofar as the applicants ambitiously complain that the board fell into "material errors of fact", this is a misunderstanding. There is no "error" in the sense of the caselaw. Rather there is merely difference of methodological and expert opinion.

36. Insofar as a complaint is made about irrationality on the pleadings, this wasn't the primary focus of the applicants' arguments, but it hasn't been demonstrated that the conclusion was irrational in the sense of not being open to the board.

37. Insofar as there is a complaint about "fair procedures", this seems essentially to boil down to the reasons argument which is the core of the issue under this heading.

38. The inspector sets out a detailed set of reasons in relation to traffic at paras. 10.7.1 to 10.7.9 as follows:

"10.7.1. The development proposes a [*sic*] three vehicular access points, one from Bellevue Road and the other two from Convent Road. There will be no cross route through the site from Bellevue Road to Convent Road by vehicular traffic. The Bellevue Road access road will service 45 dwelling units, 13 houses along Bellevue Road will avail of direct access and the two access points along Convent Road will serve the remaining 174 units. The existing road, footpath and cyclist infrastructure in the vicinity of the site is well below standard and observers highlight this point.

10.7.2. The applicant has submitted a Traffic and Transport Assessment (TTA), the methodology of which the planning authority are satisfied with. Local observers comment

on the internal layout of the site and are unhappy that a through road has not been proposed. All observers that had something to say about traffic and transport were concerned about additional traffic on the local road network leading to congestion and delays at key junctions. There are concerns too about the provision of housing directly fronting onto Bellevue Road and that there may be conflicts between vehicles and people exiting their homes. The lack of existing pedestrian facilities in the area are also heavily criticised, and local observers worry about the safety of pedestrians and cyclists. In addition, observers comment that given the lack of basic pedestrian/cyclist facilities in the area, the expectation that future occupants will leave the car at home and travel by more sustainable methods is not realistic. There are also some technical criticisms levelled at the modelling techniques used and overall methodology expressed in the TTA. However, the planning authority have no similar concerns expressly detailed in the Chief Executives Report.

10.7.3. The applicant's TTA addresses existing traffic behaviour, new proposed access arrangements, trip generation associated with the proposed residential development, traffic impact of the proposal and the proposed car and bicycle parking arrangements and assess five junctions in the vicinity of the development site, as follows:

- Junction 1- Bellevue Hill / Glen Road / Church Road
- Junction 2- Convent Road / Church Road
- Junction 3- Church Road / Delgany Wood Avenue
- Junction 4- Convent Road / Chapel Road / Delgany Wood Avenue roundabout
- Junction 5- Bellevue Hill / Ballydonagh Road / Lower Windgates

10.7.4. The TTA states that expected trip generation for the proposed residential development, community centre and crèche was estimated utilising the TRICS database and was revealed to be in total 35 trips inbound and 78 trips outbound in the morning peak hour and 69 trips inbound and 43 trips outbound in the evening peak hour. In addition, the adjacent permitted Richview development (WCC Ref. 15/1307, ABP Ref. PL 27.248401) trip generation figures were added in with development scenarios. The analysis and operational assessment of the proposed residential development at the five junctions revealed that at present the junctions operate below the normal design threshold during the morning and evening peak hours. The Church Road arm on Junction 1- Bellevue Hill / Glen Road / Church Road during the morning peak hour will approach the design threshold with minor queues and delays for motorists beginning to occur. Likewise, the Convent Road arm on Junction 2- Convent Road / Church Road, will approach the design threshold. The report goes to state that into the future all five junctions will continue to operate below the normal design threshold during the evening peak hour and that overall, the development will have a minimal impact on the junctions. Observers strongly disagree with this analysis, criticising the TTA at a technical level and from an anecdotal perspective with descriptions and photographs of traffic problems. The planning authority do not challenge the findings of the TTA, but do have a number of technical requirements regarding site specific issues that can be addressed by condition.

10.7.5. I note the findings of the TTA but I must highlight issues that lie beyond the site, roads are narrow, junctions are angled, footpaths lack width or are non-existent and cyclist facilities are token at best. Delgany Village, its centre and environs has been allowed to grow without the required and needed advances in road/footpath/cyclist facilities. I observed challenges relating to current car parking practices – whereby cars park on the footpaths within the village and obstruct safe and pleasant pedestrian passage. I note that a large volume of observations have underlined the issue of traffic congestion as one of the major concerns for the area. I do not doubt that most if not all local roads are extremely congested at peak times, the accounts and photographs submitted by observers adequately illustrate the existing problems for car users and pedestrians/cyclists alike. The dates of my recent site visits are not representative of likely traffic, but I did observe a large volume of cars parked across footpaths and along streets. In my view, the overall transport character of the area is defined by private car use and this is exemplified by the profusion of cars parked on footpaths in the village centre. The planning authority are also concerned about the phasing of the development and particularly the delivery of footpaths along Bellevue Road. I agree that footpath facilities should be delivered within the first phase of the development, especially along Bellevue Road, where there currently are none.

10.7.6. To address issues that might arise in terms of increased traffic volumes, the applicant proposes to open up the site to pedestrian and cyclist permeability and this is to be welcomed. Specifically, I note that connections to the development site to the north area proposed and should be supported. In this context, it would be desirable that such connections are actually implemented. I am satisfied that this can be achieved as Gorteen Way Ltd, the owner of the adjacent site, has given consent for this current application to be

made, so logically conditions could be attached to ensure pedestrian/cyclist connections are implemented from the outset. In addition, the planning authority note that universal access, in terms of a ramp, should be designed to allow permeability for all users, specifically at units 74-75, I agree.

10.7.7. The proposed development will add significant public realm improvements along Bellevue Road and Convent Road. I note that residents along Bellevue Road are concerned that a profusion of new entrances along Bellevue Road will constitute a traffic hazard. The planning authority have not raised any particular concern other than compliance with DMURS and welcome the new frontage and pedestrian facilities along Bellevue Road. At present the road in the vicinity of the site, is narrow and there are no footpaths with housing on just one side, traffic is inclined to move swiftly along this route. With the arrival of individual houses facing onto and accessing Bellevue Road at multiple locations, together with a dedicated footpath, the resultant behaviour and speed of passing traffic change. The provision of multiple entrances along Bellevue Road will moderate driver behaviour resulting in slowing traffic and making the pedestrian environment safer and more pleasant than it is now. Aesthetically, this location is part of Delgany and the urban expansion of the town is encouraged through the objectives of the LAP. The roll out of pedestrian facilities such as footpaths and street lighting is welcomed and in my opinion a beneficial addition to the overall amenity of the area.

10.7.8. The applicant has not prepared a specific Mobility Management Plan as part of their Traffic and Transport Assessment. It is clear that current commuting habits based on the private motor car are unsustainable and even a low density residential development would not improve matters and in fact damage the economic viability of public transport plans in the area or make more sustainable modes unattractive. Therefore, the production of a Mobility Management Plan that combines some measures to manage and control car parking should take place before development commences and I am satisfied that this can be dealt with by condition.

10.7.9. On balance, the proposed development is located at a well-served suburban location close to a variety of amenities and facilities. Current public transport options are limited to moderate frequency bus services without defined bus corridors and feeder routes to the DART station at Greystones are noted. The cycle and pedestrian facilities in the area are poor and significant improvements in the wider area are needed. However, I note that the proposed development will add significant improvements to the public realm in the immediate vicinity and this is to be encouraged. It is inevitable that traffic in all forms will increase as more housing comes on stream. However, I am satisfied that most of the ingredients are in place to encourage existing and future residents to increase modal shift away from car use to more sustainable modes of transport and this can be achieved by the implementation of a mobility management plan and a car parking strategy to be submitted prior to the commencement of development."

39. As the board states in written submissions "[t]he obligation is to provide the main reasons on the main issues (see e.g. *Balscadden* [*Road SAA Residents Association Ltd v. An Bord Pleanála*, [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020)] § 39 and at least ten High Court judgments since)."

40. *Balscadden* noted that the main guidance on reasons was *Connolly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, [2018] 7 JIC 1701 and that *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, [2019] 12 JIC 1202 did not create an additional layer of obligation as to reasons but rather was about dismissal of a point *in limine*. As the board points out in the present case, *Balz* could not have been intended to be a radical new departure in relation to the law of reasons. If the Supreme Court were going to do that, they would do it expressly and would outline the departure from the authorities on reasons, as well as considering the practical implications involved.

41. In *Sliabh Luachra against Ballydesmond Wind Farm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, 20th December, 2019), McDonald J. said at para. 38 that requirement for reasons does not require a submission-by-submission analysis, at least not in every case.

42. In *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225, [2020] 4 JIC 2405 (Unreported, High Court, 24th April, 2020) (currently under appeal but not on this point), Barr J. at para. 122 noted that reasons can be provided on an issue-by-issue basis.

43. In *Balscadden*, I attempted to summarise the practical effect of *Connolly,* in essence as requiring the main reasons on the main issues. This standard has been applied in numerous cases since then:

(i) *Atlantic Diamond Ltd v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021) §§8, 14, 18.

(ii) *Clifford and Sweetman v. An Bord Pleanála* [2021] IEHC 459, [2021] 10 JIC 1501 (Unreported, High Court, 15th October, 2021) §63.
(iii) *Flannery, Nolan and Kearns v. An Bord Pleanála* [2022] IEHC 83, [2022] 2 JIC 2504 (Unreported, High Court, 25th February, 2022) §§135, 147, 157, 158.
(iv) *Stanley v. An Bord Pleanála* [2022] IEHC 177, [2022] 3 JIC 2805 (Unreported, High Court, 28th March, 2022) (Phelan J.) §67.
(v) *Cork County Council v. Minister for Housing, Local Government and Heritage* [2022] IEHC 281, [2022] 5 JIC 2701 (Unreported, High Court, 27th May, 2022) §81.
(vi) *Monkstown Road Residents' Association v. An Bord Pleanála* [2022] IEHC 318, [2022] 5 JIC 3106 (Unreported, 31st May, 2022) (Holland J.) §64 (leave to appeal was sought regarding the application of that standard in *Monkstown Road Residents' Association v. An Bord Pleanála* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, High Court, 19th January, 2023)).
(vii) *Killegland Estates Ltd v. Meath County Council* [2022] IEHC 393, [2022] 7 JIC 0106 (Unreported, High Court, 1st July, 2022) §75, 78, 79, 99, 114, 190.
(viii) *Protect East Meath Ltd v. Meath County Council* [2022] IEHC 395, [2022] 7 JIC 0108 (Unreported, High Court, 1st July, 2022) §57.
(ix) *McGarrell Reilly Homes Ltd v. Meath County Council* [2022] IEHC 394, [2022] 7 JIC 0107 (Unreported, High Court, 1st July, 2022) §§38, 42.
(x) *Hickwell Ltd and Hickcastle Ltd v. Meath County Council* [2022] IEHC 418, [2022] 7 JIC 1206 (Unreported, High Court, 12th July, 2022) §47.
(xi) *Foley v. Environmental Protection Agency* [2022] IEHC 470 (Unreported, High Court, 26th July, 2022) (Twomey J.) §227.
(xii) *Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January, 2023) §§227, 237.
(xiii) *Glassco Recycling Ltd. v. An Bord Pleanála* [2023] IEHC 293 (Ferriter J.), §67.

44. While it is probably too much to expect that all cases will word the same point identically, it is clear that there is a centre of gravity in the jurisprudence which I think could reasonably be described as converging around the concept of the obligation being to provide the main reasons on the main issues. Virtually all authorities are consistent with *Balscadden* insofar as it adopts that interpretation of *Connolly*.

45. As regards the question of whether the inspector here gave the main reasons on the main issues insofar as concerns traffic, certainly the report does not address the full detail of the applicants' submission. But it provides a broad reason as to why that was not accepted. The board did agree that there would be an increase in traffic, but referred to a number of features that may mitigate this to an extent that the board considered acceptable. The lack of objection by the local authority is also considered in a context where this is not an appeal decision.

46. Also notable is the fact that the board introduced condition number 11 which required that the internal road network be compliant with the Design Manual for Urban Roads and Streets (DMURS) standard. In addition, the board added condition number 14 which requires the submission and agreement of a mobility management plan.

47. The applicant is obviously dissatisfied with this reasoning; but on the law as it stands at the moment, the decision passes the minimum standards. To require anything more would be to get into an area of a requirement to give micro-specific reasons for sub-issues. There isn't such a requirement.

48. The applicants submit that "it is hard for these losers to accept the position" without being given further reasons, but that is not the test. A decision-maker cannot be required to give a level of reasons that would satisfy the losing party – that would be a fool's errand anyway. What the decision-maker has to do is give the main reasons on the main issues, and the board has done that here.

49. The applicants claim that their submission was "simply overlooked", but there is no basis for that. It is clearly signalled by the inspector that technical objections were raised.

50. Insofar as outsize reliance is attempted to be placed on certain comments of Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January, 2022), it is clear from paras. 278 to 280 that there is consensus on the legal principle that the requirement is to give the main reasons on the main issues. The court in that case stated that such main reasons were required, identified one of the main issues and concluded having examined such reasons that were given on that issue that they didn't constitute "main reasons".

51. *Ballyboden* is certainly not authority for the proposition that all a participant in a process has to do is to produce an expert report in order to force the decision-maker to produce a more detailed decision than might otherwise be the case, or that a mere clash of experts is enough to warrant some form of more detailed reasons. A decision-maker can prefer one expert to another as

long as she gives the main reasons on the main issues. If it is broadly clear why one expert is preferred, then the requirement is satisfied. Here, the board basically accepted that there would be additional traffic but that there would be elements in place to mitigate that. Reasonable people can and no doubt will disagree about that, but the basic broad logic of the decision-maker is acceptably clear.

52. The applicants predictably and indignantly deny that they want a detailed response. They try to argue that all they want is to know as between their expert and the developer's experts why the board prefers the developer's experts. But in practice that comes down to something fairly close to a detailed refutation. The applicants over-interpret the concept that the points made in submissions should be addressed. As a bald proposition, that is not the law.

53. Not all points need to be addressed, only the main issues; and even they don't need to be "addressed" in a narrative type of treatment or even in a totally complete manner – only the main reasons need to be given.

54. More fundamentally, it is not up to an applicant to dictate the form of the decision. For example, while loud complaint is made about issues of methodology and construction traffic not having been addressed, one has to read the decision not solely from an applicant's point of view (an impossible standard), but from the starting point of it being valid rather than invalid where possible. One has to stand back and ask what the decision is fundamentally saying. The obvious interpretation here is that even if the development creates an increase in traffic and, therefore impliedly, even if there is some merit in the criticisms being made, nonetheless the effects can be mitigated to an acceptable extent. For good measure, the inspector notes that lower density accommodation will undermine the long-term viability of public transport. Construction effects are by their nature generally ephemeral in the long run and often won't constitute main issues, and no failure to give the main reasons on the main issues has been demonstrated here.

55. Analogous principles apply in other areas of the law. For example, an applicant for asylum does not win their claim just because they come forward with a medical report. Such a report does not have to be knocked back on a point-by-point basis. It is open to the tribunal to say that, without quibbling with the expert report, it doesn't determine the issue, because an applicant's injuries, real as they may be, didn't necessarily happen in the way the applicant says they happened. By analogy here, it is accepted that there will be traffic impacts, but even assuming that the applicants are right about that, that doesn't mean that the application should be refused.

56. I have helpfully been provided with the inspector's report in *Ballyboden*. While this is by no means a completely unreasoned document, the ultimate conclusion and, to some extent, the analysis is somewhat on the stark side and the board in submissions here didn't strongly disagree with that. Viewing the wording there, it is understandable how Holland J. might have been uncomfortable with the level of reasons provided. That aspect must be regarded as fact-specific. However, reasons are clearly provided in the present case.

57. If the court were to interpret the law as providing anything beyond broad reasons and moving towards a detailed refutation of experts or others, it would impose a burden that could rarely or never be met in practice. There can be hundreds of submissions on any given planning application. In the present case, there were 167 observer submissions with four prescribed bodies also getting involved. It would be unworkable to go further than requiring the broad reasons on the broad issues.

58. Furthermore, judges don't do more than that and it would be hypocritical to impose an obligation on administrative bodies that I wouldn't be prepared to take on for myself. Such a more stringent obligation would also have a series of unintended consequences. It would significantly delay decision-making because each point would have to be examined in detail for the purposes of preparing responses. It would also create a perverse incentive whereby participants in a process could flood the decision-maker with a huge volume of points, safe in the knowledge that if one were accidentally omitted from the reasons, then the whole decision could collapse. That would raise an untenable burden on the decision-maker because there is no limit to the detail and volume of the points that could be made generally or that could be included in an expert's report in particular.

59. There is also the real danger of creating a completely *ad hoc* piece of doctrine, especially if such an obligation were confined to the board specifically or even to answering expert reports more widely. There are so many potential administrative and judicial decision-makers and so many contexts where general reasons have been held to be acceptable that one would fundamentally unsettle the law in this area to require the reasons obligation to be intensified. Such problems don't go away merely by attempting to create a special category on an essentially lawless *ad hoc* basis for expert reports.

60. Finally, it would be anomalous if the high standard of reasons that the applicants incorrectly seek to extract from Irish administrative law were to be significantly higher than the standard of reasons required by EU law for the special context of impact on European sites: "... where a competent authority decides to authorise a plan or project likely to have a significant effect on a site

protected under that directive without requiring an appropriate assessment within the meaning of that provision, *that authority is not required to respond, in the statement of reasons for its decision, to all the points of law and of fact raised during the administrative procedure*", although "it must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site" (*Case C-721/21 Eco Advocacy v. An Bord Pleanála,* emphasis added).

Core ground 2 - material contravention regarding zoning

61. Under s. 9(6)(b) of the 2016 Act, the board can materially contravene the development plan but not "in relation to the zoning of the land". The issue then is – what is "zoning"?

62. That is a deceptively simple question to which one might have thought one had the answer prior to contact with the present case. But the question has brought out a range of ambiguities that now require to be resolved. To get a proper handle on that question one has to look at the overall situation.

63. The starting point, as always, is the statute; and s. 10(2)(a) of the Planning and Development Act 2000 states that the development plan shall include objectives for "the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated".

64. That involves not the concept of "use" *simpliciter* (as in the general sense of the 2000 Act which distinguishes between "use" and "works") but a use for a particular purpose. The purpose for which particular land is to be used is intimately and inextricably connected to, and for most purposes functionally indistinguishable from, the *type* of works or uses that will be permitted on the particular land to which the zoning relates. Yes, perhaps a council could designate lands for a purpose in purely abstract terms, say as a "village centre", without specifying what sort of developments that would involve. But any attempt to implement such a vague zoning would immediately throw up a need to answer the question of what type of developments were compatible with such a zoning. So whether a council addresses the issue directly or indirectly, the use of lands for particular purposes comes down to some concept of the type of thing that is to happen on the lands, whether that is works or "uses" in the narrower sense.

65. Such an interpretation is backed up by the ministerial guidelines on development plans which, while of course not law and while of course are not something that in themselves change the interpretation of the Act, are nonetheless informative. The fact that they were adopted after the decision here (on 1st July, 2022) is irrelevant because I am consulting them only to illustrate and illuminate the ways in which the concept of zoning has been applied and understood. That doesn't change the meaning of the legislation but it helps orient one's thinking about it. Paragraph 6.2 of the guidelines says:

> "Land-use zoning is therefore about identifying land needed for particular use types, the best locations for such land-uses and the acceptability or otherwise of the various classes of land-use within any particular zoning. It also allows for the identification of areas suited to a combination of uses, which is particularly important to facilitate flexibility and mixed-use development to support compact growth and generate activity within urban centres, in line with Town Centre First policy. The provision of land-use zoning within the development plan is intended to provide a degree of certainty and clarity to the community, landowners, developers and investors regarding future development."

66. Paragraph 6.2.2 in particular headed "Consistency in Zoning Objectives" says:

> "In order for development plans to have coherence across administrative boundaries, a greater degree of consistency is required in the zoning objectives utilised by planning authorities. While there are a relatively small number of core zoning objectives focused on principal land use and development types, such as residential, employment, town centre, agriculture or amenities, these can vary greatly in their wording and remit, especially between different local authority development plans. When such objectives are compared across planning authority boundaries, this can result in a degree of ambiguity and confusion in the development priorities for a zoning type, especially when examined on a regional or national basis. This wide variation in zoning objectives also militates against the monitoring of development trends, both regionally and nationally. Certain zoning objectives can also be overly specific or narrowly devised, which is not appropriate to the general purpose of land-use zoning. From the perspective of an applicant for planning permission, this can give rise to unnecessary variation in the purpose for which certain lands or locations may be zoned, when considering different locations for development and investment. Accordingly, there is a need for greater standardisation in zoning objectives in order to enhance

> consistency, both within local authority areas and across the Country. Appendix B to these Guidelines provides a list of zoning objectives that planning authorities may incorporate into development plans which allow for a degree of local variation where necessary, but achieves the required standardisation on a national basis."

67. Appendix B to the guidelines referred to indicates illustratively a number of possible sub-categories of zoning and acknowledges that in making zoning decisions a council is not limited to, for example, a simple category of "residential". The ministerial guidelines give, as an example, a proposed zoning "RS residential" or, alternatively, "R1 new residential" and provide for a series of other possible zonings that could include a residential element such as "UC urban core" or "DC district centre". Similarly, commercial purposes are sub-divided into a number of options, as are community-type purposes. There is no suggestion that councils should be prohibited from being more specific than say a mere "commercial" label, or should be unable to link particular types of say commercial use to particular sites.

68. McDonald J. in *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, 2nd December, 2020) reflected this approach at para. 37:

> "In my view, counsel for the Board was correct in his submission that zoning relates to the use for which lands are designated. This seems to me to follow from the terms of s. 10 (2) (a) of the 2000 Act which expressly refers to the zoning of land *'for the use solely or primarily of particular areas for particular purposes…'* That language is also reflected in para. 20 of the Fourth Schedule to the 2000 Act. It seems to me that the language of s. 10 (2) very clearly establishes that zoning of land means the designation of that land for a particular use. It is therefore necessary to consider whether, under the terms of the County Development Plan (as varied by Variation No. 2) the subject lands are zoned for residential use. Having regard to the decision of Simons J. in Redmond [*v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020)], the labels used by the planning authority are not conclusive in this context. I must therefore consider the substance of the relevant objectives of the County Development Plan (as varied) in order to determine its true nature. Furthermore, having regard to the case law cited in para. 25 above, I must also consider the terms of the County Development Plan (as varied) objectively and construe them by reference to the way in which they would be understood by ordinary reasonably informed members of the public without legal training as well as by developers and their agents."

69. As in effect reflected in the ministerial guidelines, the words "to such extent" in s. 10(2)(a) of the 2000 Act have the natural meaning that the council concerned can cut down the broad categories of zoning such as "residential" with a view to identifying particular types of residential purposes (or other purposes) in particular zoned lands. There is no necessity or logic to reading the statute in an extremely inflexible manner that would put councils in handcuffs, as being limited to the broad headings of recreational, commercial, industrial, agricultural and so on alone, without any ability to make any more specific decision as to the *types* of residential, commercial or other purposes that are appropriate for a particular piece of land. That would be a massive intrusion on the autonomy and freedom of the statutory decision-maker which would be unjustified by any clear basis in the text. It would also be highly illogical in planning terms. Such an unwarranted interpretation would conflict with the express statutory requirement of proper planning and sustainable development, which imply that a decision-maker must have sufficient flexibility to achieve those ends. We are not just playing with words here – this is about whether councils are to be hamstrung in their assigned statutory mission to promote good planning.

70. The board made the submission that because "density" is referred to in the first schedule to the 2000 Act (part II, para. 1) among the matters which *may*, rather than *must* be included in a development plan, then it must be "different from, and … not included within, zoning objectives". However, that is absolutely not what the first schedule says. It has the effect that stand-alone objectives regarding density and a whole series of other matters *may* be included in the development plan. That much is fairly obvious. But that does not mean that objectives or provisions relating to zoning cease to be such objectives or provisions merely because they include requirements relating to such matters. There is no rigid distinction in the first schedule as to what can be a zoning objective and what cannot be. A council is not excluded from including elements of parts I or II, for example, when making zoning decisions. Objectives in part III relating to identification of community facilities could give rise to a zoning objective, as could environmental protection in part IV or reserving land for infrastructure in part V. Needless to say, those objectives could be met otherwise than by way of zoning, but that does not preclude their inclusion in zoning objectives.

71. Going down the road of an extremely narrow definition of zoning objectives, as at times seemingly argued for by the board here, would in effect exclude almost anything referred to in the first schedule. That would emasculate the flexibility and jurisdiction of local government to specify zoning in the exercise of its statutory powers (as underpinned of course by Article 28A of the

Constitution). If there was ambiguity, which there isn't, there must be some presumption of local autonomy in the preparation of the plan and more specifically in the framing of zoning objectives (see the emphasis on protecting the role of local authorities in *R. v. Secretary of State for the Environment* ex parte *Norwich City Council* [1982] QB 808, [1982] 1 All E.R. 737, [1982] 2 W.L.R. 580, 80 LGR 498, 126 Sol Jo 119 *per* Lord Denning MR at p. 824, *Cork County Council v. Minister for Housing, Local Government and Heritage* [2022] IEHC 281, [2022] 5 JIC 2701 (Unreported, High Court, 27th May, 2022)).

72. The compensation provisions of the fourth schedule of the 2000 Act are not hugely determinative, not least because they are worded in a different manner. Paragraph 20 of the fourth schedule reads as follows: "[t]he development would contravene materially a development objective indicated in the development plan for the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise or a mixture of such uses)". This was discussed in *Abbeydrive Developments Ltd v. Kildare County Council* [2005] IEHC 209, [2009] 3 I.R. 58, [2005] 6 JIC 1707 where Macken J. took a relatively limited view of the words "or otherwise" (at p. 73). However, it is important not to over-interpret this. It would be restrictive and indeed destructive of proper planning and sustainable development if a planning authority was for example confined to the word "residential" simply because that is used in a general way within a general provision of the 2000 Act. The overriding importance of proper planning and sustainable development, which is the cornerstone of the 2000 Act, strongly militates against an interpretation which would mean that the local authority when framing zonings was limited to headings like "residential" alone, and unable to distinguish within that in any way between, for example, campsites, caravan parks, detached houses, apartment blocks, aparthotels, or housing estates.

73. On the other side of the coin however, merely because something is described as a zoning objective by a particular council in a particular development plan does not make it a zoning objective as a matter of interpretation of the 2000 Act: *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020). We must note one point of nomenclature. In that case, Simons J. treated matters *related to* zoning as being equivalent to a zoning *objective* and there is much discussion of what is such an objective; but the wording of the statute does not refer to contravening an "objective". Section 9 of the 2016 Act is clear that the issue is whether the contravention of a plan is "in relation to the zoning of the lands", which McDonald J. held at para. 44 of *Highlands Residents Association* was a wide phrase. It is not clear to me that anything major turns on this in the present case, however. To repeat however, a council's view of what is a zoning objective is not a determinative one and the same logic applies to the board. Just because it decides that something is not a provision of the plan in relation to the zoning does not make the board right or even presumptively right, because it is a matter of interpretation.

74. Ultimately, the purpose of zoning provisions generally, and zoning objectives in particular, is to specify the purposes for which the lands may be used, which in turn means the particular type or category of works and uses which may be carried out on such lands. The concept of the type of development is really critical to determining what is a zoning objective and what is not. If the objective limits the *type* of development in some way that is clearly distinguishable from a different type of development, then it can be said to be a zoning objective. If, on the other hand, it merely regulates the detail of the types of permitted developments involved, for example by reference to scale, design, density or similar factors, where such factors are not ones that change a development from being of one type to being of another distinct and distinguishable type, then the provision is not a zoning objective.

75. Thus, a development plan can legitimately distinguish between land zoned for different *types* of housing. Thus it can distinguish between say, land suitable for a campsite, sheltered accommodation or an aparthotel. Those specifications would be zoning objectives. Whereas if a council went further and included provisions in relation to density of such housing, that does not relate to a distinction between different types of development, and so is not a zoning objective. This can be something of a fact-specific exercise. For example, in relation to floor space, a large house and a small house are still houses. But in many situations, as a particular development gets bigger or smaller, it turns into a different *type* of development. Thus, a zoning objective could legitimately distinguish areas suitable for local shops as opposed to convenience stores, for supermarkets as opposed to superstores, for hypermarkets as opposed to retail outlets. Such a distinction could legitimately be based on, for example, floor space. Such size or floor space criteria legitimately mark a divide between distinct types of development and thus distinct uses, and consequently constitute zoning objectives, as opposed to mere detail, design or regulation within a single purpose or a type of development.

76. Applying all of this to the present case, there is no doubt that the way in which the council have framed the Greystones, Delgany and Kilcoole Local Area Plan 2013-2019 here means that the R22 residential zoning is expressly linked to a maximum density of 22 units per hectare. But a

density provision like this does not distinguish between particular *types* of development permitted and thus does not relate to the purposes for which the land can be used in the sense of the 2000 Act. It is not a zoning provision.

77. The council could, for example, have distinguished between land suitable for houses as opposed to land suitable for apartments (and indeed they did do that to some extent as we will see from the next heading, although not in a purported zoning objective), or identify land suitable for both. That would have been a zoning objective because it relates to the *type* of developments permitted. Of course, they are all residential, but a council is entitled to be more specific than such a bald heading, for the reasons outlined.

78. It is therefore open to a planning authority to identify the purpose to which land can be put by means of a zoning provision by reference to either:

(i) the specific type of developments permitted, thus for example under the commercial heading distinguishing land suitable for a logistics warehouse from an individual commercial warehouse or an abattoir from an incinerator, or under the community heading to distinguish a place of worship from a hospital; or

(ii) secondary characteristics provided that such characteristics go to the *type* of developments permitted, thus distinguishing the local shops from hypermarkets by reference to floor space or otherwise.

79. But by contrast, if the terms of the plan relate to details, design, orientation, density, scale or some other feature applicable *within* a particular type of use, then that is not a zoning provision.

80. The applicants submit that "the planning authority has itself linked density to zoning" which is absolutely correct. The problem however is that "zoning" has an autonomous meaning in the 2000 Act, does not necessarily mean whatever the particular council decides to include under the heading of zoning, and certainly doesn't mean that here. 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.

81. This ground therefore fails.

Core ground 3 - material contravention related to apartments

82. Policy RES5 of the Local Area Plan states as follows:

> "RES5: On undeveloped residentially zoned land, it is an objective of the Council to provide for the development of sustainable residential communities up to a maximum density, as prescribed by the land use zoning objectives indicated on Map A and described in 'Table 11.1: Zoning Matrix'. In existing residential areas, infill development shall generally be at a density that respects the established character of the area in which it is located, subject to the protection of the residential amenity of adjoining properties. However, where previously unsewered, low density housing areas become served by mains sewers, consideration will be given to densities above the prevailing density, (up to 10 / ha, depending on local circumstances), subject to adherence to normal siting and design criteria. Apartments generally will only be permitted within Greystones Town Centre, Kilcoole Town Centre, Delgany Village Centre, Neighbourhood Centres, Small Local Centres, Greystones Harbour and North Beach Action Plan, South Beach Action Plan and within 10 minutes walking distance of Greystones train station. Within existing residential areas, regard shall be paid at all times to the overriding objective of the Council to protect the residential amenity of these areas and to only allow infill residential development where this reflects the character of the existing residential area. Apartments will not normally be permitted on sites surrounded by predominantly single family occupied housing estate developments."

83. This reflects objective HD13 of the County Development Plan:

> "HD13 Apartments generally will only be permitted within the designated centres in settlements (i.e. designated town, village or neighborhood [*sic*] centres), on mixed use designated lands (that are suitable for residential uses as part of the mix component) or within 10 minutes walking distance of a train or light rail station."

84. The development at issue in the present case is not in the "village centre", and indeed on that basis the developer identified the inclusion of apartments in the scheme as a potential material contravention. However, the board appears not to have agreed with this and treated the issue as if there was no material contravention. Obviously, the plan does confer some planning judgement on the board by reference to the provision that apartments "generally" will only be permitted in the village centre. But how much planning judgement?

85. A qualifier like "generally" does not confer open-ended flexibility or planning judgement. Any departures from that must themselves be limited in nature and peculiar to their own facts, and not such as can be generalised in a way that would undermine or rewrite the plan. If the basis for an exception was one that could itself be applied generally, then the plan would indeed be materially contravened. To put it another way, the word "generally" does create flexibility, but only in ball-park terms, as in *Jennings v. An Bord Pleanála* [2023] IEHC 14, [2023] 2 JIC 1711 (Unreported,

Holland J., 17th February, 2023). For example, an apartment complex on a suitable site across the road from, but just outside, a village centre might come within the ball-park, but an apartment development which is well outside the area and that is favoured on a logic that could apply to a wide number of apartment developments would be outside the ball-park.

86. Notable here is the link with the heritage of the village, connecting it with the church and Carmelite monastery. This is emphasised in para. 2.1.1 of the developer's response document which states:

> "It is considered that appropriate links applies to visual, physical and social links to the village core. The urban fabric includes the physical environment including form, scale, density and connections and extends to socio-cultural, ecological and economic structures. The core of Delgany is not defined but may be assumed to be focused on Church Road and in particular the section between Bellevue Hill, Delgany Wood and Convent Road with emphasis on the area from Convent Court, opposite the application site towards the south. The core of Delgany may be considered to include as a focal point, Christ Church on Church Road, which was completed in 1789 and is a notable gothic building with a graveyard to the west and the north side of the church. To the west of Christ Church fronting Church Road is Delgany national school. The small irregular section of Church Road between the junction of Convent Road and Bellevue Hill connects five roads and contains many of the buildings associated with Delgany including the Wicklow Arms (1856) and the Delgany Inn (mid-19th century). The section of Convent Road between the application site and Church Road consist of a number of commercial businesses including food shops, cafes and the [Horse] and Hound (1790). The existing site is oriented towards Convent Road and the core of Delgany. The existing Convent property is set back from the road with a solid boundary topped with high railings with a variety of solid planting behind. This was raised at the tri-partite meeting. In relation to a visual link to the core of Delgany, the existing long boundary wall and railing which is not considered of conservation value (see conservation report which reports it is a modern addition) will be removed. A new boundary will be lower with a lighter railing so that the entire development is visually more connected to the core, making the scheme an integral part of Delgany and removing the 'gated' situation that currently applies. The steel gate and solid piers will be removed and a modern entrance designed as in [*sic*] invitation into the scheme and particularly to the protected structure. The wall will be set back to the north of the existing main entrance. The high scrub that has grown behind the railing will be removed and new low, softer[,] more open planting retaining some trees will allow views into and out of the scheme while providing biodiversity and accessibility. Three main connections are located on Convent Road which provide the main direct links and connection to the core and one main access to Bellevue Hill. Five internal secondary connections are proposed as well as secondary access to Bellevue Hill."

87. The report continues at para. 2.1.2 to state:

> "Access No. 1 Convent Road - access beside Gatehouse
>
> The closest connection to the core is the existing access beside the gate lodge. The location of this access to the site is at the south east boundary and consists of two piers and a high metal gate. The Planning Authority to improve the footpath connection at this point. All of the render, including the moulded caps to the piers, consists of hard sand and cement, dating from the middle years of the 20th century. The permanently closed steel gates close the Convent grounds visually and physically from the core of Delgany and this is reinforced by the dense planting adjacent."

88. It goes on to say:

> "This access provides a key pedestrian and cycle connection into the Convent grounds c.130 m from the junction of Convent Road and Church Road, the core of Delgany. This connection will bring pedestrians from the core of Delgany into a new public open space to the front of the Protected Structure (a new creche and community/cultural space, residential homes and open space to the north west that connects to the permitted development at Richview[)].This connection represents the anticipated desire line into the scheme and will provide an accessible access to the creche and new community facility."

89. At para. 2.1.4 it states:

> "Delgany is part of a heritage trail which indicates parking, walking trails and points of interest. The proposed development is wholly consistent with the Heritage trail and will provide new linkages between Bellevue Hill and Convent Road and onto Church Road and Priory Road. In addition, it will allow the Protected structure be viewed from a public open space and the removal of the modern extension will restore the protected structure to the original layout. The large modern structure to the side of the Church dominates the building and by removing it, will allow the protected structure to be restored visually to how it was designed. The Protected Structure which is unoccupied since the departure of the Carmelite

order from Delgany will be reused and available as a community and cultural facility and will enhance the heritage trail."

90. It continues:

"The proposed development contributes to the objectives outlined above and in particular provides a rejuvenation of the village, be [*sic*] creating a new centre for the community while also creating a more attractive place to live and work. The reuse of the protected structure as a community facility and for cultural uses will enhance cultural awareness and community identity. This will also reinforce the heritage identity of the area. The foot connections through the village will be expanded by linking Bellevue Hill to Convent Road through the site and onto Church Road and Delgany Wood. Overall, the accessible shared green space for recreation, linking the permitted open space at Richview towards the south west will enhance the heritage trail and improve the potential of tourism in the area."

91. Also relevant is para. 8.2 of the inspector's report which records the council's view that:

"[t]he extension outwards from Delgany town centre is considered logical and acceptable from a phasing perspective".

92. At para. 10.2.6 the inspector stated:

"The site is located at the edge of Delgany Village centre, a location that provides a variety of local retail, restaurant/café and other services including a primary school and a church within easy walking distance. Further afield, to the east are the commercial and leisure facilities associated with south Greystones."

93. At para. 10.4.2 the inspector states:

"Open spaces are provided throughout the scheme, with a large area combined with a new civic plaza at Convent Road to the front of the Chapel, numerous pocket parks and the linear green spine that runs through the entire scheme. Other public open spaces are found at the margins and are more of a visual amenity together with buffer space for tree retention and are to some degree also usable spaces."

94. At para. 10.6.3 the inspector said:

"In fact, the opening up of the forecourt area and the provision of a new public plaza will enhance and set off the centre piece role that the church will now take. In my view the three storey over basement apartment block to the rear of the church and villa house will act as a backdrop and focus one's eye towards the steeply angled gable of the church itself. I am satisfied that the urbanisation of the former convent grounds has been designed sensitively and that the public realm gain from Convent Road will significantly enhance the character of the area and expand the public domain of Delgany Village in a positive way."

95. While it may be something of a line call, a number of site-specific factors are particularly important in regarding the flexibility as sufficient here: proximity to the village centre, additional public realm provision in the form of the new plaza, a new crèche and community/cultural space, open space provision including pocket parks and the linear green spine, the rejuvenation of the link between the village and its historical heritage in the form of the church and monastery, the re-opening of access to these structures, and the related issue of permeability particularly in the context of established heritage trails. This is certainly not an example of merely building out into rural areas in a way that could be replicated at any edge of centre site. Having regard to all of the foregoing, including the very considerable public realm provision and indirect enhancement of the village centre and linkages to its history and heritage, the zone of planning judgement conferred by the word "generally" has not been exceeded here, because such substantial and site-specific features of this particular development mean that no comfort is thereby provided for other potential developments in a way that would undermine the requirement that matters are to be "generally" as defined by the plan.

96. As the domestic law issues fail, I now turn to the EU law issues.

EU law issues in relation to development consent

97. There were two primary issues:

(i) EIA-related reasons in relation to traffic; and

(ii) strict protection of bats.

Core ground 8 – EIA reasons in relation to traffic

98. Core ground 8 has been dealt with above as a domestic law point. The applicants provided no convincing EU law-related authority or material either in this jurisdiction or any of the 27 other current or former member states, or at a European level, or otherwise, which would require a different conclusion when considering the matter from the standpoint of the EIA directive (see *Toole v. Minister for Housing (No. 3)* [2023] IEHC 378 para. 86). This point has not been made out.

Core ground 6 - strict protection in relation to bats

99. The basic problem for the applicants is that, as the board points out in its submissions (para. 51):

> "The arguments made by the Applicants in their submissions (§§52-66) are quite different to those made in the Statement of Grounds [note refers to pleadings, pp. 8 (core ground 6), 15-19]. There is no sign in the submissions of any of the six legal errors pleaded by the Applicants under this core ground in the Statement of Grounds."

100. Insofar as the applicants have now made new arguments based on the EIA directive, and in particular arts. 4 and 11 and para. 3(b) of Annex IIA, none of these arguments are pleaded. As the board notes at para. 55 of its submissions:

> "As is apparent, there is no reference in the core ground to any alleged breach of the EIA Directive. The Board objects to any interpretation of detailed grounds 31-46 that goes beyond this core ground."

101. Insofar as the sub-grounds are concerned, there are only two references to the EIA directive. The first is sub-ground 39, which is obviously merely contextual, and the final phrase comes in at para. 41 where the sub-ground states "[i]t also undermines the conclusion on EIA screening".

102. That's it – that barely-there, blink-and-you'll-miss-it comment is the totality of the pleading on which the applicants now seek to hang an elaborately confected case under this heading.

103. Beyond this isolated throwaway comment in the pleadings, the lone and level sands of the 6,912-word statement of grounds stretch far away. There is not even a single piece of supporting legal tumbleweed on the horizon.

104. It strains credulity to breaking point to believe that when they filed the statement of grounds, the applicants had any definite intention to make a case that the board's treatment of strict protection of bats was contrary to arts. 4 and 11 of, and para. 3(b) of Annex IIA to, the EIA directive. To believe that you would have to believe:

(i) that when the applicants made an express reference to EIA in core ground 8 as regards traffic, they were also planning to challenge the decision on EIA grounds on other issues not mentioned in the core grounds;

(ii) that the applicants thought it was appropriate to have a whole section of the sub-grounds devoted to EIA screening but also thought that it was not necessary or appropriate to signal in a similarly clear manner that the EIA screening was being fundamentally attacked on bat-related grounds;

(iii) that the applicants thought it was appropriate in drafting terms to advance an EIA case under core ground 6 without mentioning the EIA directive in that core ground (which refers only to the habitats directive and the Wildlife Act 1976);

(iv) that the applicants contemplated that the decision regarding bats was invalid by reference to arts. 4 and 11 of, and para. 3(b) of Annex IIA to, the EIA directive, but their view of drafting was such that they considered it unnecessary or inappropriate to refer to any those provisions;

(v) that the applicants' view of drafting was such that it was considered unnecessary or inappropriate to refer to the EIA directive at all under that heading (instead referring only to the "conclusion on EIA screening");

(vi) that the applicants' view of drafting was such that it was considered unnecessary or inappropriate to refer to the decision as being "invalid" (or cognate terms) by reference to the EIA directive as applied to assessment of bats, and that it was sufficient to merely comment in passing that the treatment of bats "undermined" the screening decision (whatever that means);

(vii) that the applicants' view of drafting was such that it was considered unnecessary or inappropriate to explain in the pleadings how or why the treatment of bats led to the decision being invalid by reference to the EIA directive, or to provide any route-map whatsoever from the reference to undermining that would lead to *certiorari*;

(viii) that the applicants' view of drafting was such that it was considered unnecessary or inappropriate to refer to the specific provisions of the transposing legislation by reference to which any validity issue would initially have to be considered; and

(ix) that it is purely coincidental that *after* the statement of grounds was filed on 25th March, 2021, arts. 4 and 11 of, and para. 3(b) of Annex IIA to, the EIA directive came into focus by virtue of the *Waltham Abbey Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021) and (*No. 3)* [2023] IEHC 146, [2023] 3 JIC 2403 (Unreported, High Court, 24th March, 2023) decisions.

105. I appreciate that not everyone is blessed with an intuitive understanding of the principles of drafting. But nobody could be that unfortunate.

106. Looking at the circumstances overall, it is obvious that there never was any definite and precise intention to challenge the validity of the planning permission by reference to its treatment of bats having regard to arts. 4 and 11 of, and para. 3(b) of Annex IIA to, the EIA directive. The available and most plausible inference is that even assuming in their favour, for the sake of

argument, that the applicants had some glimmer of concern in relation to this originally, the actual legal point only crystallised for them as the *Waltham Abbey* proceedings unfolded subsequently. Such things happen; but to make a point that occurs to one after the event one has to seek to amend one's pleadings, not seize on a fortuitous stray reference within the pleadings to try to re-programme the whole case under this heading. The abandonment of the specific sub-grounds as pleaded within this core ground only reinforces the sense of complete and impermissible re-configuration of the case.

107. Even if I am wrong on all of the foregoing, O. 84, r. 20(3) RSC requires this point to be dismissed because it is wholly unparticularised, as correctly pleaded by the notice party at para. 41 of its statement of opposition. This is a passing comment as opposed to "any kind of proper ground invoking a legal basis for quashing a decision", as the board submitted. It would be unfair to the opposing parties to allow the applicant to build a tottering edifice reaching to *certiorari* on such an ephemeral foundation.

108. The CJEU has recently confirmed that the pleading requirements reflected in rules of court are perfectly consistent with EU law. In *Case C-721/21 Eco Advocacy v. An Bord Pleanála*, the court said:

> "23 Moreover, the Court has held that national procedural rules according to which the subject matter of the dispute is determined by the pleas in law put forward at the point in time at which the action was brought are consistent with the principle of effectiveness in so far as they ensure proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 64 and the case-law cited).
>
> 24 In the present case, the procedural rules at issue, as described in paragraph 17 above, do not appear to be such as to make it impossible or excessively difficult in practice to exercise the rights conferred by Directives 2011/92 and 92/43, at issue in the main proceedings, but, on the contrary, are such as to facilitate the proper conduct of proceedings by requiring that the pleas relied on in the action be raised with a sufficient degree of precision."

109. The applicants rely in particular on the judgment of the Court of Appeal, upholding Simons J. in this respect, in *Friends of the Irish Environment v. Government of Ireland, Minister of Housing, Planning and Local Government, Ireland and The Attorney General* [2021] IECA 317, [2021] 11 JIC 2603 (Unreported, Court of Appeal, 26th November, 2021). But that was a very different case, and obviously dates from the pre-*Eco Advocacy* era. For starters, the pleading there was a lot clearer and more detailed. Paragraph 24 of the judgment sets out paras. 9-12 of the statement of grounds as follows:

> "9. The Environmental Report goes on to consider alternatives and the assessment of the preferred scenario. The various alternatives are identified at Chapter 7 of the Environmental Report in which five alternatives are identified. These are each briefly described, and a tabular format appended where, for each environmental issue, each alternative is given either a 0/–/+ or in many cases a combination of these. These are intended to indicate potential neutral, negative and positive effects of the alternatives. There is no explanation of how these assessments were made or how or for what reason these values were assigned or the qualitative or quantitative basis for their inclusion. There is no indication as to whether or not, or to what degree, the targets (identified in Chapter 6 for each environmental issue) are expected to be achieved by each alternative under consideration (singly ... or in combination). These targets are not referred to in the alternatives or assessment sections and only reappear when monitoring is being discussed. In those circumstances there is no adequate description or evaluation of the likely significant environmental effects of each of the alternatives identified in the Environmental Report.
>
> 10. It is the applicant's case that the respondents failed to consider, adequately or at all, the reasonable alternatives to the option selected, failed to identify, describe or evaluate adequately or at all the likely significant environmental effects of the alternatives and failed to specify any or any adequate reasons for its preferred option over options 1, 3, 4 and 5.
>
> 11. In paragraph 7.3 the respondents simply state a preference for 'Option 2 – Regional Effectiveness & Settlement Diversity' on the basis that it is the alternative allegedly most likely to achieve these strategic environmental objectives in relation to public transport, higher densities in city areas and focusing managed growth in supported settlements. However, no objective qualitative or quantitative basis is provided for this selection and it is simply baldly stated without further explanation.
>
> 12. Subsequently in Chapter 8 of the Environmental Report there is what is described as an assessment of the preferred scenario i.e. the proposed approach actually adopted in the [NPF]. As with the consideration of alternatives, there is no reference to the targets specified

in Chapter 3 and no assessment of the degree to which the preferred scenario will or will not lead to the targets being meet [*sic*]. The assessment of the preferred scenario appears to be limited to short discursive sections."

110. The context therefore is that there is quite a bit of detail in the pleading albeit that there might have been more detail. The present matter couldn't be more different.

111. All of this was addressed by Costello J. as follows:

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

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

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

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

138. In this case, the applicant raises an important argument in relation to the application of the SEA Directive and the issue whether it has been properly complied with in the adoption of the NPF, which sits at the apex of all plans for development within the state and which is to govern development decisions throughout the state for the next 20 years. While I accept that the issue whether the reasonable alternatives *were assessed to a comparable extent* as the preferred option was not expressly pleaded in the statement of grounds – and therefore not the subject of an order for leave to seek judicial review – a related argument – namely the *adequacy* of the assessment of the reasonable alternatives – was clearly part of the case from the beginning, and the ground to which objection is now taken was clearly raised in written submission a month before the case came to trial. The respondents had the opportunity to respond in their written submissions of 6 March 2020, in oral submissions and in their supplemental written submissions. On balance, I am satisfied that the impugned pleading is not of the generic nature which was criticised in the authorities relied upon by the respondents and, while it undoubtedly would have been preferable if an application for leave to amend the statement of grounds had been brought, I agree with the observations of Simons J. in *Halpin*; it would not be appropriate, on a pleading point, to prevent the applicant from advancing an argument in relation to the application of a significant EU environmental provision where the respondents have pointed to no prejudice in meeting the point in question. In this regard, I note that there was no application to file a supplemental affidavit by the respondents upon receipt of the written submissions on 10 February 2020, nor was there any suggestion that there was any relevant evidence which they could have adduced had the point been expressly pleaded in the statement of grounds, nor was it suggested that it was a ground upon which the applicant would not have been granted leave to seek judicial review had it been raised when leave was initially sought."

112. Apart from the radically different context of there being a much more detailed statement of grounds to work off, the pleading in *Friends of the Irish Environment* was addressed by Simons J. on the basis that it was somewhat relevant that the plea related to an EU law point. This was accepted by Costello J. But very respectfully, that was all before *Eco Advocacy*. Logically, that can't be the position now. If European law doesn't create any extra latitude for pleading of EU law points, then it can't make any difference that an applicant stretches a forlorn arm above the surface to wave a blue flag as she disappears wordlessly into the quicksand of defective pleadings.

113. In any event, the reading of the applicants' pleadings here isn't "overly strict" – it isn't within a country mile of being overly strict. The relatively permissive question which is being asked is whether the point is acceptably clear. That answers itself – No. A lack of prejudice to the opposing parties could be a useful factor to confirm a line call, as in *Friends of the Irish Environment*, but is irrelevant if the point is dead on arrival.

114. Hence it follows that the applicants' point, if you want to call it that, regarding the EIA screening being "undermined", isn't a properly formulated complaint, is not properly pleaded, does

not comply with rules of court, and is not saved by any EU law requirement. The message of *Eco Advocacy* is that there is no European cavalry ready to ride to the rescue of inadequately-pleaded applications. That bad news will hit some applicants more heavily than others.

115. As those matters dispose of the administrative and EU law challenge to the consent, we can turn to the issues of statutory validity and then to the derogation licence.

Core ground 4 – statutory validity

116. The applicants' complaint regarding the validity of ss. 5(6) and 9(6)(c) of the 2016 Act is totally misconceived. The argument is as put at sub-ground 22 that "section 5(6) and/or 9(6)(c) of the 2016 Act (which makes no provision for new or updated environmental assessments, for possible modifications to, or grants of permission in material contravention of the CDP) is inconsistent and incompatible with the requirements of the SEA Directive by allowing for the granting of permission in contravention of the CDP and Masterplan and therefore constitute a derogation from those plans. This is impermissible as a matter of EU law which requires any such derogation to be within the scope of Article 2(a) and Article 3(2)(a) of the SEA Directive."

117. This 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.

120. The applicants rely by analogy on two cases, Case C-411/17 *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderan ASBL v. Council of Ministers* (Court of Justice of the European Union, 29th July, 2019, ECLI:EU:C:2019:622) and Case C-160/17 *Thybaut, De Coster, Romain v. Région wallonne* (Court of Justice of the European Union, 7th June, 2018, ECLI:EU:C:2018:401).

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 Aftodioikisi Aitoloakarnanias v. Ipourgos Perivallontos* (Court of Justice of the European Union, 11th September, 2012, ECLI:EU:C:2012:560). 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 and Lanificio di Gavardo SpA v. Ministry of Health* (Court of Justice of the European Union, 6th October, 1982, ECLI:EU:C:1982:335, para. 16)). 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 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.

124. Determined to be helpful, the applicants' sub-grounds on this point conclude by saying (at para. 23):

> "It is not for the Applicants or indeed to Board to say what a compliant procedure should be."

125. This perhaps illustrates the wider jurisprudential point that it generally assists your case to show how the system makes sense overall. By contrast, an it-all-depends approach, or even worse, a position that making the law workable is someone else's problem, is not always the most strategic.

126. The State objected to the unparticularised nature of the claim under this heading (see their statement of opposition, para. 8), but as the point fails on the merits I don't need to deal with that objection.

Core ground 7 – issues regarding derogation licence

127. At the outset regarding the derogation licence, it is important to note that this point is pleaded independently from the validity of the development concerned. The applicants did not contend on the pleadings that the permission was invalid because the derogation licence was invalid.

128. Nor did they initially argue that they had ever so contended. The board and notice party were legitimately emphatic that such case was never made until adverted to in submissions in the closing minutes of the hearing. Indeed, the applicants were forced to concede that "we've claimed relief not connected with any particular ground". That of course is a complete non-starter in drafting terms. Yes, a court can grant unpleaded relief for reasons explained elsewhere (notably by virtue of O. 84 r. 19), but only within the pleaded grounds. The court can't expand the case to cover new grounds not actually pleaded. And there is simply no such ground here. That isn't something that can be rectified by creative interpretation of the pleadings, for the same reasons as already addressed in relation to the flawed pleading regarding "undermining" the EIA screening above: see *Case C-721/21 Eco Advocacy v. An Bord Pleanála*.

129. Independently of that, the argument, even if pleaded, would be defeated by logic. There is no requirement in Irish law to obtain a derogation licence at any particular stage of the process. It can be applied for before, during or after the planning permission. Even if the permission is functionally dependent on there being a derogation licence, the fact that a developer has failed to obtain such a licence in advance (or has obtained an invalid licence) can't under those circumstances make the permission invalid (unless perhaps the board relied in some determinative way on the specific conditions of the licence actually granted, but that hasn't been demonstrated here).

130. I make this point because we have already seen in *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38, [2022] 10 JIC 2402 (Unreported, Supreme Court, 24th October, 2022) that applicants can make illogical claims that all parts of their case are mutually interdependent. That is not always so. Either law or logic, or sometimes (as here) both, can have the effect that the absence of an entitlement to one relief is not compensated for by any claim to another relief. In this case, the alleged dependence of the validity of the permission on the validity of the derogation licence wasn't pleaded, and makes no sense anyway (save in circumstances that don't apply here).

131. With that important point addressed, we can now turn to the question of the challenge to the derogation licence as an issue in itself.

132. That needs to be contextualised. The applicants here have not challenged the validity of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) by reference to the procedure for granting derogation licences. They haven't made a point that any possibility of excluding public participation for derogation licences granted before, during or after a developing consent is impermissible, and they haven't made any plea regarding a lack of a joined-up system or about the lack of publication of derogation licences. Nor have they made a point about a lack of provision to revoke a derogation licence, although in fairness it would seem that the general power to revoke under s. 22(3) of the Interpretation Act 2005 would cover the situation (because the definition of "statutory instrument" includes a "licence"), so potentially one could see an argument that an aggrieved person could apply to the Minister to do so. Whether that is going to be an effective procedure or not can be left to a case where it properly arises.

133. The derogation licence is a legally separate decision under a legally separate code made by a legally separate decision-maker. It is not a preliminary decision with any unitary process leading to a development consent, for the purposes of Irish law. It is of course functionally related to the development consent in that consent cannot be lawfully operated without a derogation. There are many similar relationships in law, for example where more than one licence is required. A common example is where a developer needs both a planning permission and a licence from the EPA.

Reinforcing that is the separate procedural system for the two decisions, particularly the fact that leave to appeal is not required for a challenge to the derogation licence. Presumably the applicants' claim that the licence is part and parcel of the permission only applies to legal contexts where that works in their favour, and will be scornfully rejected in any other context, such as if the opposing parties were to point out that their argument has the logical consequence that the applicants shouldn't be entitled to appeal the rejection of a challenge to a derogation licence without leave to do so.

134. An important point is that it is obvious as a matter of domestic law (leaving aside how one is to apply a conforming interpretation) that an extension is required to challenge a derogation licence if the challenge is brought more than three months after the date of the licence.

135. For good or ill, Irish law works on the premise that the time period runs from the date of the decision (reflected e.g. in O. 84 r. 21(2) RSC), and that if one only finds out about it later one can seek an extension of time. That is at least a workable rule even if it sounds harsher than it is at first sight. Where EU law is in issue, conforming interpretation means that one has the full time period from the date one actually, or should have, found out about the decision (see Case C-456/08 *European Commission v. Ireland* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:46), Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:45), *per* Murray J. in *Arthropharm (Europe) Ltd v. The Health Products Regulatory Authority* [2022] IECA 109, [2022] 5 JIC 1003 (Unreported, Court of Appeal, 10th May, 2022) and caselaw discussed in *Marshall v. Kildare County Council* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023) (under appeal by the applicants, but this was a point decided in favour of the applicants in that case)). The courts have yet to declare such an entitlement if the challenge is purely domestic, so applicants need to move rapidly if they don't find out about a decision until some time after it is made.

136. Also one needs to acknowledge that three months from the date they found out about it wouldn't be enough for these applicants because they didn't do anything to challenge the licence when they found out about it as part of the application documents for the permission. With an apparent belief in living dangerously, the applicants waited until eight weeks after the date of the grant of permission to bring the challenge. That obviously complicates the legal situation for them. So we need to analyse their submission as to why they say they were entitled to disregard the need for extension of time, and be clear on what they have to establish in order to impugn the derogation licence, or in other words what is the applicants' route map to success, if any, under this heading?

137. In considering the applicants' submissions in that regard, one thing emerges clearly, which is that the applicants have, I'm afraid, fundamentally misunderstood the relationship between EU and domestic law. Much of their submissions on the time issue are unfortunately a confused jumble of decontextualised snippets of EU law which don't amount to what the applicants think they amount to.

138. Ground zero for the applicants' mischaracterisation of European law seems to come in the following two sentences in their written legal submissions:

> "The Applicants also rely on the principle that national procedural rules cannot be relied upon to frustrate the effectiveness of European law. The judgment in *Workplace Relations Commission* provides important clarification in relation to the principle of effectiveness: *i.e.* national courts are also required to provide an effective remedy when they identify a breach of EU law [n82 refers here to *Case C-752/18 Deutsche Umwelthilfe eV v. Freistaat Bayern*, (Court of Justice of the European Union, 19th December, 2019, ECLI:EU:C:2019:1114, §§39-40), *Case C-470/16 North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185, §§56-57)]."

139. The applicants' reliance on Case C-378/17, *Minister for Justice and Equality v. Workplace Relations Commission* (Court of Justice of the European Union, 4th December, 2018, ECLI:EU:C:2018:979) is as misplaced as it is predictable.

140. We need to remind ourselves what this case actually decided. The court said at para. 31 that:

> "EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law."

141. That applies to a situation where domestic law is in conflict with EU law – in such a case the domestic law has to be disapplied even if that means exceeding the domestically-conferred jurisdiction of the national body. That has, I'm afraid, nothing to do with a situation where the domestic rule (such as an extension of time) is capable of being applied in a conforming manner. In such a case, the general rule is that one has to submit to the domestic procedure and argue for a

conforming interpretation. It is not the case that one can simply proceed as if the domestic law does not exist.

142. The applicants seem to believe that all they have to do is to step on to the pitch wearing a blue jersey and the game is over. That is not so – they still need to score goals by the local rules, but such rules cannot make goal-scoring impossible or excessively difficult. The local rule book is not rendered irrelevant and inapplicable merely by virtue of the fact that the blue team would have to engage with it.

143. The applicants' self-penned and wildly inaccurate formula is that "national courts are also required to provide an effective remedy when they identify a breach of EU law". That suggests a free-floating duty on the national court to "identify" a breach of EU law, presumably independently of the parties' efforts or their compliance with domestic law, and then an equally free-floating "require[ment]" to "provide" an effective remedy – on a plate obviously, with all the trimmings, and no effort required by the supine litigant concerned. *Workplace Relations Commission* doesn't decide anything of the sort, and nor is there any such obligation on any other basis.

144. In Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern*, the Grand Chamber held at paras. 39 and 40:

> "39 In addition, in order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law (see, to that effect, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraphs 50 and 51).
>
> 40 To that end, it is incumbent upon the national court to ascertain, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by that law, whether it can arrive at an interpretation of domestic law that would enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded."

145. Those statements are about the interpretation of domestic law, not giving applicants a free pass to ignore domestic law (as the applicants have done here by failing to even seek an extension of time).

146. At para. 42 the Grand Chamber went on:

> "In that regard, it should be recalled that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21, and of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 58 and 61)."

147. So the domestic court should first "interpret national law in compliance with the requirements of EU law". Only if that is not possible do we move on to disapplying national law, and only in cases where the EU law concerned has direct effect due to being clear, precise and unconditional. Even then, such an EU law provision doesn't automatically have priority if there is a conflicting fundamental right recognised in European law as stated at para. 56:

> "EU law, in particular the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter of Fundamental Rights, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure."

148. In *North East Pylon Pressure Campaign Ltd*, the court said at paras. 56 and 57:

> "56 Therefore, if the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No 347/2013, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law (see, by

analogy, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 49).

57 Consequently, where the application of national environmental law – particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013 – is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive."

149. Again that is about interpreting domestic law, not ignoring it. One can note in passing that the court did not consider art. 9(3) and (4) of the Aarhus Convention to have direct effect, but nonetheless the principle of conforming interpretation applies.

150. The fundamental problem for the applicants is that they think that either they, or the court, or both, can just ignore O. 84 r. 21 RSC (the three-month rule and provision for extension of time). But that rule confers some flexibility and is capable of being operated in a manner that complies with EU law, or to put it another way, nobody has shown that a conforming interpretation is impossible. If, for example, the rule were to prohibit extensions of time in circumstances where access to the court was required by EU law, and so where there was a direct conflict with applicable EU law and a conforming interpretation was not available, then one would be into *Workplace Relations Commission*-disapplying-national-law territory. But we haven't got to that point here.

151. The fundamental point is that there isn't anything inherently unlawful about national law providing rules about things like time limits as an aspect of the principle of national procedural autonomy: see *Krikke v. Barranafaddock Sustainability Electricity Limited* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303. The CJEU held in Case C-348/15 *Stadt Wiener Neustadt v. Niederösterreichische Landesregierung* (Court of Justice of the European Union, 17th November, 2016, ECLI:C:2016:882) at paras. 40 and 41:

"40 ... It is indeed settled case-law of the Court that, in the absence of EU rules in the field, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar national actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

41 The Court also considers that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, which protects both the individual and the administrative authority concerned. In particular, it finds that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (see, to that effect, judgments of 15 April 2010, *Barth*, C-542/08, EU:C:2010:193, paragraph 28, and of 16 January 2014, *Pohl*, C-429/12, EU:C:2014:12, paragraph 29)."

152. The applicants' next complaint is:

"It is the Applicant's case that these domestic rules and procedure cannot be relied upon to frustrate the objectives of the Directive–in this case the strict protection of bat fauna whose roosts may be lost to the proposed development."

153. The loose wording of the submission gives it away – the principle of EU law is that the domestic procedural rule must not make it in practice impossible or excessively difficulty to exercise EU law rights. It is not a principle that any and every applicant must be allowed to win their case, or that nobody can be held to fall foul of a procedural rule because that would "frustrate" the objectives of a directive.

154. Next, the applicants' endeavours to find supportive fragments of authority are turned up a notch:

"As identified by the Court of Justice in Case C-166/97, *Commission v. France* (§13):

'According to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive…'"

155. As is perhaps obvious, that was an enforcement action by the Commission in relation to failure to fulfil obligations conferred by a directive (art. 4 of the birds directive (Council Directive 79/409). The settled caselaw referred to in the partial quotation also involves enforcement actions. The language of the CJEU regarding the context of enforcement action is just not transferrable holus-bolus to the conforming interpretation context, as the applicants seem to imply.

156. The quote continues:

"(see, inter alia, Case C-259/94 Commission v Greece [1995] ECR I-1947, at paragraph 5 and Case C-214/96 Commission v Spain [1998] ECR I-7661, at paragraph 18)."

157. None of this has anything to do with what amounts to an alleged entitlement of the applicants to exempt themselves from domestic law requirements - in this instance the need to apply for an extension of time to challenge a derogation licence.

158. The applicants' submission then reaches its peroration:

> "In Case C-415/21 [*sic*], *Commission v. Belgium*, the Court of Justice stated (§21):
>
> 'The provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law.'"

159. This case is mis-cited – its correct case number is Case C-415/01. There is no emphasis in the original, but the submissions do not mention that emphasis has been added. Also, the quotation, strangely, is incomplete although there are no ellipses noted in the quotation in the submissions. The full quotation from *Case C-415/01 Commission v. Belgium* 2003 ECR I-02081 (ECLI:EU:C:2003:118), para. 21, is:

> "In that regard, it is important to recall that, according to consistent case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32). The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law (see Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 51 and 52)."

160. *Case C-415/01 Commission v. Belgium*, and Case C-159/99 *Commission of the European Communities v. Italian Republic* (Court of Justice of the European Union, 17th May, 2001, ECLI:EU:C:2001:278), were enforcement actions about the birds directive. Case C-313/99 *Mulligan v. Minister for Agriculture and Food* (Court of Justice of the European Union, 20th June, 2002, ECLI:EU:C:2002:386) was a reference by the High Court here on the interpretation of Council Regulation (EEC) No 3950/92 of 28th December, 1992 establishing an additional levy in the milk and milk products sector. Unfortunately for the applicants, paras. 49 to 54 of *Mulligan* do not support the EU-law-straitjacket argument underpinning the applicants' case. Rather they impliedly acknowledge the scope of national procedural autonomy:

> "49 In the present case, the questions referred by the national court, as reformulated in paragraph 38 of this judgment, concern two specific aspects of the legislative procedure followed for the adoption of the clawback measure at issue in the main proceedings, namely the fact that the 1995 Regulations, first, gave the Minister a discretion to adopt decisions for that purpose and, second, permitted the adoption of those measures by means of a notice published in the national press.
>
> 50 With regard to the first aspect of that procedure, the mere fact that a national legislative instrument has delegated to an authority of a Member State, such as a minister, authority to adopt measures pursuant to Article 7(1) of Regulation No 3950/92 is not in itself of such a nature as to infringe the principle of legal certainty, since the adoption of a measure following such a procedure does not necessarily mean that that measure is not binding or does not satisfy the requirement of that principle that it be specific, precise and clear.
>
> 51 With regard to the second aspect of that procedure, it suffices to observe that, although the principle of legal certainty requires appropriate publicity of the national measures adopted pursuant to a Community regulation, it is nevertheless the case that the principle does not prescribe any specific form of publicity, such as publication of the measures in the Official Journal of the Member State concerned.
>
> 52 As is clear from the case-law cited in paragraph 47 above, the reason why the principle of legal certainty, as a general principle of Community law, requires appropriate publicity of measures adopted by the Member States in implementation of an obligation under Community law is the obvious need to ensure that persons concerned by such measures are able to ascertain the scope of their rights and obligations in the particular area governed by Community law.
>
> 53 It follows that to be appropriate publicity must be of such a nature as to inform the natural or legal persons concerned by the measure of their rights and obligations under it. It is not therefore ruled out that publication of that measure in the national press may satisfy that condition. However, it is for the national court to determine, on the basis of the facts before it, whether that is the case in the main proceedings.

54 Consequently, the answer to the second and third questions must be that the principle of legal certainty does not preclude, as a general principle of Community law, a Member State from choosing, for the purpose of adopting national measures pursuant to Article 7(1) of Regulation No 3950/92, a procedure whereby a legislative instrument authorises the competent authority, such as a minister, to adopt those measures by means of a decision. That principle requires that the publicity for such measures be of such a nature as to inform the natural or legal persons concerned by the measures of their rights and obligations under them. It is for the national court to determine, on the basis of the facts before it, whether that is the case in the main proceedings."

161. Bearing all that in mind, the question is whether there is any remaining path, however narrow, to enable the applicants to progress their objection to the derogation licence.

What is the applicants' route-map, if any, to impugning the derogation licence?

162. In order to succeed, the applicants would need to establish the following arguments (phrased as propositions but I am not to be taken as accepting these for present purposes):

(i) **The grant of a derogation licence should be held to be "part of the development consent procedure"** to use the language of the CJEU in Case C-463/20 *Namur-Est Environnement ASBL v. Région wallonne* (Court of Justice of the European Union, 24th February, 2022, ECLI:EU:C:2022:121).

(ii) **Therefore the derogation licence should be capable of being challenged as if made on the date of the development consent**. As put in legal submissions, "[i]nsofar as any time objection may be made in relation to this point, the Derogation Licence only crystallised and was only published once planning permission for the proposed development was granted and the Bat Report was published". The concept of "crystallisation" is to some extent a conceit of the applicants' own confection, although on the other hand one cannot totally rule out such an argument as flowing from the proposition that the licence should be treated as part of the development consent for EU law purposes. Hence the applicants submit: "[i]t is the Applicants' case that the only appropriate time to challenge the Derogation Licence was after planning permission was granted."

(iii) **This should apply even where national law allows the derogation licence to be applied before, during or after the development consent, if the detriment created by a licence in practice requires the approval of the project.** In such circumstances, where the licence is obtained before the development consent, then the licence should be treated as part of the consent so that it can be challenged as of the date of the consent, notwithstanding the principle of national procedural autonomy reflected for example in art. 11(2) of the EIA Directive 2011/92 which provides that: "[m]ember States shall determine at what stage the decisions, acts or omissions may be challenged". Thus any given applicant can simultaneously challenge an associated derogation licence on the basis that it is a part of the development consent, even in a member state like Ireland where the law is unspecific as to whether one can seek any necessary development consents before, during or after the procedure: see the slightly different fact situation of *Namur-Est Environnement ASBL* and in particular the opinion of Advocate General Kokott delivered in that case (Court of Justice of the European Union, 21st October, 2021, ECLI:EU:C:2021:868). At para. 37 of her opinion, Advocate General Kokott stated: "Moreover, the Kingdom of Belgium's submission is also not convincing in terms of content, since the permit under species protection law was expressly applied for in relation to the implementation of the quarry project. According to the observations submitted in the hearing, detriment caused to protected species is accordingly permissible only within the framework of the project, and therefore requires, at least in practice, the approval of the project as a whole. A further reason why such a link with the project appears to be necessary under EU law is that only the objectives of the measure concerned, in this case the project, can justify a derogation from the obligations of species protection in accordance with Article 16 of the Habitats Directive and Article 9 of the Birds Directive."

(iv) **The applicants were entitled to an extension of time to cover the period up to when they knew about the derogation licence.** The written submission goes on: "[w]hile the Minister does take a time point against the Applicants (§§29-30 of the SOO), he does not explain how the Applicants were supposed to challenge a decision with which they had no involvement, where there was no public participation, and which was only published in the context of materials being placed by the Developer on its website for the purpose of applying for planning permission." If the complaint is that the applicants couldn't have challenged the licence before

the application documents were placed on the website, that is a fair point, but it is not in dispute. Had the applicants moved within three months from that date and sought an extension of time for the purpose, we would not be having this discussion. But they didn't do that either.

(v) **The applicants were entitled to a further extension of time to cover the period from when they knew about the derogation licence up to the date of the permission.** The argument is that this follows from the above points.

(vi) **Where an applicant is to be allowed an extension of time by virtue of EU law, domestic procedures should not preclude a claim merely because an applicant does not apply for an extension of time to which she would be thus entitled.** Here the applicants are really pushing the boat out, because they didn't even invoke the formality of seeking an extension of time in the statement of grounds, or when applying for leave (even on a conditional basis if and insofar as such an extension was required), which was the legally ideal time to alert the court to the problem, or by way of a motion seeking extension of time thereafter. Their main line of defence seemed to be that they didn't need to apply for an extension of time. That is incorrect – obviously so – as a matter of domestic law. There isn't anything about the relationship between EU and domestic law that would preclude that conclusion. But is this only the omission of a formality? It has to be pointed out that this is a totally self-inflicted addition to the list of issues because it would have been painless for the applicants to have asked for the extension on the grounds that they claim to be entitled to it as of right, thereby providing formal compliance with domestic law rules. On the other hand, if the applicants can ignore domestic law as to time because it is a formality, then what else can they ignore? Can they wander into court without pleadings or affidavits, without seeking leave, without paying stamp duty, without complying with rules of court or practice directions? The whole doctrine cooked up by the applicants appears on the face of things to be a recipe for procedural chaos. Perhaps there is some other answer to this that I am missing and that meets the minimum threshold of plausible doubt warranting consideration of the Luxembourg route, so I will give the opportunity to clarify that as stated below.

(vii) **A derogation licence cannot conclude that there were no alternatives unless it actually considers alternatives.** Assuming that the applicants get over the time problem, their next point is that the licence was invalid because it didn't study any alternatives, so it could not conclude that there were no alternatives.

(viii) **A derogation licence can only be granted for the purpose of protecting wild fauna and conserving natural habitats if some identified level of protection is created by the licence rather than by mitigation measures associated with the detriment created by the licence.** The applicants essentially complain that the licence itself doesn't provide protection for fauna and habitats so should not have been issued on the basis that it did.

Conclusion on this issue for present purposes

163. Having identified the foregoing points, I have some concerns that the EU argument on the time issue crystallised very late in the hearing and that the parties may not have had the fullest opportunity to address these questions. I am therefore going to give the parties a final opportunity to make written legal submissions on these points and in particular on whether I should decide these myself or whether any doubt arises as to these such as would warrant consideration of the Luxembourg route. By all appearances at the present moment, and totally subject to contrary argument, the weakest link is point (vi), so the parties will have to focus on whether or not there is anything to create doubt about the answer to that in particular, while also having the opportunity to consider the other issues.

164. Subject to any alternative position that may emerge following further submissions, the take-home point in the meantime is that as a matter of domestic law, a derogation licence should be challenged when any given challenger finds out about it or at the latest within three months from the earliest date on which she should have known about it. Where the challenge comes more than three months after the date of the licence, an extension of time is required as a matter of Irish law. Any EU law argument can normally only be made once there is compliance with the domestic law requirement to seek such an extension, which on the face of things is consistent with both equivalence and effectiveness. If an applicant challenges a licence within three months of the date she could reasonably have known of it, then an extension based on EU law is there for the asking. One might have thought that the safer course is to comply with that rather than to add further EU law dominoes to an already crowded list of things that have to fall one's way, because to wait for the final permission means having to face a whole other set of tripwires. But even if an applicant

incautiously waits until then, the prudent and indeed completely obvious course is to formally apply for the extension of time when seeking leave. These applicants didn't do that, for reasons best known to themselves.

Summary

165. Without taking from the more express and operative terms of the judgment, a rough summary of the outcome is as follows:

(i) Core ground 1 – this was not pursued;
(ii) Core ground 2 – zoning – this misunderstands the concept of a zoning provision;
(iii) Core ground 3 – material contravention – the plan provided sufficient flexibility for the decision on the specific facts here;
(iv) Core ground 4 – statutory invalidity – this exaggerates the effect of the SEA directive beyond anything in national or European caselaw;
(v) Core ground 5 – this was not pursued;
(vi) Core ground 6 – insofar as the pleaded case was concerned, this was not pursued, and insofar as an attempt was made to construct a new case out of a passing reference to the EIA screening, the argument is not adequately pleaded;
(vii) Core ground 7 – derogation licence – there will be a further opportunity to make submissions on the remaining net issues here;
(viii) Core ground 8 – traffic – this exaggerates the entitlement to reasons, which were sufficient in context; and
(ix) Core ground 9 – stay – this can continue for the time being subject to any application.

Order

166. For the foregoing reasons, it will be ordered that:

(i) the challenge to the decision of the board be dismissed;
(ii) submissions be invited in the terms stated in the judgment on the challenge to the derogation licence;
(iii) the matter be listed for mention on a date to be notified;
(iv) the stay be continued for the time being until further order with liberty to apply; and
(v) the foregoing order be perfected with no order as to the costs of the challenge to the decision of the board, and with costs of the challenge to the derogation licence reserved, unless submissions to the contrary are lodged with the court within 7 days of the date of this judgment.