THE HIGH COURT

[2024] IEHC 327

[Record No. 2022/1107JR]

BETWEEN

GRAYMOUNT HOUSE ACTION GROUP, DARRAGH RICHARDSON AND AOIFE GRIMES

APPLICANTS

AND

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

RESPONDENTS

AND

TRAFALGAR CAPITAL LIMITED

NOTICE PARTY

JUDGMENT of Mr Justice Barr delivered electronically on the 31st day of May 2024.

Introduction.

1. This application concerns a challenge to a grant of planning permission made by the first respondent in respect of a development to be carried out at Dungriffin Road, Howth, County Dublin. The permitted development involves the demolition of the existing house, known as Graymount House, and the construction of a four-storey, single block of apartments, comprising 32 units on a 0.48ha. site. The development will comprise 5 one-bedroom units; 21 two-bedroom units; and 6 three-bedroom units, covering a total floor area across all floors of 3,306m².

2. A decision confirming an intention to grant planning permission for the development was made by the second respondent on 07 September 2021. On 04 October 2021, the applicants appealed that decision to the first respondent. The first respondent issued its decision to grant planning permission for the development on 21 October 2022. On 15 December 2022, the applicants first moved their application seeking leave to proceed by way of judicial review challenging that decision and the decision of the planning authority. Having been granted leave to amend their statement of grounds on a number of occasions, the applicants were ultimately granted leave to proceed by way of judicial review by order of the court dated 20 March 2023. The applicants were also granted liberty to seek certain reliefs as against the third to fifth named respondents, hereinafter referred to collectively as 'the State respondents'.

3. The grounds of challenge will be dealt with in detail later in the judgment. They can be summarised in very brief terms in the following way: (a) in granting permission for the development, the first respondent failed to have any, or any adequate regard to the fact that due to the unsatisfactory nature of the footpaths at either end of Dungriffin Road, the traffic generated by the development would constitute a traffic hazard; (b) the first respondent granted permission for the development which constituted a density greater than that permitted under the Final County Council Development Plan 2017 – 2023 and, as such, constituted a material contravention of the development plan, in respect of which the first respondent had not adopted the correct procedures; (c) in granting the permission, the first respondent acted in material contravention of the development plan by exceeding the number of units permitted under the settlement strategy contained in the development plan; (d) in granting the permission and in particular, in providing for the demolition of Graymount House, the first respondent had granted a permission in material contravention of the development plan, without going through the necessary procedures; (e) that in granting the permission, the first respondent had failed to have regard to the obligations in the development plan to provide public open space and in particular, to ensure that the public had a right of access to such space as was provided; (f) that in permitting the removal of a substantial number of trees from the site, the first respondent had permitted a development that was in material contravention of the development plan and had not gone through the necessary processes, nor given adequate reasons therefor; (g) that in permitting the development, the first respondent had failed to have regard to the matters set out in Annex 3 of Directive 2011/92/EU as required by Art. 4(3) thereof and that in carrying out a preliminary examination, had failed to properly apply the provisions of the Directive, in particular in relation to the effect of the development on bats and the cumulative effect on traffic in the area; (h) that if the applicants were not permitted to challenge the decision of the second respondent to grant permission for the development at this stage, the State respondents had failed in their obligation to provide practical information, as required under Art. 11(5) of the Directive.

The Law.

4. At the hearing of this application, the parties handed in a joint book of authorities. It had 74 cases and pieces of legislation in it. During the hearing, they uploaded additional cases onto the Share-file platform. While not wishing to be disrespectful to any of the counsel

who prepared the joint book of authorities, the court has to state that citing that level of legal authority was not helpful to the court in its task of reaching a decision in this case.

5. Before coming to the conclusions of the court on the substantive issues that arise for determination, it will be helpful to set out the broad legal principles that apply in this case.

6. The legal status of a development plan has been considered in a large number of cases. Each local authority is mandated by statute to adopt a development plan for their administrative area. The development plan sets out a broad range of objectives that must be either achieved, or at the very least, must be considered by the planning authority, and on appeal, by An Bord Pleanála, when considering an application for planning permission.

7. The legal nature of a development plan has been likened to a contract between the planning authority and the residents who live in its administrative area. In broad terms, the planning authority undertakes to follow the development plan when granting planning permission; or if decides that it is appropriate to grant planning permission in contravention of the development plan, they must set out their reasons why it is appropriate to do so.

8. The legal nature of a development plan was considered by the Supreme Court in *AG (McGarry) v Sligo County Council* [1991] 1 IR 99 where Walsh J described a development plan in the following terms:

> *"The plan is a statement of objective; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism and if thought proper, objection. When adopted it forms an environmental contract between the planning authority, the Council and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan."*

9. In *Byrne v Fingal County Council* [2001] 4 IR 565, McKechnie J described the legal effect of a development plan as follows:

> *"A development plan, founded upon and justified by the common good and answerable to public confidence, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying*

justification for its existence is satisfied and those affected, many adversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good."

10. More recently, in *Ballyboden Tidy Towns Group v An Bord Pleanála* [2022] IEHC 7, Holland J adopted the earlier descriptions of a development plan as being akin to a contract between the local authority and the residents in its administrative area. He described it in the following way at para. 126:

"*The environmental contract is between the planning authority and the community. The community includes many and various stakeholders in the planning process: planning authorities, property-owners, developers, builders, business interests, local residents, planning and other construction-related professionals, elected politicians, environmental activists, community organisations, those concerned to support and those concerned to object to planning applications and, no doubt, others. But the contract is with the community generally: not with any particular constituency within it. The observation that planning documents are not addressed to a cognoscenti may be somewhat idealistic given the complexities of the area – nonetheless it remains an important principle*."

11. In *Sherwin & Anor. v An Bord Pleanála* [2024] IESC 13, the Supreme Court endorsed the judgment of Holland J in the *Ballyboden* case and described the development plan in similar terms at para. 90.

12. While the analogy with a contract can be helpful, it is also apt to mislead, if applied too literally. This is because a commercial contract will normally be very precise and prescriptive in its terms. A properly drawn contract should make it crystal clear what must be done by each of the parties to the contract. Ideally, it should not contain any "wriggle room", where parties can exercise a judgment as to the extent of their obligations under the contract.

13. That is not the case with a development plan. It has been recognised in a number of cases that a development plan can contain objectives that are very clear and precise, similar to the terms one would find in a contract; but it also contains objectives that are much more aspirational in nature. These objectives leave it open to the planning authority to exercise a significant degree of planning judgment, when considering an application for planning permission which touches upon the attainment of those objectives.

14. The wide spectrum of objectives that can be contained in a development plan, was succinctly described by Clarke J (then sitting as a judge of the High Court) in *Maye v Sligo Borough Council* [2007] 4 IR 678, in the following way:

> "*[53] 6.4 The way in which development plans are set out vary. Certain aspects of the plan may have a high level of specificity. For example the zoning attached to certain lands may preclude development of a particular type in express terms. Where development of a particular type is permitted, specific parameters, such as plot ratios, building heights or the like may be specified. In those cases it may not be at all difficult to determine whether what is proposed is in contravention of the plan. In those circumstances it would only remain to exercise a judgment as to the materiality of any such contravention. [54] 6.5 However at the other end of the spectrum, it is not uncommon to find in a development plan objectives which may, to a greater or lesser extent, be properly described as aspirational. Such objectives may be expressed in general terms. In such cases a much greater degree of judgment may need to be exercised as to whether the development proposed amounts to a material contravention of the development plan.*"

15. In *Jennings & Anor. v ABP* [2023] IEHC 14, Holland J, when considering the issue of the standard of review to be applied in reviewing whether a decision to grant planning permission could be struck down as being in material contravention of a development plan, recognised that there was a distinction between those objectives in a development plan which were vague or aspirational in nature and which involved a degree of planning judgment; and those which were more precise, which did not admit of that latitude of interpretation at the planning application stage. He summarised the position in the following way at para. 112:

> "*112. Accordingly, I confess to the view that, on questions of material contravention there is much to be said for the analysis of Keane J in Byrne and Laffoy J in O'Reilly. That view is that where a development plan, on a proper interpretation,*
>
> • *allows appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is for irrationality rather than full-blooded.*
>
> • *does not allow appreciable flexibility, discretion and/or planning judgement to the decisionmaker, review is full-blooded as the issue is one of law*."

16. This analysis was confirmed by the Supreme Court in the *Sherwin* case at paras. 98-104 and was accepted by the Supreme Court at para. 105.

17. This problem in relation to the wide spectrum of objectives that can be contained in a development plan, is compounded by the fact that the statutory obligation on a planning authority is not to follow the development plan slavishly, as some form of mandatory prescriptive document, that does not admit of any exception or interpretation. For the most part, the obligation is to "have regard to" the provisions of the development plan, or to the relevant guidelines, when considering a particular application for planning permission.

18. The classic statement of the meaning at law of the obligation to "have regard to" something, is that set out by Quirke J in *McEvoy v Meath County Council* [2003] 1 IR 208, at p.223:

> "*It is clear from the foregoing authorities and in particular the decision of the Supreme Court in Glencar Exploration plc. v. Mayo County Council (No. 2) [2002] 1 I.R. 84, that the obligation imposed upon the respondent by s. 27(1) of the Act of 2002 to "have regard to" the guidelines when making and adopting its development plan does not require it rigidly or "slavishly" to comply with the guidelines' recommendations or even necessarily to adopt fully the strategy and policies outlined therein.*"

19. The obligation on the planning authority to have regard to guidelines issued under the planning legislation was considered by Holland J in *Cork County Council v Minister for Housing, Local Government & Heritage & Ors.* [2021] IEHC 683, where he noted that the obligation to have regard to particular guidelines, did not imply that they had to be slavishly followed in all circumstances: see generally paras. 36-40.

20. Another issue which arises in the present case, is whether, in granting planning permission for the development, the planning authority and the Board, were allowing a development that was in material contravention of the development plan. In the *Sherwin* case, the Supreme Court referred to the analysis that had been carried out by Holland J in the *Jennings* case, where Holland J had stated as follows at para. 108:

> "*Further, to refer simply to the "question of material contravention" and identify "it" as one of law may be to obscure the fact that it is in truth a number of questions, some or all of which may arise in a given case. The following may not be a complete list:*

• First is the question of interpretation of the relevant content of the development plan; that is undoubtedly a question of law, subject to "full-blooded review".

• Second is the question, closely linked to the first, whether, on that interpretation, the plan leaves any or more or less discretion or planning judgement to the decision-maker, or, which may amount to the same thing, it sets broad policy, imprecise, or subjective standards, for example on matters aesthetic. Given the necessity to "discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan (such that) the Court must attribute clear meaning to the plan as best it can…", there is an obvious interpretative tension between attributing clarity (in the sense of precision) and the recognised necessity that a development plan, of general application to a wide and often complex locality and a wide range of circumstances, be flexible with holistic decision making in mind. However, in this context it can also be remembered that appreciable flexibility is provided by the statutory provisions allowing for material contravention.

• The third question is that of applying the plan, as so interpreted, to the facts – that is to say the substantive content of the planning application - to discern whether there is a contravention of the plan.

• The fourth question is whether, in light of the answer to the second, the court should, as to the substantive decision of the decision-maker on the third question (whether the plan has been contravened), substitute its view for the decision-maker's.

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

21. In its judgment in *Sherwin*, the Supreme Court endorsed the analysis that had been carried out by Holland J in *Jennings* and commented as follows at para. 105:

> "*I am in broad agreement with the approach set out by Holland J. which seems to me to be sensible and appropriate. Like him I would highlight that the question of whether a provision in a development plan does in fact allow appreciable flexibility, discretion and/or planning judgment to the decision-maker may be a difficult question in a particular case. For my part, I would also highlight in particular the need to remember that the issue under consideration is the standard of review by the court. Whatever standard should apply, the first question must be the nature of the determination (if any) actually made by the decision-maker, "as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan", (per Costello J. in SWR), in circumstances where there has been the required focus by the decision-maker on the specific provision of the plan allegedly materially contravened. In my opinion that question is the crucial starting point, before one gets to the questions as to the standard of review by the court*."

22. In *North Kerry Wind Turbine Awareness Group v ABP* [2017] IEHC 126, McGovern J noted that under s.37 of the Planning and Development Act 2000, the Board is permitted to grant planning permission where in its view the development constitutes a material contravention of the development plan. It was held that there was no legal requirement on the Board to expressly recite that it was granting planning permission in material contravention of the development plan, as long as it was clear from the wording of the decision that it had done so. In that case, it was held that the Board had given extensive and cogent reasons for so doing: see paras. 31 and 33.

23. In *Element Power Ireland Limited v ABP* [2017] IEHC 550, the court reached a similar conclusion, that the Board was entitled to depart from the development plan and to depart from guidelines and to grant planning permission that was in material contravention of a development plan. The court noted that while the Board must have regard to national and local strategy, it was not bound by it: see para. 68.

24. Another issue that arose in argument at the Bar in the present case, concerned the interpretation of planning documents generally, including development plans. That issue was examined in *Re XJS Investments Limited* [1986] IR 750, where McCarthy J delivering the judgment of the Supreme Court, set out the following principles on the construction of planning documents at p.756:

"*(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.*

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

25. An allied question which arose in the present case, is the level of reasoning that is required to be given by the Board in its decision. A number of propositions have been clearly established. First, the Board is entitled to rely on the reasons set out in the Inspector's report. Secondly, the Inspector is entitled to have regard to all the documents submitted as part of the planning application and the adjudication process thereon. This means that by the time the matter comes before the Board, there may well be a large volume of documentation which discusses various issues that arise in relation to the development.

26. In *Connelly v ABP* [2018] IESC 31, Clarke J examined the rationale behind the duty to give reasons in some detail. These principles are well known. It is not necessary to recite them again in this judgment. It will suffice to state that at section 7 of his judgment, he set out that the reasons for a decision can be derived in a variety of ways, either from a range of documents, or from the content of the decision, or in some other fashion.

27. It was noted that reasons for the Board's decision, may be found in the Inspector's report and in the documents either expressly, or by necessary implication, referred to in it. Clarke J stated as follows at paras. 9.8 and 9.9:

"*9.8 It seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the Inspector's report and the documents either expressly or by necessary implication referred to in it, the s. 132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned.*

9.9 Any interested party will have had access to all of that documentation. If the reasons for the Board's decision can be reasonably ascertained from that documentation, then, at least so far as national law is concerned, the requirement to give reasons will be met because any interested party (including a person who

has standing but who was not involved in the planning process before the Board) will be able to assess whether adequate reasons have been given or whether there might be grounds for challenging the decision of the Board. Insofar as the High Court judgment suggests that the reasons for the Board's decision cannot be sufficiently identified, I would reverse the judgment."

28. As to the level of reasoning that is required in a decision of the Board, Clarke J noted that there was a middle ground between the sort of broad discursive consideration, which might be found in a judgment of a court on the one hand, and an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other. He held that there was at least an obligation on the part of decisionmakers to move into that middle ground, although precisely how far, would depend on the nature of the questions which the decisionmaker had to answer before coming to a conclusion.

29. In *Balscadden Road SAA Residents Association Limited v ABP* [2020] IEHC 586, Humphreys J summarised the law on the level of reasoning required in planning matters in the following way at para. 39:

"*Considering a range of caselaw in relation to the question of reasons, including RPS Consulting Engineers Ltd. v. Kildare County Council [2016] IEHC 113, [2017] 3 I.R. 61; Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019); Friends of the Irish Environment CLG v. Government of Ireland [2020] IEHC 225 (Unreported, High Court, Barr J., 24th April, 2020); O'Neill v. An Bord Pleanála [2020] IEHC 356 (Unreported, High Court, McDonald J., 22nd July, 2020); Crekav Trading G.P. Ltd. v. An Bord Pleanála [2020] IEHC 400 (Unreported, High Court, Barniville J., 31st July, 2020); and Leefield Limited v. An Bord Pleanála [2012] IEHC 539 (Unreported, High Court, Birmingham J., 4th December, 2012), one can draw a number of conclusions as follows:*

(i). the extent of reasons depends on the context;

(ii). what is required is the giving of broad reasons regarding the main issues;

(iii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;

(iv). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;

(v). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and

(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved, and should not be read in isolation."

30. In *O'Donnell v ABP* [2023] IEHC 381, Humphreys J stated that in the *Balscadden* case, he had attempted to summarise the practical effect of the *Connelly* principles, in essence, as requiring that the main reasons on the main issues be given in the decision. He noted that that approach had been applied in thirteen cases decided at Superior Courts level. He stated from these authorities, it was clear that there was a centre of gravity in the jurisprudence which could be described as converging around the concept of the obligation being to provide the main reasons on the main issues. He noted that virtually all the authorities were consistent with *Balscadden*, insofar as it had adopted that interpretation of the *Connelly* principles. Humphreys J also held that there was no requirement for the decisionmaker to give micro specific reasons for its decision on sub issues: see paras. 43-47.

31. That is a broad summary of the general legal principles that have to be applied by the court in the determination of this application. Other authorities will be referred to as and where necessary, when the court is dealing with discrete issues that fall for determination.

The Applicants' Case against Fingal County Council (the Second Respondent).

32. The second respondent gave its decision of an intention to grant planning permission in respect of the development, on 07 September 2021. On 04 October 2021, the applicants appealed that decision to ABP, the first respondent. The first respondent gave its decision on 21 October 2022. The applicants first moved their application seeking leave to proceed by way of judicial review seeking to quash the decisions of both the first and second respondents, on 15 December 2022. After a number of adjournments to allow for

amendment of the statement of grounds, the applicants obtained leave to proceed by way of judicial review by order of the court dated 20 March 2023.

33. The first issue that arises in relation to the challenge to the decision of the second respondent, is whether, having regard to the date on which the applicants first moved their application for judicial review, they are entitled to challenge the decision of the second respondent.

34. I hold that they are not entitled to challenge that decision, because once a decision had been made by ABP, the first respondent, the decision of the planning authority was annulled from the date on which it had been given by the planning authority. That is clearly established by s.37(1)(b) of PDA 2000.

35. In *Yennusick v Wexford County Council* [2023] IEHC 70, it was held by Ferriter J that once the Board had given a decision on appeal, that operated to annul the decision of the planning authority as and from the time when it had been given. From the date of the Board's decision, the decision of the planning authority was a nullity, therefore he held that the applicant could not challenge it by way of judicial review, after a decision had been given by the Board. He stated as follows at paras. 13 and 14:

> *"13. In my view, the Council is correct in its fundamental submission to the Court that the applicants are simply not in a position to seek leave to challenge the Council's decision in light of the provisions of s.37(1)(a) of the 2000 Act. That subsection provides that "where an appeal is brought against a decision of the planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given". It has been made clear in the authorities that the effect of this provision is that once the Board hands down a decision on an appeal from a decision of the planning authority, the planning authority's decision is annulled: see e.g. People over Wind v the Board [2015] IEHC 271, para 272. This applies even where the Board's decision is subsequently held to be invalid: see McCallig v An Bord Pleanála (no.1) [2013] IEHC 60 (at para. 83).*
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> *14. As the applicants appealed the Council's decision to the Board, and the Board gave a decision on that appeal, the Council's decision is now a nullity. There is accordingly no basis for the court to entertain an application for leave to apply for*

judicial review in respect of that, now annulled, decision. It follows that the question of an extension of time to make such an application must also fail."

36. A similar decision was reached in *Duffy v Clare County Council* [2023] IEHC 430, see paras. 26 and 27.

37. Based on these authorities, I hold that the applicants' case against the second respondent must be dismissed as being misconceived, due to the fact that by virtue of the decision of the Board made on 21 October 2022, the second respondent's decision was a nullity from the date on which it had been given. This meant that it was a nullity on the date on which the application for judicial review was first moved on 15 December 2022. One cannot challenge a legal nullity. The application for relief against the decision of the second respondent, must be dismissed.

38. At the hearing of the application, the applicants argued that caselaw established that an applicant had to await the end of a statutory decision making process, including any appeal provided therein, before they could challenge intermediate steps in the process. It was submitted that the applicants in this case had to await the outcome of the appeal before ABP, before they could challenge the decision that had been issued by the second respondent.

39. The applicants relied on the decision in *Spencer Place Development Company Limited v Dublin City Council* [2019] IEHC 384, as authority for the proposition that one must await the outcome of the planning process, before commencing judicial review proceedings: see paras. 30-37.

40. The court is satisfied that this argument is not well founded. While it is correct that in general, one cannot challenge intermediate decisions that are taken in a decision making process; one must continue with the process to a conclusion before mounting whatever challenge may be appropriate by way of judicial review application against the decision reached at the end of the process. However, that relates to procedural decisions that are taken in the course of a decision making process, *e.g.* whether to hold an oral hearing. A decision of a planning authority in relation to its intention to grant planning permission for a particular development, cannot be categorised as an intermediate decision.

41. However, the rule against bringing a challenge by way of judicial review proceedings to intermediate decisions, is not a hard and fast rule. There are exceptions to it. One does not have to await the conclusion of a process if a decision has been made which is such that

it leads to an inevitability of injustice, or something that taints the process in an ongoing way, or there is some flagrant breach of fairness that deprives the person of any real first instance consideration and warrants immediate intervention: see *Duffy v Clare County Council* at para. 25.

42. In the present case, even though a statutory appeal was provided for under the planning code, the existence of such an appeal, did not prevent the applicants challenging the decision of the second respondent, while at the same time pursuing an appeal to ABP.

43. While not directly on point, it is clear that decisions of a planning authority are amenable to judicial review: see s.50 of PDA, which makes provision for the planning authority, or the Board, to seek a stay where there is a challenge by judicial review proceedings before it.

44. The decision in *Mount Juliet Estate Residents Group v Kilkenny County Council* [2020] IEHC 128, establishes that it is possible to bring a judicial review application against a decision of a planning authority, while an appeal is pending before the Board. It was held that it was possible to bring judicial review proceedings against the planning authority's decision prior to the hearing of an appeal therefrom by ABP, if the subject matter of the challenge goes to the jurisdiction of ABP: see paras. 20 and 21.

45. I hold that the applicants could have proceeded by way of judicial review once the decision of the second respondent had been given, notwithstanding that they had an appeal pending before ABP. They had their opportunity to challenge the decision of the second respondent. They did not avail of that opportunity. They were long out of time to do that when they first moved their application for leave to proceed by way of judicial review on 15 December 2022. They do not come within the recognised categories of cases where it would be appropriate to grant an extension of time to bring such an application. Accordingly, I hold that the applicants are out of time to challenge the decision of the second respondent. On this basis also, their application for reliefs against the second respondent must be dismissed.

The Applicants' Case against the State Respondents, the 3rd to 5th Respondents.

46. The applicants' case against the State respondents, only arises in the event that the court holds that the applicants are not entitled to challenge, the decision of the second respondent. The court has so held. Therefore, the court must determine the subsidiary case that is made by the applicants against the State respondents.

47. The essence of their case against the State respondents is that, having regard to the provisions of Art. 11(5) of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) Text with EEA relevance (hereafter "the EIA Directive"), the State respondents were obliged to provide "practical information" to the applicants, to enable them to understand that if they did not challenge the decision of the planning authority within the time provided under the rules of court, they would not be entitled to challenge it after they had obtained a decision from the Board on appeal.

48. In particular, the applicants wish to make the case that because the second respondent had failed to refuse permission for the proposed development on the grounds that it would constitute a material contravention of the development plan; that had the consequence that the jurisdiction of the Board on the hearing of the appeal, was not limited in the manner that would have been the case, had that decision been made by the planning authority at first instance.

49. The applicants' case was that under the provisions of Art.11(5) of the EIA Directive, they ought to have been provided with practical information which would have alerted them to the fact that they would have lost their opportunity to challenge the decision of the first instance decisionmaker, by proceeding with an appeal before ABP. While the applicants were not specific in relation to what exact information they ought to have been given in this regard, they stated that the failure of the State respondents to provide "practical information" constituted a failure to adequately transpose the Directive into Irish law.

50. Article 11(5) of the EIA Directive states:

> *"In order to further the effectiveness of the provisions of this Article, Member State shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."*

51. It is entirely unclear what precise information the applicants submit should have been provided by the State respondents. Insofar as the applicants made a case under this heading, I hold that was not pleaded with adequate particularity in the applicants' amended statement of grounds. Having regard to the obligation under the rules to plead with particularity and having the decisions in *Moorview Developments Limited v First Active* [2005] IEHC 329; *Sweetman v ABP* [2020] IEHC 39 and *Eco Advocacy CLG v ABP* [2023] IEHC 644, I hold that the applicants are not permitted to proceed with their application for

this ground of relief against the State respondents, due to their failure to properly plead their case in this regard in their statement of grounds .

52. Even if I am wrong in that, I hold that the State has provided adequate practical information, which is sufficient to comply with its obligations under the Directive. In particular, guidance of a comprehensive and practical nature is given in ss. 37, 37H, 50, 50A and B of PDA 2000 and in Regulation 31 of the regulations made thereunder.

53. Furthermore, I accept the submission made by counsel on behalf of the State respondents, that the office of the planning regulator publishes leaflets on various aspects of planning procedure from time to time. These, coupled with the statutory provisions and the rules of court, constitute information of a practical nature concerning the bringing of judicial review applications against various planning decisions. They constitute compliance with the State's obligations under the Directive.

54. Finally, what the applicants contended for at the hearing of the application, was that a person should be informed that where a planning authority does not refuse an application for planning permission on the ground that it would constitute a material contravention of a development plan, and thereby did not limit the jurisdiction of the Board in hearing an appeal therefrom; a person should be given information that unless they challenged that aspect of the planning authority's decision straight away, they would not be able to challenge it, in the event that they elected to bring an appeal to An Bord Pleanála and subsequently sought to challenge the decisions of the Board and the planning authority by way of judicial review subsequent to the hearing of the appeal by the Board.

55. That is not information of a practical nature. That is seeking the provision of complex legal advice about the timing and effect of bringing a challenge to a decision of a planning authority. It is unrealistic to expect that advice of that nature, is what is contemplated within the term "practical information" contained in Art. 11(5) of the Directive. For these reasons, I refuse the applicants' application for reliefs against the State respondents.

The Substantive Grounds of Challenge to the Decision of the First Respondent.

(a) Inadequate Consideration of the Traffic Hazard posed by the Development.

56. The applicants submitted that in granting permission for the development, the first respondent failed to have any or any adequate regard to the issue of the traffic hazard that would be posed by the development on Dungriffin Road. It was submitted that the Board had failed to adequately consider the various submissions that had been made to it by people

living in the vicinity, in relation to the inadequate provision of footpaths in the area. In particular, it was submitted that the Board had failed to give any consideration to the fact that Dungriffin Road was a narrow road, on which the footpaths were particularly narrow at either end of the road, and indeed, at one end there was no footpath on one side of the road. This was particularly hazardous for pedestrians and in particular, for parents pushing buggies with young children, at that end of the road. It was submitted that the development would increase this problem by producing more vehicular traffic on Dungriffin Road.

57. It was submitted that the Board had merely noted the various submissions that had been made in this regard, but had not addressed them. It was submitted that the Board was obliged to consider not just the site where the development would be carried out, but also the general planning and development of the area, which would have included some consideration of the inadequacy of footpaths at either end of Dungriffin Road and the safety issues for pedestrians that that posed.

58. It was submitted that both the Council at first instance and the Board, had not given adequate consideration to whether the grant of permission constituted a material contravention of the development plan, having regard to the objectives set out therein to improve pedestrian connectivity in the area. It was submitted that the Board had failed to have adequate regard to the submissions made by Ms Grimes and Ms Egan, in relation to the unsafe condition of the footpaths at either end of the road. Similar submissions had been made by Ms O'Donovan and Mr Walsh, in relation to the level of traffic on the road; the narrowness of the road and the narrowness of the footpaths. It was submitted that while the Board had relied on the Inspector's report as its reasoning in this regard, that report had not constituted an adequate assessment of the issue and in particular, it was alleged that it had failed to engage with the submissions that had been made by interested parties.

59. The issue of traffic impact that would be generated by the development was considered by the Inspector at section 7.8 of his report. Earlier in the report he had noted the various concerns that had been raised by local residents in relation to the adequacy of footpaths at either end of Dungriffin Road.

60. The Inspector noted that the proposed development was going to take place in an area in which there was already substantial residential development. The speed limit on Dungriffen Road was 50km/h. The width of the road at the entrance to the site was 6.5m. He noted that there were adequate footpaths on either side of the road in that area.

61. In reaching his conclusion that the development would not lead to any appreciable increase in traffic volume, which in turn could cause problems for pedestrians, if there were inadequate footpaths at either end of Dungriffin Road, he was influenced by the fact that he had before him the report from Waterman Moylan, the engineering consultants retained by the developer, who had carried out an extensive analysis of the transport issues arising in relation to the development. They had concluded as follows at para. 5.5:

> *"In conclusion, the proposed development would have a negligible impact on the surrounding roads and transport infrastructure due to the low number of trips being generated by the said development. It is proposed that a total of three trips into the development and seven trips leaving the development are generated during the am peak, similarly, in the pm peak, seven trips arriving and six trips departing are generated. Further to this, due to the location of the subject site with regard to its proximity to public transport facilities in the area, public transport will form a significant mode share for residents of and visitors to the proposed development."*

62. That expert evidence from the developer's engineer was uncontroverted by any expert evidence submitted on behalf of the applicants. The data in relation to the level of traffic likely to be generated by the development was compiled using accepted methodology.

63. The court is satisfied that in acting on the information that was before him, the Inspector reached a logical and rational conclusion that was open to him on the uncontroverted expert evidence. The development plan does not have any provision in relation to footpaths. Accordingly, it cannot be argued that allowing a development in the middle of Dungriffin Road, where there are adequate footpaths, could constitute a material contravention of the development plan. This proposition is untenable, given the almost negligible impact of the traffic coming into and out of the development at peak hours in the morning and evening.

64. Having regard to the test for what can constitute a material contravention of a development plan, as set down in the *Jennings* case at para. 112, as endorsed by the Supreme Court in the *Sherwin* case, the court is satisfied that on this issue of potential traffic hazard caused by the development, this was an issue on which a multifaceted planning judgment was required from the Board. The court is satisfied that in approaching his analysis of this issue, the Inspector did so in a reasonable and considered fashion. The Board was

entitled to act on that opinion, based as it was, on uncontroverted expert evidence. The court can see no basis on which the decision of the Board can be set aside on this ground.

65. Insofar as it was argued that the Board had failed to have regard to the provisions in the development plan set out at MT22, which had the objective of improving pedestrian and cycling connectivity to travel hubs, that is a very general objective in the development plan. It places a general obligation on the local authority to attempt to improve pedestrian and cycling connectivity to transport hubs; it does not mean that a development which will only produce a negligible volume of traffic, should not be granted planning permission, because it will not improve pedestrian or cycling connectivity to transport hubs. If the applicants were correct in their contention, it would mean that the Board would have to hold that every new development must improve pedestrian and cycling connectivity to transport hubs, otherwise the development would be held to be in material contravention of the development plan. That is simply an untenable contention.

66. The court is satisfied that the Board was entitled to come to the conclusion that such connectivity was not adversely affected by the proposed development, given the negligible level of additional traffic and the fact that the speed limit in the area was low and footpaths at the entrance to the site were adequate and the sight lines in the area were more than sufficient.

67. Given the broad nature of the objective contained in the development plan and the nature of the obligation to "have regard to" the development plan, as outlined in the caselaw, the court is satisfied that the Board had a large measure of discretion in approaching this issue, which involved a significant amount of planning judgment. The court is satisfied that in adopting the reasons set out in the Inspector's report, the Board acted in a logical and reasonable fashion. This ground of challenge to the Board's decision must fail.

(b) Density.

68. The applicants accepted that the relevant guidelines permitted an increase in residential density in certain circumstances *e.g.* where the development is close to urban centres; developments that are close to large sites of employment and/or education; and developments that are close to public transport, either in the form of a frequent bus route, or are within walking distance of the DART or Luas.

69. It was submitted that in this case the Inspector and the Board had permitted a high density development, with regard to the Guidelines for Planning Authorities on Sustainable

Residential Development in Urban Areas, (2009), but without regard to the provisions of the Sustainable Urban Housing: Design Standards for New Apartments Guidelines (2020).

70. It was submitted that the 2020 Guidelines had repealed and replaced the 2009 Guidelines and therefore the Inspector, and by extension, the Board, had operated on the basis of the wrong guidelines.

71. Furthermore, it was submitted that while a higher density was allowed for developments that were close to public transport, the development in this case was not sufficiently close to a public transport corridor, nor was it within walking distance of Howth DART station, given that it was accepted in the planning statement lodged by the developer, that the development was 1.6km from Howth DART Station.

72. It was submitted that while there was a bus stop relatively close to the development, the frequency of the service provided thereat was not sufficiently frequent to qualify as a public transport corridor, given that there were two buses servicing the area three times per hour, so there was a bus approximately every twenty minutes. It was submitted that the apartment guidelines stated that the site must be 400/500m from a "high frequency service". It was submitted that the level of bus connectivity in the present case, did not meet that standard.

73. In essence, it was submitted that the Inspector and the Board had erred in allowing the level of density in the development, when the necessary provisions of the 2020 Guidelines had not been considered; nor had they been met. It was submitted that there was a statutory obligation on the planning authority in s.28(1) of the PDA 2000 to have regard to the guidelines. The Board also had a statutory obligation under s.28(2) to have regard to the guidelines (where applicable).

74. The court is satisfied that there is no substance in this ground of challenge to the decision. Guidelines are primarily addressed to planning authorities to be taken into consideration when exercising their function of drawing up development plans. Planning authorities and on appeal, the Board, must also have regard to relevant guidelines when considering an application for planning permission. However, it was established in *Cork County Council v Minister for Housing, Local Government and Heritage*, that guidelines can be general in nature and that rigid or slavish adherence to them is not required: see paras. 36-40. As noted by Holland J, the guidelines figures in relation to density, represented a

"ballpark" figure; they were not an absolute figure, which had to be strictly adhered to in every case.

75. The court is satisfied that the level of density allowed for in this development, being 32 units on 0.48ha., which represents 67 units/ha., is not that much higher than the 50 units/ha., which is provided for under the guidelines.

76. Secondly, the court is satisfied that the 2020 Guidelines do not implicitly repeal or replace the 2009 Guidelines. At para. 1.18 of the 2020 Guidelines, it is explicitly stated that they should be read in conjunction with the 2009 Guidelines. The court is satisfied that both guidelines can coexist and that there may be areas of overlap between one and the other; but the court is satisfied that the 2020 Guidelines do not repeal the 2009 Guidelines; not least because the 2020 Guidelines do not explicitly state that to be the case.

77. The court is satisfied that the 2009 Guidelines and the 2020 Guidelines are designed to be somewhat general in nature. They afford the planning authorities a wide margin of discretion in relation to the density to be applied in any particular development, having regard to local factors. In the 2020 Guidelines, when dealing with the various locations where a higher density may be appropriate, the guidelines themselves make clear that local factors can be taken into account. In relation to each of the relevant locations, they state as follows:

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

78. The Inspector considered the issue of density at section 7.3 of his report. It is clear therefrom that he looked at the issue with some care. He came to the conclusion that the particular development in question, did not neatly fall within any one of the designated areas where higher density was deemed appropriate. However, it shared the characteristics of a number of such places in certain regards. The Inspector went on to look at the fact that the development was within walking distance of Howth DART Station.

79. At the hearing of this application, the applicants submitted that the Inspector had been wrong to conclude that the development was within walking distance of Howth DART Station, because in the planning statement submitted by the developer, it had been stated that the development was 1.6km from Howth DART Station; whereas the guidelines provided that it should only be 1.5km from a DART station. The court does not regard this as a sustainable basis on which to strike down the decision. Whether one measures the site at

1.5km or 1.6km from the DART station does not appear to be of such material significance, that one should set aside a decision on density on that account.

80. The court is satisfied that in carrying out his analysis, the Inspector had regard to the proposed development and to its place within the community generally, in terms of its closeness to a relatively frequent bus service and its proximity to Howth DART Station. The court is satisfied that in considering the guidelines, a level of latitude was given to the Inspector, within which he was called upon to exercise his planning judgment. The court is satisfied that in carrying out the analysis that he did of this issue, he applied his judgment in a reasonable and logical fashion.

81. The court is satisfied that while he did not refer to the 2020 Guidelines explicitly, it is clear from the documents that were before him that the 2020 Guidelines had been considered by him. They had been referred to in the planner's report that was before the Inspector. In addition, in referring to the proximity of the development to Howth DART Station at 1.5km, it was clear that he was referring to relevant characteristics for the category of development designated as intermediate urban locations as per the 2020 Guidelines.

82. I am satisfied that the Inspector approached this issue in a logical and sensible manner, having regard to the fact that the development shared a number of characteristics of various areas where it was appropriate to allow a higher density; that in allowing a higher density at this location he had not gone so far out of the ballpark figure, that it could be regarded as being unreasonable or irrational. The Board was entitled to have regard to the documents that were before the Inspector and to rely on the Inspector's report. Accordingly, this ground of challenge to the Board's decision fails.

(c) Settlement Strategy.

83. The applicants submitted that s.10 of the PDA provided that a development plan must set a strategy for the relevant area which was consistent with regional spatial strategies. To that end, the objectives in the development plan for the Fingal area provided at SS02 that all proposals were to be consistent with Fingal's hierarchy strategy. Objective SS03 provided that the local authority was to identify sufficient lands to accommodate growth. It was submitted that the general objective was therefore to develop lands within the administrative area in accordance with the settlement strategy.

84. It was submitted that the relevant settlement strategy for the Howth area was that set out in the Fingal Development Plan 2017-2023, Variation No. 2. The applicants relied on the figures given in table 2.4, at p.22 of the Variation, which set out the total residential capacity provided under the development plan, updated as of September 2019. It showed that for the Howth area there was the potential to have 436 remaining residential units for the remaining period of the development plan.

85. It was submitted that as the operative date for the figures given in that table of September 2019, the grant of permission for the proposed development of 32 units, was in excess of the figures permitted in the settlement strategy, because the figures provided for as of September 2019, had been exceeded when permission for a development on the former Techcrete site was granted by the respondent in April 2020 for some 512 units thereon, thereby exhausting the amount provided for under the settlement strategy in the development plan. Therefore, it was submitted that the grant of permission in this case constituted a material contravention of the development plan, which obliged the Board to follow certain processes, as provided for under PDA 2000, which had not been done in this case and accordingly the decision should be struck down.

86. In argument at the Bar, the applicants initially suggested that the respondents had vastly exceeded the settlement strategy by the grant of the following planning permissions: Techcrete site (512); Bailey Court site (177); Glenveagh/Deer Park site (162); Santa Sabina site (143); and Osprey site (8). However, it appeared that a number of these developments had dropped out of the picture. The permission in respect of the Bailey Court development had been struck down by the High Court in November 2020, some eighteen months before the Inspector's record and some two years before the Board's decision in this case. The Santa Sabina site is in the Sutton area, not in the Howth area.

87. At the hearing the key issue became the date of the grant of permission for the development at the Techcrete site and the operative date of the variation for the settlement strategy in the Fingal Development Plan. It was accepted that the permission for the Techcrete site was given on 03 April 2020. I accept the submission made by counsel on behalf of the first and second respondents that the grant of permission for development in this case was not in excess of the settlement strategy, due to the fact that the figure of 436 units for the Howth area for the remainder of the period of the development plan, did not include the permission in respect of the Techcrete site. This is because the variation to the

development plan specifically states: "Variation No. 2 of the Fingal Development Plan 2017-2023 is effective from 19 June 2020". Thus, it is clear that the Techcrete permission had predated the implementation of that variation. Therefore the figure allowed of 436 units, was clearly sufficient to accommodate the level of development in this case.

(d) Protection of Existing Historic Building.

88. Under this heading, the applicants submitted that the Board's decision breached the objectives set out in CH33 and 37 of the development plan which provided for the protection of the historic building stock in the administrative area and the repurposing of historic buildings through adaptation and reuse.

89. It was submitted that in allowing the demolition of Graymount House, there was no evidence that the Board had had regard to these objectives. The applicants accepted that Graymount House was not a protected structure, nor was it on the architectural list as being a building of significance, but it was submitted that it was part of the historic building stock in the area. It was submitted that where the Board was intending to depart from the development plan and grant a permission for a development that would involve demolition of the historic building, it was incumbent on the Board to say why it was so doing and to do so deliberately.

90. While it was accepted that the Inspector's report had considered relevant material and had come to the conclusion that demolition of the house was acceptable, it was submitted that the Inspector had not asked the right questions. The applicants had also submitted that the Inspector had not "gone through the processes"; although they had not specified exactly what was meant in this regard.

91. The court is satisfied that the objectives set out in CH33 and 37 of the development plan come within the definition of general objectives, as per the decisions in *Jennings* and *Sherwin*. Thus, the attaining of these objectives allows for an exercise of planning judgment on the part of the decisionmaker. In this case, the Inspector had had regard to the planner's report and to the views of the conservation officer. He had noted that the house was in poor condition, with few original features remaining. There had been inappropriate additions made to it over the years. He had reached the conclusion that the house did not contribute substantially to the character of the area.

92. The court is satisfied that the language used in CH33 and 37 is somewhat aspirational in nature. These are objectives of the type set out in *Maye v Sligo County Council*

by Clarke J at paras. 6.4 and 6.5, where it is appropriate for the planners to exercise a measure of planning judgment. The court is satisfied that there was more than adequate material before the Inspector which enabled him to come to the conclusion that the building, while of some antiquity, was not deserving of protection and accordingly, that it was appropriate to allow for demolition of the structure. It had been noted in the planner's report that the planning officer and the conservation officer had undertaken a site visit in December 2020. It noted that the report received from the conservation officer noted that the retention of historic building stock should be promoted. On discussion held with the conservation officer, it was noted that there was no intention to include Graymount House in the record of protected structures, which was then under review. The planning officer had therefore considered that the proposed demolition was considered acceptable.

93. The Inspector in reaching his conclusion that it was appropriate to allow the demolition of the house had had regard to the architectural design statement, the architectural assessment, the report of the conservation officer section and the planner's report. In light of the evidence before him and the conclusions expressed in those reports, he had come to the decision that demolition of the house was acceptable. I am satisfied that the Inspector had given the matter careful consideration. In adopting that reasoning, the Board had exercised its planning judgment in a way that was rational and reasonable in all the circumstances. Therefore, I hold that this ground of challenge is without substance.

(e) Access to Public Open Space.

94. At the hearing of the application, this ground of challenge was reduced to an assertion that the Board's decision was invalid due to the fact that, while public open space had been provided in the development, there had been no provision in the permission granted, whereby the right of the public to have access to the open space was secured.

95. It was submitted that the provisions of the development plan, and in particular PM52 and 55 and DMS57 required the provision of public open space. It was submitted that while the developer had stated that he would make public open space available within the development, that statement alone was not enough to secure the right of the public to have access to the open space so provided.

96. In this regard the applicant referred to the decision in *Mahon v ABP* [2010] IEHC 495, which related to the zoning of land as open space. Dunne J looked at what was the nature of public open space and held that the zoning of land simpliciter, merely affected its

use, but did not transfer any ownership of it to the public at large. She held that the zoning of lands as public open space, did not have the effect of making the lands available for use by members of the public. By analogy, it was argued that a representation that the land, or a portion of it, would be public open space, was not sufficient to actually ensure a right of access for members of the public to it. It was submitted that in failing to have such right of access in the planning permission, the first respondent had failed to comply with the provisions of the development plan in relation to the provision of public open space at such development sites.

97. It was submitted that the Board had misdirected itself in law as to what was meant by public open space, as a result of which, they had failed to provide public open space in granting permission for the development; and had therefore permitted a development that was in material contravention of the development plan; in respect of which no reasoning had been given.

98. While the issue of the amount of public open space that had been provided was initially raised in the pleadings, it was not pursued at the hearing of the application. I am satisfied having regard to the findings made by the Inspector that there was 32% of the site provided for public open space, that the necessary requirement in this regard has been met.

99. The key area of disagreement between the parties was in relation to whether an adequate right of access for the public to the open space had been provided for in the planning permission granted to the developer. The commitment to provide public open space had been given in the documentation submitted by the developer. Condition 1 attaching to the planning permission, which is in the usual terms, provides that the planning permission is granted on the basis of the documentation submitted as part of the planning process. The court is satisfied having regard to the decision of the Supreme Court in *Lanigan v Barry* [2016] IESC 46 per Clarke J at paras. 35 and 36, that condition 1 secures a right of enforcement as against a developer in relation to commitments given in the documentation submitted as part of the planning application.

100. The court accepts that the provision of public open space was also secured by condition 13, which provided that the management and maintenance of the proposed development following its completion, shall be the responsibility of a legally constituted management company. It further provided that a management scheme, providing adequate measures for the future maintenance of public open spaces, roads and communal areas shall

be submitted to, and agreed in writing with the planning authority prior to commencement of development. Also of relevance is condition 21, which provided that prior to commencement of development, the developer had to lodge with the planning authority a bond from an insurance company, to ensure that the development would be carried out in accordance with the terms of the planning permission.

101. The court is of the view that the applicants' argument under this ground, tends to confuse the grant of planning permission with the implementation of that permission. The securing of the right of access to the public to the public open space provided under the permission, is a matter that can be agreed at a later date between the second respondent and the developer. It can be secured in a number of ways, such as by a lease, a licence, an easement, a s.49 agreement, or by the taking in charge of that area by the County Council.

102. In the circumstances, the court is satisfied that adequate public open space has been provided at the site and that there are sufficient measures in place to secure the right of the public to have access to the open space so provided. Accordingly, there is no substance in this ground of challenge to the decision.

(f) Removal of Trees.

103. As part of the permission granted, 34 of the existing 86 trees, 5 of the existing 7 hedges and 2 shrub borders were authorised to be removed. It was noted that the planning application had been accompanied by an arboricultural assessment, which had included a tree survey and a classification of the trees based on type/condition/value. The survey identified that 8 trees were classified as U, meaning that their existing value would be lost in 10 years. No trees were classified as A, meaning that they were of high quality or value, with a minimum 40 years life; 27 trees were classified as B, meaning that they were of moderate quality/value, with a minimum 20 years life; and the remaining 51 trees were classified as C, meaning they were of low quality/value, with a minimum of 10 years life.

104. It was noted that of the 34 trees that were to be removed, 8 were category U, 4 were category B and 22 were category C trees.

105. The Inspector also noted that the proposal entailed the retention of the majority of trees on site, as well as the planting of new trees, which had been detailed in the landscape plans for the site. The Inspector was of the view that the level of tree removal proposed, was not excessive, with the majority of existing trees being retained and the attractive character of the site also being retained. He noted that none of the trees were subject to

tree preservation orders. In the circumstances, he was satisfied that the level of intervention was reasonable, and the proposal provided for the retention of the majority of the existing trees on site.

106. It was submitted by the applicants that the development plan provided for the objective of preserving trees. It was submitted that in this case the Inspector had not considered the objective of preserving the trees. It was submitted that the removal of almost 50% of the trees on site, could not be regarded as "preserving and protecting", trees. It was further submitted that the Inspector had not asked himself whether the development constituted a contravention of the development plan and, if so, whether it was a material contravention thereof. It was submitted that he had not given adequate reasons for his decision in this regard.

107. The court is satisfied that the objectives set out in the development plan in relation to the preservation and protection of trees are those of a general and aspirational nature. In deciding whether trees can be removed as part of the development of a site, the decisionmaker has to exercise a degree of planning judgment in the matter. In this case, the Inspector had a considerable body of information before him. He had an extensive report detailing the quality and quantity of the trees that were to be removed. He also had extensive information from the landscape design documentation, showing the level of planting that was to be carried out on the site.

108. The court is satisfied that in this case, the Inspector was entitled to come to the conclusion, on the basis of the information before him, that the removal of 34 trees was permissible. He had noted that the trees were not the subject of any specific preservation orders. It is also clear that when one looks at the development plan as a whole, it is clear that removal of trees is permitted in appropriate cases. It is also necessary to look at the development plan in light of the fact that this land was zoned therein as residential. The Inspector was entitled to have regard to the fact that the architectural design statement at section 2.1, showed that the existing trees had been considered extensively at the design stage of the development. He also had the benefit of the landscape design report, and the arborist's report which, as mentioned, went through all the trees on site.

109. The court is satisfied that the issue in relation to the removal of trees involved one of planning judgment. It had been given careful consideration by the planning authority and in the reports and also by the Inspector in his report. There was no contrary expert evidence

in relation to trees before the Inspector, or the Board. The court is satisfied that the conclusion reached by the Inspector and the Board was reasonable in all the circumstances. The court is satisfied that in granting permission which involved the removal of 34 trees from the site, that did not constitute a material contravention of the development plan, as the objectives set out therein, did not lend themselves to that interpretation. Accordingly, the court finds that this ground of challenge is without substance.

(g) Environmental Impact Assessment Ground (EIA).

110. Under this ground of objection, the applicant submitted that the Board had failed to have regard to the matters set out in Annex 3 to the Directive, as required by Art. 4(3) of the EIA Directive. It was submitted that the obligation on the planning authority and on the Board was to have regard to biodiversity in the area and to the characteristics of the potential impact of the development. It was submitted that all of these matters had to be taken into account when deciding if an EIA was required.

111. It was submitted that Regulation 109 of the Planning and Development Regulations 2001-2023, provides that where an appeal relating to a planning application for sub-threshold development was not accompanied by an EIAR, the Board shall carry out a preliminary examination of, at the least, the nature, size or location of the development. It was submitted that the Regulation further provided that where the Board had concluded, based on such preliminary examination, that there was no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required. It was further submitted that the regulations provided that if the Board was in doubt on the issue, it shall require the applicant for permission to furnish the information provided for in schedule 7 for the purposes of a screening determination. It was submitted that in *Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157, it had been held that the precautionary principle requires that the likelihood of significant effect on the environment must be considered to exist, when that likelihood cannot be objectively excluded. It was submitted that the test was a fairly light trigger to provide for the carrying out of a screening exercise: see paras. 61 and 62.

112. The applicants submitted that the Board had not complied with their obligations under Reg. 109, in particular because the Inspector's report at para. 5.4 had been very brief. There had been no reference to the cumulative effect on traffic, or the effect on bats. It was submitted that the level of information before the Board was not sufficient at the second

stage to enable them to come to the conclusion that no further screening was necessary. It was submitted that the planner's report had been very brief, running to only three lines, effectively just saying that the development was sub-threshold for requiring an EIAR.

113. It was noted that under Art. 12 of the Habitats Directive, bats are a protected species. In the present case, the developers ecological impact assessment had included a bat survey, which had noted that no bats had been observed in the trees but that lighting would cause a decrease in foraging. The survey had also noted that there was no bat roosting in the trees to be felled. It was submitted that these conclusions meant that the issue of bats had to be considered and it was only if the likelihood of any significant effects could be ruled out, that the Board could come to the conclusion that an EIAR was not required. It was submitted that the Board had to consider bats when considering if an EIA was required. In addition, Annex 3 provided the criteria for screening, which provided that one had to take account of biodiversity and that would include the issue of bats. It was submitted that that had not been adequately considered by the Board in this case.

114. Alternatively, it was submitted that the Board had not had regard to the cumulative effect of the development on the environment. In particular, reference was made to the Inspector's report in the application concerning the Techcrete site, and in particular, referring to traffic congestion at Sutton Cross. That inspector's report had noted that the traffic at Sutton Cross was at capacity level. It was submitted that the Board had not considered the cumulative effect of traffic from the development on the environment generally and in particular, in the area of Sutton Cross.

115. I accept the submission made on behalf of the first respondent that the obligation to take into account the matters set out in Annex 3 and schedule 7, does not require the Board to go through each and every matter therein and cross it off in somewhat of a "tick box" type exercise. The nature of the obligation to "have regard to" was considered in the *Cork County Council v Minister for Housing* case, where it was held that phrase included the obligation to "consider" and "take into account", which all meant the same thing. It means that one must have regard to the matters contained in the relevant legislation, but it does not mean that one has to have a slavish duty to comment on each aspect set out therein.

116. In *Eco Advocacy v ABP* [2021] IEHC 265, Humphreys J referred a number of questions to the CJEU in relation to the level of reasoning that was required when carrying out the screening process. While the judgment of the Court (Case C-721/21) did not answer

that particular question, the Advocate General's opinion, which was delivered on 19 January 2023, stated clearly that the level of reasoning that was required varied, depending on the issue concerned. The Advocate General stated that in some cases the level of reasoning could be quite brief, if it was obvious what the reasons were. It was not necessary to follow the exact structure of Annex 3. As long as it was clear that the project would not have adverse effects on the environment: see paras. 63 – 74.

117. The principle that when interpreting planning decisions, one must have regard to all the documents that were before the decisionmaker, also applies to issues concerning an EIA: see *Coyne v ABP* [2023] IEHC 412, at para. 379.

118. In the present case, the bat survey had established that there were no bats roosting in any of the trees on the site. There was some evidence that bats came into an area at the eastern side of the site to forage for insects at night. The reports had revealed that there was very little light spillage in this area. In the circumstances, it was entirely reasonable for the Inspector to conclude that the development would not have any adverse effects on biodiversity and in particular, on bats. In these circumstances, as he was only carrying out a preliminary examination because the development was a sub-threshold development, he was entitled to reach the conclusion that it did not warrant any further investigation or assessment.

119. In *Shadowmill Limited v ABP*, Holland J looked at the nature of reasoning that is required in both a preliminary examination and EIA screening in the following way at para. 99:

> "*The ultimate point of both Preliminary Examination and EIA Screening is to discern if subthreshold development requires EIA. The issue is not, per se, the size of the project but is the likelihood of significant effect on the environment - as to which many factors are potentially influential. Shadowmill correctly cite Case C-392/96 to the effect that small projects can have significant effects. Nonetheless, and assuming the thresholds are set with a view to generally ensuring that developments requiring EIA are subjected to it, and noting that Annex III of the EIA Directive and Schedule 7 PDR 2001 identify the size of the project as one of its characteristics requiring "particular regard", it is at a very general level unsurprising to find that a Proposed Development of 32 dwelling units will be considered not to require EIA where the relevant threshold is 500 units. It is all the less surprising to find that a Permitted*

Development of 18 dwellings will be considered not to require EIA. That said, the decision must be made by the Board and made in accordance with law. Its substantive merits or demerits are not for the court to review save for irrationality."

120. In the *Shadowmill* case, part of the development involved the demolition of a building, which had "numerous potential bat roosting features". It was clear that this would require a derogation licence. Thus, the level of interference with bats in that case, was of an altogether different magnitude to any possible interference with the foraging of bats in the eastern part of the site, which may be caused by the development in this case. As already noted, in the present case, an extensive bat survey had been carried out, which failed to reveal any bats in the house. Nor were any bats observed roosting in the trees. While two species of bats had been noted on the site, the survey noted that no bats had been observed roosting in the trees and no trees of bat roosting potential were to be removed in the course of the development. Given the evidence of foraging, a precautionary approach had been applied, which required that there should be a further pre-commencement survey and, if necessary, a derogation licence should be required if there was to be any interference with bats. This precautionary approach adequately catered for any potential impact on bats. The court is satisfied that while the Inspector's report is terse in its reasoning on this issue, the reasoning is clear in light of the documents that were before the Inspector at the time.

121. Insofar as it was contended that the preliminary examination carried out by the Inspector was inadequate, due to the fact that he had not adequately considered the cumulative impact of the additional traffic that would be generated by the development on the traffic situation in the Howth area generally, and in particular, in the area of Sutton Cross; I find that this argument is unfounded. The uncontroverted expert evidence before the Inspector, was that the amount of traffic that would be generated at peak hours by this development, was negligible. In such circumstances it is unrealistic to argue that a negligible increase in traffic on Dungriffin Road would have an adverse effect on the existing traffic difficulties at Sutton Cross, some 4km away.

122. Insofar as the applicant had sought to rely on an opinion expressed in the documentation concerning the Glenveigh/Deer Park planning application, which consisted of 162 units, and the cumulative effect of the traffic that would be generated from such development; two things need to be noted about that development: First, it was located some 2km from Sutton Cross, whereas Graymount is 4km from Sutton Cross; secondly the

Glenveigh/Deer Park site was opposite the Techcrete site, which had permission for 512 units. In these circumstances there was undoubtedly going to be significant traffic generated by the combination of the two developments being in close proximity to each other and to Sutton Cross. These considerations do not apply in the present case.

123. Having regard to the content of the engineer's report, which was before the Inspector, which was to the effect that the amount of additional traffic generated by the development, would have a negligible impact on Dungriffin Road, it was reasonable and logical for the Inspector to conclude that there was no likelihood of adverse effects due to the cumulative impact of such an additional negligible amount of traffic to the existing traffic on the roads in the Howth area generally.

124. I am satisfied having regard to the expert reports that were before the Inspector in relation to the issue of biodiversity, in particular, concerning bats, and in relation to the issue of traffic generation; that he was in a position to reach the conclusion that there was no likelihood of adverse effects on the environment, or on bats. Accordingly, while his conclusion in his report is somewhat terse, the level of reasoning therein is sufficient, having regard to the nature of the evidence that was before him. Therefore, this ground of challenge to the decision must also fail.

Conclusions.

125. For the reasons set out herein, the court would propose to make a final order in the following terms:

(1) Refuse all reliefs sought by the applicants against the first respondent;

(2) Dismiss the applicants' application for relief against the second respondent;

(3) Refuse the applicants' application for all reliefs against the third, fourth and fifth respondents.

126. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the issue of costs and on any ancillary matters that may arise.

127. The matter will be put in for mention by way of remote hearing at 10.30 hours on 19th June 2024 for the purpose of making final orders.