[2025] IEHC 1

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0001244]

BETWEEN

COOLGLASS WIND FARM LIMITED

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Friday the 10th day of January 2025

> "When a man says he approves of something in principle, it means he hasn't the slightest intention of putting it into practice" – Otto von Bismarck.

1. The refusal of permission for a wind farm development here has given rise to challenge both on fact-specific grounds and on broader grounds. The latter include an issue of statutory interpretation relating to s. 15(1) of the Climate Action and Low Carbon Development Act 2015 as amended by the Climate Action and Low Carbon Development Act 2021.

Geographical context

2. The proposed development is a 13-turbine wind farm and associated works in the townlands of Fossy Upper, Aghoney, Gorreelagh, Knocklead, Scotland, Brennanshill, Monamantrry, Coolglass, Crissard, Kylenabehy, Monamanry, Brennanshill, Knocklead, Aghoney, Timahoe, Carrigeen, Ballygormill South, Money Upper, Hophall, Rathleague, Ballymooney, and Rathbrennan, in County Laois (https://www.pleanala.ie/en-ie/case/317809).

Facts

3. On 20th April 2022, the applicant submitted a pre-application request to the board.

4. The board held two pre-application consultation meetings with the applicant on 16th June 2022 and 16th November 2022, during which the project details, environmental assessments, and strategic considerations were discussed.

5. Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy entered into force on 30th December 2022.

6. On 8th May 2023, the board decided that the proposed development was a strategic infrastructure development within the meaning of s. 37A of the 2000 Act and thus that it was advising the applicant to submit a planning application direction to the board (https://www.pleanala.ie/en-ie/case/313375).

7. On 14th August 2023, the applicant submitted a planning application to the board, accompanied by an environmental impact assessment report (**EIAR**) and a Natura Impact Statement (**NIS**). The application was registered under ABP Ref. 317809-23.

8. The board received 106 public observations on the proposed development, raising various issues and concerns, such as environmental impacts, site suitability, grid connection, community consultation, and county development plan policies.

9. The board also received submissions from prescribed bodies, including Laois County Council, the Department of Housing, Local Government and Heritage, the Department of Defence, the Department of Transport, the Health and Safety Authority, and Transport Infrastructure Ireland.

10. The council's chief executive's report stated that the proposed development would materially contravene the county development plan 2021-2027 (the **CDP**) and its wind energy strategy (**WES**), as 12 of the 13 proposed turbines were located in areas designated as "not open for consideration" for wind farm development.

11. The board circulated the public observations and prescribed bodies' submissions, including the chief executive's report on 17th October 2023 and 25th October 2023 respectively requesting a response from the applicant. The applicant submitted a response to the board on 20th December 2023.

12. The inspector prepared a report dated 16th May 2024, following a site inspection on 11th April 2024. The inspector recommended that a grant of permission be refused on the basis that the proposed development represented an identified material contravention of the CDP and, therefore, concluded that the proposed development would be contrary to the proper planning and sustainable development of the area.

13. The board direction relying on the inspector generally is dated 21st August 2024.

14. The board order issued on 23rd August 2024. The board's decision notes the general support policy for wind energy development within the CDP but concludes that the proposed development would materially contravene objective CM RE 7 of the CDP and policy objective WES 7 of the WES, and would therefore be contrary to the proper planning and sustainable development of the area.

15. In the interests of making clear what facts are being found, I am accepting all of the evidence on behalf of the applicant that was not contested as to its substance. The most pertinent such evidence is set out in more detail later in this judgment.

Procedural history

16. I granted leave to seek judicial review to the applicant in the Planning and Environmental List on 14th October 2024. I confirmed that the expedited procedure under Practice Direction HC126 applied to the proceedings, and listed the substantive hearing for 20th December 2024.

17. On 1st November 2024, the board indicated its intention to contest the admissibility of the affidavit of Brian Keville sworn on behalf of the applicant. The parties agreed that the board could make that application to exclude the evidence of Brian Keville in its opposition papers and without the necessity for a formal motion.

18. The board filed its opposition papers on 15th November 2024.

19. The notice parties confirmed on 22nd November 2024 that they did not intend to file opposition papers.

20. The applicant delivered its written legal submissions on 29th November 2024 (filed on 2nd December 2024).

21. The board delivered its written legal submissions on 9th December 2024 (filed on 10th December 2024).

22. The applicant served a supplemental affidavit of Brian Keville on the parties on 13th December 2024 and subsequently applied to the court on 16th December 2024 for liberty to file it. The court granted liberty to file it on a without prejudice basis having regard to the board's stated objection.

23. The notice parties delivered their written legal submissions on 16th December 2024.

24. The applicant delivered its replying legal submissions on 19th December 2024.

25. The matter was then heard under the expedited procedure on 20th December 2024 (the last day of term) – only 2.5 months after proceedings were commenced. As with other similar cases, this sort of case processing speed would have been impossible, even unthinkable, without the expedited procedure.

Relief sought

26. The reliefs sought in the statement of grounds are as follows:

> "i. An order of certiorari quashing the decision of An Board Pleanála (the 'Board') of 23 August 2024 (the 'Decision') to refuse permission to the Applicant for the construction of a 13 turbine wind farm and associated works in the townlands of Fossy Upper, Aghoney, Gorreelagh, Knocklead, Scotland, Brennanshill, Monamantrry, Coolgalss, Crissard, Kylenabehy, Monamanry, Brennanshill, Knocklead, Aghoney, Timahoe, Carrigeen, Ballygormill South, Money Upper, Hophall, Rathleague, Ballymooney, and Rathbrennan, County Laoise (the 'Proposed Windfarm').
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> ii. A declaration that the Board, in failing to approve adequate planning applications to meet Ireland's 2030 renewable energy targets in the Climate Action Plan 2024, is failing to comply with its obligations under section 15 of the Climate Action and Low Carbon Development Act 2015;
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> iii. Such declaration(s) of the legal rights and/or legal position of the Applicant and/or of the legal duties and/or legal position of the Board as the Court considers appropriate and, in particular, insofar as the Court considers it appropriate, declaratory relief with respect to the obligations of the Board under section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended).
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> iv. An order remitting the matter to the Board with such directions as the Court considers appropriate.
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> v. Such further or other directions in relation to the affidavits filed in these proceedings or the hearing of these proceedings as may be necessary or appropriate.
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> vi. Further or other relief.
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> vii. An order providing for the costs of the within proceedings."

Grounds of challenge

27. The core grounds of challenge are as follows:

> "(1) Domestic Law Grounds
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> 1. Core Ground 1: The Decision is invalid as the Board erred in law and failed to comply with its obligations under section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended) (the '2015 Act') in making the Decision, and in particular in failing to exercise its discretion under section 37G and/or section 37(2)(b) of the Planning and

Development Act 2000 (as amended) (the '2000 Act') in accordance with the requirements of section 15 of the 2015 Act, further particulars of which are set out in Part 2 below.

2. Core Ground 2: The Decision is invalid as the Board has failed to properly exercise its jurisdiction and/or fettered its discretion in adopting, and applying in this case, a policy of refusing to exercise its discretion to grant permission in material contravention of the development plan under section 37G and/or 37(2)(b) of the 2000 Act for wind farm developments in areas designated unfavourably for wind farm development, further particulars of which are set out in Part 2 below.

3. Core Ground 3: The Decision is invalid as the Board purported to abrogate its obligations under section 15 of the 2015 Act and/or its jurisdiction under section 37G and/or 37(2)(b) of the 2000 Act to the Office of the Planning Regulation (the 'OPR') and/or the Minister for Housing, Local Government and Heritage (the 'Minister'), and in doing so failed to properly exercise its jurisdiction and/or fettered its discretion under those sections and/or had regard to an irrelevant consideration, further particulars of which are set out in Part 2 below.

4. Core Ground 4: The Board erred in law and acted ultra vires in considering whether to grant permission notwithstanding that the Proposed Development materially contravened the Development Plan by reference to section 37(2) of the 2000 Act instead of section 37G of the 2000 Act, further particulars of which are set out in Part 2 below.

5. Core Ground 5: The Decision is invalid as the Board failed to exercise its functions under the 2000 Act, and in particular its discretion under section 37G and/or section 37(2)(b) of the 2000 Act, in a manner that was compatible with the State's obligations under Articles 2 and 8 of the European Convention on Human Rights (the 'ECHR') in accordance with section 3 of the European Convention on Human Rights Act 2003, further particulars of which are set out in Part 2 below.

(2) EU Law Grounds

6. Core Ground 6: The Decision is invalid as the Board failed to treat the Proposed Development as being in the overriding public interest and serving public health and safety, and to give priority to that overriding public interest when balancing legal interests when making the Decision, as required by Article 3(2) of Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, further particulars of which are set out in Part 2 below.

7. Core Ground 7: The Decision is invalid as the Board breached the duty of sincere cooperation in Article 4(3) of the Treaty of the European Union, in refusing to exercise its discretion under section 37G and/or section 37(2)(b) of the 2000 Act to grant permission for the Proposed Development, and thereby failing to give effect to and/or jeopardising the attainment of the objectives of European Law, including the binding obligations of the European Union and its Member States with respect to climate change, further particulars of which are set out in Part 2 below."

28. I should also say that the headings in the statement of grounds dividing the domestic from EU law grounds are rather loose and can be regarded as indicative only, since EU law points are also relevant to core ground 1.

The fact-specific grounds

29. Ultimately this matter is capable of being decided on two highly fact-specific grounds, which I will deal with first – core ground 4 and core ground 3.

Core ground 4 – reliance on wrong section

30. Core ground 4 is:

"4. Core Ground 4: The Board erred in law and acted ultra vires in considering whether to grant permission notwithstanding that the Proposed Development materially contravened the Development Plan by reference to section 37(2) of the 2000 Act instead of section 37G of the 2000 Act, further particulars of which are set out in Part 2 below."

31. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 4: Reliance on section 37(2) of the 2000 Act

38. The Applicant's position is that Inspector incorrectly advised the Board: (i) that the Board's jurisdiction to materially contravene the Development Plan arose under section 37(2) of the 2000 Act, and (ii) that its jurisdiction was subject to the criteria cited in section 37(2)(b) of the 2000 Act (Inspector's Report, §11.3.23). The Board, therefore, incorrectly determined the application on the basis that its jurisdiction to materially contravene the Development Plan was circumscribed by the requirements of section 37(2)(b), which it was not, instead of determining the application having regard to its discretion under section 37G(6).

39. The Board's position is that the Board decision referred to s.37G of the PDA and the onus is on the Applicant to demonstrate that the Board did not exercise its powers under

that statutory provision. Insofar as the Inspector referred to s.37(2)(b) of the PDA, same must be understood in light of the Applicant's submissions which specifically quoted this provision and the Board decision must be read in context and in such a way as to render it valid. Further, the Applicant has not identified how the Inspector's analysis is irrational or unlawful or what factor(s) it might have relied on which are not captured by s.37(2) but potentially captured by s.37G(6)."

32. The board direction provides as follows (emphasis added):

"The submissions on this file and the Inspector's report were considered at a Board meeting held on 09/08/2024.

The Board decided to refuse permission, **generally in accordance with the Inspector's recommendation**, for the following reasons and considerations. The Board also made a determination in relation to costs as set out hereunder.

Reasons and Considerations

1. Policy Objective CM RE 5 of the Laois County Development Plan 2021-2027 seeks to promote and facilitate wind energy development in accordance with the Guidelines for Planning Authorities on Wind Energy Development and Appendix 5, Wind Energy Strategy of the Development Plan, subject to compliance with normal planning and environmental criteria. Notwithstanding the general supportive policy for wind energy development, Policy Objective CM RE 7 prohibits the location of wind farms in areas identified as 'Areas not open for consideration', as outlined in Map 3.2. The Wind Energy Strategy for County Laois delineates 'Areas Not Open for Consideration' whereunder Policy Objective WES 7 refers, stating that 'these areas are not considered suitable for wind farm development due to their overall sensitivity arising from landscape, ecological, recreational and/or cultural and built heritage resources as well as their limited wind regime'. Accordingly, having regard to the totality of relevant policy in relation to wind energy as set out in the statutory plan, it is considered that the proposed development would materially contravene Policy Objective CM RE 7 of the Laois County Development Plan 2021-2027 and Policy Objective WES 7 of the Laois County Wind Energy Strategy and would, therefore, be contrary to the proper planning and sustainable development of the area.

Note 1:

The Board noted the matters raised relating to archaeology and cultural heritage, in the Department of Housing, Local Government and Heritage's submission (dated 6th October 2023) and the response to these by the applicant. Ordinarily these matters would elicit a request for further information, however, given the substantive reason for refusal the Board decided not to pursue those matters in this instance.

Note 2:

In deciding to refuse permission, the Board noted that at policy-making stage the planning authority's Wind Energy Strategy was subject to oversight by the Office of the Planning Regulator and subsequent Ministerial Direction. However, the Board noted that the areas designated where wind energy development was 'not open for consideration' remained unaltered with regards to the area of the proposed development in the final confirmed and adopted County Development Plan.

Schedule of Costs

In accordance with the provisions of section 37(H)(2)(c) of the 2000 Act (as amended), the Board decided that the net amount due to be refunded to the applicant is €75,075.

Board Member: Tom Rabbette Date: 21/08/2024"

33. That is an express reliance on the inspector, without identifying any matter where a different approach is being taken.

34. The inspector's report includes the following (emphasis added):

"11.3.23. The Board will be aware that **under section 37(2)(a) of the Planning and Development Act 2000**, as amended, it may, **in determining an appeal under that section**, decide to grant permission even if the proposed development contravenes materially the Development Plan. This decision-making power is **subject to the provisions of paragraph (b)**, which stipulates that the Board may approve such developments under certain conditions: if the development is deemed strategically or nationally significant, if there are discrepancies or lack of clarity in the Development Plan's objectives regarding the project, if the development aligns with regional spatial and economic strategies, relevant government policies, or the statutory responsibilities of local authorities, or if it is consistent with the development trends and previous permissions in the area since the Development Plan was established.

11.3.24. In this instance, notwithstanding the Applicant's assertions of strategic importance and the imperatives of national energy policy, the compelling weight of evidence regarding the unsuitability of the site for wind farm development based on established policy

provisions, significant visual impact, and landscape sensitivity, as well as oversight by the OPR and Ministerial Direction in 2022 is overwhelming. The proposed development not only challenges the integrity of the Laois County Development Plan but also raises substantive concerns about the precedent it sets for future developments within protected and sensitive areas. Therefore, considering all these factors and maintaining alignment with the principles of proper planning and sustainable development, I recommend refusing permission for the proposed development."

35. It is confounding that the inspector referred to "an appeal" when he was dealing with a first-instance decision, and that he treated the application as being made under a section that obviously did not apply – and indeed that the erroneous reference to s. 37(2) wasn't picked up expressly by anybody subsequently. Admittedly the way the inspector phrased the matter suggested that he got the wrong reference from within the applicant's material, but the board has to be able to do better than fly on automatic pilot and copy-and-paste mistakes into its decision-making documents. Plus, he doesn't claim to have got the utterly inappropriate word "appeal" from the applicant.

36. This is not a mere technicality. Section 37(2) of the 2000 Act (which does not apply) provides:

> "(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.
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> (b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—
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> (i) the proposed development is of strategic or national importance,
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> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
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> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
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> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.
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> (c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan."

37. By contrast, s. 37G(6) of the 2000 Act (which does apply) provides:

> "(6) The Board may decide to grant a permission for development, or any part of a development, under this section even if the proposed development, or part thereof, contravenes materially the development plan relating to any area in which it is proposed to situate the development."

38. What is obvious is that s. 37G(6) is significantly more permissive than s. 37(2). The whole premise of the inspector's discussion of conditions in s. 37(2)(b) (which don't exist in s. 37G) is a completely false one. This is not merely relying on the wrong section but applying a test that doesn't exist in this context.

39. The reliance on the inspector's report by the board vitiates the decision on that basis, on totally conventional administrative law grounds.

40. The board's position that it is up to the applicant to demonstrate that the wrong section was relied on is misconceived. The applicant has demonstrated enough to give rise to such an inference by pointing to the error in the inspector's report and the express reliance on the report by the board. A public body should not take an "admit nothing, deny everything, put the onus on the applicant for everything" attitude. Despite the obviously erroneous wording, the board unacceptably isn't even admitting an error here, let alone the consequences of that. That is a poor strategic approach on any view, even leaving aside duty to assist the court. The board's legalistic defence at para. 111 of submissions that the applicant should have evidentially established the extent of the board's consideration of relevant matters doesn't get them anywhere in circumstances such as we have here. The board's internal consideration is a matter within its peculiar knowledge, and while it's not enough for an applicant to merely allege wrongful consideration with no basis for saying so, this applicant has done a lot more than that. By pointing to a totally misconceived and legally chaotic discussion in the inspector's report, the onus has been put on the board to lay its cards face up, if it has cards to lay. Instead it retreats into denial and the mantra that "the obligation is on the applicant ...".

41. But even if (which has not been in any way made out) matters were in fact properly considered, the material contains an error on the face of the record, which is a free-standing basis on which the decision should be quashed.

42. In this context one can also note that the inspector's analysis is disingenuous. The factors in favour of material contravention are improperly trivialised as "the Applicant's assertions", with no discussion in that regard and a complete and utter failure to even consider, still less decide, whether these factors have objective basis beyond assertion. In that regard it would be far outside the realm of the rational to deny such a basis or to characterise such matters as being only assertions.

43. The factors that are alleged to be "overwhelming" against the project are "established policy provisions, significant visual impact, and landscape sensitivity, as well as oversight by the OPR and Ministerial Direction in 2022". But the second two factors are irrelevant considerations, a matter to which we will turn shortly. The first three factors are the same thing. The ponderous-sounding "established policy provisions" are just the development plan. What the inspector is saying ultimately is that it is "overwhelming" that visual impacts (as enshrined in a plan) take priority over compliance with national and EU legally binding targets to address the climate emergency (which itself threatens landscapes here and globally with vastly more severe disturbance, desertification, sea level rise and so on). Only a lawyer would attempt to call that rational. Someone else might say that it represents a deeply skewed set of values and an unwillingness to face new realities so starkly highlighted by the board elsewhere, something to which we will now turn.

44. Courts sometimes endearingly look at cases in total isolation (a virtue-signalling but completely intellectually disreputable manoeuvre, although we needn't get into that in detail), but if we can widen the lens just a fraction, the contradictions of the present decision are apparent from two cases in particular. Firstly in *Shannon LNG v. An Bord Pleanála* [2024] IEHC 555, [2024] 9 JIC 3004 (Unreported, High Court, 30th September 2024), the board protested meekly that it was not in the business of making energy policy and was simply trying to reflect its understanding of governmental policy in its refusal of permission. Yet here, Government policy and legally binding targets that support a grant of permission are dismissed as mere "Applicant's assertions", and an approach is taken (intended to be a "precedent") that applied generally severely undermines the achievement of both national, EU and international policy and legally-enshrined national, EU and international climate goals (as Mr Keville outlines and as discussed below). The contrast between the board as would-be humble servant of Government energy policy in *Shannon LNG*, and as a significant roadblock and obstacle to the achievement of the climate goals of national and EU energy policy here, is startling.

45. Secondly, I noted in *Nagle View Turbine Aware Group v. An Bord Pleanála* [2024] IEHC 603 (Unreported, High Court, 1st November 2024) that the inspector in that case had concluded with the compelling and obvious point that:

> "While it is noted that many of the submissions reference their agreement in principle in respect of merits of renewable energy, there is resistance to the location of such a proposal within the locality for the range of reasons outlined in the summary of submissions received above. In order to address Climate Change, I would suggest that other elements of our environment and the context within which the environment is perceived must also change. This includes in particular the visual context of an area which cannot be expected to remain unchanged in perpetuity but particularly within the context of a climate emergency."

46. I will discuss this further later in the judgment, but again only a lawyer would attempt to call it rational for the board to produce totally inconsistent approaches in different decisions. To anyone else, the board can't say on the one hand that measures to tackle the climate emergency "must" (the inspector in *Nagle View*) result in changes to visual context, and on the other hand that renewable energy infrastructure "must" (the inspector in this case) take place within local policy provision - such that the board must capitulate immediately and without meaningful discussion to a provision of a development plan grounded in the council's assertion that visual context takes priority over the climate emergency. Whether all of this plunges one into depression, brings out one's inner *Skolstrejk för klimatet*, or just inspires judicial levels of indifference, is probably a matter of taste and perspective. But either way, the inspector's report here is an utterly flawed document in key respects, even on the most orthodox and established administrative law basis.

Core ground 3 – abrogation to Minister/ OPR

47. Core ground 3 is:

> "3. Core Ground 3: The Decision is invalid as the Board purported to abrogate its obligations under section 15 of the 2015 Act and/or its jurisdiction under section 37G and/or 37(2)(b) of the 2000 Act to the Office of the Planning Regulation (the 'OPR') and/or the Minister for Housing, Local Government and Heritage (the 'Minister'), and in doing so failed to properly exercise its jurisdiction and/or fettered its discretion under those sections and/or had regard to an irrelevant consideration, further particulars of which are set out in Part 2 below."

48. The parties' positions as recorded in the statement of case are summarised as follows:

> "Core Ground 3: Abrogation of the Board's obligations under section 15 of the 2015 Act and/or its jurisdiction under section 37G of the 2000 Act
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> 36. The Board did not expressly state a reason for its decision not to exercise its discretion to grant permission in material contravention of the Development Plan under section 37G(6) of the 2000 Act. However, Note 2 to the Direction and the relevant portions of the Inspector's Report (11.3.24 and §§12.5.30 – 12.5.33) make apparent that the Inspector and the Board decided that, in circumstances where the Office of the Planning Regulation (the 'OPR') and the Minister for Housing, Local Government and Heritage (the 'Minister') had not altered the areas designated not open for consideration for wind farm development during the section 31 Ministerial Direction procedure, the Board was not required to independently consider its obligations under section 15 of the 2015 Act and/or the exercise of its discretion under section 37G(6) of the 2000 Act. The obligation imposed by section 15 of the 2015 Act on the Board is not delegable and the Board had to perform, and to give consideration as to how to perform, its functions consistently with the Climate Plans and Objectives, regardless of what steps had or had not been taken by the OPR and the Minister. The Board therefore impermissibly purported to abrogate its obligations under section 15 of the 2015 Act and/or its jurisdiction under section 37G of the 2000 Act to the OPR and/or the Minister.
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> 37. The Board's position is that the Board Direction and Order clearly record the reasons for the Board's refusal and are to be considered in addition to the Inspector's Report which details why the Inspector considered that a grant in material contravention of the CDP was not appropriate. Insofar as the Applicant relies on Note 2 to ground a complaint that the Board abrogated its jurisdiction, this is denied. Without prejudice thereto, the pleas in respect of Note 2 comprise an impermissible collateral attack on the CDP process and the Applicant cannot impugn the Board decision by such means."

49. The position here is relatively simple. Note 1 and 2 in the direction appear under the heading of Reasons and Considerations. Note 1 explains why the board didn't do something it could have done. Note 2 says (emphasis added):

> "Note 2:
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> **In deciding to refuse permission**, the Board noted that at policy-making stage the planning authority's Wind Energy Strategy was subject to oversight by the Office of the Planning Regulator and subsequent Ministerial Direction. However, the Board noted that the areas designated where wind energy development was 'not open for consideration' remained unaltered with regards to the area of the proposed development in the final confirmed and adopted County Development Plan."

50. As the applicant says, "there is no way to read that other than as explaining why the board decided to refuse permission". That's what it says. It is a manifestly irrelevant consideration. It is true at one level that, in a situation where legally binding targets for renewables are not actually being met, attempts by councils to preclude or limit renewable energy infrastructure can generally be regarded as unlawfully inconsistent with EU, ECHR and national law and policy in this area. But the fact that the Office of the Planning Regulation (**OPR**) and the Minister for Housing, Local Government and Heritage (the **Minister**) failed to take any action to address the inconsistency (something that the Climate Change Advisory Council suggests they should urgently rectify across the board – especially I might add given the relative triviality of some of their objections to development plans in relation to other matters, which was my view of the storm in a teacup in *Friends of the Irish Environment v. Minister for Housing* [2024] IEHC 588 (Unreported, High Court, 17th October 2024), para. 150) doesn't make the refusal of an application for such infrastructure consistent with climate plans and goals when it wouldn't otherwise be so.

51. To put it another way, and again sticking to the most orthodox interpretation of administrative law, the fact that the Minister and OPR did not seek an amendment of the plan relates to a different test under a different statutory provision and is simply not a legally relevant consideration to the refusal of permission. The reliance on the former in coming to the latter decision vitiates that decision.

The other grounds

52. Having regard to the foregoing, the decision must be quashed and the matter remitted. I did give serious consideration to stopping here, or to only deciding the other grounds in part. Compared to purely legal decisions, tactical (not really the right word but no better one comes immediately to hand) decisions can involve a great deal more agony. But with all necessary caveats, in case I am wrong about the fact-specific points I think on balance and in the circumstances of this particular case (which can be distinguished from most other cases that can be decided on a net point), it is for the best if I decide all of the other grounds.

53. So we can turn next to core ground 1.

Core ground 1 - breach of 2015 Act

54. Core ground 1 is:

"1. Core Ground 1: The Decision is invalid as the Board erred in law and failed to comply with its obligations under section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended) (the '2015 Act') in making the Decision, and in particular in failing to exercise its discretion under section 37G and/or section 37(2)(b) of the Planning and Development Act 2000 (as amended) (the '2000 Act') in accordance with the requirements of section 15 of the 2015 Act, further particulars of which are set out in Part 2 below."

55. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 1: Failure to comply with Section 15 of the Climate Action and Low Carbon Development Act 2015

31. The Applicant's position is that the Board failed to comply with its obligations under section 15 of the Climate Action and Low Carbon Development Act 2015 (the '2015 Act') in making the Decision. Section 15 of the 2015 Act requires the Board to carry out its functions consistently, insofar as practicable, with specified climate plans and objectives (the 'Climate Plans and Objectives'), which include the Climate Action Plan 2024 ('CAP24'). Refusing permission for the Proposed Windfarm was inconsistent with the achievement of the targets set by CAP24 of achieving 9 GW of onshore wind and an 80% share of renewable electricity by 2030. In those circumstances, the Board was required to grant permission for the Proposed Windfarm, unless it determined that it was not practicable for it to do so. In that context, where the obligation on the Board under section 15 to act 'consistently', insofar as practicable, with the Climate Plans and Objectives is more stringent than the obligation on the Board under section 37G(2)(c) of the Planning and Development to 'consider' the provisions of the Development Plan, the Board was required to exercise its discretion under section 37G(6) to materially contravene the Development Plan, unless it was not practicable for it to do so. The Board therefore erred in law and acted contrary to section 15 of the 2015 Act in refusing permission for the Windfarm Development on the sole basis that it materially contravened the Development Plan.

32. The Board denies that it failed to comply with s.15 of the 2015 Act and further denies that s.15 requires it to grant planning permission for any individual development and, in particular, for the proposed development which the Board otherwise concluded is contrary to the proper planning and sustainable development of the area. None of the statutory or policy provisions recited by the Applicant mandate a grant of planning permission for a proposed development simply because it is a renewable energy development and nor do they require the Board to subjugate all other planning and environmental considerations, such that the fact that the proposed development may bring benefits in climate terms necessarily overrides other relevant planning considerations. The Board was entitled to reach the conclusion it did and there is no statutory obligation on the Board to contravene materially the CDP.

33. The Notice Parties position is that while section 15 (as amended in 2021) imposes a stronger obligation on relevant bodies, including the Respondent, than that originally imposed in 2015, section 15 of the 2015 Act cannot be interpreted in such a way that it would displace or disapply other legal obligations to which the Respondent is subject; that it would undermine the integrity of the planning system generally; or that it would transform a discretionary power vested in the Respondent, in the context of complex decision-making requiring the balancing of a wide range of interests, into a presumption that, subject to practicability, a specific outcome or result must follow."

Factors relevant to statutory interpretation here

56. While the board tries to drown s. 15 under Latin maxims, there are some rather more basic principles of statutory interpretation that need to be taken as the starting point.

57. In *A, B, C (A Minor Suing by His Next Friend, A) v. The Minister for Foreign Affairs and Trade* [2023] IESC 10, [2023] 1 I.L.R.M. 335 ("A, B, C") (at para. 73) Murray J. said:

"... it is to be remembered that the cases – considered most recently in the decision of this court in *Heather Hill Management Company CLG and anor. v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being

the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."

58. In *Heather Hill and Anor. v. An Bord Pleanála and Ors.* [2022] IESC 43, [2022] 2 I.L.R.M. 313, [2022] 11 JIC 1004 at paras. 159-162 Murray J. said:

> "159. In both *McCallig* [*v. An Bord Pleanála (No. 2)* [2014] IEHC 353 (Unreported, High Court, Herbert J., 5th June 2014)] and the Court of Appeal judgment in this case, reference was made to 'the presumption against radical amendments'. …
>
> 160. I cannot but think that this principle is sometimes now applied beyond its proper limits. One would expect that every statute 'changes' the law, and the limitations of language are such that it often happens that it can be said a law lacks clarity. Few statutes do not in some shape or form impinge upon rights (and in particular property rights) or effect alterations to the general law that cannot be described from someone's perspective as significantly departing from the pre-existing legal assumptions. There is no presumption against any of this. What there is, as the quoted passage shows, is a presumption that imprecise language will not be interpreted so as to impose significant changes to the pre-existing law particularly 'where the change is contrary to the actual objects of the Act'. To that might be added a related presumption that legislation will be strictly construed when it interferes with vested rights.
>
> 161. Where this has happened, however, it can be easily spotted. …
>
> 162. In this case, it might be argued that the legislation affects the rights of those who are respondents in proceedings to which the provision applies. Before the Act such persons might have enjoyed at least the expectation that they could apply for their costs if they successfully defended the claims against them, and they might say that the legislation should be strictly construed so as to maintain the status quo to the greatest extent possible having regard to the language of the section. But even if such a case could be made (and I express no view here as to the extent to which such an expectation has any legal effect) the fact is that there can be no doubt but that here the court is concerned with legislation which clearly and on any view effects radical changes to the law. That was the whole point. So, the argument is not as much that there should be an assumption that s. 50B did not radically change the law, but rather that the radical change in the law which it did introduce should be more limited than the language used to express it suggests. The language in the provision is not lacking in clarity, and the object for which the respondent contends is not supported by the text of the legislation. The respondent's argument therefore seeks to read down clear words by reference to an asserted but unsubstantiated purpose, not to interpret unclear language having regard to an object evident from the text. The presumption deployed is simply of no application where a major change in the law is clearly envisaged by the language used in the provision in question (and see *Farrell v. Attorney General* [1998] 1 IR 203, 226 per Keane J.)."

59. In addition, readings that, if possible, comply with EU law and ECHR obligations are required under the judgment of 13 November 1990, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, C-106/89, ECLI:EU:C:1990:395 and the European Convention on Human Rights Act 2003.

60. So the way in which I would propose to approach the interpretation of s. 15 in this case is to look at the following headings:

(i) the language of s. 15(1);
(ii) the context of s. 15(1);
(iii) the purpose of s. 15(1);
(iv) a conforming interpretation in EU law terms;
(v) a conforming interpretation in ECHR terms;
(vi) conclusion on interpretation; and
(vii) application of the law to the facts here.

Factor I – The language of s. 15(1)

61. Section 15(1) of the 2015 Act as amended by the 2021 Act provides:

> "15. (1) A relevant body shall, in so far as practicable, perform its functions in a manner consistent with—
>
> (a) the most recent approved climate action plan,
>
> (b) the most recent approved national long term climate action strategy,
>
> (c) the most recent approved national adaptation framework and approved sectoral adaptation plans,
>
> (d) the furtherance of the national climate objective, and
>
> (e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State."

62. We can start with what the section says on its face.

63. The distinction between have-regard-to obligations and comply-with obligations is foundational to administrative law and to planning law in particular.

64. The basic fault line is between regard and compliance, but there are shades of emphasis within that. I can attempt to sketch the spectrum as follows:

(i) Simple have-regard obligations – the decision-maker has to take the matter into account but is free to depart from it. The weight to be attached to the matter is in principle for the decision-maker. This can also be phrased as requirement to consider something. An example from the 2000 Act, s. 18(3)(a):

> "(3) (a) When considering an application for permission under section 34, a planning authority, or the Board on appeal, shall have regard to the provisions of any local area plan prepared for the area to which the application relates, and the authority or the Board may also consider any relevant draft local plan which has been prepared but not yet made in accordance with section 20."

(ii) Intensified have-regard obligations – the decision-maker is directed to have due or adequate or reasonable or appropriate regard to something. The weight to be given to the matter is now no longer totally discretionary. That implies something more than merely considering it and implies that the matter be given a degree of weight – not binding weight of course but material weight. It would normally mean an intensified duty of giving reasons – so that it would be clear why the decision-maker came to a conclusion different to the one that would be suggested by having regard to that factor in the event of such a different conclusion. An example from the Water Environment (Abstractions and Associated Impoundments) Act 2022, s. 86(2):

> "(2) Without prejudice to the generality of subsection (1), or section 20 (2)(i), the Agency, in considering an application by Waterways Ireland under Part 5 for a licence stated in the application to be necessary for the management, operation or maintenance of navigable water or a canal or navigation thereon, shall have due regard to the functions conferred on Waterways Ireland under the Canals Act 1986 and the Act of 1990 and the need to protect navigation in navigable waters or canals."

Or a definition from s. 2 of the Freedom of Information Act 1997:

> "'determined' means determined by the Minister and, in relation to a form, means determined having had appropriate regard to the needs of requesters, and cognate words shall be construed accordingly;"

(iii) Comply-with to a reasonableness standard obligations – only reasonable as opposed to total compliance is required. An example from the Schedule to the S.I. No. 79 of 1981 - Harbour Rates (Dublin Harbour) Order 1981:

> "2. Where 'by arrangement' is used in relation to any commodity mentioned in this Schedule the rates fixed in relation to that commodity shall be in reasonable conformity with the general standard of rates in the Schedule."

(iv) Comply-with insofar as relates to the achievement of objectives. Such an obligation leaves to the decision-maker the choice of detail of compliance but is mandatory as to the overall result to be achieved. A member state's choice of transposing measures falls into this category. Article 288 TFEU provides *inter alia*:

> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Section 10(1A) of the 2000 Act is in this category – compliance with the National Planning Framework (**NPF**) and Regional Spatial and Economic Strategy (**RSES**) is as to objectives only, not to every jot and tittle of those documents (*Killegland Estates Ltd. v. Meath County Council* [2022] IEHC 393 (Unreported, High Court, 1st July 2022) at para. 146) and indeed must also take account of the fact that provisions in the NPF for example may only require general compliance rather than being highly prescriptive – *Killegland Estates Ltd v. Meath County Council* [2023] IESC 39 (Unreported, Supreme Court, Hogan J., 21st December 2023) at para. 101. Section 10(1A) states:

> "(1A) The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements specified in guidelines under subsection (1) of section 28."

(v) Comply-with as far as practicable or possible – the decision-maker is required to comply with the matter in question, unless it is not possible or practicable to do so (concepts that are linguistically separate but only infrequently different in practice). Practicable means capable of being put into practice, not merely doing what is reasonable. This is a very high standard only just falling short of unconditional compliance requirements. It applies only unless compliance is not feasible: Lord Goddard L.C.J. in *Lee v. Nursery Furnishings Ltd* [1945] 1 All ER 387, Budd J. in *O'Donovan v. Attorney General* [1961] I.R. 114. Practicability is more exacting that reasonableness: *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 I.R. 574 *per* O'Donnell J. at para. 5: it is a "demanding and somewhat unforgiving standard". Practicability is objective and is not based on the subjective view of the actor concerned. An example from the Roads Act 1993, s. 18(6):

> "(6) In the performance of its functions, the Authority shall comply as far as possible with any plan approved under subsection (2)."

(vi) Compliance subject only to specified exception – here there must be straight compliance unless an exception applies. If the exception doesn't apply then there is not a further get-out clause of practicability or reasonableness. An example is s. 3 of the ECHR Act 2003:

> "3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

(vii) Unconditional comply-with obligations – these are straight obligations to comply with something with no exceptions envisaged. An example from the Local Government (Mayor of Limerick) and Miscellaneous Provisions Act 2024, s. 60(2):

> "(2) The panel may, if it considers it appropriate to do so, request the Mayor, the Príomh Chomhairleoir, the director general or any member to provide specified documentation or information within a period specified in writing by the panel and the person so requested shall comply with the request."

Or s. 19(3) of the 2000 Act:

> "(3) The Minister may provide in regulations that local area plans shall be prepared in respect of certain classes of areas or in certain circumstances and a planning authority shall comply with any such regulations."

65. Insofar as concerns climate issues, different obligations weigh in at different places on the spectrum. On its face, and in terms of its own language ("plain meaning" if you like), s. 15(1) is at level (v), well above merely having significant regard to something.

Factor II – The context of s. 15

66. The primary context of the amendment to s. 15 effected by the 2021 Act is that it significantly strengthened the pre-existing wording of the section.

67. Section 15 as originally enacted provided (emphasis added):

"15. (1) A relevant body shall, in the performance of its functions, **have regard to**—
(a) the most recent approved national mitigation plan,
(b) the most recent approved national adaptation framework and approved sectoral adaptation plans,
(c) the furtherance of the national transition objective, and
(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.
(2) The relevant Minister may, from time to time, give a direction to a relevant body requiring it to prepare, and submit to him or her, within such period as may be specified in the direction, a report specifying—
(a) the measures that the relevant body has adopted for the purposes of compliance by that relevant body with subsection (1), and
(b) the progress made by the relevant body in the performance of its functions in the manner referred to in that subsection.
(3) The relevant Minister may, from time to time, give a direction to a relevant body requiring it to adopt such measures as are specified in the direction for the purposes of compliance by the relevant body with subsection (1).
(4) A relevant body shall comply with a direction under this section.
(5) In this section—
'Act of 2014' means the Freedom of Information Act 2014 ;
'prescribed body' has the same meaning as it has in the Act of 2014;
'public body' has the same meaning as it has in the Act of 2014;
'relevant body' means—
(a) a prescribed body, and

(b) a public body;

'relevant Minister' means, in relation to a relevant body that is—

(a) a public body—

(i) referred to in section 6(1)(a) of the Act of 2014, the Minister of the Government having charge of the Department of State concerned,

(ii) referred to in section 6(1)(b) of the Act of 2014, such Minister of the Government as the Government may designate in relation to that public body,

(iii) referred to in section 6(1)(c) of the Act of 2014 that was established or appointed by—

(I) the Government, such Minister of the Government as the Government may designate in relation to that public body, or

(II) a Minister of the Government, the Minister of the Government who established or appointed the public body concerned,

(iv) referred to in paragraph (d) or (e) of section 6(1) of the Act of 2014, such Minister of the Government as the Government may designate in relation to that public body,

(v) referred to in section 6(1)(f) of the Act of 2014, that is directly or indirectly controlled by—

(I) a public body to which subparagraph (ii) or (iv) relates, such Minister of the Government as the Government may designate in relation to that public body,

(II) a public body to which subparagraph (iii)(I) relates, such Minister of the Government as the Government may designate in relation to that public body, or

(III) a public body to which subparagraph (iii)(II) relates, the Minister of the Government who established or appointed the public body referred to in section 6(1) (c) of the Act of 2014,

(vi) referred to in section 6(1)(g) of the Act of 2014, the Minister for Education and Skills,

(vii) referred to in section 6(1)(h) of the Act of 2014 (other than a public body referred to in subparagraphs (i) to (iv)), such Minister of the Government as the Government may designate in relation to that public body, and

(viii) referred to in paragraph (a) or (b) of section 6(2) of the Act of 2014 (other than a public body referred to in subparagraphs (i) to (iv)), such Minister of the Government as the Government may designate in relation to that public body,

and

(b) a prescribed body, such Minister of the Government as the Government may designate in relation to that public body."

68. As amended, section 15 now provides (emphasis added):

"15. (1) A relevant body shall, **in so far as practicable, perform its functions in a manner consistent with**—

(a) the most recent approved climate action plan,

(b) the most recent approved national long term climate action strategy,

(c) the most recent approved national adaptation framework and approved sectoral adaptation plans,

(d) the furtherance of the national climate objective, and

(e) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

(2) The relevant Minister may, from time to time, give a direction to a relevant body requiring it to prepare, and submit to him or her, within such period as may be specified in the direction, a report specifying—

(a) the measures that the relevant body has adopted for the purposes of compliance by that relevant body with subsection (1), and

(b) the progress made by the relevant body in the performance of its functions in the manner referred to in that subsection.

(3) The relevant Minister may, from time to time, give a direction to a relevant body requiring it to adopt such measures as are specified in the direction for the purposes of compliance by the relevant body with subsection (1).

(4) A relevant body shall comply with a direction under this section.

(5) In this section—

'Act of 2014' means the Freedom of Information Act 2014;

'prescribed body' has the same meaning as it has in the Act of 2014;

'public body' has the same meaning as it has in the Act of 2014;

'relevant body' means—
(a) a prescribed body, and
(b) a public body;
'relevant Minister' means, in relation to a relevant body that is—
(a) a public body—
(i) referred to in section 6(1)(a) of the Act of 2014, the Minister of the Government having charge of the Department of State concerned,
(ii) referred to in section 6(1)(b) of the Act of 2014, such Minister of the Government as the Government may designate in relation to that public body,
(iii) referred to in section 6(1)(c) of the Act of 2014 that was established or appointed by—
(I) the Government, such Minister of the Government as the Government may designate in relation to that public body, or
(II) a Minister of the Government, the Minister of the Government who established or appointed the public body concerned,
(iv) referred to in paragraph (d) or (e) of section 6(1) of the Act of 2014, such Minister of the Government as the Government may designate in relation to that public body,
(v) referred to in section 6(1)(f) of the Act of 2014, that is directly or indirectly controlled by—
(I) a public body to which subparagraph (ii) or (iv) relates, such Minister of the Government as the Government may designate in relation to that public body,
(II) a public body to which subparagraph (iii)(I) relates, such Minister of the Government as the Government may designate in relation to that public body, or
(III) a public body to which subparagraph (iii)(II) relates, the Minister of the Government who established or appointed the public body referred to in section 6(1) (c) of the Act of 2014,
(vi) referred to in section 6(1)(g) of the Act of 2014, the Minister for Education and Skills,
(vii) referred to in section 6(1)(h) of the Act of 2014 (other than a public body referred to in subparagraphs (i) to (iv)), such Minister of the Government as the Government may designate in relation to that public body, and
(viii) referred to in paragraph (a) or (b) of section 6(2) of the Act of 2014 (other than a public body referred to in subparagraphs (i) to (iv)), such Minister of the Government as the Government may designate in relation to that public body,
and
(b) a prescribed body, such Minister of the Government as the Government may designate in relation to that public body."

69. There are three essential aspects that emerge from the context.

70. Firstly, the change to s. 15(1) is clearly a step-change from a mere have-regard-to obligation to a comply-with obligation. That distinction is foundational and not to be minimised or nullified, and nor could it have been inadvertent.

71. Secondly, the subsequent provisions whereby the Minister can give notice to a body can't on any reasonable view contradict that or be deemed to be some sort of self-contained mechanism to enforce the law which renders it wholly or partly non-justiciable. Those notice provisions pre-existed the 2021 Act in any event.

72. And thirdly, any pinched and narrow reading of s. 15(1) has to be reality checked against what the 2021 Act says overall (rather than just about how one public body operates at the moment). And what we find is that it imposes sweeping obligations across the public sector from the Government down.

73. The overall architecture of the 2015 and 2021 Acts in the context of the framework of supranational obligations is well summarised on behalf of the applicant by Mr O'Sullivan:

"53. The key elements of that framework, relevant to these proceedings, are inter alia as follows:

i. Section 3(1) of the 2015 Act puts in place a mandatory climate objective, known as its 'national transition objective': 'the State shall, so as to reduce the extent of further global warming, pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy'.

ii. To achieve this mandatory objective, the Climate Act puts in place:

I. binding carbon budgets, which limit the permitted emissions for Ireland over three successive periods between 2021 and 2035 (section 6A, 6B and 6D),

II. binding sectoral emissions ceilings, which limit the permitted emissions for specified sectors over those periods (section 6D),

III. a climate action plan, which must be consistent with the carbon budget programme, and set out inter alia sector specific actions that are required to comply with the carbon budget and sectoral emissions ceiling for the period to which the plan relates (section 4),

IV. a national long term climate action strategy, which must be consistent with the carbon budget programme and set out the manner in which it is proposed to achieve the national climate objective (section 4), and

V. a national climate change adaptation framework (section 5).

iii. Section 6A(6) further puts on a legally binding footing Ireland's interim target of 51% emissions reductions relative to 2018 levels by 2030.

iv. To ensure that the foregoing objectives are complied with in practice, section 15 of the 2015 Act requires that public bodies shall, in so far as practicable, perform its functions in a manner consistent with the Climate Plans and Objectives.

v. A detailed monitoring and implementation framework is put in place through section 12 of the 2015 Act, which requires the Climate Change Advisory Council ('CCAC') to prepare annual reviews on the progress made during the immediately preceding year in: (i) achieving reductions in greenhouse gas emissions, (ii) complying with the carbon budget and each sectoral emissions ceiling for that period, and (iii) furthering the achievement of the national climate objective, and to make recommendations with respect inter alia to measures necessary with respect to the achievement of the sectoral emissions ceilings, the national climate objective, or any international or EU law obligations.

vi. CCAC reviews are required to have regard, inter alia, to Environmental Protection Agency ('EPA') greenhouse gas emissions projections."

74. Specifically, the 2021 Act inserts a new s. 3 in the 2015 Act:

"3. (1) The State shall, so as to reduce the extent of further global warming, pursue and achieve, by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy (in this Act referred to as the 'national climate objective').

(2) For the purpose of enabling the State to pursue and achieve the national climate objective, the Minister shall make and submit to the Government for approval—

(a) carbon budgets in accordance with sections 6B and 6D,

(b) a sectoral emissions ceiling in accordance with section 6C,

(c) a climate action plan in accordance with section 4,

(d) a national long term climate action strategy in accordance with section 4, and

(e) a national adaptation framework in accordance with section 5.

(3) The Minister and the Government shall carry out their respective functions under sections 4, 5, 6, 6A, 6B, 6C and 6D in a manner—

(a) that is consistent with the ultimate objective specified in Article 2 of the United Nations Framework Convention on Climate Change done at New York on 9 May 1992, and:

(i) any mitigation or adaptation commitments entered into by the European Union in response or otherwise in relation to that objective;

(ii) the steps specified in Articles 2 and 4(1) of the Agreement done at Paris on 12 December 2015 to achieve that objective,

and

(b) which takes account of the most recent national greenhouse gas emissions inventory and projection of future greenhouse gas emissions, prepared by the Agency.

(4) The Minister shall consult with the Advisory Council for the purpose of the performance, by him or her, of his or her functions under sections 4, 5 and 6.

(5) The Government may consult with the Advisory Council for the purpose of the performance by them of their functions under sections 4 to 6D."

75. It also inserts a new s. 4:

"Climate action plan and national long term climate action strategy

4. (1) The Minister shall, to enable the State to pursue and achieve the national climate objective—

(a) prepare an annual update to the Climate Action Plan 2019 to Tackle Climate Breakdown, published by the Minister on 17 June 2019 (in this Act referred to as a 'climate action plan'), and

(b) prepare, not less frequently than once every 5 years, a national long term climate action strategy (in this Act referred to as a 'national long term climate action strategy').

(2) The Minister shall, when preparing a climate action plan under subsection (1)(a)—

(a) ensure that the plan is consistent with the carbon budget programme,
(b) set out a roadmap of actions, to include—
(i) sector specific actions that are required to comply with the carbon budget and sectoral emissions ceiling for the period to which the plan relates,
(ii) sector specific actions that are required to address any failure, or projected failure, to comply with the carbon budget and sectoral emissions ceiling for the period to which the plan relates, and
(iii) other actions and measures that are reasonably necessary to support Government policy on climate change, including measures to inform, and promote dialogue with, the public regarding the challenges and opportunities in the transition to a climate neutral economy,
and
(c) consult with—
(i) any other Minister of the Government as he or she considers appropriate, including each Minister of the Government who has responsibility for sector specific actions, and
(ii) the public and such persons as he or she considers appropriate.
(3) The roadmap of actions referred to in subsection (2)(b) shall—
(a) specify measures that, in the Minister's opinion, will be required for the first budget period in a carbon budget programme,
(b) set out an overview of the policies and, to the extent feasible, measures, that, in the Minister's opinion, will be required for the second budget period in a carbon budget programme, and
(c) outline potential policies that, in the Minister's opinion, may be required for the third budget period in a carbon budget programme.
(4) The Minister shall, in each year, commencing with the year 2021, submit a draft of the climate action plan to the Government for approval.
(5) The national long term climate action strategy shall specify the manner in which it is proposed to achieve the national climate objective and shall include—
(a) projected reductions in greenhouse gas emissions and the enhancement of sinks, for a minimum period of 30 years,
(b) projected reductions in greenhouse gas emissions in each of the relevant sectors determined by the Government under section 6C and the enhancement of removals in such sectors, for a minimum period of 30 years, and
(c) an assessment of potential opportunities for achieving reductions in greenhouse gas emissions in the sectors referred to in paragraph (b).
(6) When preparing the national long term climate action strategy the Minister shall—
(a) ensure that the strategy is consistent with the carbon budget programme,
(b) have regard to Article 15 of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 20181 on the Governance of the Energy Union and Climate Action, and
(c) consult with—
(i) any other Minister of the Government as he or she considers appropriate, and
(ii) members of the public and such persons as he or she considers appropriate.
(7) The Minister shall, as soon as may be after a draft national long term climate action strategy has been prepared, submit the draft national long term climate action strategy to the Government for approval.
(8) For the purposes of performing their respective functions under this section, the Minister and the Government shall have regard to the following matters:
(a) the need to deliver the best possible value for money consistent with the sustainable management of the public finances and to maximise, as far as practicable, the net benefits to society taking into account the impact of greenhouse gas emissions;
(b) the need to promote sustainable development and restore, and protect, biodiversity;
(c) relevant scientific or technical advice;
(d) climate justice;
(e) any recommendations or advice of the Advisory Council;
(f) the social and economic imperative for early and cost-effective action in relation to climate change;
(g) in so far as practicable, the need to maximise employment, the attractiveness of the State for investment and the long term competitiveness of the economy;
(h) the fact that the means of achieving a climate neutral economy and other measures to enable the State to pursue the national climate objective may not yet be fully identified and

may evolve over time through innovation, evolving scientific consensus and emerging technologies;
(i) the role of behavioural change on the part of individuals and different sectors of society in supporting the Government to pursue the national climate objective and the policies and measures required to effect such change;
(j) the risk of substantial and unreasonable carbon leakage as a consequence of measures implemented by the State to pursue the national climate objective;
(k) the requirement for a just transition to a climate neutral economy which endeavours, in so far as is practicable, to—
(i) maximise employment opportunities, and
(ii) support persons and communities that may be negatively affected by the transition;
(l) the protection of public health;
(m) the National Planning Framework (or, where appropriate, the National Spatial Strategy);
(n) the special economic and social role of agriculture, including with regard to the distinct characteristics of biogenic methane;
(o) where a national long term climate action strategy has been approved under this section, the most recent approved national long term climate action strategy;
(p) the 2019 Climate Action Plan or, where a climate action plan has been approved under this section, the most recent approved climate action plan;
(q) where a national adaptation framework has been approved under section 5, the most recent approved national adaptation framework;
(r) where sectoral adaptation plans have been approved under section 6, the most recent approved sectoral adaptation plans.
(9) The Government may—
(a) approve, or
(b) approve, subject to such modifications as they consider appropriate,
a climate action plan submitted to them under subsection (4) or a national long term climate action strategy submitted to them under subsection (7).
(10) The Minister shall, as soon as may be, cause an approved climate action plan and an approved national long term climate action strategy to be laid before the Houses of the Oireachtas.
(11) A Minister of the Government, shall, in so far as practicable, perform his or her functions in a manner consistent with the most recent approved climate action plan and the most recent approved national long term climate action strategy.
(12) In this section—
'carbon leakage' means the transfer, due to climate policies, of production to other countries with less restrictive policies with regard to greenhouse gas emissions;
'National Planning Framework' has the meaning assigned to it in section 20A of the Planning and Development Act 2000 ;
'National Spatial Strategy' means the 'National Spatial Strategy: 2002-2020' published by the Government on 28 November 2002, or any document published by the Government which amends or replaces that Strategy."

76. It requires local plans consistent with national plans:
"Role of local authority
14B. (1) Each local authority shall prepare and make a plan relating to a period of five years (in this section referred to as a 'local authority climate action plan') which shall specify the mitigation measures and the adaptation measures to be adopted by the local authority.
(2) A local authority shall make a local authority climate action plan—
(a) in the case of the first such plan, within 12 months of the receipt of a request from the Minister, which request shall be made not later than 18 months after the coming into operation of section 16 of the Climate Action and Low Carbon Development (Amendment) Act 2021, and
(b) in the case of each subsequent plan, not less than once in every period of five years.
(3) A local authority climate action plan shall, in so far as practicable, be consistent with the most recent approved climate action plan and national adaptation framework, and in making a local authority climate action plan, a local authority shall have regard to—
(a) the most recent approved national long term climate action strategy,
(b) the most recent approved sectoral adaptation plans, and
(c) any policies of the Minister or the Government on climate change.
(4) In making the local authority climate action plan, a local authority shall—
(a) consult and co-operate with adjoining local authorities,

(b) consult with the Public Participation Network in the administrative area of the local authority and such other persons as the local authority considers appropriate,
(c) co-ordinate, where appropriate, with adjoining local authorities in relation to the mitigation measures and adaptation measures to be adopted,
(d) consider any significant effects the implementation of the local authority climate action plan may have on adjoining local authorities, and
(e) consider any submissions made to it by an adjoining local authority under subsection (5)(c).
(5) A local authority shall, before making a local authority climate action plan—
(a) publish, in such manner as the local authority considers appropriate, a draft of the proposed local authority climate action plan,
(b) publish a notice on the internet and in at least one newspaper circulating in the administrative area of the local authority inviting members of the public and any interested parties to make submissions in writing in relation to the proposed local authority climate action plan within such period (not exceeding two months from the date of the publication of the notice) as may be specified in the notice, and
(c) have regard to any submissions made pursuant to, and in accordance with, a notice under paragraph (b).
(6) A local authority climate action plan shall be submitted to the members of the local authority concerned and those members shall, by resolution, within a period of six weeks—
(a) approve, or
(b) approve, subject to such modifications as they consider appropriate,
the local authority climate action plan.
(7) A local authority climate action plan shall have effect for a period of five years from the date on which it is approved by the members of the local authority concerned.
(8) The Minister may issue guidelines, consistent with furthering the achievement of the national climate objective, to local authorities in respect of the content and preparation of a local authority climate action plan and a local authority shall comply with any such guidelines.
(9) Not more than 30 days after a local authority climate action plan is approved under subsection (6), the local authority shall publish the local authority climate action plan in such manner as the local authority considers appropriate.
(10) A local authority may, at any time, vary or revise a local authority climate action plan approved under this section, and this section applies to any such variation or revision in the same manner as it applies to a local authority climate action plan, subject to the modification that any such variation or revision shall have effect for the unexpired period of the local authority climate action plan under subsection (7), and to any other necessary modifications.
(11) In this section, 'adjoining local authority' means, in relation to a local authority, a local authority whose administrative area adjoins the administrative area of the first mentioned local authority."

77. The board, taking s. 15(1) out of context, presents the applicant's interpretation as a shuddering nightmare of an implicit change in the law. But positioning s. 15(1) in the overall context of the legislation as a whole renders such scare tactics rather less plausible. It is clear that the 2021 Act has created a broad range of sweeping obligations across the whole public sector, of which the implications on the board are of a piece, and not to be read down on the basis of some sort of special pleading for planning decision-makers – a board-related exceptionalism that permeates the whole set of opposing submissions.

78. Had the legislature been required to amend each and every enactment to which the broad and sweeping obligations of the 2015 and 2021 Acts apply, the Bill would probably still be in the Parliamentary Counsel's office being worked on, such would be the complication involved.

79. Insofar as it is suggested that the wide application of s. 15 is a reason to give it a narrow interpretation, I agree with the applicant that far from this being the case, the approach of a general requirement of general application underlines and reflects the need for "rapid, far-reaching and unprecedented changes to all aspects of society and the economy". To subject the Act to the detail of any and every rule in a contrary sense is to allow it to die a thousand deaths.

80. This isn't in any way unprecedented – as the applicant points out it is a similar approach to that in s. 3 of the ECHR Act 2003.

81. The applicant neatly illustrates that where a different approach is taken such as the example of transposition of directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive) by granular Act-by-Act amendment, it has taken decades to implement EU law properly, and indeed one can't be sure that even that has happened fully as yet.

82. The argument that the Act can't mean what it says because it should have amended the 2000 Act results in two possible outcomes, both unacceptable:

(i) either this applies to all Acts – in which case, as the applicant points out, to accept this interpretation of s. 15 would almost entirely negate the section because the argument of no effect without express amendment could be made about any statutory provision;

(ii) or it only applies to the 2000 Act, in which case it would be unacceptable as a form of special pleading – implicitly, the illogical argument is that the 2000 Act alone is so sacred that it can't be influenced by anything other than express language.

83. The board's argument that the applicant's reading is a form of breach of a postulated principle against implicit amendment of the law is a classic case of the fallacy outlined by Murray J. in *Heather Hill*. And anyway there is no implicit change in the law here – the change is very explicit.

84. At para. 71 of submissions, the board raises the petrified cry against any "far-reaching" interpretation. But that term isn't the insult the board seems to think it is. Indeed the State in submissions (para. 7) expressly endorsed that phrase.

85. While of course I don't put weight on the Dáil debates, I can't help noticing in passing that one cabinet Minister at second stage of the Bill for the 2021 Act rather undermined the board's case in advance by positively championing that phrase, saying (emphasis added) that she and her own colleagues in Government had advocated for:

> "... an ambitious **and far-reaching** response to the climate crisis facing our planet. This immense climate challenge requires an equally immense effort to combat what will be, if we do not act, an utterly devastating impact on our world as we know it.
>
> ... The message was clear; we need climate action now. This momentum and appetite for system change, not climate change, has been steadily building. The urgency of this crisis has united millions of people across the globe. They have marched in their droves to strike for climate, demand change and fight for their futures. We must deliver emission reductions now for our children's futures, our planet's future and our shared future.
>
> Sustained climate action requires a combined commitment and co-operation across politics and society. ...The climate challenge can only be addressed if we are all working together to do so. This requires a change in the way we govern, live and work. We must educate our children through school, university and apprenticeships so they are equipped with the skills and knowledge to tackle this challenge head-on. We need system change so that it is clear, obvious, safe and cheaper to make the green choice rather than the environmentally destructive one. ...
>
> The Government's consultation on the climate action plan does not just ask what we can do but how Government can best help everybody to work together to meet this challenge. The Climate Action and Low Carbon Development (Amendment) Bill is a momentous Bill. I commend [the sponsoring Minister, Minister Ryan and] every single official, activist, expert and campaigner who contributed to make this the vital Bill it truly is. This Bill is the culmination of years of hard work, endless campaigning and unwavering commitment by so many to protect our planet as best we can, to make it a liv[e]able and safe place for generations to come and to transform Ireland into a world leader when it comes to tackling this climate crisis. Ní neart go cur le chéile. (https://www.oireachtas.ie/en/debates/debate/dail/2021-04-21/25/)"

86. Without relying on that obviously, the actual statutory context of s. 15(1) viewed in the light of the Act as a whole supports an interpretation that the subsection means what it says.

Factor III – The purpose of s. 15

87. The climate emergency represents a critical risk to human and other natural life on earth: *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2021] 3 I.R. 1, [2020] 2 I.L.R.M. 233, [2020] 7 JIC 3107; *Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024. The UN IPCC states:

> "All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade. Global net zero CO2 emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (*high confidence*) ... [Sixth Intergovernmental Panel on Climate Change (IPCC) assessment report, summary for policymakers (https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) cited in *Toole v. Minister for Local Government and Heritage (II)* [2024] IEHC 610 (Unreported, High Court, 1st November 2024) at para. 11]"

88. A legislative purpose to facilitate radical and far-reaching action is consistent with the fact that:

(i) we know from the IPCC that rapid, deep and in most cases immediate cuts in greenhouse gas (**GHG**) emissions are required to meet essential climate targets in the interests of preserving the state of the earth as a liveable habitat for human and other natural life; and

(ii) we know – definitionally – that rapid, deep and immediate cuts to GHG emissions can't be delivered by business as usual – and therefore it follows that radical new approaches are required, and required now, not at some indeterminate future time.

89. Similar statements were available to legislators when the Dáil declared a climate emergency in May 2019 and when the 2021 Act was enacted.

90. The State's submission in the present case reinforces this (emphasis added):

"THE CLIMATE ACT FRAMEWORK

6. The State recognises that climate change is **the single greatest threat facing humanity** and that taking ambitious climate action is necessary to ensure a sustainable future both nationally and globally.

7. In particular, limiting global warming to 1.5°C above pre-industrial levels will require **rapid, far-reaching and unprecedented changes in all aspects of the economy and society**. The ambitious but necessary emissions reductions targets necessary to achieve this objective will, by their nature, **require very significant changes in Irish society**.

8. **It is for that reason** that the Climate Action and Low Carbon Development (Amendment) Act 2021 amended the Climate Action and Low Carbon Development Act 2015 to put in place the robust legal framework for climate action that is now found in the Climate Act."

91. The applicant throws down the gauntlet as to whether this is "all just empty rhetoric", because the board (largely supported by the State) recoils in horror from the logical implications of this and demands the right to continue business as usual. But an immediate end to business as usual is a precondition for planetary survival.

92. The problem is that the problem is so big that to even describe it factually sounds like scaremongering. I tried to summarise it at para. 9 of *Toole v. Minister for Local Government and Heritage (II)* [2024] IEHC 610 (Unreported, High Court, 1st November 2024):

"9. The central mechanic of the greenhouse effect is that each net additional unit of greenhouse gases (GHG), of which the most significant is carbon dioxide (CO_2), in the atmosphere contributes to global warming, and the effect is cumulative. It is not the case that there is some safe limit or timeframe up to which all will be well – every increase in atmospheric GHG amplifies climate change. Furthermore, reaching peak emissions, which is supposed to be happening around now, merely means that the *level of annual increase* in emissions is not itself increasing. But the cumulative level of emissions – which is what counts – will continues to increase for decades, and even when it stops increasing (net zero), we will be left at whatever concentration of GHG as exists at that point, which will be vastly in excess of pre-industrial levels. Indeed the effects of climate change will continue long after global temperature reaches its peak, which is still a long way off. And actually reducing GHG concentrations and temperatures from there to pre-industrial levels, if that were to be the ultimate goal, would require colossal measures of a kind that do not seem to be currently at hand. According to the Royal Society, even with no further GHG emissions as and from now (a completely counterfactual scenario), global temperatures would remain elevated for a thousand years (https://royalsociety.org/news-resources/projects/climate-change-evidence-causes/question-20/). The actual and potential effects of global warming are well documented – drought, heatwaves, wildfires, extreme rainfall and weather events, ocean acidification, other massive biodiversity and habitat loss, melting of sea ice and permafrost, rising sea levels and changes in ocean currents with potentially catastrophic effects, potential tipping points if as yet uncertain planetary boundaries are, or already have been, crossed, again with the potential for catastrophic results, and the effects of the foregoing on the human population including in terms of food security, vulnerability of housing to floods and sea rises, and other issues of physical safety."

93. The applicant's summary of how the law has changed in recent years is worth quoting at length. The applicant identifies the three critical binding developments as the enactment of the 2021 Act, the 2022-23 EU legislation, and the 2024 decision in *Klimaseniorinnen*:

"5. The invocation in these proceedings of the serious risks that arise by reason of the climate emergency, the vital importance of renewable energy, and the imperative for immediate and far-reaching action to combat climate change, is not novel. Nor is this the first case where litigants have sought to rely on that urgency to alter the approach of the Board – or indeed the Court – to planning applications where climate action is engaged.

6. Those attempts have, to date, almost invariably failed. The Courts have made clear that neither the urgency that arises with respect to climate change, nor the failure by the

global community to address that urgency, can of itself create a justiciable standard against which decisions of the Board, or the policy of the State, can be challenged (see, e.g. An Taisce v An Bord Pleanála & Ors [2021] IEHC 254 ('An Taisce') (at 42-45); Coyne v An Bord Pleanála [2023] IEHC 412, ('Coyne') (at 90-91).

7. The Courts have recognised that, since the enactment of the 2015 Act, the State's response to climate change is not 'a law-free zone' (Coyne, at 91) and 'what might once have been policy has become law' (Friends of the Irish Environment v The Government of Ireland [2020] IESC 49, [2021] 3 IR 1 ('FOIE'). However, while the 2015 Act may have imposed an obligation to have regard to climate policy, it did not dictate compliance with climate policy and so was not effective at achieving climate goals.

8. That situation has changed significantly, by reason of three important advances in the legal framework governing climate action.

9. First, the amendment of the 2015 Act by the 2021 Act has fundamentally altered the legal landscape, through the introduction of a detailed and legally binding framework consisting of inter alia:

i. a binding 'national transition objective' to transition to a low carbon, climate resilient and environmentally sustainable economy by the end of 2050 (section 3(1));

ii. binding carbon budgets that must provide for a 51% reduction in emissions in 2030 on 2018 levels (section 3(2) and 6A(5));

iii. sectoral emission ceilings that must be within the limits of the carbon budgets (section 6C(1));

iv. climate action plans that must be consistent with those carbon budgets, and set out the sector specific actions that are required to comply with those carbon budget and the sectoral emissions ceilings (section 4(2));

v. a national long term climate action strategy that is required to be consistent with those carbon budgets, and to specify the manner in which it is proposed to achieve the national climate objective (section 4(2));

vi. a requirement on the Minister and the Government when making and approving those measures (and the Climate Change Advisory Committee ('CCAC') generally), to carry out their functions in a manner consistent with:

I. the objective stated in Article 2 of the United Nations Framework Convention on Climate Change done at New York on 9 May 1992 (the 'UNFCC'),

II. any mitigation or adaptation commitments entered into by the EU in response or otherwise in relation to that objective, and

III. the steps specified in Articles 2 and 4(1) of the Paris Agreement to achieve that objective;

and which takes account of the most recent EPA national greenhouse gas emissions inventory and projections (section 3(2));

vii. a requirement that Ministers, in so far as practicable, perform their functions in a manner consistent with the most recent approved climate action plan and the most recent approved national long term climate action strategy (section 4(11));

viii. a requirement that Ministers comply, in so far as practicable, in the carrying out of their functions, with the sectoral emissions ceiling that applies to the sector for which that Minister has responsibility (section 6C(9));

ix. a requirement that relevant bodies, which include the Board shall, in so far as practicable, perform their functions in a manner consistent with the Climate Plans and Objectives (as defined below) (section 15(1));

x. a detailed monitoring and compliance framework based on annual and periodic reviews by the CCAC which must draw on the EPA national greenhouse gas emissions inventory and projections, and a requirement on the Minister to account to a joint committee with respect to progress (section 12, 13 and 14A); and

i. a requirement on local authorities to make a climate action plan specifying the mitigation measures and the adaptation measures to be adopted by the local authority, which shall, insofar as practicable, be consistent with the most recently approved climate action plan and national adaptation plan (section 14B).

10. When compared to the general and non-binding obligations that arose under the unamended 2015 Act, there can be no doubt but that the Legislature, in enacting the 2021 Act, intended to bring about a transformative shift in how Ireland addresses the climate crisis, and to create an effective and enforceable framework for action. In that respect, that relevant bodies and Ministers can now be held directly to account in the Courts with respect to individual actions and decisions, based on an assessment of whether they have acted consistently with the Climate Plans and Objectives and, if not, whether they have established that it was not practicable for them to do so, is key to achieving the aims of that framework.

11. Second, to address the energy crisis following the Russian invasion of Ukraine, two EU measures were adopted with the express aim of accelerating the deployment of renewable energy: Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy (the 'Temporary Renewable Energy Regulation') and Directive (EU) 2023/2413 as regards the promotion of energy from renewable sources (the 'RED III Directive').

12. Both RED III and the Temporary Renewable Energy Regulation introduce a presumption that renewable energy projects are of overriding public importance for the purposes of certain environmental measures, including Article 6(4) of the Habitats Directive. In addition, the Temporary Renewable Energy Regulation requires that Member States ensure, for projects recognised as being of overriding public interest, that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case.

13. In the domestic context, both the Climate Action Plan 2023 ('CAP23') (at 12.1.4 and 12.3.1) and the Climate Action Plan 2024 ('CAP24') (at 12.4.1.1) state that it is necessary to ensure that renewable energy generation projects and associated infrastructure are considered to be in the overriding public interest, reflecting those EU law measures.

14. These new measures are again intended to be transformative with respect to the consenting procedures for renewable energy development in the EU. They complement the existing detailed and prescriptive framework for combating climate change in the EU, as summarised in the affidavit of Donal O'Sullivan.

15. Third, in April 2024, the European Court of Human Rights ('ECtHR') in Verein KlimaSeniorinnen v Switzerland, Application No. 53600/20 ('KlimaSeniorinnen'), found a breach of the European Convention on Human Rights ('ECHR') with respect to climate change, for the first time. In particular, the ECtHR considered that Article 8 imposes a positive obligation on the State 'to put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life' and a further positive obligation to '<u>apply that framework effectively in practice</u>', and in an 'timely' manner. (paragraph 538) (emphasis added here and below).

16. These developments fundamentally alter the legal landscape, introducing judiciable standards capable of grounding substantive challenges to development consent decisions, based on climate concerns. To the knowledge of the Applicants, this is the first time that the Court will be called on to determine the implications of these new developments for the obligations on the Board when determining applications for permission for renewable energy development."

94. The affidavit of Mr O'Sullivan, uncontradicted in these respects, illustrates two fundamental points:

(i) reaching the targets for renewable energy are key to reaching the overall binding national climate targets and related international commitments; and

(ii) Ireland is falling short in relation to those targets.

95. Rather than try to paraphrase these points, the affidavit is worth quoting at length (some emphasis added):

"Climate Obligations of Ireland and the EU under the Paris Agreement

15. The obligations of the EU and Ireland with respect to climate action, and in turn the Board's obligations, stem from the international framework: the United Nations Framework Convention on Climate Change (the 'UNFCCC') and the measures adopted under that Convention, and in particular the Paris Agreement.

16. The Paris Agreement, together with subsequent decisions of the Conference of the Parties ('COP') and the Conference of the Parties serving as the Meeting of the Parties ('CMA'), outlines a clear and detailed oversight framework, agreed by the international community following extensive negotiation, aimed at ensuring that the goals of the Paris Agreement are achieved.

17. The central goal of the Paris Agreement is defined in Article 2(1)(a) thereof, and commits the Parties to the aim of:

'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change'.

18. Under Article 4(2) of the Paris Agreement, **the key obligation on the parties designed to ensure the achievement of the long term temperature goal ('LTTG') set out in Article 2 is to 'prepare, communicate and maintain successive nationally determined contributions that it intends to achieve' ('NDCs') and to 'pursue**

domestic mitigation measures, with the aim of achieving the objectives of such contributions'.

19. Under Article 4(3) of the Paris Agreement, **the NDCs of each party 'shall reflect its highest possible ambition'**.

...

Commitments of the EU and Ireland under the Paris Agreement

22. **Under Article 4(16) of the Paris Agreement, the Member States of the European Union – including Ireland – have opted to fulfil their international climate change obligations jointly, by**:

i. preparing and submitting an EU NDC to the UNFCCC collectively for all Member States of the European Union so as to comply with the Paris Agreement, and

ii. **implementing its obligations under the Paris Agreement in the internal legal order of the European Union, by a detailed system of legislative measures that are binding on all Member States**.

23. The EU and its Member States submitted their intended nationally determined contribution ('INDC') on 6 March 2015. The EU's INDC became its NDC when the EU ratified the Paris Agreement in October 2016, and the EU committed to a target of at least 40% economy-wide reduction of greenhouse gas emissions by 2030, compared to 1990 level.

24. On 18 December 2020, the EU submitted an updated and enhanced NDC, committing the EU to reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. On 16 October 2023, the EU submitted a further updated NDC, maintaining the same target as the 2020 NDC. ...

25. In addition to interim targets, **the EU has committed to achieving a climate-neutral EU by 2050, consistent with Article 4(1) of the Paris Agreement**. This aim was endorsed by the European Council in December 2019 and, on 6 March 2020, the EU long-term low greenhouse gas emission development strategy, reflecting that climate neutrality objective, was adopted by the Council and submitted to the UNFCCC Secretariat in accordance with Article 4(19) of the Paris Agreement. ...

EU Legislative Framework

26. **The EU's commitments under the Paris Agreement were given binding effect in EU law, in particular, through the adoption of Regulation (EU) 2021/1119** of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (the 'European Climate Law') which entered into force on 29 July 2021, and which, inter alia:

i. establishes a framework for achieving the binding objective, in Article 2(1), of climate neutrality within the European Union by 2050, with the aim of achieving negative emissions in the European Union thereafter, and

ii. provides, in Article 4(1), for an interim binding EU target of a net domestic reduction in greenhouse-gas emissions by at least 55% compared to 1990 levels by 2030, and for the setting of a climate target for 2040 within six months of the first Global Stocktake under Article 15 of the Paris Agreement.

27. The European Union's overall climate targets are supported by a detailed legislative framework at the EU level.

28. First, a number of key legislative measures in the EU law framework divide emissions reduction targets between three legislative systems, which cover different sectors of the economy: the EU Emissions Trading System ('EU ETS'), the Effort Sharing Regulation ('ESR') and the regulation on land-use related emissions and removals ('LULUCF').

The Emissions Trading System

29. The EU ETS is governed by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ('the ETS Directive,').

30. The system works on the 'cap and trade' principle. A cap is set on the total amount of certain greenhouse gases that can be emitted by installations covered by the system and is reduced over time so that total emissions fall. The sectors covered by the system include power and heat generation, energy-intensive industry sectors, and commercial aviation. The electricity sector is covered by the ETS.

31. Since the commencement of Phase 3 of the ETS (2013-2020), there is a single, EU-wide cap on emissions, in place of the previous system of national caps. The ETS is therefore centrally controlled by the EU and Member States do not have individual targets. The current target of the EU ETS is to reduce emissions from the existing EU ETS sectors and from maritime by 62% by 2030, compared to 2005 levels.

The Effort Sharing System

32. EU effort sharing measures are governed by Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/3013 (the 'Effort Sharing Regulation' or the 'ESR').

33. The ESR was introduced in 2018, replacing the Effort Sharing Decision ('ESD'), and set nationally binding non-ETS targets for 2030. The initial aim of the ESR was to collectively deliver a reduction of 30% in total EU emissions from non-ETS sectors by 2030, which together with a 43% cut in ETS emissions by 2030 would allow the EU to achieve the 40% reduction target committed to in its initial NDC.

34. Under the revised ESR, a new more ambitious target of EU-level greenhouse gas emissions reductions of 40% by 2030 compared to 2005 was introduced. Together with the 62% reduction envisaged under the ETS, this 40% reduction in ESR emissions is aimed at achieving the EU's overall 55% reductions target.

35. Unlike the ETS, which operates at an EU level, with a single EU target, **effort sharing measures have individual binding targets for Member States. Under Article 4 and Annex I of the ESR, Ireland is required to achieve a 42% reduction in ERS emissions by 2030, compared to 2005.** Although the electricity sector falls under the ETS rather than the ESR, decarbonisation of the electricity sector is key to permitting decarbonisation of the sectors governed by the ESR, and therefore key to achieving the EU and Ireland's targets under the ESR.

LULUCF

36. The LULUCF Regulation (Regulation (EU) 2018/841) addresses emissions and removals of CO2 in the land use, land use change and forestry sectors. The EU has adopted a Union net greenhouse gas removals target of 310 million tonnes of CO2 equivalent, as a sum of the reported greenhouse gas net emissions and removals in the sector in 2030. I reference LULUCF here for completeness, where it is the third measure addressing emissions reduction in the EU. However, it is not relevant to the obligations that arose for the Board under section 15 of the 2015 Act with respect to the Proposed Development.

Renewable Energy Targets

37. In addition to the ETS, ESR and LULUCF, which address emissions reduction directly, there are a range of further EU measures that do not directly govern emissions reductions, but that are essential to achieving those reductions.

38. In particular, and relevant to these proceedings, ambitious targets for improving energy efficiency and for increasing renewables in the EU energy mix have been agreed by the EU. In line with the European Commission's plan to make Europe independent from Russian fossil fuels well before 2030, (RePowerEU), the EU has agreed to increase ambition on energy savings through an enhanced target to reduce final energy consumption at EU level by 11.7% in 2030, and a new target for increasing renewable energy in final energy consumption of at least 42.5% by 2030, with an additional 2.5% indicative top up that would allow the EU to reach 45%.

39. **The enhanced target of reducing final energy consumption at EU level by 11.7% in 2030 was made binding by Article 4(1) Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) (the 'Energy Efficiency Regulation')**.

40. The enhanced target for increasing renewable energy in final energy consumption of at least 42.5% by 2030 was made binding on the EU by Article 3(1) of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (the 'Renewable Energy Directive'), as amended by Directive (EU) 2023/2413 as regards the promotion of energy from renewable sources (the 'RED III Directive').

41. **Member States are required to define their individual contribution to achieving that 42.5% legislative target, under Article 4, Article 5 and Annex II of the Governance of the Energy Union and Climate Action [Regulation (EU) 2018/1999] (as amended) (the 'Governance Regulation')**. Ireland initially defined its individual contribution at 31.4%. However, following criticism by the Commission through the NECP process, Ireland increased its individual contribution to 42.5%. ...

42. Notably, in the context of Ireland's EU obligations to achieve its defined individual contribution of an increase of renewable energy in final energy consumption of 43% by 2030, compared to 2005 levels, Ireland has confirmed in its national energy and climate plan that:

'Ireland's proposed trajectory will not be in line with the desired trajectory set out in the Governance Regulation. This is primarily due to the fact that large projects, particularly offshore wind projects, cannot be constructed in shorter timeframes and will not be fully operational by the end of the decade.'

43. This indicates that, not only are the Renewable Energy Targets essential to meeting Ireland's EU obligations in that respect, Ireland will need to go further in that respect, if the requirements of the Governance Regulation are to be complied with.

EU Law Compliance Mechanism

Compliance by Member States with their obligations under EU Climate Law is monitored through a detailed monitoring and compliance framework established by the Governance Regulation.

...

European Wind Power Action Plan

47. In October 2023, the European Commission published the European Wind Power Action Plan, which sets out immediate actions to be taken together by the European Commission, Member States and industry to support the wind energy sector. It builds on existing policies and legislation and focuses on six main areas, including the acceleration of deployment through increased predictability and faster permitting.

48. The European Wind Power Action Plan recognises that **wind energy is 'pivotal to meeting the EU's decarbonisation objectives and delivering clean, affordable and secure electricity to our households, our industry and increasingly our transport sector,' and cautioned that 'with 16 GW of new wind projects installed in 2022, we are nowhere near the 37 GW/year needed as cost-effective contribution to achieving the EU 2030 targets**.'

49. The European Wind Power Action Plan calls on Member States to commit to specific, concrete pledges on wind energy deployment volumes for at least the period 2024-2026, providing a clear and credible overview of wind energy deployment in the following years, to be formalised by the end of 2023. On 19 December 2023, those pledges were published, in a document entitled 'Wind Pledges - European Wind Power Action 19 December 2023'. That document confirmed:

'These non-legally binding pledges show the commitment of Member States to accelerate and ramp-up the deployment of wind in the EU, both onshore and offshore. They show that there is a solid business case and a positive outlook for the wind sector in the EU in the short-, medium- and long-term, under the positive effect of recent EU and Member States' policies. However, more is needed to get closer to the 37 installed GW a year needed to cost-effectively deliver on the 2030 EU renewable energy target.'

50. Ireland's commitment under its Wind Pledge mirrors its target under CAP24. Thus Ireland's target of 9GW for onshore wind forms part of its commitment to the European Union as its contribution to meet the EU's 2030 EU renewable energy target under the Renewable Energy Directive as amended by RED III, and under the European Wind Power Action Plan, as well as constituting a national target.

...

The Climate Action Plan 2024 and the Renewable Energy Targets

56. CAP24 is the third annual update to the Government's plan to deliver on its climate targets and transition to a low-carbon, climate-resilient and environmentally sustainable economy and society. The plan sets out actions across all key sectors, including electricity, transport, buildings, industry, agriculture, land use and waste, as well as cross-cutting themes such as governance, finance, innovation, education and international cooperation. The plan is informed by extensive stakeholder engagement, technical analysis, environmental assessment and alignment with the carbon budgets and sectoral emissions ceilings.

57. The plan recognises the potential of renewable energy, especially wind and solar, to decarbonise the electricity sector and enable the electrification of other sectors, such as transport and heating. The plan envisages a large-scale deployment of renewables, with a target of 80% renewable electricity by 2030, supported by grid development, interconnection, flexibility, storage and demand response. The plan also supports community and micro-generation, as well as offshore wind development, which is facilitated by the Maritime Area Planning Act 2021.

58. The Climate Action Plan 2024 sets out a sectoral emissions ceiling for the electricity sector of 40 MtCO2eq for the first carbon budget period (2021-2025) and 20 MtCO2eq for the second carbon budget period (2026-2030). **This requires a 75% reduction in emissions from the electricity sector by 2030, based on 2018 levels. Achieving**

these targets is crucial as the electricity sector plays a pivotal role in decarbonising other sectors, including transport, heating, and industry, through electrification.

59. The plan outlines **the need for a significant increase in the share of renewable electricity to 80% by 2030. It further outlines ambitious targets for deploying 9 GW of onshore wind**, 8 GW of solar power, and at least 5 GW from offshore wind projects. I will refer to those obligations collectively as the 'Renewable Energy Targets'.

Summary of Obligations Arising

60. In summary, therefore, the relevant obligations arising for the EU and its Member States under international and EU law are inter alia as follows:

i. The EU and its Member States have committed in their NDC submitted to the UNFCCC under Article 4(16) of the Paris Agreement to a target of at least 55% reduction of greenhouse gas emissions by 2030, compared to 1990 levels;

ii. The EU and its Member States have committed in their EU's long-term low greenhouse gas emission development strategy submitted to the UNFCCC under Article 4(16) of the Paris Agreement to achieving climate neutrality within the EU by 2050;

iii. Article 2(1) of the European Climate Law puts in place a binding obligation on the EU and its Member States of achieving climate neutrality within the EU by 2050;

iv. Article 4(1) of the European Climate Law puts in place an interim binding EU target of a net domestic reduction in greenhouse-gas emissions by at least 55% compared to 1990 levels by 2030;

v. The Emissions Trading System requires an EU wide reduction in ETS emissions of 62% by 2030, compared to 2005 levels;

vi. The Effort Sharing Regulation requires an EU wide reduction in ESR emissions of 40% by 2030, compared to 2005 levels;

vii. The Energy Efficiency Regulation requires a reduction in final energy consumption at EU level by 11.7% in 2030, compared to 2005 levels;

viii. The Renewable Energy Directive as amended by the RED III Directive requires an increase of renewable energy in final energy consumption of 42.5% by 2030, compared to 2005 levels.

61. The obligations on Ireland, and the electricity sector, specifically under EU and national law are as follows:

i. Ireland must achieve climate neutrality by 2050, under section 3 of the 2015 Act;

ii. Section 6A(5) of the 2015 Act requires Ireland to achieve an interim target of an overall 51% emissions reductions by 2030, compared to 2018;

iii. The Effort Sharing Regulation requires Ireland to reduce its ESR emissions by 42% by 2030, compared to 2005 levels;

iv. The Renewable Energy Directive together with Article 4, Article 5 and Annex II of the Governance Regulation require Ireland to achieve their defined individual contribution of an increase of renewable energy in final energy consumption of 43% by 2030, compared to 2005 levels;

v. Under the 2015 Act and CAP24, the electricity sector is required to remain within its sectoral emissions ceiling of 40 MtCO2eq for the first carbon budget period (2021-2025) and 20 MtCO2eq for the second carbon budget period (2026-2030);

vi. Under CAP24, and to achieve compliance with the sectoral emissions ceiling, the electricity sector must achieve the Renewable Energy targets.

62. The centrality of the Renewable Energy Targets to achieving Ireland's and the EU's broader obligations with respect to climate change as detailed above is clear from CAP24, the CCAC Annual Review 2023, the CCAC Annual Review 2024 for Electricity and Ireland's Updated NECP published in July 2024. The Applicant will rely on the full content of those documents, in this respect.

63. In particular, however, I am advised and believe that CAP24, the CCAC Annual Review 2023, the CCAC Annual Review 2024 for Electricity make clear that:

i. **Achieving the Renewable Energy Targets is necessary to achieving the 75% reduction in emissions from the electricity sector by 2030 relative to 2018 required by CAP24**;

ii. **Achieving that 75% reduction in emissions from the electricity sector by 2030 relative to 2018 is necessary to comply with the legally binding sectoral emissions ceiling for the electricity sector in CAP24, of 40 MtCO2eq for the first carbon budget period (2021-2025) and 20 MtCO2eq for the second carbon budget period (2026-2030)**;

iii. **Decarbonisation of the electricity sector is the foundation for the decarbonisation of other sectors** such as heat, transport and industry, and onshore wind

energy is the foundation for decarbonisation of the electricity sector in the short-term, pending the rollout of offshore wind energy;

iv. **Meeting the Renewable Energy Targets, and in particular the 9 GW onshore wind target, is therefore essential** not only to meeting the sectoral emissions ceiling for the electricity sector, but also to facilitate other sectors in meeting their sectoral emissions ceilings;

v. Complying with the sectoral emissions ceiling for the electricity sector, and facilitating other sectors in meeting their sectoral emissions ceilings, is **necessary for Ireland to comply with the legally binding carbon budgets adopted by Ireland on 6 April 2022**;

vi. Complying with Ireland's carbon budgets is **necessary for Ireland to achieve its binding national target of 51% emissions reductions relative to 2018 by 2030**;

vii. Achieving compliance with Ireland's binding national target of 51% emissions reductions relative to 2018 levels by 2030 is fundamental to the furtherance of the binding national climate objective, to transition to a climate-neutral economy by 2050;

viii. The Renewable Energy Targets are therefore key to the objective of mitigating greenhouse gas emissions.

64. The Renewable Energy Targets are therefore of key importance in achieving the domestic targets set out in the Climate Plans and Objectives, as well as complying with Ireland and the EU's obligations under national and international law."

96. All of this context supports a purposive interpretation of s. 15(1) in line with what it actually says. A weak meaning falling short of an obligation to comply will result in a failure to achieve the statutory purpose.

Factor IV – EU law conformity

97. As the applicant submits, the duty of sincere cooperation under art. 4(3) TEU applies to the State and its emanations (including relevantly the board and the court). The problem for the board is that an interpretation of s. 15(1) that allows the board to merely have-regard-to climate goals rather than actually comply with such goals would give rise to a failure to give effect to or a jeopardising of the attainment of the objectives of European law, including the binding obligations of the European Union and its member states with respect to climate change, contrary to the duty of sincere cooperation.

98. An interpretation of s. 15 insofar as it applies to the board's decisions on such infrastructure that supports the overall requirement to comply with EU law regarding supply of renewable energy, is consistent with the *Marleasing* requirement to read domestic law in an EU law-compatible way.

99. Mr O'Sullivan's evidence, not contradicted in this respect, as to the extent of compliance with EU law obligations is as follows:

"Progress to Achieving the Climate Plans and Objectives and the Renewable Energy Targets

65. It is well known that **Ireland, the EU and the global community are not on track to meet their respective climate targets**.

66. In the context of the global community, this was confirmed in the first Article 14 Global Stocktake, in inter alia Decision 1/CMA.5 of the Council of Ministers, Outcome of the first global stocktake, ...

67. In the context of the EU, this was confirmed in the Commission's Climate Action Progress Report 2023, ...

68. **In the context of Ireland's EU law obligations, this was confirmed in the Commission's Climate Action Progress Report 2023, the Commission Recommendation (EU) 2024/1029 of 23 February 2024 on the draft updated integrated national energy and climate plan of Ireland covering the period 2021-2030, and the Commission Staff Working Document Assessment of the draft updated National Energy and Climate Plan of Ireland (C(2024) 1187 final)**.

69. In the context of Ireland's domestic obligations, that Ireland is not on track to meet its targets was confirmed by the CCAC Annual Review 2023, the CCAC Annual Review 2024 for Electricity, Ireland's Updated National Energy and Climate Plan published in July 2024 and the EPA 2023 and 2024 greenhouse gas emissions projections for the period 2023-2050.

70. Finally, and most relevantly for the purposes of these proceedings, **it is clear that Ireland is not on track to meet the Renewable Energy Targets, or the requirements of the Climate Plans and Objectives more generally. In particular, Ireland is not on track to meet the 9 GW onshore wind target, and significant and urgent further action is required if there is to be any prospect of that target being met**. This has been outlined in the Statement of Grounds, and is clear from the relevant EPA publications, the CCAC Annual Review 2023, the CCAC Annual Review 2024 for Electricity, and Ireland's Updated National Energy and Climate Plan published in July 2024 and the Environmental

> Protection Agency ('EPA') 2023 and 2024 greenhouse gas emissions projections for the period 2023-2050."

100. The State replies to the effect that the 2015 and 2021 Acts were not in purported transposition of any *specific* EU law measure. And it's true that the Acts don't state on its face that they are transposing any given such measure. It's also true that EU law doesn't, in terms, require member states to impose such an interpretative and general obligation on public bodies. But as the applicant says, that is "just irrelevant". The critical point is that faced with an issue of interpretation of a national provision, the domestic courts should give that provision an interpretation that supports and implements EU law rather than allows such law to be undermined.

101. The irrelevance of the point that no specific directive is being implemented by the 2021 Act is borne out by the important relevant principle laid down by the CJEU Grand Chamber in the judgment of 5 October 2004, *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01 to C-403/01, European Court Reports 2004 I-08835, ECLI:EU:C:2004:584:

> "115 Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari*, paragraphs 49 and 50).
>
> 116 In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.
>
> 117 In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraphs 16 and 17).
>
> 118 In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, *Marleasing*, paragraphs 7 and 13).
>
> 119 Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded."

102. As the applicant submits, the interpretative obligation arising under EU law extends not only to ensuring that Ireland's climate targets under EU law are properly transposed, but rather requires the national courts to do everything within their power, including to consider the whole body of rules of national law, and to interpret and apply that body of rules in so far as possible, to achieve an outcome consistent with the objective pursued by EU climate law. Thus I agree with the applicant that the court must interpret the 2015 Act, insofar as possible, to ensure that Ireland's EU law climate obligations will in fact be met. Such an interpretation is consistent with s. 15(1) meaning what it says rather than being merely a souped-up "have-regard-to" obligation.

Factor V – ECHR conformity

103. Section 2 of the ECHR Act provides:

> "2. —(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

104. Section 3(1) of the ECHR Act 2003 provides:

"3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

105. It can be noted that this is pretty much at or near the highest point on the regard-comply spectrum – it means comply unless compliance is illegal.

106. Self-evidently, in interpreting the ECHR, one has regard to the Strasbourg jurisprudence. Section 4 provides:

"4.—Judicial notice shall be taken of the Convention provisions and of—
(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
(b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
(c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,
and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

107. In April 2024, as discussed in *Toole (II)*, the ECtHR gave judgment in *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024 (https://hudoc.echr.coe.int/eng/?i=001-233206). The judgment contains a wide overview of developments in climate law and litigation. The court found a violation of art. 8 of the ECHR which encompasses a right to effective protection from the serious adverse effects of climate change. There was a breach of the positive obligations thereby imposed in terms of establishing a relevant domestic regulatory framework relating to budgeting for and limiting emissions. In addition, the failure by the domestic courts to accept the applicants' standing to litigate was a breach of art. 6.1 of the ECHR. In the latter respect, reliance was placed on the Aarhus Convention and related guidance, *The Aarhus Convention: An Implementation Guide*, Second Edition, 2014 (https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf), and the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, 2015 (https://www.un-ilibrary.org/content/books/9789210574082).

108. For present purposes, there are two pertinent elements to the *Klimaseniorinnen* case – putting in place a framework of measures and complying with that framework:

"550. When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:
(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);
(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.
...
573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context."

109. I agree with the applicant that one must conclude that art. 8 of the ECHR imposes a positive obligation on the State to put in place a legislative and administrative framework with respect to climate change designed to provide effective protection of human health and life, and a further positive obligation to apply that framework effectively in practice, and in a timely manner.

110. Ireland has a framework of course but (as discussed above under the heading of EU law conformity) it is clear that it is not being complied with. The latter failure, on the logic of *Klimaseniorinnen*, involves a breach of art. 8 of the ECHR.

111. The application of the framework in practice is crucial. As we know from the termination of pregnancy context (*Case of A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 (https://hudoc.echr.coe.int/fre?i=001-102332)), the Strasbourg court takes a dim view of a situation where there are laws on the books but a failure to put in place practical arrangements to implement them.

112. The problem for the opposing parties here is firstly that an interpretation of s. 15(1) that allows the climate goals in legislation to fall by the wayside due to a failure by the board to exercise discretionary powers to override development plans is an interpretation that fails to conform with ECHR obligations contrary to s. 2 of the 2003 Act.

113. Secondly, the failure by the board to use its discretionary powers in that manner constitutes a failure to act consistently with ECHR obligations contrary to s. 3 of the 2003 Act.

114. The board rather weakly raises the defence that a body corporate doesn't have *locus standi* to argue for the right to a private life in a climate-relevant sense under art. 8 of the ECHR. But that isn't the point of course. Whether an individual applicant has standing in a hypothetical case or not doesn't affect the interpretation of a statutory provision. The point being made is that the court should interpret the 2015 Act as amended in an ECHR-compatible manner. Such an interpretation supports the applicant's proposition that s. 15(1) should be read as meaning what it says.

115. Thus the requirement to read legislation in an ECHR-compliant manner supports an interpretation of s. 15 that goes beyond the board's have-regard-to interpretation and the State's meaningful engagement interpretation. It reinforces the applicant's case that the interpretation should ensure that ECHR obligations are complied with in practice, including compliance in practice with stated goals in relation to renewable energy infrastructure.

Conclusion on the meaning of s. 15

116. Sometimes (although not as often as some people think) the language, context and purpose of a provision, or the requirements of EU law conformity or ECHR conformity, pull in different directions. This is not such a case.

117. On the contrary, all vectors of interpretation point strongly in the same direction – the need for an imperative reading of s. 15(1) in line with what it says, namely that the board and any other relevant body is required to act in conformity with the climate plans and objectives set out in the subsection unless it is impracticable to do so.

118. I therefore reject the watered-down interpretations of s. 15(1) offered by the opposing parties here and accept the applicant's interpretation.

119. The logical implication of that is that s. 15 applies to the board as it applies to other relevant bodies and as other provisions of the legislation apply to central and local government. It imposes an obligation to act consistently with the climate plans and objectives referred to in s. 15 insofar as practicable. That does not mean allowing an application which is prohibited by law. That wouldn't be practicable apart from anything else. But it does mean exercising discretionary and evaluative powers in whatever way is most likely to be consistent with the relevant plans and objectives.

120. The attempt by the board to cut down the scope and meaning of s. 15 by reference to Latin maxims such as *noscitur a sociis* (submissions para. 43) or *generalia specialibus* (para. 45) brings to mind a different classical analogy, that of the Emperor Nero fiddling while Rome burned in 64 CE. That isn't an irrelevant comparison – the greenhouse effect involves the planet literally burning due to the cumulative volume of GHGs in the atmosphere since the Industrial Revolution.

121. The State's plea for a "wide margin of appreciation" reduces the compliance language of s. 15 to something functionally indistinguishable from a mere have-regard-to obligation.

122. The State re-writes s. 15 into vanishing point in its submissions at para. 103:

> "103. Fifth, taking all of these considerations together, it is submitted that section 15(1) cannot be interpreted as an overriding obligation which would take precedence over other legal or other considerations to which a relevant body is required to or entitled to have regard in the performance of its functions. Section 15(1) is intended to support relevant bodies in acting in a manner consistent with the Climate Act, rather than to disrupt the proper and lawful performance of their functions."

123. Merely providing "support" to bodies reduces the section to a mere information note or reminder that they can do something they can do anyway. It drains the section of the clear imperative force on its face, reinforced by its context and purpose and by EU and ECHR obligations. The applicant calls attention to the stark disconnect between the State's recognition of the climate emergency as the supreme challenge of our time in theory, and the rejection of the logical implications of that in practice.

124. As far as practicability is concerned, that has an objective and established meaning. It is not up for renegotiation in every case, and still less here where there is an overriding legal context to ensure compliance with overall goals.

125. The State submits at para. 95:

> "The duty under section 15(1) cannot be interpreted in such a way as to impose an unduly onerous and exacting obligation on relevant bodies, including, in particular, in the context of individual decision-making functions a relevant body may discharge (including functions of a quasi-judicial nature)."

126. As the applicant says, this is an attempt to read down the section to deprive it significantly of its efficacy. And the scarecrow reference to quasi-judicial functions falls flat. Being judicial (or even quasi-judicial, surprisingly) doesn't give one an immunity from being subjected to mandatory statutory provisions.

127. Again we have a massive and unexplained contradiction between the State's opening rhetorical acceptance of the climate emergency as the supreme challenge of our times, combined with quibbling rejection and inadequacy of intention when it comes to actually operationalising that to its logical conclusions. Pure Otto von Bismarck.
(https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00001699)

128. That lack of intention can be the only explanation for the State's dogged insistence in reading in quite a lot of qualifying language into s. 15 that is simply not there (for example that it only requires a body to merely "endeavour"). Nor is it the case that the obligations end if a body *considers* that a further step is impracticable – that step has to be actually impracticable. The applicant quite correctly points out the "myriad of ways" in which the State is adding qualifiers that are simply not to be found in the section. This in substance amounts, impermissibly, to the State in effect getting cold feet about the legislation for some unexplained reason and attempting to render it of limited meaning in practice by rewriting it in a narrow way.

129. Opposing parties generally love nightmare scenarios and floodgates arguments, and the board has been to the fore on occasion in that regard. It surely wins another campaign medal with the following:

> "68. However, if one was to follow the logic of this argument, it appears that any projects which contribute to a reduction of greenhouse gas emissions and, thereby, meet the objectives in s.15 of the 2015 Act would have to be granted (in so far as is practicable). Conversely, any projects which contribute to an increase in such emissions would have to be refused. The role of the Board as decision-maker would be reduced to a mechanistic analysis of whether a specific project either increased or decreased greenhouse gas emissions and, it appears on the Applicant's logic, the Board would have to grant or refuse permission based on that analysis, regardless of other consequences.
>
> 69. This would reduce the decision-maker's discretion, which of course must be guided by the overall principle of proper planning and sustainable development, to vanishing point."

130. This is over-simplistic I'm afraid, as bogeyman defences tend to be. It ignores several critical factors:

(i) firstly, the board's position is not totally mechanistic because there does need to be an assessment of practicability;

(ii) secondly, that the concept of proper planning and sustainable development inherently (indeed for practical purposes expressly) means development that is sustainable in a planetary sense – the need for renewable energy provision is an irreplaceable part of sustainable development, not something to be set in opposition to it;

(iii) thirdly, there will be many developments that have no discernible impact one way or the other on climate goals – the board is quite free to continue business as usual in those areas;

(iv) further, projects causing emissions aren't automatically affected to the same extent because of the different context and the fact that due to displacement effects it is much less certain whether refusal would bring about a net contribution to climate goals;

(v) the applicant accepts that if the board independently of a council's view as expressed in a plan considered that a particular development would be contrary to proper planning and sustainable development, that would be a ground for refusal compatible with s. 15; and

(vi) finally, the board's role won't be as limited as suggested because the 2021 Act only impacts on the exercise of their discretionary and evaluative powers – where the 2000 Act requires them to do something or not to do something in an imperative and non-discretionary way, that continues unaffected.

131. The conclusion is that where the board (or *mutatis mutandis* any other relevant body) is called on to make a decision of relevance to the achievement of the matters set out in s. 15(1), it should proceed as follows:

(i) The board must ask itself what substantive disposition of the matter that is practicably available would contribute to achieving the s. 15 goals. In the case of renewable energy projects, the answer to that will almost always be a grant of permission, and is obviously so here. It is not an answer that the permitting of any one project won't achieve climate goals on its own. That is the drop-in-the-ocean fallacy that is rejected globally, and would obviously strangle the effort to address climate change at the starting line.

(ii) The board should then ask whether the substantive disposition of the matter in a way that furthers climate goals is precluded by a mandatory and non-fixable legal requirement that confers no discretion or evaluative judgement on the decision-maker. If so, the project has to be refused no matter how climate-friendly it is.

(iii) If the answer to that is No, the board should then ask if its discretion or evaluative judgement can be exercised in such a way as to support the outcome favouring climate goals. Examples include the following:

(a) insofar as concerns an overall judgement as to proper planning and sustainable development, that must be exercised in an evaluative way that furthers climate goals if practicable, albeit that it could allow the board to form an independent judgement that a project did not comply with the principles of proper planning and sustainable development, if those two concepts are properly considered together;

(b) insofar as concerns material contravention, if such contravention arises, the board should exercise the power to permit such contravention in whatever way that furthers climate goals if practicable to do so – as the applicant submits, the board cannot merely defer to a limitation in an individual development plan if to do so would contribute to an inconsistency (the avoidance of which is not impracticable) with climate plans and objectives contrary to s. 15;

(c) if non-mitigable impacts on European sites arise, the board must apply the public interest override in a manner that furthers climate goals, if practicable to do so; and

(d) if there is some impracticability in a grant of permission, but it can (or could potentially) be resolved by a procedural decision that is not impracticable, then the board is required to make the procedural decision that is most consistent with climate goals to enable the problem to be fixed – for example to require further information or to carry out any additional steps open to it regarding assessments if the developer's initial assessment information is deemed inadequate.

132. I do need to emphasise that the obligation to use discretionary powers favourably to renewable energy infrastructure does not automatically translate into an obligation to refuse permission for developments that cause emissions. One can see an argument as to why the board would not be required to start from a position of scepticism in relation to projects causing emissions to quite the same extent as it should start from a presumption of favourability regarding renewable projects. We can save detailed consideration for a case in which it arises but there are two obvious reasons for this:

(i) The concept of *net* zero implies a continuing necessity for some emissions in the short term at least. That relates to the fact that pending complete adaptation of the economy, there will be other imperatives of economic necessity that require projects that, in and of themselves, wouldn't support climate goals in isolation. Energy security to enable the ongoing orderly functioning of society, especially in the context of the Russian Federation's full-scale criminal war of aggression against Ukraine, is one example.

(ii) Even if a project is not in itself driven by such an imperative, one has to be conscious of displacement effects. Refusal of a project in Europe may simply have the effect of the project being relocated to a jurisdiction with lower environmental standards, thus producing more emissions overall. Emissions are definitionally a cumulative global problem, so while refusing such projects feels good in the moment, it may or may not be doing anything to combat climate change. Rightly or wrongly, that was an explicit part of my thinking in *An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July 2021). Such an approach

doesn't particularly give one a feeling of virtue, but it makes a certain amount of sense depending on the context.

133. In other words, it doesn't automatically follow from a pro-renewables interpretation that there must be, say, an anti-cheese factory interpretation, an anti-data centre interpretation or an anti-LNG storage interpretation. The trade-offs and displacement effects would need to be considered.

Application of the law to the facts here

134. Of course, one thing the board and the State don't attempt to explain is how refusal of this application could be consistent with the climate obligations governed by s. 15.

135. As adverted to above, the State proposed a limited meaning for s. 15, but not as limited as that argued for by the board. But under even the State's bare bones reading, "a relevant body must do more than simply have regard to the objectives and measures identified in paragraphs (a) to (e). In performing its functions, a relevant body must engage in a meaningful way with the objectives and measures identified in section 15(1)(a)-(e), must endeavour to carry out its functions in a manner consistent with those objectives and measures, and, where it considers that it is not practicable to do so, it may be required to explain why this is so" (State submissions para. 72). Even if (incorrectly in my view) the bar were to be set at this extremely minimalist level, the board decision here didn't in any rational sense constitute meaningful engagement with s. 15. There is some reference in the background to climate in the inspector's report, but the actual analysis in section 11 didn't consider the s. 15 obligation at all. As the applicant correctly submits, "There is simply no reading of the inspector's report ... that could possibly be said to support the contention that ... the inspector and then the board ... considered the obligations under s. 15".

136. The inspector doesn't refer to s. 15. The board doesn't refer to s. 15. The inspector doesn't refer to the 2015 Act at all. The board doesn't refer to the 2015 Act either. The 2021 Act only gets a passing mention by the inspector on an issue that isn't relevant in this respect. The board doesn't mention it at all. Of course even a mention doesn't constitute meaningful engagement, let alone compliance, but the board hasn't even managed a bargain-basement version of having regard to the legislation.

137. The board simply engaged in a direct read-across from the contravention to "therefore" the application being not in accordance with proper planning and development. That skips several essential steps, including the crucial step of engagement with consistency with the plans and objectives in s. 15, the practicability of approving the application, and thus whether the board should have materially contravened the plan.

138. I noted in *Nagle View Turbine Aware Group v. An Bord Pleanála* [2024] IEHC 603 (Unreported, High Court, 1st November 2024) that the board is already using the language of a presumption in favour of renewable energy development. The inspector in that case (Ms Una Crosse) said in section 14.2.3.1 (emphasis added) (https://www.pleanala.ie/anbordpleanala/media/abp/cases/reports/308/r308885.pdf?r=176603655092):

> "Guidelines and National and Regional Policy
>
> **There is a positive presumption in favour of renewable energy development at National, Regional and Local policy levels.** At national level, the proposed development complies with national planning policy as set out in the National Planning Framework Plan, 2018-2040 which recognises the need to move toward a low carbon and climate resilient society with a sustainable renewable energy supply.
>
> The 2006 Wind Energy Development Guidelines (and 2019 Draft Guidelines) advise that a reasonable balance must be achieved between meeting national policy on renewable energy and the proper planning and sustainable development of an area.
>
> The Guidelines also state that projects should not adversely affect any European sites, have an adverse impact on birds, give rise to peat instability or adversely affect drainage patterns, cultural heritage, sensitive landscapes, the local road network or residential amenity. These matters will be addressed specifically, where relevant, in the relevant sections of this assessment and the EIA and AA below.
>
> In terms of the consideration that the current Guidelines are not fit for purpose, while it is acknowledged that the Guidelines date from 2006, draft Guidelines dated 2019 have been prepared and consenting authorities await the finalisation of same by the Department which according to the CAP 2023 (Table 12.6) is expected to be redrafted in 2023 and published in 2024. Until that time, the existing guidelines remain in force but with the applicant in this instance opting to apply key elements of the draft guidelines in terms of the proposed development – such as the minimum set back of 4 times the tip height and zero-shadow flicker. I consider that this is appropriate and seeks to apply best practice to the consideration of the proposed development.

At regional level, the policies reiterate those at National Level in the main and I note it is outlined that the RSES recognises and supports the many opportunities for wind as a major source of renewable energy and contends that Wind Energy technology has an important role in delivering value and clean electricity for Ireland."

139. The report *inter alia* notes national policy as follows:

"5.1.1. Project Ireland - National Planning Framework 2040

The National Policy Position establishes the fundamental national objective of achieving a transition to a competitive, low carbon, climate resilient and environmentally sustainable economy by 2050. This will be achieved by harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar.

Of particular relevance is National Strategic Outcome NSO8 which seeks a Transition to a low carbon and climate resilient economy. It is stated that 'the National Climate Policy Position establishes the national objective of achieving transition to a competitive, low carbon, climate-resilient and environmentally sustainable economy by 2050. This objective will shape investment choices over the coming decades in line with the National Mitigation Plan and the National Adaptation Framework. New energy systems and transmission grids will be necessary for a more distributed, renewables focused energy generation system, harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar and connecting the richest sources of that energy to the major sources of demand'.

One of the objectives in respect of Green Energy is to 'deliver 40% of our electricity needs from renewable sources by 2020 with a strategic aim to increase renewable deployment in line with EU targets and national policy objectives out to 2030 and beyond. It is expected that this increase in renewable deployment will lead to a greater diversity of renewable technologies in the mix'.

National Policy Objective (NPO) 55 seeks to 'promote renewable energy use and generation at appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050'.

5.1.2. Project Ireland 2040 – National Development Plan 2018-2027

The key role of the NDP is to set out the public capital investment to achieve the National Strategic Outcomes as set out within the National Planning Framework. A number of key energy initiatives, proposed to diversify energy resources and assist in the transition towards a decarbonised society are set out with the NDP further emphasises National Strategic Outcome 8: Transition to Sustainable Energy by stating that: 'Ireland's energy system requires a radical transformation in order to achieve its 2030 and 2050 energy and climate objectives. This means that how we generate energy and how we use it, has to fundamentally change. This change is already underway with the increasing share of renewables in our energy mix and the progress we are making on energy efficiency. Investment in renewable energy sources, ongoing capacity renewal, and future technology affords Ireland the opportunity to comprehensively decarbonise our energy generation. By 2030, peat and coal will no longer have a role in electricity generation in Ireland. The use of peat will be progressively eliminated by 2030 by converting peat power plants to more sustainable low-carbon technologies.'

To achieve a Low-Carbon, Climate Resilient Society, the Plan outlines a New Renewable Electricity Support Scheme to support up to 4,500 megawatts of additional renewable electricity by 2030.

5.1.3. Ireland's Transition to a Low Carbon Energy Future 2015-2030

This document is a complete energy policy update, which sets out a framework to guide policy up to 2030. Its objective is to guide a transition, which sets out a vision for transforming Ireland's fossil fuel-based energy sector into a clean, low carbon system. It states that under Directive 2009/28/EC the government is legally obliged to ensure that by 2020, at least 16% of all energy consumed in the state is from renewable sources, with a sub-target of 40% in the electricity generation sector. It notes that onshore wind will continue to make a significant contribution but that the next phase of Ireland's energy transition will see the deployment of additional technologies as solar, offshore wind and ocean technologies mature and become more cost-effective.

5.1.4. Climate Action Plan 2023

The Climate Action Plan (CAP) 2023 was adopted in December 2022 and follows a number of predecessors which arose following the declaration of a climate and biodiversity emergency by the Irish Government. The Plan seeks to identify how Ireland will achieve its 2030 targets for carbon emissions by sector and through a series of actions. The overarching requirement in the Climate Action Plan as they relate to electricity require transformational policies, measures and actions, and societal change to increase the deployment of renewable

energy generation, strengthen the grid, and meet the demand for flexibility in response to the challenge.

The Plan seeks to reduce the State's greenhouse gas emissions by 51% by 2030. One of the most important measures increasing the proportion of renewable electricity to up to 80% by 2030, including a target of 9 GW from onshore wind, 8 GW from solar and at least 5 Gigawatts of offshore wind energy by 2030.

5.1.5. Wind Energy Development Guidelines 2006

The following sections of the Guidelines are of particular relevance:

- Section 5.6 discusses noise impacts, which should be assessed by reference to the nature and character of noise sensitive locations i.e. any occupied house, hostel, health building or place of worship and may include areas of particular scenic quality or special recreational importance. In general noise is unlikely to be a significant problem where the distance from the nearest noise sensitive property is more than 500m.
- Section 5.12 notes that careful site selection, design and planning and good use of relevant software can help to reduce the possibility of shadow flicker in the first instance. It is recommended in that shadow flicker at neighbouring offices and dwellings within 500m should not exceed 30 hours per year or 30 minutes per day. The potential for shadow flicker is very low at distances greater than 10 rotor diameters from a turbine.
- Chapter 6 relates to aesthetic considerations in siting and design. Regard should be had to profile, numbers, spacing and visual impact and the landscape character. Account should be taken of inter-visibility of sites and the cumulative impact of developments.
- 5.1.6. Draft Wind Energy Development Guidelines 2019

Chapter 5 – considering an application for wind energy development. A planning authority may consider some if not all of the following matters:

- Environmental assessments (EIA, AA etc.)
- Community engagement and participation aspects of the proposal
- Grid Connection details
- Geology and ground conditions, including peat stability; and management plans to deal with any potential material impact. Reference should be made to the National Landslide Susceptibility Map to confirm ground conditions are suitable stable for project;
- Site drainage and hydrological effects, such as water supply and quality and watercourse crossings; Site drainage considerations for access roads/tracks, separate in addition to the impact of the actual turbines management plans to deal with any potential material impact on watercourses; the hydrological table; flood risk including mitigation measures;
- Landscape and visual impact assessment, including the size, scale and layout and the degree to which the wind energy project is visible over certain areas and in certain views;
- Visual impact of ancillary development, such as grid connection and access roads;
- Potential impact of the project on natural heritage, to include direct and indirect effects on protected sites or species, on habitats of ecological sensitivity and biodiversity value and where necessary, management plans to deal with the satisfactory co-existence of the wind energy development and the particular species/habitat identified;
- Potential impact of the project on the built heritage including archaeological and architectural heritage;
- It is recommended that consideration of carbon emissions balance is demonstrated when the development of wind energy developments requires peat extraction.
- Local environmental impacts including noise, shadow flicker, electromagnetic interference, etc.;
- Adequacy of local access road network to facilitate construction of the project and transportation of large machinery and turbine parts to site, including a traffic management plan;
- Information on any cumulative effects due to other projects, including effects on natural heritage and visual effects;
- Information on the location of quarries to be used or borrow pits proposed during the construction phase and associated remedial works thereafter;
- Disposal or elimination of waste/surplus material from construction/site clearance, particularly significant for peatland sites; and
- Decommissioning considerations.

Notable changes within the draft guidelines relate to community engagement, noise and separation distance.

Noise

- Section 5.7.4 - The 'preferred draft approach', proposes noise restriction limits consistent with World Health Organisation Guidelines, proposing a relative rated noise limit of 5dB(A) above existing background noise within the range of 35 to 43dB(A), with

43dB(A) being the maximum noise limit permitted, day or night. The noise limits will apply to outdoor locations at any residential or noise sensitive properties.

Shadow Flicker

- Section 5.8.1 - The relevant planning authority or An Bord Pleanála should require that the applicant shall provide evidence as part of the planning application that shadow flicker control mechanisms will be in place for the operational duration of the wind energy development project.

Community Investment

- Section 5.10 - The Code of Practice for Wind Energy Development in Ireland Guidelines for Community Engagement issued by the Department of Communications, Climate Action and Environment (December 2016) sets out to ensure that wind energy development in Ireland is undertaken in observance with the best industry practices, and with the full engagement of communities around the country.

Visual Impact

- Section 6.4- Siting of Wind energy projects.

Set back

- Section 6.18.1 Appropriate Setback Distance to apply - The potential for visual disturbance can be considered as dependent on the scale of the proposed turbine and the associated distance. Thus, a setback which is the function of size of the turbine should be key to setting the appropriate setback. Taking account of the various factors outlined above, a setback distance for visual amenity purposes of 4 times the tip height should apply between a wind turbine and the nearest point of the curtilage of any residential property in the vicinity of the proposed development, subject to a mandatory minimum setback of 500 metres.
- Policy SPPR 2 – Set back.
- Section 6.18.2 Exceptions to the mandatory minimum setbacks - An exception may be provided for a lower setback requirement from existing or permitted dwellings or other sensitive properties to new turbines where the owner(s) and occupier(s) of the relevant property or properties are agreeable to same but the noise requirements of these Guidelines must be capable of being complied with in all cases"

140. The inspector also identified national and European legislation and policy as follows:

"9.1.3. Policy Context and Guidance (see section 5 above) which includes reference to the following:

EU Directives and Polices

- EU Renewable Energy Directive 2009/28/EC
- European 2020 Strategy for Growth
- 2030 Climate and Energy Framework
- Energy Roadmap 2050
- Recast Renewable Energy Directive (RED2)
- European Green Deal

National Policy

- Climate Action and Low Carbon Development Act 2015
- Project Ireland 2040: The National Planning Framework
- Project Ireland 2040: National Development Plan 2018-2027
- Climate Action Plan 2019
- Climate Action and Low Carbon Development (Amendment) Bill 2020
- Department of Environment Heritage and Local Government Planning Guidelines for Wind Energy (June 2006)
- Draft Revised Wind Energy Guidelines (Published for Consultation on 12th December 2019)
- National Landscape Strategy for Ireland 2015-2015 (DAHG)
- Code of Practice for Wind Energy Development in Ireland Guidelines for Community Engagement issued by the Department of Communications, Climate Action and Environment (December 2016)"

141. The inspector applied this *inter alia* as follows (emphasis added):

"14.2.2. Need for Proposed Development

This matter is addressed in some detail in the documentation received and it is not intended to repeat same. The proposed windfarm would be compatible with European and National climate change and renewable energy policies as summarised in section 5 above. It would contribute to the achievement of European and National renewable energy targets, and in particular the objectives of the Climate Action Plan (2023) which seeks to reduce the State's greenhouse gas emissions by 51% by 2030 and increase the proportion of renewable electricity to up to 80% by 2030, including a target of 9 GW from onshore wind. Providing

the physical infrastructure, in this instance onshore wind turbines, to facilitate the achievements of this measure is critical thereby providing a demonstrable need for the proposed development.

While it is noted that many of the submissions reference their agreement in principle in respect of merits of renewable energy, there is resistance to the location of such a proposal within the locality for the range of reasons outlined in the summary of submissions received above. In order to address Climate Change, I would suggest that other elements of our environment and the context within which the environment is perceived must also change. This includes in particular the visual context of an area which cannot be expected to remain unchanged in perpetuity but particularly within the context of a climate emergency."

142. We should bookmark that observation as its common sense contrasts so markedly with the dogmatic contrary position of the inspector in the present case in relation to visual impacts.

143. As noted above, if climate goals take precedence over visual impacts and the like, then logically they must take precedence over development plan provisions that are motivated by visual impacts. Outside of Orwellian doublethink, there is no way the board can logically support the position it articulated in *Nagle View* while at the same time refusing material contraventions where, as here, the plan provision is motivated by visual impacts.

144. And again, if the reader can bear to be depressed further, we can note from Ms Crosse's wording that those objecting to wind developments in that case have much in common with the board itself and the State in the present matter. Those objecting parties are, as she notes, in favour of renewable energy infrastructure "in principle", but, as Otto von Bismarck would have predicted, they are not minded to particularly support that in practice. The message is familiar – of course yes in principle, but unfortunately not this development, not this developer, not here, not now. Perhaps we should commend our public institutions for being so in tune with the public mood in that regard.

145. In the present case, the inspector (Mr Brendan Coyne – going by public organisation charts, apparently a more junior staff member than Ms Crosse who prepared the foregoing) stated (emphasis added):

"12.5.28. Assessment

12.5.29. I acknowledge the concerns raised by the third-party submissions, particularly the apprehension that the proposed wind farm's location within the scenic Slieve Margy region may significantly impinge upon the visual amenity and character of the area. I note the concerns raised by Laois County Council regarding the landscape and visual impacts of the proposed development. The Council highlighted potential discrepancies in the planning documents concerning turbine placement and the accuracy of their location, whereby their location contravenes the Laois County Development Plan and its Wind Energy Strategy. They have also pointed out issues with the validity of the landscape and visual assessment due to potential inaccuracies in the site layout depicted in Figures 7-1 and 7-2 of the EIAR. I also note the concerns raised by the Department of Housing, Local Government and Heritage – Development Applications Unit regarding the landscape and visual impact assessment within the EIAR for the proposed wind farm. The Unit has identified deficiencies in the report, criticising the methodology for its reliance on desk-based research and the absence of adequate fieldwork, which could potentially overlook the effects on archaeology and cultural heritage. They note that the visual impact assessment lacks comprehensiveness, with limited viewpoints and photomontages failing to fully represent the impact on national monuments and the wider landscape setting, contrary to the objectives of the Laois County Development Plan. The applicant's response to these concerns are detailed in Section 10 above.

12.5.30. In consideration of the foregoing, my assessment of the proposed development must take into consideration the policy framework outlined within the Laois County Development Plan 2021-2027, which categorically designates areas for wind energy development, as well as areas where such development is explicitly prohibited. I have addressed this issue in Section 11.3 of this report. In view of the facts presented in Section 11.3 of this report and the policies within the Laois County Development Plan, it is my view that the proposed development's location within an area designated as 'not open for consideration' represents a fundamental conflict with the planning policy framework.

12.5.31. The Laois County Development Plan provides a considered approach to landscape protection, balancing the need for renewable energy infrastructure with the preservation of landscape character. Policy Objective CM RE 7, by demarcating 'Areas not open for consideration', underscores a commitment to safeguard certain landscapes from development impacts that would significantly alter their appearance or character. The specific policy objectives for Hills, Uplands, and Mountain Areas delineate criteria that the

proposed wind farm cannot satisfy due to its visual impact and siting within a highly sensitive landscape, as detailed under objectives LCA 5 through to LCA 11.

12.5.32. Furthermore, the Wind Energy Strategy for County Laois reinforces these designations, indicating a clear intent to steer wind farm development towards less sensitive areas. The strategy's classifications are aimed at ensuring that development is compatible with the valued landscape characteristics of Laois County. The positioning of the proposed turbines, primarily within 'Areas not open for consideration', contravenes the Wind Energy Strategy for the county. This Wind Energy Strategy was subject to oversight by the OPR, and changes were subject to Ministerial Direction regarding (inter alia) turbine separation distances from neighbouring properties, and the Development Plan contributing to the realisation of national renewable energy targets (dated 7th March 2022).

12.5.33. It is my view that the overarching significance of the proposed development for renewable energy, economic development, and climate change mitigation cannot override the clear policy directives set by the County Development Plan. National energy policy and objectives, while critically important, must be realised in a manner that respects local landscape sensitivities and planning policies. To permit a development of this nature, which contravenes the explicit provisions of the Laois County Development Plan, would undermine the legitimacy of the Plan and the statutory planning process, setting an undesirable precedent for the future development of protected areas.

12.5.34. In light of these considerations and taking into account the landscape and visual impact assessment presented in the EIAR, I consider that the proposed wind farm, due to its location, would not only materially contravene the Laois County Development Plan but would also significantly impact the visual integrity and character of the landscape, which the Development Plan seeks to preserve. The Plan's policies and objectives reflect a deliberate prioritisation of landscape protection in areas not deemed suitable for wind farm development, a policy intent that must be upheld.

12.5.35. Therefore, I conclude that, notwithstanding the potential benefits associated with renewable energy development, the proposal in its current location would materially contravene the Laois County Development Plan 2021-2027 and its appendaged Wind Energy Strategy by reason of its location in an area 'not open for consideration' and thereby would be contrary to the proper planning and sustainable development of the area. I recommend, therefore, that the proposed development be refused permission on this basis."

146. The obvious point to note here is that the inspector starts from a proposition that determines the issue – dealing with the climate emergency "must be realised in a manner that respects local landscape sensitivities and planning policies". *Must* it? That is an *a priori* position, and one that is by no means obvious to put it mildly – indeed it is the direct opposite of the much more compelling view expressed by the inspector in *Nagle View*, who said that visual impacts "must" be subordinated to tackling the climate emergency.

147. The inspector here begs the question and loads the dice before the start – local sensitivities plus whatever related bans on wind energy a majority of councillors in a particular area manage to push through "must" have priority. The fact that if the climate emergency is not addressed, far worse impacts, chaotic and unplanned, will happen on landscapes here and everywhere, just vanishes from sight in this reasonable-sounding linguistic framing of the issues. Indeed that is a reminder that s. 15 affects more than just how the board decides its cases. It affects how it trains its inspectors and board members in climate law and science, and how it internally allocates work so that only duly trained people who understand climate issues at a deep level should be allowed near projects to which those issues are relevant.

148. Whatever the inspector's and board's approach is, it is not compliance with s. 15(1). It isn't even a serious attempt to engage with the aims of that provision. Not only does it fail to exercise the power to materially contravene, which would have been practicable, in order to further the urgent climate goals and policies of s. 15(1), it gives no serious consideration to a material contravention.

149. The inspector does state that the applicant asked for approval despite material contravention, at para. 11.3.21, and then rejects that in a single paragraph, for patently flawed reasons which we have already discussed, at para. 11.3.4. That probably qualifies as consideration of the concept of contravention in a very general sense (albeit highly confused and legally unsustainable consideration). But it doesn't comply with s. 15(1) and it doesn't even comply with the watered-down interpretation offered by the State that the board should seriously engage with the matters supported by s. 15(1). Those matters are not considered at all let alone seriously considered – insofar as they feature at all, they are improperly dismissed as mere applicant's assertions.

150. Applying the duty to act consistently insofar as practicable with those goals and policies here, the board didn't do that. So the decision must be quashed on this ground also.

Core ground 2 – fixed policy

151. Core ground 2 is:

> "2. Core Ground 2: The Decision is invalid as the Board has failed to properly exercise its jurisdiction and/or fettered its discretion in adopting, and applying in this case, a policy of refusing to exercise its discretion to grant permission in material contravention of the development plan under section 37G and/or 37(2)(b) of the 2000 Act for wind farm developments in areas designated unfavourably for wind farm development, further particulars of which are set out in Part 2 below."

152. There is a preliminary issue as to the affidavits of Mr Keville. The parties' positions are as follows:

> "Preliminary Issue 1: Admissibility of the Affidavits of Brian Keville
>
> 24. The Board's position is that the First Keville affidavit is inadmissible on the basis it comprises evidence which was not before the Board at the time of the making of its decision; ii) new evidence on the merits of the decision, and iii) evidence which is not reasonably required to enable the Court to determine the proceedings, contrary to Order 39, Rule 58(1) of the Rules of the Superior Courts.
>
> 25. The Second Keville affidavit was served after the pleadings had closed and a hearing date had been set by the Court and only after the Applicant had had sight of the Board's Statement of Opposition. The Board objects to the Second Keville affidavit as inadmissible on the same basis as the First Keville affidavit. Without prejudice thereto, the Second Keville affidavit further contains evidence which could have been included in the First Keville affidavit but was not. The evidence itself also pre dates the date of swearing of the First Keville affidavit. Further, the Second Keville affidavit was also delivered outside the agreed directions for delivery of affidavits.
>
> 26. The Applicant's position is that the First Keville affidavit is admissible. The first issue addressed in the Brian Keville affidavit – that the Board adopted a policy of refusing to exercise its discretion to grant permission in material contravention of the development plan for wind farm developments in areas designated unfavourably for wind farm development – is in support of Ground 2, which claims the Board fettered its discretion by impermissibly adopting and applying such a fixed policy. The Board is required to comply with its legal obligations, including the obligation on the Board, as a statutory decision maker, not to impermissibly fetter its discretion by adopting a fixed policy and/or abrogating its decision making power. An Applicant for permission is not required to submit to the Board that it has impermissibly adopted and applied a fixed policy in similar decisions in the past, provide evidence in that respect to the Board, or submit to the Board that it should not apply that fixed policy, for that legal obligation to arise for the Board.
>
> 27. The second issue addressed in the Brian Keville affidavit – that the Board is not acting in a matter consistent with the Renewable Energy Targets – falls within paragraph 38 (x), (xi) and/or (xii) of the decision in Reid v An Bord Pleanála [2021] IEHC 230.
>
> 28. The Second Keville Affidavit does no more than respond to a criticism in the Board's submissions that the First Keville Affidavit did not identify the decisions on which it relied. The decisions made within 2023 and 2024 with respect to wind farm developments were in any event within the knowledge of the Board and no prejudice was suffered by the Board by reason of the late delivery.
>
> 29. The Notice Parties are adopting a neutral position with respect to this preliminary issue."

153. First of all, the position of the board in trying to put the onus on the applicant as to facts within the board's peculiar knowledge, while itself remaining silent, is unacceptable. Indeed the board's legalistic objections exacerbate rather than excuse their failure to lay their cards face up, because that escalates matters from a passive failure of disclosure to an active attempt to suppress the applicant's efforts to bring out the facts. That is improper and more than a lack of candour.

154. The objection that the applicant should have alleged to the board that it had a fixed policy is utterly hollow. The board already knows how it operates and it didn't require the applicant to tell it that. Furthermore the obligation to give due and proper consideration to issues falls under the heading of autonomous legal obligations, not something that the board only has to do if specifically put to it.

155. Obviously the applicant was not in any event passive on the issue of the board's climate obligations. As it submits:

> "The Applicant did bring the 2015 Act, the amendment to the 2015 Act by the 2021 Act, and the Climate Action Plan 2023 (then in force) to the attention of the Board, in the Planning Report. Equally the Renewable Energy Targets were brought to the Board's attention, as

was the role of the CCAC in monitoring progress towards achieving Ireland's climate targets (Planning Report, 3.2.1.2; EIAR, Chapter 4). The Applicant also submitted that the Board should grant permission in material contravention having regard to the strategic importance of the Proposed Development with respect to climate change."

156. In any event, the general principle that one's points should be made to the decision-maker has numerous exceptions, many of which apply here as set out in *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230 (Unreported, High Court, 12th April 2021), particularly the heading of autonomous obligations.

157. Furthermore, if a respondent is in breach of its duty of candour, as here, an applicant can come forward with evidence to enable the court to understand the facts of the matter.

158. Finally the fact that the board isn't positively denying the facts averred to makes it all the more inappropriate for the board, as a public body with a duty of candour, to try to legalistically exclude this evidence. (That isn't suggest that a public body can't try to exclude actually irrelevant or inadmissible evidence – but this isn't such evidence.) Excluding the affidavits of Mr Keville would be a serious injustice to the applicant and would hamper the court's capacity to understand the factual position here. The board's decision not to reveal relevant facts and then to try to prevent the facts coming out represents a breach of its duty to the court. Both of Mr Keville's affidavits must be admitted.

159. Turning then to the substance, the parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 2: Fettering of the Board's Discretion

34. The Applicant's position is that the Board failed to properly exercise its jurisdiction, and/or fettered its discretion, in adopting and applying in this case a policy of refusing to exercise its discretion to grant permission in material contravention of the development plan for wind farm developments in areas designated unfavourably for wind farm development. Moreover, the cumulative effect of those decisions, if the Board continues to adopt that approach, is to render it impossible, in practical terms, to achieve the target in the Climate Action Plan 2024 for deploying 9 GW of onshore wind by 2030 and/or to seriously jeopardise the achievement of that target. Relatedly, the application of that policy has resulted in and/or contributed to the Board failing to approve adequate planning applications to meet the 1.6 GW annual increase in capacity needed to achieve Ireland's 2030 targets for onshore renewables. In adopting and applying that policy, both with respect to the Proposed Windfarm and more generally, the Board is therefore acting in breach of its obligations under section 15 of the 2015 Act.

35. The Board's position is that this ground should be dismissed in limine as it relies exclusively on the evidence in the Keville affidavits which is inadmissible and was not put before the Board at the time of the making of its decision. Without prejudice to that, the Board did not fetter its discretion, and the evidence demonstrates that the Board considered the relevance of climate policy considerations but ultimately decided to refuse permission in the factual circumstances."

160. One of the ironies about large institutional systems (and I amn't suggesting that Irish public bodies are massively worse than those anywhere else) is that they often get their timing magnificently wrong, and swing from one extreme to another at precisely the most untimely moment. It is a matter of record that up to the suspension of its deputy chairperson in May 2022, the board had attracted huge controversy for its apparently free-wheeling contravention of city and county development plans on a widespread basis to approve SHD developments in often controversial locations (the caselaw gives some striking examples of this). Matters have now swung the other way so that from end-2022 onwards, the board seems now almost petrified to approve any material contravention favourable to renewable energy infrastructure, even if necessary to contribute to ensuring compliance with binding national and EU law obligations.

161. The affidavit of Mr Keville provides an extremely concerning and disturbing picture which establishes (it isn't contradicted on the merits) a pattern of behaviour by the board that is in effect sabotaging the compliance by the State with national and international climate commitments, although no doubt that isn't the subjective intention. There is no point paraphrasing it and it is worth quoting at length (emphasis added):

"Pattern of refusals of proposed windfarm development

7. I am aware that **there has been a significant drop in the Board's approval rating for wind energy projects since early 2023**. By way of broad overview, that approval rating of wind energy projects (excluding single-turbine developments and amendments to previously permitted projects) has dropped **from over 80% in 2017-2022, to 61% in 2023 and 30% in the first nine months of 2024**.

8. The key issue that has contributed to this drop in approval rating and has arisen in 60% of the refusals by the Board in 2023/2024, is the drafting of Development Plans by

local authorities that preclude the development of onshore wind energy in specific locations, together with a change in approach by the Board with respect to addressing applications for wind farm development located in areas where planning policy in county development plans does not favour wind farm development.

9. In that respect, my experience has been that, **until late 2022, the Board was in many cases prepared to consider the strategic and environmental importance of wind farm developments** and, where appropriate, to grant permission for those developments even when located in areas without favourable policy for wind energy development within the relevant development plan.

10. However, since the end of 2022, coinciding with the recent updating of county development plans, **a pattern has emerged** whereby the Board has, in a significant proportion and number of cases, refused permission for proposed wind farm developments wholly or partly on the basis that they are located in areas with unfavourable policy for wind farm development and which therefore **materially contravene the relevant development plan**.

11. I have considered **every decision made by the Board** with respect to new wind farm development from 1 January 2023 to 30 September 2024.

12. Between 1 January 2023 and 30 September 2024, the Board determined 27 cases relating to new wind farm developments with more than one proposed turbine. In the same period, the Board determined 3 cases in which just one single wind turbine was proposed, but these are not considered further in this affidavit as they are not material in terms of meeting the CAP24 targets (and in any event, in none of these cases did the Board materially contravene the County Development plans in granting permission for these developments). Of the 27 larger wind farm applications determined over 2023/2024 to-date, nine of those decisions related to applications for strategic infrastructure development ('SID') under section 37E of the Planning and Development Act 2000 (the '2000 Act') and 18 of those decisions related to appeals under section 37 of the 2000 Act.

13. Of those 27 applications, there were 14 refusals of permission, 1 partial refusal and 12 grants of permission. This amounted to 0.75 GW of onshore wind capacity granted permission, and 0.737 GW of onshore wind capacity refused permission.

14. None of the 12 projects for which permission was granted were located in areas with unfavourable planning policy for wind energy development. **None of the 12 projects for which permission was granted, required a material contravention of the development plan** under sections 37(2)(b) or 37G(6) of the 2000 Act. In contrast, **8 of the 14 applications where permission was refused, were refused wholly or partly on the basis that they were located in areas with unfavourable policy for wind farm development. In each of those 8 decisions, the Board declined to materially contravene the plan** notwithstanding the strategic importance of the projects for meeting Ireland's climate goals. In 7 of those 8 decisions, the Board and/or the Board's Inspector placed reliance on the supervisory roles played by the Office of the Planning Regulation (the 'OPR') and/or the Minister for Housing, Local Government and Heritage (the 'Minister') in the making of development plans through the Ministerial Direction procedure under section 31 of the 2000 Act. In the one case that the Board partially refused, of the 3 proposed wind turbines, the Board granted planning permission for one turbine proposed in an area with favourable policy for wind farm development, but refused 2 turbines in an area immediately adjacent with unfavourable policy.

15. In 2023 and 2024, the 8 projects refused and one project partially refused permission by the Board wholly or partly on the basis that they were located in areas with unfavourable policy for wind farm development, **amounted to a capacity of 496.3 MW**.

16. Therefore, **in 2023 and 2024 there was no case in which the Board determined that a new wind energy project was of sufficient strategic importance to merit materially contravening the development plan**, where the proposed development was located in an area with unfavourable policy for wind farm development in the development plan. This is despite the clear urgency that arises with respect to accelerating the deployment of onshore wind and solar electricity generation, which is crucial if the electricity sector is to meet its sectoral emissions ceiling for the first carbon budget period, as was recently confirmed in the Climate Change Advisory Committee (the 'CCAC') Annual Review 2024 for Electricity. ...

17. In my view, it is evident, from that pattern of decisions, that **the Board has, since in or about late 2022/early 2023, adopted a policy of giving effect to prohibitions and/or restrictions on wind farm developments and refusing applications for planning permission for wind farm developments in areas with unfavourable policy for wind farm development, and in particular refusing to exercise its discretion to**

grant permission in material contravention in those circumstances. I further believe that **there is a pattern whereby the Board has deferred to development plan policies with limited if any independent analysis of whether the proposed development would be in the interests of proper planning and sustainable development**, relying in particular in that respect on the oversight of the OPR and the Minister of the making of development plans through the Ministerial Direction procedure under section 31 of the 2000 Act.

Implications of that pattern of refusals with respect to Ireland's climate action targets

18. The second issue that I will address is the implications of that pattern of refusals, should it continue, with respect to Ireland meeting its 2030 targets relevant to onshore wind in CAP24.

19. I will consider this issue at two levels. First, I will address the issue from the perspective of what the Board knew or ought to have known as of the date of the Decision. Second, to provide context to the Court, and to demonstrate the urgency and materiality of this issue, I have set out projections (which were not before the Board) as to the likely impact of the policy adopted by Board on Ireland's ability to achieve that target, if it continues to apply that policy in the future.

Board's Assessment of Consistency with Climate Plans and Objectives

20. **CAP24 sets targets for renewable energy of: (i) achieving 9 GW of onshore wind, 8 GW of solar power, and at least 5 GW from offshore wind projects by 2030; and (ii) achieving an 80% share of renewable electricity by 2030.** I will refer to those targets together as the 'Renewable Energy Targets', and will refer to the specific target with respect to onshore wind as the '9 GW onshore wind target'.

21. The Statement of Grounds in these proceedings has set out the vital importance of achieving the Renewable Energy Targets, with respect to the broader goals and targets in CAP24, and Ireland's binding national and EU law obligations with respect to climate change. I do not intend to repeat that summary here. The centrality of the Renewable Energy Targets to achieving Ireland's broader obligations with respect to climate change is clear from CAP24 ..., the CCAC Annual Review 2023 ..., the CCAC Annual Review 2024 for Electricity ... and Ireland's Updated National Energy and Climate Plan ('NECP') published in July 2024 ...

22. The Statement of Grounds has also pleaded that **Ireland is not on track to meet the Renewable Energy Targets**. Again, I do not intend to repeat that summary here. The significant challenges facing the electricity sector in meeting the Renewable Energy Targets, and the extent to which Ireland is not on track to meet those targets, is clear from inter alia the CCAC Annual Review 2024 for Electricity, and the Environmental Protection Agency ('EPA') 2023 and 2024 greenhouse gas emissions projections for the period 2023-2050 ...

23. It is clear from those materials, published as part of the statutory monitoring framework established by the 2015 Act, that: (i) **accelerated deployment of onshore wind and solar electricity generation is crucial if the electricity sector is to meet its sectoral emissions ceiling for the first carbon budget period, and (ii) the year 2024 is critical for the Electricity sector, and the renewable share of electricity generation must significantly increase to achieve the 2025 and 2030 targets and remain within the sectoral emissions ceiling**,

24. Moreover, it is clear from those materials that **existing development plans and local area plans do not currently provide sufficient areas with favourable policy for onshore wind developments, and that urgent reform is required to align those plans with national and regional targets**. That is a significant difficulty with respect to achieving the Renewable Energy Targets where, as detailed below in or **about 30% of onshore wind projects currently in the planning system, and in or about 50% of the onshore wind projects going into the planning system up to the end of 2026, are located in areas with unfavourable policy for wind farm development**.

25. I say and believe that, in light of the foregoing, it would or should be evident to anyone involved in the development consent process for onshore wind, including the Board, that adopting a policy, whereby the Board defers to the planning authorities' designation of land suitable for wind farm development, instead of exercising its jurisdiction to grant permission in material contravention of the development plan where appropriate, would **seriously jeopardise the achievement of the Renewable Energy Targets**. That policy, and/or the application of that policy, could not, on any view, be characterised as consistent with CAP24, or the other Climate Plans and Objectives identified in section 15 of the 2015 Act.

Policy will render it impossible, in practical terms, to achieve the 9 GW target

26. To provide further context, and to emphasise the seriousness of the consequences of the policy that has been adopted by the Board, I have carried out an exercise to determine whether, if the Board continues to apply that policy into the future, there is any possibility, in practice, of increasing deployment of onshore wind energy to 9 GW by 2030.

27. My conclusion is that **the cumulative effect of the Board's decisions, if the Board continues to adopt that approach, would be to render it impossible, in practical terms, to achieve the target in CAP24 of deploying 9 GW of onshore wind by 2030**. At the very least, that policy, if the Board continues it, will seriously jeopardise the achievement of that target.

28. In that respect, I have carried out projections of the wind energy capacity likely to be connected by 2030, if the Board continues to apply that policy. I emphasise that the exercise that I have carried out is preliminary in nature and is not intended to constitute a definitive or an exact calculation. Nevertheless, the majority of the analysis relies on information in the public domain, and indeed on information relating to cases currently with or previously decided by the Board.

29. In order to estimate the extent to which the State is likely to fall short of the 9 GW target, should the Board continue to apply the policy, it is necessary to consider: (i) current installed capacity, (ii) projects currently in construction, (iii) projects with irrevocable planning permission, (iv) projects with planning permission at risk of being overturned by the Courts, (v) proposed projects currently in the planning process, and (vi) future projects that are not yet in the planning system. With respect to each of those categories of project, a number of uncertainties arise, which I have tried to account for in reaching my conclusions. I have summarised the approach that I have taken in that respect below.

(i) Current Installed Capacity

30. The first category of project that I have considered is projects that are currently operational. There is current installed capacity for onshore wind as of 30 September 2024 of 4,767 MW.

31. The key uncertainty that arises with respect to installed capacity for onshore wind is with respect to currently authorised projects due to be decommissioned by 2030, i.e. projects that will require an extension to the life of their planning permission prior to 2030, or replacement of the existing turbines (repowering) if they are to remain operational. There is a significant concern that not all existing onshore wind projects will be granted permission to continue operations, thereby reducing the current installed capacity for onshore wind. This concern has been expressed on a number of occasions by the CCAC in, e.g., the CCAC Annual Review 2023, section 5.4.1, and the CCAC Annual Review for Electricity 2024, section 3. ...

32. This issue has also been addressed in detail in a report commissioned by Wind Energy Ireland ('WEI') from MKO entitled Repowering Ireland and dated 18 June 2024. ...

33. By way of summary, of the 4,767 MW of installed capacity for onshore wind, 854MW are due to be decommissioned by 2030, unless they are repowered or extended (see MKO, 'Repowering Ireland', Table 2.1). One project, the Derrybrien windfarm, will not be repowered, resulting in a loss of 59.50 MW. The dataset assembled to inform the Repowering Ireland report is not published as part of the report, but was requested and shared with the Department of the Environment, Climate and Communications ('DECC') to allow the data to be independently validated.

34. The analysis in the Repowering Ireland report concluded that **26% of all currently connected projects are located in policy areas classified as unfavourable for wind farm development in current development plans**. If 50% of the existing installed capacity which is due to be decommissioned by 2030 nevertheless remains installed and operational by 2030, of the other 50% currently installed (and which I estimate will require planning permission to continue operating or attempt to repower), 26% of those projects will likely be refused an extension of their permitted operation life or repowering based on the Board's policy. **On that basis, approximately 103.29 MW would be lost**.

35. Of the remaining 74% (of the 50% which I estimate will require planning permission to continue operating or attempt to repower) that might attempt to repower the wind farm with new wind turbines, it is estimated that **those projects will likely see a reduction of 35.1% in repowered installed capacity, equating to a loss of approximately 103.18 MW** (see MKO, 'Repowering Ireland', section 4.4).

36. Based on those assumptions, only 588 MW of the 854 MW capacity due to be decommissioned by 2030 would remain available in 2030, **with a loss of -266 MW of currently available capacity**.

(ii) Projects currently In Construction

37. My analysis has established that 10 wind farm projects, totalling 481MW in capacity are currently in construction. Each of these 10 project has already secured irrevocable planning permission, a grid connection and a route to market for the electricity they will generate. This does not include a project with a capacity of 91MW which is partially constructed but which is subject to legal proceedings which are preventing works proceeding.

38. It is almost certain that these 481MW will connect and become fully operational in the next 12-24 months, and thereby result in additional capacity of approximately +481 MW by 2030.

(iii) Projects with Irrevocable Planning Permission

39. The third category of project that I have considered is projects with irrevocable planning permission, i.e. where challenges to permissions have been successfully defended or where the time to challenge permissions has expired. These projects are not yet in construction. This category of project has the potential to add approximately 831.61 MW of capacity, if each project successfully proceeds to connection by 2030.

40. Of that 831.61 MW, approximately 81%, or 676.81 MW, have a grid connection offer. 76%, or 631.62 MW, have planning permission for their grid connections. 36%, or 296.60 MW, have a route to market secured (i.e. have qualified for support under the State's Renewable Energy Support Scheme or have entered into a corporate power purchase agreement with a large electricity consumer).

41. Taking account of a number of risk factors that arise for these projects pertaining to, for example historical site activity and unauthorised development, not securing planning permission for grid connection and difficulties in securing grid connection (in particular in locations with grid constraints), I have estimated that projects with irrevocable planning permission are likely to result in additional capacity of approximately 524.15 MW by 2030.

42. The fourth category of project that requires to be considered is permitted projects still subject to judicial review. This category of project has the potential to add approximately 632.4 MW of capacity, if each project successfully proceeds to construction by 2030. Having regard to the various risks arising that those projects will not proceed to construction by 2030, and in particular the risk of those permissions being quashed on judicial review, I have estimated that projects with planning permission still subject to judicial review are likely to result in additional capacity of approximately +447.23 MW by 2030.

(iv) Proposed Projects in Planning System

43. The fifth category of project that requires to be considered is proposed projects that are currently in the planning system but where a decision on the application for permission has not yet been made. **This category of project has the potential to add approximately 1,769.50 MW of capacity**, if each project successfully proceeds to construction by 2030. However:

a. My analysis has established that **28.26% of those projects are located in areas without favourably policy support for wind farm development in current development plans**. If all 28.26% of those projects were to be refused permission based on the Board's policy, **approximately 499 MW of capacity would be lost**.

b. My analysis has established that 354 MW of projects are currently seeking planning permission in Counties Mayo and Donegal, none of which is likely to be connected by 2030 if permitted, due to the need for deep transmission grid reinforcement which is unlikely to be in place by 2030.

c. Further, of the remaining projects seeking planning permission, I have estimated that **24.1% of those projects are likely to be refused by the Board based on the Board's record of refusing permission for wind farms in 2023/2024 for reasons other than policy, which would result in a further 220.88 MW of capacity being lost**.

d. To take account of other risks that arise with respect to these projects reaching connection stage by 2030 (i.e. with respect to possible judicial review, obtaining a grid connection offer, obtaining planning permission for grid connection, securing a route to market and commencing and completing construction), and the time frame likely to be involved in that respect, my analysis estimates that 20% of these otherwise successful projects, amounting to 139.12 MW will succumb to other such risks.

On that basis, I have estimated that pipeline projects currently in the planning process are likely to result in additional capacity of approximately +556.50 MW by 2030.

(v) Future Projects Not Yet in the Planning System

44. The final category of project that I have considered is future projects that are in an advanced pre-planning stage. I have included in this category those projects that have completed at least two years of bird surveys, and which will be applying for planning

permission between now and the end of 2026. Any projects that will apply for permission in 2027 or thereafter have been excluded, as they are not considered feasible for 2030 delivery even under the most expedited delivery scenario. The data with respect to this final category of projects was furnished to me by Wind Energy Ireland, who in turn obtain that data from a survey carried out annually with their members to establish the size of the industry's project development pipeline. The survey information is submitted by Wind Energy Ireland members confidentially, but is shared with state bodies such as Eirgrid (the electricity transmission network operator) who use it for future network analysis and planning.

45. This category of project has the potential to add approximately 3,831.2 MW of capacity, if each project successfully proceeds to construction and connects by 2030. However:

a. the pipeline survey results have estimated that **48.43% of those projects are located in areas without favourable policy support for wind farm development in current development plans**. If all 48.43% of those projects were to be refused permission based on the Board's policy, **approximately 1,855.45 MW of capacity would be lost**.

b. My analysis of the Wind Energy Ireland pipeline data has also established that a further 176 MW is proposed in favourable policy areas in County Mayo, none of which be connected by 2030 if permitted, due to the need for deep transmission grid reinforcement which is unlikely to be in place by 2030.

c. Further, I have estimated that **24.1% of the remaining capacity in this category of project are likely to be refused by the Board based on the Board's record of refusing permission for wind farms in 2023/2024 for reasons other than policy, which would result in approximately 433.74 MW being lost**.

d. To take account of other risks that arise with respect to these projects in fact reaching connection stage by 2030 (i.e. with respect to possible judicial review, obtaining a grid connection offer, obtaining planning permission for grid connection, securing a route to market and commencing and completing construction, and the time frame likely to be involved in that respect), my analysis estimates that 50% of these otherwise successful projects, amounting to 683.01 MW will succumb to other such risks thereby delaying completion and energisation of these projects beyond 2030.

On that basis, I have estimated that future projects that are in an advanced pre-planning stage are likely to result in additional capacity of approximately +683.01 MW by 2030.

46. Based on those calculations, my current projection for 2030 installed wind energy capacity, if the Board continues to apply this policy into the future, but with no decommissioning of current operational wind farms, is 7,459.08 MW.

47. My current projection for 2030 installed wind energy capacity, allowing for some decommissioning and repowering of current operational wind farms as estimated above, is 7,193.12 MW.

48. Therefore, even taking the more optimistic approach with respect to current operational wind farms, i.e. that all of that capacity will remain available, my current best estimate is that **the State would fail to meet the 9 GW target for 2030 by in or about 1.5 GW, if the Board continues to apply the policy at issue in these proceeding**. My view is that this result would to a significant extent be caused by that policy of the Board where, in particular:

a. **496.3 MW of projects have already been refused by the Board based in whole or in part on this policy in 2023 and 2024**

b. Approximately 499MW of projects currently in the planning process are likely to be refused by the Board if that policy is applied; and

c. Approximately 1,855MW of projects in the development pipeline that are likely to apply for planning permission by the end of 2026, are likely to be refused by the Board if that policy is applied.

49. I emphasise that these calculations were not before the Board when it made its decision. However, my view is that the Board did not need these precise calculations before it for it to be aware that the policy it chose to employ was likely to seriously jeopardise the achievement of the Renewable Energy Targets. Rather, I have set out these projections for background information and to explain the context within which the issue arises, and to make clear the urgency and materiality of the issue that arises for determination.

50. Finally, I note that my analysis is based on existing development plans. The CCAC has for a significant period of time recommended that the State take urgent action to align development plans with the Renewable Energy Targets. I understand that the State intends to take policy action in that respect through the draft National Planning Framework (the 'draft NPF'). However, the implementation of the relevant proposals at Section 9.2 (Regional

Renewable Electricity Capacity Allocations) of the draft NPF, if the draft NPF is adopted, will in my view take a significant period of time. I do not believe that those changes will be actioned in development plans in sufficient time to materially alter my analysis, as set out above.

51. The policy framework outlined in the draft NPF, in my professional opinion, is not likely to benefit individual wind farm project proposals until 2028/2029. I say this because –

a. In my view, the NPF is unlikely to be finalised until the end of next year on the basis that it is unlikely to be finalised before the general election due in the coming months and allowing for the draft NPF to be reviewed by the new Government (estimated December 2025).

b. Following that, the process by which the Regional Renewable Energy Strategies are set, environmentally assessed, put out to public consultation and finally approved will take at least a further 12 months (estimated December 2026).

c. Then the County Development Plans throughout the Country will require to be varied, which process will take at least a further 12 months (estimated December 2027).

d. On the basis of the last County Development Plan cycle, it is highly likely that a number of County Development Plans will be subject to oversight from the OPR and Ministerial Directions under section 31 of the planning and Development Act 2000 (as amended), which process will take at least a further 12 months (estimated December 2028).

52. I say that any windfarm permitted with the benefit of the new policy framework in 2028, based on experience so far this decade, will not be energised and connected by 2030. I say this on account of all of the steps which require to be taken to complete the development of a wind farm after planning permission is granted, which are represented on a Gantt chart which I have compiled. ... I further say this knowing that only one wind farm that applied for planning permission after 1st January 2019 has energised to-date (Lisheen 3 whose planning application was submitted on 1 December 2020 and which project was completed and energised on 18 November 2022). All of the other wind farm projects energising this year (2024), have taken significantly longer between planning and energisation, such as Crossmore wind farm in Co. Clare (planning applied for in 2009), Yellow River wind farm in Co. Offaly (planning applied for in 2014), and Moanvane wind farm in Co. Offaly (planning applied for in 2018). The quickest wind farms to be developed, from when planning permission was applied for, to when they are likely to be energised in late 2024 or earlier 2025 include Derrinlough wind farm in Co. Offaly (4¾ years since planning was applied for in February 2020) and Cushaling wind farm also in Co. Offaly (5 years to deliver since planning was applied for in March 2020).

Requirement for annual connection of 1.6 GW Renewable Energy Capacity

53. Finally, I will address the consistency of the Board's decision making with the requirement identified by the CCAC that an average of 1.6 GW of renewable energy capacity must be connected annually to meet the Renewable Energy Targets.

54. The CCAC has addressed this issue in detail in the Annual Review 2024 of Electricity, noting inter alia that:

a. An annual average increase of 1.6 GW of onshore renewables (i.e. onshore wind and solar) is required to meet 2030 capacity targets.

b. **In 2023, only 0.6 GW of new grid-scale solar (0.4 GW) and onshore wind (0.2 GW) generation was connected, which is significantly below the annual average increase of 1.6 GW** of onshore renewables required to meet the 2030 capacity targets.

c. In 2023, only 0.5 GW of wind and 0.8 GW of solar energy projects received planning permission and **no onshore wind projects were awarded permission before September**;

d. Appeals and judicial reviews, including for all of the Board's approved projects, continue to delay the development of projects.

55. The CCAC made inter alia the following relevant recommendations, to accelerate the deployment of onshore wind and solar electricity generation:

a. To achieve Ireland's targets in this sector, the Government must urgently deliver the National Planning Framework Review so that Local Development Plans, County Development Plans and local authority climate action plans can be aligned with the mandated national and regional targets and with EU legal requirements.

b. The Minister for Housing must mandate variations to County Development Plans to provide sufficient zoned areas;

> c. In the event of failure to provide sufficient zoned areas, An Bord Pleanála must approve adequate planning applications to meet the 1.6 GW annual increase in capacity needed to achieve Ireland's 2030 targets.
>
> 56. The necessary alterations to the local area plans, development plans and local authority climate actions plans to align them with the mandated national and regional targets and with EU legal requirements have not yet taken place. I believe that, despite the progress with respect to the draft NPF, it will be a significant period of time before the proposals in the draft NPF are implemented in local plans. In that context, I have been asked to provide an opinion as to whether the Board is approving adequate planning applications to meet the 1.6 GW annual increase in capacity needed to achieve Ireland's 2030 targets.
>
> 57. My view, based on my analysis set out above and the level of solar energy developments granted permission in 2023, is that **the Board will not be able to approve adequate planning applications to meet the 1.6 GW annual increase in capacity needed to achieve Ireland's 2030 targets, without materially contravening development plans under section 37(2)(b) or 37G(6) of the 2000 Act** to grant planning permission for wind farm developments in areas with unfavourable policy for wind farm development, but which in all other respects would be in accordance with the proper planning and sustainable development of the areas in which those windfarm developments are proposed."

162. The board indignantly denies in submissions that there is a policy. But that isn't grounded in either the pleadings or the evidence. In fact, para. 59 of the statement of opposition, verified by para. 3 of the affidavit of Pierce Dillon, doesn't deny a fixed policy. The essential point made there is that "the applicant bears the burden of proof".

163. But even leaving that aside, the critical point is that when the board dismisses the existence of a policy, that is an essentially semantic move which we have seen in many contexts before.

164. The classic example is from international law. War is generally illegal, so nations don't declare war anymore. Instead they engage in "military interventions", "police actions" or "special military operations". By defining what they are doing as not being war, they purport to avoid any suggestion of illegality. But that is just playing with words.

165. A similar principle applies here. A fixed policy is illegal so the board inevitably defines whatever it is doing as not being a fixed policy. But that doesn't tell us anything about reality – only about the board's use of language.

166. The critical point is that a fixed practice of supine submission to bans on renewable energy in development plans didn't happen by magic. It didn't happen by accident in the course of entirely open-minded individual consideration of applications and appeals on a case-by-case basis, like throwing dice that just coincidentally happened to roll a double six every time for years on end. That's an insult to the intelligence of the public – the odds of that are millions-to-one against.

167. So all that's left is that the change happened deliberately. The form of the deliberation doesn't matter – formal policy, informal policy, common understanding, meeting of minds, fixed practice, or the old stand-by of a conscious decision to assign work to specific people with a particular known approach (it is a matter of public record (citations are superfluous because the board will be familiar with them, but an example is referred to in *Frawley v. An Bord Pleanála* [2023] IEHC 432 (Unreported, High Court, 24th July 2023), para. 11) that that was alleged to have been the board's preferred *modus operandi* prior to May 2022 in order to achieve particular outcomes without leaving fingerprints in the form of a "policy"), call it what you will. It comes to exactly the same thing as a fixed policy – indeed it is rather worse because it hides behind bamboozling abstractions and denials, legalistic blaming of the applicant on an onus of proof basis, and obstruction of the court's ability to understand the facts of the matter. One has to accept in the absence of contradiction (reinforced by the absence of a plea that there is no fixed policy) the evidence that there has been a significant shift since end-2022 whereby the board now effectively refuses to materially contravene development plans in support of renewable energy. That can only have been as a result of deliberation.

168. We do know when the deliberation happened – late 2022 or early 2023 at the latest. What we don't know is who did the deliberation and in what form was it disseminated across the organisation. But the board knows both of those things and has chosen to keep silent about them. It isn't too late for the board to come clean. Any continuing failure to do so may hypothetically be relevant to the public interest limb of any test that may arise in any potential consequential application that any of the opposing parties may wish to make, but we can consider that if it arises. In the meantime I will just point out that a respondent public body's duty of candour to the court is an ongoing one, as is specifically its duty to rectify a failure in candour. In fairness to the board, it does typically take a much more reasonable forensic approach, indeed to the extent that if it feels an impugned decision could have been better it will often not contest the point, unless perhaps the problem wouldn't have changed anything. So one can really feel the difference in those mercifully

limited number of cases when the board for whatever reason gives the impression of subordinating its duty to the court to what comes across as a need to win at all costs. Apart from anything else, reasonableness, perspective, judgement and transparency are persuasive. Blustering legalistic concealment and denial is not persuasive. No doubt the board will live up to the usual high standards it sets itself by coming forward promptly with the required disclosure here, for the record at least. That won't change the fact that the applicant has succeeded under this heading based on what was before the court at the trial. Indeed in fairness to the board, there was an offer (not an application) at the hearing to seek time to obtain further instructions. Since the applicant didn't seem to want matters adjourned for that purpose, for obvious and understandable reasons, I didn't take the board up on that, but really it's not up to me or even an applicant to compel a public law respondent to set out all relevant facts – they have to do that on their own initiative.

169. Applying the law here, the effectively fixed approach adopted by the board of refusing material contravention even in the face of the climate emergency is inconsistent with the obligations of s. 15. But independently it falls foul of the principle against fettering discretion.

170. That principle also applies to fettering the discretion to allow material contravention: *Christian and Others v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506, *per* Clarke J. at 10.4:

> "However, the point which arises here is that the entitlement of the members to deviate from the development plan is enshrined in statute. The elected members have such a discretion; they cannot take that discretion away from themselves. It was argued on behalf of Dublin City Council that the challenged provision of the Development Plan was really meaningless in that it could not, it was accepted, prevent the members from exercising a discretion, in accordance with the statutory process and within the terms of what is permitted under statute, to allow a material contravention. That that is so can hardly be doubted. If the statute confers an entitlement on the elected members then they cannot give it away. However, it seems to me that that answer begs the real question. Why is the provision there in the first place if it has no meaning? It is true that in respect of any aspect of the zoning of Dublin City (or indeed any other local authority) it is not possible to give a planning permission which contravenes in a material fashion the development plan without going through the material contravention process. Why then is specific mention made in the fashion already cited under Z15 and not made in respect of any other zoning if, in truth, the position is the same in all cases being that material contravention is possible? It seems to me that the only reasonable interpretation to place on the presence of the challenged provision in respect of Z15 (and its absence in respect of all other zones) is that it is intended to convey a prejudgment on the part of the elected members in respect of any future material contravention application and as, perhaps, a warning that no such applications will be entertained. On that basis it is clearly impermissible as an unlawful fettering of the elected members' discretion. It seems to me, therefore, that that provision should also be quashed."

171. So I would also uphold core ground 2 as a basis for quashing the decision.

Core ground 5 – breach of ECHR Act 2003

172. Core ground 5 is:

> "5. Core Ground 5: The Decision is invalid as the Board failed to exercise its functions under the 2000 Act, and in particular its discretion under section 37G and/or section 37(2)(b) of the 2000 Act, in a manner that was compatible with the State's obligations under Articles 2 and 8 of the European Convention on Human Rights (the 'ECHR') in accordance with section 3 of the European Convention on Human Rights Act 2003, further particulars of which are set out in Part 2 below."

173. The parties' positions as recorded in the statement of case are summarised as follows:

> "Core Ground 5: Section 3 of the ECHR Act 2003
>
> 40. The Applicant's position is that Article 8 of the European Convention on Human Rights ('ECHR') imposes a positive obligation on the State to put in place a legislative and administrative framework with respect to climate change designed to provide effective protection of human health and life, and a further positive obligation to apply that framework effectively in practice, and in a timely manner. In failing to properly apply section 15 of the 2015 Act, in a manner that resulted in the effective application of the framework established by the 2015 Act in practice, the Board erred in law and acted in breach of section 3 of the ECHR Act 2003.
>
> 41. The Board's position is that the sole particular in respect of this ground does not comply with Order 84, Rule 20(3) of the Rules of the Superior Courts as it does not identify the nature of the legal obligation which is said to be placed on the Board qua the ECHR and in the context of the consideration of an application for development consent, nor does it identify the basis upon which it is asserted that the refusal of an application for planning

permission is inconsistent with the Applicant's rights under Articles 2 and 8 of the ECHR and/or specify any interference in this respect.

42. Without prejudice thereto, the Applicant has failed to demonstrate that it has locus standi to make this argument and / or how a private limited company has rights under Articles 2 and 8 of the ECHR and/or that they are engaged in this context. The Applicant's reliance on Case 53600/20 Verein [KlimaSeniorinnen] Schweiz v Switzerland in this regard is misconceived.

43. Further, it is denied that the Board failed to consider climate policy in the context of its decision."

174. In effect this issue has already been considered under core ground 1 above and for reasons broadly explained there I would uphold this ground also.

Core ground 6 – breach of regulation 2022/2577

175. Core ground 6 is:

"6. Core Ground 6: The Decision is invalid as the Board failed to treat the Proposed Development as being in the overriding public interest and serving public health and safety, and to give priority to that overriding public interest when balancing legal interests when making the Decision, as required by Article 3(2) of Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, further particulars of which are set out in Part 2 below."

176. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 6: Failure to treat the development as being in the overriding public interest

44. The Applicant's position is that EU law requires that, in the development consent process, windfarm developments are treated as being in the overriding public interest. Specifically, Article 3(2) of Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy requires that the construction and operation of plants and installations for the production of energy from renewable sources is given priority when balancing legal interests in the individual case. The Board therefore erred in law and acted in breach of EU law in rejecting the Applicant's submission that the Board should determine the application for permission based on a presumption that the Proposed Development is in the overriding public interest.

45. The Board's position is that the pleas under this ground do not comply with Order 84, Rule 20(3) of the Rules of the Superior Courts in circumstances where they do not identify the basis upon which the Board's refusal to exercise its discretion to grant permission in material contravention of an application for planning permission for an individual project breaches Regulation EU 2022/2577 (the 'TRE Regulation').

46. Without prejudice thereto, the TRE Regulation does not have the meaning and effect contended for by the Applicant. The presumption under the TRE Regulation is for the purposes of balancing legal interests in the context of the carrying out of certain EU law assessments under the three specified Directives therein. The Board did not refuse permission because of any constraint arising under any of the three specified Directives in Article 3(1) of the TRE Regulation and it does not have the effect contended for by the Applicant. Furthermore, Article 3(2) of the TRE Regulation did not preclude the Board from refusing to exercise its discretion under s.37G(6) and/or s.37(2)(b) to grant permission for the Proposed Development in material contravention of the CDP. The Applicant's erroneous premise is based on a misunderstanding of the scope of the TRE Regulation."

177. It is not clear to me that this ground really arises on the facts. The basis of refusal was contravention of a development plan, not impacts on European sites. So the overriding public interest issue in the sense of art. 3(2) council regulation (EU) 2022/2577 (which is the pleaded issue) doesn't really seem to arise. While I take the applicant's point that some of the language in recitals 13 and 14 to council regulation (EU) 2024/223 of 22 December 2023 amending regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy is somewhat wider, that point wasn't particularly developed in written or oral argument and thus I don't think it has been shown in this particular case that the subsequent regulation enlarges the scope of art. 3(2) of the 2022 regulation sufficiently to put that provision in play here.

Core ground 7 – breach of EU law by failure to provide for material contravention

178. Core ground 7 is:

"7. Core Ground 7: The Decision is invalid as the Board breached the duty of sincere cooperation in Article 4(3) of the Treaty of the European Union, in refusing to exercise its discretion under section 37G and/or section 37(2)(b) of the 2000 Act to grant permission for the Proposed Development, and thereby failing to give effect to and/or jeopardising the attainment of the objectives of European Law, including the binding obligations of the European Union and its Member States with respect to climate change, further particulars of which are set out in Part 2 below."

179. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 7: Duty of Sincere Cooperation

47. The Applicant's position is that the Board breached the duty of sincere cooperation under Article 4(3) of the Treaty of the European Union, in refusing to exercise its discretion to grant permission for the Proposed Development in material contravention of the development plan. In doing so, the Board failed to give effect to and/or jeopardised the attainment of the objectives of European Law, including the binding obligations of the European Union and its Member States with respect to climate change, as detailed in Core Ground 7 of the Statement of Grounds.

48. The Board's position is that the pleas under this ground do not comply with Order 84, Rule 20(3) of the Rules of the Superior Courts and cannot form a proper basis for relief. Without prejudice thereto, it is denied that the duty of sincere cooperation can be relied upon by the Applicant in the manner contended for and/or to the extent it operates to read in enhanced obligations under s.15."

180. As with the ECHR point, in effect this issue has already been considered under core ground 1 above and for reasons broadly explained there I would uphold this ground also.

Summary

181. In outline summary, without taking from the more specific terms of this judgment:

(i) as regards the fact-specific points, firstly the board adopted the inspector's report generally, which considers the wrong section of the 2000 Act regarding material contravention and which involves a significantly different test;

(ii) secondly, the board had regard to an irrelevant consideration regarding the lack of ministerial/OPR objection to the contested provisions of the development plan;

(iii) in case I am wrong on the foregoing I will set out a decision on the other points;

(iv) section 15(1) of the 2015 Act means what it says, and the board failed to exercise its powers in a manner compliant as far as practicable with the climate objectives and policies set out in that subsection;

(v) that failure also constituted a breach of duty under the ECHR Act 2003 and a breach of EU law obligations;

(vi) the board adopted an unlawfully fixed approach to material contravention, and for good measure has failed and is continuing to fail to disclose the circumstances in which it did so; and

(vii) the alleged breach of regulation 2022/2577 has not been shown to arise on the facts.

Order

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

(i) there be an order of *certiorari* in terms of relief 1;

(ii) subject to a final decision on the form of the order, there be an order remitting the matter to the board to reconsider the application in accordance with this judgment;

(iii) provisionally, there be an order for costs (including the costs of written submissions and certifying for two counsel in respect of all relevant court applications) to the applicant against the respondent in respect of the proceedings, the quantum of costs to be determined, in default of agreement, in the legal costs adjudication process, and (in view of the matter being capable of being decided on the fact-specific grounds) there be no order as to costs in favour of or against the State parties; and

(iv) the matter be listed on Monday 20th January 2025 to confirm the foregoing.