THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 369

[Record No.: 2021/12JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN:

KESHMORE HOMES LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT Of Ms. Justice Siobhán Phelan, delivered on the 27th day of June, 2023

INTRODUCTION

1. This application for judicial review concerns a decision of An Bord Pleanála ("the Board") to refuse planning permission for a residential development comprising 64 dwellings (subsequently reduced to 62) and associated development on lands in the townlands of Loughminane, Knocksborough Glebe and Whitesland West, Kildare, County Kildare ("the proposed development"). The Applicant (hereinafter "KHL") is a company carrying on a development business and was the applicant for planning permission in the application the subject of the present proceedings.

2. The Applicant challenges the decision of the Board by reference to three different issues. First, it is alleged that there was a failure to consider a submission made by the Applicant that planning permission should be granted in material contravention of the Kildare County Development Plan 2017 – 2023 ("the Development Plan") and/or a failure to give reasons for rejecting that submission.

Second, it is alleged that the Board failed to afford fair procedures to the Applicant in respect of the application of a Variation to the Development Plan. Third, it is alleged that the Board has adopted an "*inconsistent*" approach to different applications for planning permission which gives rise to an unfairness.

BACKGROUND

3. KHL's application for planning permission was made on the 6th of December, 2019. The application involved the construction of 64 residential units, comprising detached, semi-detached and terraced houses, and eight apartments in a single, two-storey block (ref. 19/1359). At that time, the site was subject to the Kildare County Development Plan, 2017-2023 (the "CDP") and the Kildare Town Local Area Plan, 2012-2018 (as extended) (the "LAP").

4. On the 7th of February 2020, the planning authority, Kildare County Council (the "Council"), decided to refuse permission on three grounds, the first of which was that the proposed development would represent a material contravention of the LAP. The material contravention identified, however, related to section 7.2.1 of the LAP for Kildare Town which prioritised development land zoned Phase 1 lands over lands zoned Phase 2 (which included KHL's lands). No contravention of the CDP was identified as a basis for the refusal.

5. By letter dated the 5th of March, 2020, KHL lodged an appeal with the Board against the Council's decision. This first-party appeal was supported by submissions on behalf of KHL by its planning consultant (David Mulcahy, Planning Consultants Limited) dated the 4th of March 2020. It was submitted on behalf of KHL that there was no material contravention of the LAP for Kildare Town. The broad thrust of the submissions were directed to why it was in the interests of proper planning and sustainable development to grant permission in respect of the particular zoned phased 2 lands notwithstanding that all zoned phased 1 lands had not yet been developed. A brief alternative submission was made to the effect that if the Board concluded there was a material contravention of the LAP, the Board could nevertheless grant permission for the proposed development:

"having regard to the delivery of housing which is of national importance arising from the current housing crisis and, the RSES (Regional Spatial and Economic Strategy) which are clear that alternative lands should be considered for housing development when existing residential zoned land is not delivering same."

6. Express reference was made in the first-party appeal to s. 37(2) of the Planning and Development Act, 2000 (the "2000 Act"),which was quoted in full at para. 9.1.1, and the Board's power under that provision to grant permission in material contravention of a development plan. This submission was made with reference to the LAP and not the CDP. The submission focussed on the importance of development in the context of the national housing crisis (clearly referrable to the Board's power to grant permission under s. 37(2)(i)) and the Regional Spatial and Economic Strategy ("RSES") (referrable to the power under s. 37(2)(iii)) notwithstanding a material contravention. Again, as already noted, these submissions were addressed to a contravention of the LAP as opposed to the CDP.

7. Express reference was also made to a proposed variation of the CDP even though it had not yet been adopted (at p. 52) and was not the basis for the refusal under appeal in the following terms:

"We note that the Planner's Report makes reference to 'Variation of the Kildare County Development Plan 2017-23'. We highlight that this is a proposed variation and is currently the subject of 73 submissions. We submit that it cannot be considered as part of the assessment of an application until it has been formally adopted. That said, we note that Kildare Town has been designated as a Self-Sustaining Growth Town which is the second highest tier within the settlement strategy and reflects the strong development of the two in recent years and its infrastructure base."

8. Several months after the appeal had been submitted, on the 9th of June, 2020, the Council made the previously mooted variation to the CDP (the "Variation"). I

understand that the Variation was itself a response to the publication on the 28th of June, 2019 by the Eastern and Midland Regional Assembly of a RSES for the period from 2019 to 2023. The Variation effected changes to the Core Strategy and Settlement Strategy contained in the CDP including the insertion of a new Table 3.3 which contained a revised dwellings target for towns in the county. The dwellings target for Kildare Town, where the subject development is located, was revised from 1527 to 283. This constituted an 81 per cent reduction in the dwellings target to 2023 for Kildare Town.

9. The Variation had major implications for the development of KHL's lands as it had the effect of amending the CDP core strategy by substantially reducing the target number of new dwellings for settlements in County Kildare. The Variation was challenged in separate proceedings commencing in July, 2020 entitled *Ardstone Residential Partners Fund ICAV and Ardstone Homes Limited v. Kildare County Council* (2020/538JR) (the "*Ardstone Proceedings*"). A stay on the Variation was granted on an interim basis by order *ex parte* made on the 12th of August, 2020 in the *Ardstone Proceedings* in respect of the towns of Celbridge, Clane and Johnstown. The terms of the stay were subsequently varied by order made on the 19th of November, 2020 with the effect of limiting the application of the stay to the lands the subject of the *Ardstone Proceedings*.

10. On the 19th of August, 2020, the Board made a decision in respect of a separate development referred to as the "*Rycroft Decision*". The Inspector's Report in that case had been completed in August, 2020. While the inspector found that the proposed development in the case of that development integrated within the existing settlement and was an appropriate location for expansion, refusal of the appeal was recommended with reference to the Variation adopted by the Council in June, 2020 on the basis that the grant of permission would be a material contravention of the housing allocation for the area (Kilcock in that case) were the stay then understood to be in play by virtue of the *Ardstone Proceedings* lifted. Notably, the Inspector considered in some detail whether permission should be granted notwithstanding a material contravention having regard to the provisions of s. 37(2)(b) of the 2000 Act. Having done so she concluded that the settlement hierarchy and housing allocation stated in the Variation

were in keeping with the policies and objectives of the National Planning Framework (NPF) and the RSES for the Eastern and Midlands Regional Assembly and would therefore be contrary to the proper planning and sustainable development of the area. The Inspector specifically addressed the possibility that the Board might disagree with her and conclude that the grant of permission was warranted under s. 37(2)(b) of the 2000 Act and stated that in view of the conflict between policies requiring sustainable growth and "*in the absence of any order of priority in the LAP*" the development might be justified under s. 37(2)(ii) of the 2000 Act.

11. In the *Rycroft Decision*, the Board decided to grant permission on the basis that the proposed development would be in accordance with proper planning and sustainable development of the area notwithstanding a material contravention of the CDP. According to the terms of the Board Direction in that case, it determined that although the Variation reflects certain objectives of the RSES, it:

> *"has been adopted without any associated dezoning, and in the opinion of the Board, without due regard to density or efficient land-use implications, and as such has not demonstrated itself to be wholly consistent with Sustainable Urban Development Guidelines, Residential Density Guidelines, and NPF compact growth objectives, etc.). The development is located on residentially zoned land in an existing urban settlement, within the Dublin MASP and is adjacent to existing infrastructure and services. The development provides linkages to a proposed school site, is well served and accessible to public transport (via the Sligo Dublin rail line), and as such is suitable for development and of a strategic and beneficial nature to the town of Kilcock."*

12. Accordingly, notwithstanding that the grant of permission was incompatible with the varied CDP, permission was granted by the Board on appeal in respect of the *Rycroft Development*.

13. Just over a month later, on 22nd of September, 2020, the Board's Inspector reported on KHL's appeal. In the Inspector's Report (paragraph 6.1), KHL's appeal was summarised only in part. Specifically, at p.12 of the Report, the Inspector recorded

that KHL had submitted that the proposed development was not a material contravention of the LAP, the primary finding for the decision under appeal. However, she did not record the alternative submission, *i.e.* that permission could be granted even if there were a material contravention.

14. The Inspector concluded that the proposed development was in material contravention of the LAP which prioritised development of zoned phase 1 lands. In her analysis of the issue (paragraph 7.2), the Inspector referred to the Variation and the revised core strategy target of 283 dwellings for Kildare Town by 2023 (paragraph 7.2.3). She said that recent planning permissions would provide 811 new residential units, being "*significantly above the number of units permissible in the core strategy*". Her conclusion (paragraph 7.2.5) was that, having regard to the quantum of extant permissions for residential development within Kildare Town, the proposed development would contravene the core strategy and, therefore, Policy HP2 of the LAP. On this basis, she recommended refusal of permission stating that the proposed development would, by reason of being in contravention of the LAP, be contrary to the proper planning and sustainable development of the area. The Inspector's report did not address whether, notwithstanding a material contravention, permission should nonetheless be granted.

15. On 2nd of November, 2020, the Board refused permission. The Board refused permission having regard to: (i) the Variation and its revision of the CDP core strategy; and (ii) the quantum of extant permissions for residential development within the boundary of Kildare Town. On these bases, the Board considered that the proposed development would contravene the core strategy of CDP and, therefore, Policy HP2 of the LAP and would be contrary to the proper planning and sustainable development of the area.

16. Of note, prior to refusing the application by reference to the Variation which had been adopted since the appeal was lodged, the Board did not provide KHL with an opportunity to comment upon or make submissions to it in connection with the said Variation. Indeed, at that time the Variation was the subject of a Court ordered stay, albeit in respect of the towns of Celbridge, Clane and Johnstown but not Kildare where the subject development site was located.

17. The Board's decision did not address whether, notwithstanding a material contravention, permission should nonetheless be granted and no reasons for rejecting KHL's submission in this regard were given. In this way, the Board's approach to the Variation and to the question of whether permission should be granted notwithstanding a material contravention of same differed from its approach in the *Rycroft Decision* where it proceeded to consider the grant of permission notwithstanding a finding of a material contravention and thereafter determined to grant permission, advancing reasons for its decision to do so notwithstanding material contravention of the CDP by reason of the Variation.

18. Following receipt of the letter notifying the making of the Board decision, the KHL's planning consultant was unable to obtain a copy of the Inspector's Report and the Board Direction on the Board's website as those documents were not uploaded in accordance with the Board's normal practice. He contacted the Board and received a copy of the Inspector's Report on the 17th of November, 2020. Meetings with experts and solicitors were impacted by COVID-19 restrictions with the result that written advices were only obtained from counsel on the 16th of December, 2020. Draft judicial review papers were received and were ready for filing on the 5th of January, 2020, being the last day for commencement of proceedings under statutory time limits.

19. As KHL's solicitor was unaware that due to COVID-19 restrictions an advance appointment was required from the Central Office in order to issue proceedings, it was not possible to issue the proceedings that day. When contact was made on the 5th of January, 2021, she was given an appointment on the 8th of January, 2021. Papers were filed on the 8th of January, 2021 but a leave application was only moved before a Judge on the 18th of January, 2021. This was said to be the first opportunity to get a court listing due to COVID-19 restrictions.

20. By reason of the thirteen-day lapse between the 5th and the 18th of January, 2021 when the leave application was opened before the Court, an extension of time is

necessary for the maintenance of the within proceedings. The Board Direction was only received upon further follow up enquiry in January, 2021 but this was after the papers for proceedings by way of judicial review had been finalised. The papers were only uploaded to the Board's website and made accessible on-line on the 12th of January, 2021, when the time for bringing proceedings by way of judicial review had expired.

21. While the *Ardstone Proceedings* were extant when the within proceedings were commenced and were referred to as part of these proceedings, they have not been determined but have since been adjourned generally with liberty to re-enter.

ISSUES

22. In these proceedings the Applicant seeks an order of *certiorari* quashing a decision of An Bord Pleanála (the "Board") of 2nd of November, 2020 (ref. 306825) refusing planning permission for residential development at a site in Kildare Town (the "Site") adjacent to the existing Loughminane Green residential housing estate. The Applicant also seeks an order, pursuant to s. 50(8) of the 2000 Act extending the period of time provided for in s. 50(6).

23. The Decision is challenged on the following grounds:

(i) Failure to consider KHL's submission and/or to give reasons for rejecting it (Grounds 1 and 2).

(ii) Unfair procedures in relation to the Variation (Ground 4).

(iii) Unfairness arising from inconsistency in the Board's approach to the Variation (Ground 5).

24. A challenge to the decision was based on an invalid variation referrable to proceedings entitled *Ardstone Residential Partners Fund ICAV and Ardstone Homes Limited v. Kildare County Council* (High Court, Record No.: 2020/538 JR) in which it was sought to quash the Variation was not pursued before me. Those proceedings

have not been determined and it is now common case that the Variation was lawfully in force at the time the Board took its decision and that the Board was correct in making its decision by reference to the Development Plan as varied.

25. As a preliminary matter, I must determine whether it is appropriate to make an order extending time pursuant to s. 50(8) of the 2000 Act.

CHRONOLOGY

26. The relevant dates as they appear from the papers before me are as follows:

6th of December, 2019	Application received by the Council.
7th of February, 2020	Notification of Council's decision to refuse permission as in material contravention of LAP.
February 2020-March 2020	Consultation process in respect of proposed Variation of CDP.
5th of March, 2020	First Party Appeal to the Board
9th of June, 2020	Variation No.1 adopted.
31st of July, 2020	Challenge to Variation in unrelated judicial review proceedings (the *Ardstone Proceedings*).
19th of August, 2020	Board order on the Rycroft Application granting permission notwithstanding material contravention of CDP by reason of the Variation.
22nd of September, 2020	Inspector's Report on KHL application.

16th of October, 2020	Board meet to consider file and decide to refuse permission.
2nd of November, 2020	Order of the Board refusing permission issued and was posted on 3 November 2020 but documents were not uploaded and made available on-line in accordance with normal practice.
November, 2020	KHL Planning Consultant contacts Board seeking copy documents.
17th of November, 2020	Inspector's Report and Board Direction emailed to KHL Planning Consultant.
16th of December, 2020	Meeting of legal team with consultants and Applicant.
5th of January, 2021	Statement of Grounds finalised and Grounding Affidavit sworn. Central Office appointment to issue papers sought.
8th of January, 2021	Papers filed in Central Office by appointment.
7th of January, 2021	Email request from Planning Consultant for copy Board Direction.
8th of January, 2021	Board direction emailed to KHL Planning Consultant from Board.
12th of January, 2021	Board Direction, Board Order and Inspector's Report published on Board's website.

18th of January, 2021	Leave to proceed by way of judicial review granted.
18th of January, 2021	Leave to proceed by way of judicial review granted.

STATUTORY PROVISIONS

27. A time limit of 8 weeks is prescribed under s. 50(6) of the 2000 Act. Section 50(6) of the 2000 Act provides in relevant part:

> *"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision… to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision… by… the Board…"*

28. This time limit is not absolute and a power to extend time in accordance with statutory criteria is prescribed under s. 50(8) of the 2000 Act. Section 50(8) provides:

> *"(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."*

29. Section 34 of the 2000 Act provides for the grant of planning permission by a planning authority. Under s. 34(2)(*a*) the planning authority's discretion to grant

permission is restricted by considerations of proper planning and sustainable development. Section 34(2)(a) provides:

> *"When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to—*
>
> *(i) the provisions of the development plan,*
>
> *(ia) any guidelines issued by the Minister under section 28,*
>
> *(ii) the provisions of any special amenity area order relating to the area,*
>
> *(iii) any European site or other area prescribed for the purposes* of section 10(2*)(c),*
>
> *(iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government,*
>
> *(v) the matters referred to in subsection (4),*
>
> *(va) previous developments by the applicant which have not been satisfactorily completed,*
>
> *(vb) previous convictions against the applicant for non-compliance with this Act, the Building Control Act 2007 or the Fire Services Act 1981, and*
>
> *(vi) any other relevant provision or requirement of this Act, and any regulations made thereunder."*

30. While the planning authority's power to grant permission is a power which falls to be exercised in the interests of the proper planning and sustainable development of the area within prescribed parameters as set out in s. 34(2)(a), provision is further made for the grant of planning permission in a case which could give rise to a material contravention of the development plan under s. 34(6)(a). Section 34(6)(a) of the 2000 Act provides democratic and legislative safeguards on the exercise of a power to grant permission in material contravention on the basis of strict compliance with prescribed requirements regarding notice, consideration of

submissions, the preparation of a report by the executive and resolution by the planning authority before the decision to grant permission is made. The grant of permission by a planning authority in material contravention of the development plan is subject to significant procedural safeguards and the scheme of the 2000 Act operates to restrict the circumstances in which a permission may be granted in material contravention by a planning authority.

31. The power to grant permission by the planning authority in material contravention of the development plan differs from that of the Board under s. 37 of the 2000 Act in that there is no statutory notification requirement or consultation process prescribed where the Board considers granting permission in material contravention of the development plan. Both the planning authority and the Board are required by s. 34(10) of the 2000 Act, however, to state the main reasons and considerations on which the decision is based, including a decision to grant permission in material contravention of a development plan.

32. Under s. 37(1)(b) of the 2000 Act, it is provided that various provisions of s. 34 apply, *mutatis mutandis*, to the Board when considering an appeal, as they apply to a planning authority considering a planning application at first instance. These include s. 34(2)(a) which restricts the grant of permission by considerations of proper planning and sustainable development and s. 34(3), which requires, *inter alia*, consideration to be given to the application itself, any information relating to the application furnished by the applicant in accordance with relevant regulations and any written submissions or observations concerning the proposed development properly made.

33. Section 37(2) provides for the grant of planning permission on appeal notwithstanding that it has been refused by the planning authority as being in material contravention in the following terms:

"(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.

(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

34. It is clear therefore that the discretion to grant permission on appeal against a decision to refuse an application on the basis that it would be in material contravention of the development plan is very narrow. While there are differences between the exercise of the respective powers of the planning authority and the Board in this regard, the primary restriction on both of them in granting permission is the same. They are both required to exercise their powers for the purpose of the proper planning and sustainable development of the area, regard being had to the prescribed factors.

35. In this case a Variation to the Development Plan was adopted while the appeal was pending to the Board. No provision is made for a party to the appeal to make submissions to the Board in respect of a change of this nature of their own motion but under s.131 of the 2000 Act the Board, may, where it is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to do so request submissions or observations in relation to any matter which has arisen from (*a*) any party to the appeal or referral, (*b*) any person who has made submissions or observations to the Board in relation to the appeal or referral, or (*c*) any other person or body.

36. Furthermore, although s. 137 of the 2000 Act provides that in determining the Appeal the Board may take into account matters other than those raised by the parties or by any person who has made submissions or observations to the Board in relation to the appeal or referral if the matters are matters to which, by virtue of the 2000 Act it is entitled to have regard to, it must give notice in writing to each of the parties and to each of the persons who have made submissions or observations in relation to the appeal or referral of the matters that it proposes to take into account and shall, where not convening an oral hearing, afford an opportunity for submissions or observations in relation to the matters to be made to the Board in writing within a period specified in the notice.

DISCUSSION AND DECISION

Extension of time

37. As noted above the decision of the Board was made on Monday, 2nd of November, 2020. Accordingly, under s. 50(6) of the 2000 Act, an application for judicial review of the decision required to be brought within eight weeks of this date, *i.e.* by Sunday, 27th of December, 2020. It is common case that this period was extended, by s. 251 of the 2000 Act, to Tuesday, 5th of January, 2021. While the papers grounding the within application for judicial review are dated 5th of January, 2021, they were not filed in the Central Office until 8th of January, 2021 (3 days late) and the

application for leave which "*stopped the clock*" was not moved before a judge until 18th of January, 2021 (13 days late)(see *Heaney v. An Bord Pleanála* [2022] IECA 123 as to the necessity for the leave application to be opened to "*stop the clock*"). Accordingly, an extension of time of some 13 days is required in this case.

38. The principles governing extension of time are set out in *Simons on Planning Law* (Browne, *Simons on Planning Law* (3rd ed., 2021), paras. 12-320–456). In submissions I have also been referred to *Irish Skydiving v. An Bord Pleanála* [2016] IEHC 448, *Heaney* v. *An Bord Pleanala & Ors.* [2022] IECA 123; *Sweetman v. An Bord Pleanála* [2017] IEHC 46; *Reidy v. An Bord Pleanála* [2020] IEHC 423; *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2 I.R 404; *S v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R 163; *Casey v. An Bord Pleanála* [2004] 2 ILRM 296; *Arthropharm (Europe) Limited v. The Health Products Regulatory Authority & Anor* [2022] IECA 109.

39. In grounding the application for an extension of time, Mr. Costello refers to the fact that the letter from the Board notifying KHL of its decision of 2nd of November, 2020 was received by KHL's planning consultant, David Mulcahy, on the 3rd of November, 2020. Contrary to the normal practice of the Board, however, the Inspector's Report and the Board Direction were not available for review on the Board's website as usually occurs within three days. In this case these documents had still not been uploaded and made available for inspection on the Board's website in January, 2021 when proceedings commenced.

40. In the absence of the material being placed on the Board's website and wishing to avoid unnecessary journeys and visits to public buildings during the COVID-19 pandemic, Mr. Mulcahy contacted the Board seeking a copy of the Inspector's Report and Board Direction. He did not receive the Inspector's Report until the 17th of November, 2020, when the Inspector's Report and Board Order were emailed to him directly by a member of the Board's staff. At that stage he was still not furnished with the Board direction. Indeed, at the date of finalizing the papers grounding these proceedings neither Mr. Mulcahy nor KHL had received a copy of the Board direction.

In the absence of it being placed on the website, Mr. Mulcahy made further contact with the Board seeking a copy in January, 2020.

41. It is averred that the delay in receiving a copy of the Inspector's Report of some 15 days delayed KHL in progressing matters because it impeded advice in relation to possible judicial review proceedings. Mr. Costello says that when KHL received the Inspector's Report, it was then necessary to seek advice from KHL's planning consultants and other advisers, including engineers, as to the implications from a planning perspective, if legal proceedings were to be issued and to be successful. He confirms that the meeting with KHL's engineers, planning consultant and solicitor was delayed and had to be dealt with remotely, due to COVID-19 Restrictions. He avers in general terms as to his lack of technical expertise. He confirms that in December, 2020, KHL instructed its solicitors to seek advice from counsel as to the prospects of success for judicial review proceedings.

42. Written advice from counsel was received on the 16th of December, 2020. Mr. Costello says that due to commitments at this time of the year, it was not possible to convene an in-person or virtual meeting with counsel before the Christmas vacation. He further says that KHL is a small, independent developer, with limited resources, many of which are tied up in the site the subject of these proceedings. He confirms that the costs associated with High Court litigation were, therefore, a major deterrent to issuing proceedings and arrangements had to be made to fund such proceedings.

43. Mr. Costello states that as a result of the time required to address all these issues, in conjunction with the delay associated with the late delivery of the Inspector's Report and non-delivery of the Board Direction, it was not possible to give instructions to commence proceedings at an earlier point in time. He reminds us that over the Christmas break, the Government announced further restrictions on movement and business activity, arising from the COVID-19 pandemic. He says that unfortunately, KHL's solicitor did not realise in advance that due to the COVID-19 restrictions an appointment would have to be set up directly with the High Court Central Office to issue these urgent Proceedings. She contacted the High Court Office on the 5th of January, 2021, the last day for moving the application within time, to organise this and

the appointment was made for the first available slot, being the 8th of January, 2021. Thereafter, the application was moved on the 18th of January, 2021.

44. The Board opposes the grant of an extension of time and contends that these proceedings should be dismissed, without any consideration of the substantive issues which arise, as they were commenced outside of the relevant 8-week period and the Applicant has not established any basis upon which an extension of time could be granted in accordance with s. 50(8) of the 2000 Act. The Board's position with regard to this issue is explained in the first affidavit of Mr. Clarke sworn on the 10th of May, 2021. He accepts that the relevant documents were not published on the Board's website until the 12th of January, 2021—after the expiry of the eight-week period but points out that they were available for inspection on the public file maintained at the Board's office in accordance with the requirements of s. 146(5) of the 2000 Act. Mr. Clarke rests on the assertion—which is not disputed—that the Board is not obliged by law to publish its decisions or to make relevant documents available through its website. He accepts that the Board "*endeavours to publish relevant records on its website*" but says that this "*does not always occur*". He does not say why it did not occur in this case.

45. In response, Mr. Mulcahy swore an affidavit in which he stated that, whatever about the Board's legal obligations concerning publication, "*the fact is that the Board's practice for many years has been to publish the publicly available documents in this way*", *i.e.* on its website. He states that he has relied on this practice and, in recent years, has never physically attended at the Board's offices to request such documents. He further states that: "*The availability of documents by means of the Board's website became even more important during the period of Covid-related restrictions on movement*". Mr. Clarke swore a short, second affidavit, in which he corrected an error in his first affidavit and clarified certain points. Notably, however, he did not dispute Mr. Mulcahy's evidence concerning the practice of the Board in relation to the publication of documents on its website.

46. It is submitted on behalf of KHL that the delay in this case was relatively minor, running from the 5th of January, 2021 to 18th of January 2021, with the proceedings

having issued on the 8th of January, 2021. It was urged on me that had it not been for restrictions on the issuing of proceedings out of the Central Office, and the inability to attend in person before the Court, the proceedings could have been issued and an application opened within time, on the 5th of January, 2021. It is submitted that the delays that prevented this derived from COVID-19 restrictions and were not within KHL's control. It is further contended that the delay on the part of the Board in providing KHL with a copy of the Inspector's Report—which was critical to any analysis of the merits of a potential judicial review—accounts for more than two weeks, which exceeds the period of delay on KHL's part from the 5th of January, 2021 to 18th of January 2021. It is submitted that his delay was also outside KHL's control. While it is acknowledged that the Board is not obliged to publish the Inspector's Report on its website, emphasis is placed in submissions on the fact that the Board does not dispute its longstanding practice relied upon by Mr. Mulcahy. It is further pointed out in submissions that the Board does not offer any explanation for its delay in publishing the documents relevant to this case until after the eight-week period had expired.

47. It is submitted that Mr. Mulcahy took a responsible approach in requesting copies when the documents did not appear online and that it was not unreasonable for him not to attend at the Board's offices to access the documents in circumstances where: (i) he reasonably expected those documents to be published online shortly; (ii) the Board did not communicate that it did not intend to follow its usual practice; and (iii) the general reluctance then prevailing to undertake unnecessary journeys or to engage in unnecessary personal interactions with other individuals.

48. For its part, the Board submits that neither criteria guiding the exercise of a discretion to extend time under s. 50(8) of the 2000 Act have been met in this instance. They rely on the fact that s. 50(8) operates as a restriction on the power of the Court to extend time and is one which must be strictly construed. Looking at the nature and extent of delay, the Board submits that the delay of 13 days is not a minor delay as suggested on behalf of the Applicant but amounts to an extension of nearly 25% of the time allowed by the 2000 Act. They contend that it is of a similar magnitude to the delay of 19 days in *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2

I.R 404 and 17 days in *Irish Skydiving v. An Bord Pleanála* [2016] IEHC 448, cases in which extensions of time were refused. I am also referred on behalf of the Board to cases where extensions of time have been refused where there have been significantly shorter delay including *Heaney . An Bord Pleanála* [2022] IECA 123 which concerned a delay of only 5 days and *Dunne v. Kildare County Council* [2023] IEHC 73 where the delay was only 1 day.

49. Pointing to the fact that the Inspector's Report was available to KHL well within the 8-week period and was, at all relevant times, available on the Board File and had been published in the manner required by the 2000 Act, it is submitted on behalf of the Board that the delay, while a copy of the report was obtained, was not "*outside the control*" of KHL It is pointed out that it was open to the Applicant or its professional advisers to attend at the Board's offices to obtain the relevant records but they elected not to do so. In those circumstances, it is contended that the fact of the Inspector's Report not being in the possession of KHL for a period of time is not something which could justify an extension of time.

50. The Board further submits that the Applicant's reliance on the availability of its professional advisors to give advice in November and December, 2020 and an oversight by its solicitor who did not realise that it was necessary to make an appointment with the Central Office to lodge papers due to restrictions arising from the COVID-19 pandemic is misplaced as they submit that neither of these factors provide either good and sufficient reason to grant an extension nor are they factors outside of the control of the Applicant. I am referred to *S v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R 163, *Casey v. An Bord Pleanála* [2004] 2 ILRM 296 and *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2 I.R 404 in this regard.

51. It is submitted on behalf of the Board that the evidence provided by the Applicant in support of an extension of time does not suggest that he acted with any particular expedition. It is acknowledged that the error of the Applicant's solicitor with regard to arrangements in the Central Office consequent upon the COVID-19

pandemic is unfortunate but submitted that it is not a factor which can justify delay where those arrangements were in place for a significant period prior to January, 2021 and were well advertised. Issue is taken with the explanation provided for the delay between the 8th of January, 2021 (when the papers were lodged in the Central Office) and the 18th of January, 2021 (when the application was moved in the High Court) and the description of the 18th of January, 2021 as being the "*first opportunity*" to move the application. It is submitted on behalf of the Board that even during the height of the restrictions a duty judge was available every day to deal with matters such as applications for leave to apply for Judicial Review where time is about to expire.

52. With some difference of emphasis and disagreement in relation to the proper application of same, the parties are agreed that the principles guiding the exercise by me of a discretion to extend time under s. 50(8) of the 2000 Act may be summarised as follows:

(a) The jurisdiction is discretionary, to be exercised in accordance with relevant principles, in the interests of justice.

(b) The onus is on the applicant to persuade the court that an extension should be granted.

(c) The requirements in paragraphs (a) and (b) of s. 50(8) are cumulative and mandatory.

(d) As to the existence of a good and sufficient reason, the applicant must explain the entire period of the delay beyond the eight-week period, not merely some part of that period.

(e) The reason must justify not merely the delay, but the extension of time. Accordingly, matters such as the applicant's conduct or the plainly unmeritorious nature of the substantive judicial review application may be considered.

(f) There is no absolute rule as to what may or may not be taken into account or constitute a good or sufficient reason.

(g) Generally, a "*good*" reason will also be "*sufficient*".

(h) A good reason connotes a reason that both explains the delay and affords a justifiable excuse for it.

(i) The most significant factor is likely to be the degree of delay.

(j) Other relevant considerations include:

(i) whether any conduct on the part of the respondent has contributed to the delay;

(ii) the complexity of the legal issues involved;

(iii) any other personal circumstances affecting the applicant;

(iv) whether the applicant formed an intention to challenge the contested decision by judicial review within the time limit;

(v) whether reasonable diligence has been exercised in seeking to pursue that remedy and whether legal advice and/or representation was available to the applicant;

(vi) prejudice to a respondent and to third parties; and

(vii) whether the matters relied on in seeking the extension of time are set out in an affidavit.

(k) The circumstances giving rise to the delay must have been outside the control of the applicant.

53. Applying these principles to the facts and circumstances of this case I must consider firstly whether good and sufficient reason for delay has been advanced on behalf of the Applicant and secondly whether I am satisfied that the failure to move within the 8-week deadline was outside the control of KHL.

54. It is true that the extent of the delay in this case is more than in other cases where an extension of time has been refused. This is an important consideration which

weighs against granting an extension of time but is not determinative of the application. Whether or not the test set down in s. 50(8) is met can only be determined in the light of the facts and circumstances of a case as a whole. Cases in which lesser periods than that in issue here have not been excused through the grant of an extension of time cannot be blindly followed in this case because the facts and circumstances of those cases are not the same.

55. In this case it is accepted that there was a delay in the Inspector's Report and Board documentation being made available. The Board contributed to this delay by inexplicably departing from its established practice by not putting the documentation on the website at a time when restrictions were in place in response to the COVID-19 Pandemic. While it would have been open to KHL's advisor to attend at the Board offices to take copies of relevant documents during this period, it was not unreasonable in all of the circumstances for him to defer such travel in the expectation of copies being made available in the normal way. Pandemic restrictions meant that he had good reason not to travel on the reasonable assumption that the material would be made available making travel unnecessary. I would not fault the planning advisor for relying on the Board's usual practice in the circumstances not least the fact that the State remained in the grips of the COVID-19 Pandemic. It was acknowledged in *Heaney v. An Bord Pleanala* [2021] IEHC 201 that the blameworthiness of the authorities may be relevant when taking into account the overall circumstances of the case in deciding whether to extend time. In this case the Board's failure to upload the documents was not a breach of statutory duty and cannot properly be described as "*blameworthy*" but it seems to me that it is nonetheless a factor to which I might properly have regard as contributing to delay and as attributable to the conduct of the authorities.

56. Some fifteen days was lost to KHL by reason of the Board's departure from its normal practice in not putting the material on the website in this case. This fifteen-day period would not have prevented the application being moved on time as papers were in fact ready for the 5th of January 2021, were it not for COVID-19 related restrictions applying to court services. It is nonetheless a factor in considering the overall period of delay and whether good and sufficient reasons have been demonstrated.

57. It is easy to forget more than two years later the restrictions placed on normal activities by the COVID-19 Pandemic but in the November-January period in question, Ireland was subject to a further wave of infection leading to the reintroduction of movement restrictions. A new practice requiring an appointment to file papers in the Central Office had been put in place in response to the COVID-19 Pandemic. While practitioners were generally aware of this new practice, experience was still new. Actual knowledge was dependent on the extent of a practitioner's litigation practice from the beginning of the Pandemic. Furthermore, it was not possible to simply locate a judge in the Four Courts before whom papers might be opened in order to preserve the position as regards time, a practice temporarily interrupted while judges were not physically sitting and most work was conducted remotely. I accept therefore that there were barriers to access to the courts arising from public health measures adopted in response to the COVID-19 Pandemic which impeded matters being mentioned for the purpose of stopping time running.

58. I also attach significance to the fact that KHL had clearly instructed the bringing of proceedings within the prescribed 8 weeks in a manner which would have allowed the application to be made on time but for COVID-19 related restrictions. It is clear that notwithstanding delays in obtaining papers for which I consider KHL is not culpable, judicial review pleadings had been finalised by the 5th of January, 2021, the last day for moving the application. In pre-COVID-19 times it would have been possible to issue papers out of the High Court Central Office that same day without an appointment. It would then also have been possible to open the application before any sitting judge thereby avoiding the necessity for an extension of time at all.

59. While these circumstances would not excuse delay in every case without further elaboration on the efforts made to move the application, this case is somewhat unusual in that in addition to delays caused by papers not being uploaded online in accordance with normal practice, there is also no easily discernible prejudice to a third party by reason of KHL's delay. The only party directly affected by the refusal of permission challenged in the within proceedings is KHL. The key importance of prejudice as a consideration when it comes to the exercise of my power to extend time

is well established from dicta in cases such as *Kelly v. Leitrim County Council* [2005] 2 I.R. 404. In this case there is no question of financial loss or prejudice to a third-party developer as there usually would be where a challenge is brought against the grant of permission. There are no private law actors whose interests have been identified as affected by an extension of time. I accept and am mindful of the fact that the local authority generally has an interest in finality and in the maintenance of the integrity of the planning process, but I find that no special circumstances requiring particular expedition have been demonstrated in this case such as might weigh heavily against the grant of an extension of time.

60. While leaving an application of this nature to the "*last minute*" is not good practice and was deprecated in *Dunne v. Kildare County Council* [2023] IEHC 73 because it allows no margin for error or "*safety net*", I cannot lose sight of the fact that slightly more than two weeks were lost to KHL by the unexplained departure from the Board's established practice of uploading documents for public accessibility on-line. This reduced the margin for error within the already narrow, prescribed period of time which KHL might otherwise have enjoyed.

61. Given the absence of identified, specific prejudice to a third party and the role of the Board in contributing to the delay by its departure from its practice of putting material on its website, combined with the added complications caused by COVID-19 restrictions in impeding access to the courts in a timely manner and adopting "*a holistic view of all the relevant circumstances*" (*Heaney*, para. 95) including the legislative policy and overall integrity of the process, I am satisfied that KHL have established a good and sufficient explanation for their delay and reason for justifying an extension of time of thirteen days. In my view the justice of this case is best met by the granting of an extension of time up to and including the 18th of January, 2021.

62. I am also satisfied that the circumstances giving rise to the failure to move the application before the expiry of 8 weeks were outside the control of the KHL. KHL clearly directed the making of the application before the expiry of the time limit and in a manner which allowed papers to be finalised within that time despite delays in obtaining access to necessary documents. KHL was unable to move the application

on the final day of the permitted period because of new COVID-19 related restrictions on access to the Court system. It was the presence of these restrictions on accessibility to the courts which prevented the making of an application before the Court "*to stop the clock*" on the 5th of January, 2021. Just as KHL had no control over the publication of planning material on the Board's website, so too COVID-19 restrictions on access to the Courts were outside the control of KHL Ultimately, it was the COVID-19 restrictions which precluded the application being brought in time but KHL had no margin for error or safety net available to it due to delays in accessing the planning documentation, for which it was not responsible and did not control, as a result of the failure to upload the documentation online.

Failure to consider KHL's submission and/or to give reasons for rejecting it (Grounds 1 and 2)

63. It is contended on behalf of KHL that the Board failed to consider KHL's submission that if there was a material contravention of the CDP or the LAP, permission should nonetheless be granted. It is further contended, in the alternative, that the Decision is invalid because the Board failed to give reasons for rejecting KHL's submission that permission should be granted notwithstanding a material contravention of the CDP and/or LAP. The Board disputes that there has been any failure to properly consider the application and further contends that the reasons given for refusing planning permission are contained in the Board's Order and Direction.

64. In its appeal of the 5th of March, 2020, KHL submitted (paragraph 9.1.1), first, that there was no material contravention of the LAP and, second and in the alternative, that if there was, the Board could nevertheless grant permission for the proposed development:

> *"having regard to the delivery of housing which is of national importance arising from the current housing crisis and, the RSES which are clear that alternative lands should be considered for housing development when existing residential zoned land is not delivering same."*

65. Express reference was made in the appeal to s. 37(2) of the 2000 Act and the Board's power under that provision to grant permission in material contravention of a development plan. KHL submit that there were, therefore, two limbs to the appeal in this regard. Yet only one was addressed by the Board.

66. The Board's order records that it refused permission for one reason, as follows:

> *"The site is located in an area zoned C – New Residential (Phase 2). Policy HP2 of the Kildare Town Local Area Plan 2012-2018 (as extended) aims to facilitate the phased sustainable development of lands in compliance with the core strategy and the settlement strategy set out in the Kildare County Development Plan 2017-2023 and seeks to ensure that new residential development is prioritised on land zoned Phase 1. Having regard to the provisions of Variation no. 1 of the county development plan, which revised the core strategy to reflect the objectives of the Regional Social and Economic Strategy and the National Planning Framework, and the quantum of extant permissions for residential development within the boundary of Kildare Town, it is considered that the proposed development would contravene the core strategy of the development plan and, therefore, Policy HP2 of the Local Area Plan. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."*

67. It is apparent that the Board refused permission having regard to: (i) the Variation and its revision of the CDP core strategy; and (ii) the quantum of extant permissions for residential development within the boundary of Kildare Town. On these bases, the Board considered that the proposed development would contravene the core strategy of CDP and, therefore, Policy HP2 of the LAP. In summary, the Board refused permission because of a material contravention of the LAP.

68. No reference was made by the Board or its Inspector to whether, notwithstanding a material contravention, permission should nonetheless be granted. The Applicant contends that there has been a failure to consider the case made that even if in material contravention, permission should be granted and to give reasons for

refusing to exercise its power to grant permission notwithstanding a finding of material contravention. Reliance is placed on *Balz v. An Bord Pleanala* [2019] IESC 90. In *Balz v. ABP* [2019] IESC 90, paragraph 57, O'Donnell J. stated:

> *"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."*

69. It is maintained on behalf of KHL that this duty was not complied with in the present case, insofar as the submission that permission should be granted notwithstanding a material contravention is concerned. In argument I have been further referred by the parties to *Ballyboden Tidy Towns Group v. An Bord Pleanala & Ors.* [2022] IEHC 7 and *Balscadden Road SAA Residents Association Limited v. An Bord Pleanala & Ors.* [2020] IEHC 586 in respect of the duty to give reasons. It is submitted that either that the submission was not considered at all or that it was considered and rejected, but the Board failed to give any reasons for the rejection. Either way, KHL maintain that the Board has breached its duty and its decision is *ultra vires*.

70. The Board does not accept that there has been a failure to consider a submission or provide reasons for same. They refer to the provisions of the CDP and the LAP and the basis upon which the application was presented to the Board. The Core Strategy and Settlement Strategy contained in the CDP (as varied in June) contain a dwellings target of 283 additional dwellings in Kildare for 2023. The lands which were the subject of the application for planning permission are zoned C – New Residential (Phase 2). The Board point to the fact that Policy HP 2 of the LAP limits the circumstances in which Phase 2 lands may be developed. The Board reminds me that the application for planning permission and the appeal to the Board was presented on the basis that the proposal was consistent with the CDP (as it then was) and the LAP.

At para. 9.1.1 of the Planning Report submitted on behalf of KHL in support of the appeal, it was asserted that the application:

> *"does not materially contravene the Kildare Town LAP 2012 – because the consideration of residential development on Phase 2 lands is a matter of subjective opinion based on what is considered to be the 'appropriate development' of Phase 1 lands. In other words, there is no specific means of measurement to categorically state that the development of Phase 2 lands represents a material contravention"*.

71. This submission was addressed to the LAP prior to the Variation to the CDP subsequently adopted in June, 2020. The Planning Report also stated the following, however:

> *"Notwithstanding same, should the Board be of the view that they are restricted, we submit that the Board can grant permission for the proposed development having regard to the delivery of housing which is of national importance arising from the current housing crisis and, the RSES which are clear that alternative lands should be considered for housing development when existing residential zoned land is not delivering same"*

72. As apparent from its decision, the Board decided that a grant of planning permission would contravene the core strategy of the development plan and, therefore, Policy HP2 of the LAP and would not be in the proper planning and sustainable development of the area concerned. The question then is whether, having determined that the proposal contravened the KDP and the LAP, the Board was required to consider whether permission should be granted by reference to s. 37(2)(b) of the 2000 Act and if so to provide a reasoned decision in respect of its decision to refuse to do so. It is the Board's submission that the Board is not obligated to consider the exercise of a power to grant permission in respect of a development which has been found to be in material contravention. In this regard I am referred to the decisions of Irvine J. in *Cicol v. An Bord Pleanála* [2008] IEHC 146 and McGrath J. in *Kenny v. An Bord Pleanala* [2020] IEHC 290.

73. It is argued in reliance on *Cicol v. An Bord Pleanála* [2008] IEHC 146 and *Kenny v. An Bord Pleanala* [2020] IEHC 290 that where the Board had decided that a development was not in accordance with the proper planning and sustainable development of the area, it was not obliged to either consider the grant of permission in material contravention of the CDP or give reasons for not exercising that jurisdiction. It is contended that those conclusions are not impacted by the decision of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90, which relates to the obligation on the Board to consider submissions made by third parties. In this case, however, it is contended that it was decided that the development was not in accordance with proper planning and sustainable development and in consequence, there was no obligation to consider the grant of permission in material contravention. The Board contends that it follows that the decision was properly reasoned as the Board could not proceed to consider a material contravention which was not in accordance with proper planning and sustainable development and no further reasoning was required. In view of the submissions made it is now necessary to consider in further detail the decisions in *Cicol v. An Bord Pleanála* [2008] IEHC 146 and *Kenny v. An Bord Pleanala* [2020] IEHC 290.

74. In *Cicol*, Irvine J. emphasised that as the Board had decided that the permission was in contravention of the Development Plan it would have had to have *'very significant reasons to justify proceeding to grant planning permission'* and third parties would have had to have the opportunity to address the issue. She outlined in some detail the restrictions prescribed under the 2000 Act directed to curtailing the circumstances in which planning permission might be granted notwithstanding a finding of material contravention. It appears from her judgment in that case, however, that no argument was advanced before the Board that if the development was considered to be in material contravention that permission should still be granted under s. 37(2) of the 2000 Act. Accordingly, this case is somewhat different as the power to grant permission, even if the development was considered in material contravention of the LAP, was advanced albeit in circumstances where the primary submission was that there was no material contravention.

75. In her judgment in *Cicol*, Irvine J. addresses whether there is an obligation on the Board, having concluded that the proposed development was in material contravention of the Development Plan as provided for in s. 34(2)(a)(i) to then proceed to have regard to all of the matters set forth in ss. 34(2)(a) to (c) inclusive (paras. 102-110). It is clear from her consideration of the question, however, that a significant factor in her ultimate decision that there was no such obligation in that case was the fact that the applicant had neither made the case that permission should be granted even if found to be in material contravention nor established the existence of matters which, if considered, might have altered its decision to refuse planning permission. Her judgment is clearly predicated on a finding (at para. 106) that:

> *"the applicant did not request the Board to consider granting planning permission even if it came to the conclusion that the proposed development constituted a material contravention of the Development Plan. Neither did it place any material information before the Board which might have justified the Board in proceeding to consider making such a decision".*

76. She concluded on this issue (at para. 109):

> *"I do not accept the applicant's submission that I can infer from the provisions of ss. 34 and 37 of the Act of 2000, that the Board was mandated, having rejected the applicant's contention that its development was not in contravention of the Development Plan, to go on to consider of its own motion whether it should grant planning permission on the basis of other considerations which were not ventilated by the applicant in the course of the appeal."*

77. Unlike *Cicol*, however, in *Kenny* the Court considered the question of a failure to address s. 37(2) considerations where the Board had been requested to do so. Having held that the jurisdiction under s. 37 only arises where the Board is considering a departure from a development plan or LAP (at para. 121), McGrath J found:

"123.it seems to me that the power under s. 37(2) cannot be considered in isolation. The overriding principle which governs the planning authority, and the Board on appeal, is that which is set out in s. 34. The manner in which that section is worded is not without significance. Section 34 expressly provides that the planning authority, or the Board on appeal, in arriving at a decision as to whether planning permission ought to be granted is restricted to considering the proper planning and sustainable development of the area. There are various factors which it is obliged to have regard to, but in my view, it would be inconsistent with the framework of the Act to impose on the Board an obligation to consider the exercise of discretion under s. 37(2), where it has formed the view that the proposed development, as here, is not in accordance with the proper planning and development of the area. This is altogether a separate issue from whether, although in material contravention of the relevant plan, the Board is nevertheless of the view that the proposed development accords with the proper planning and sustainable development of the area. This is the overriding consideration.

124. I must therefore conclude that the potential exercise of the power under s. 37(2) does not arise unless the Board is of the view that, taking everything into consideration, the proposed development, albeit constituting a material breach of a development plan or LAP, nevertheless is in accordance with the proper planning and development of the area. A fortiori the potential exercise of a power under s. 37(2) does not arise where, as here, the planning authority has decided that the proposed development is <u>not</u> in accordance with the proper planning and sustainable development of the area. This is the overriding consideration, and in this case, such is clear form the reason which the Board gave for the refusal.

78. In *Kenny*, the Court therefore found that once it has been concluded that the development is not in accordance with the proper planning and sustainable development of the area, a request for that jurisdiction to be exercised *'cannot translate into a legal obligation to consider that which does not arise in the first place'* (at para. 125). McGrath J. continued (also at para. 125):

"... a request to consider that jurisdiction to exercise such power cannot translate into a legal obligation to consider that which does not arise in the first place. It must follow that a failure to provide reasons for not exercising that jurisdiction does not give rise to a cause of action on such interpretation of the provisions of the Act that the exercise of that jurisdiction could not arise, and would be in excess of the powers of the respondent to purport to do so in the circumstances. While it may have been helpful, or indeed a matter of courtesy, for the Board to state why it did not consider exercising a power which it did not enjoy, in view of its conclusions regarding proper planning and development considerations, I do not believe that the failure to do so is unlawful or actionable. In this regard, I accept counsel for the respondent's submission that in those circumstances it would be unduly formulistic to impose such an obligation on the Board to insert a line in the reasons to state what I believe the legal position to be."

79. The written submissions on behalf of KHL did not address the decisions in *Cicol* or *Kenny* at all. While there is an obvious difference between this case and *Cicol* as outlined above, an attempt was also made to distinguish *Kenny* by counsel for KHL in replying submissions. It was emphasised that in *Kenny* other reasons existed for the refusal, independently of the finding that the proposed development would be in material contravention. Unlike this case, the other reasons for refusal were standalone reasons which had no nexus with the question allegedly not considered, namely, whether permission should be granted pursuant to s. 37(2) notwithstanding that the proposed development was in material contravention of the development plan.

80. Having carefully considered the terms of the decision in *Kenny*, read together with *Cicol* upon which it relies and builds, it seems to me that the decision in *Kenny* applies and is binding on me in circumstances where the Board communicated a clear decision in this case that it did not consider the proposed development to be in the interests of proper planning and sustainable development of the area. That being the case, there was no proper basis for the exercise of a jurisdiction under s. 37(2) of the 2000 Act and no further requirement to give reasons for the decision to refuse permission. It is established that the authorities are restricted to considering the proper

planning and sustainable development of the area and may not consider a material contravention which would not be in the interests of proper planning and sustainable development.

Unfair procedures in relation to the Variation (Ground 4).

81. KHL further contends that the Board's Decision is invalid because in making it, the Board failed to follow fair procedures in that it did not afford the KHL an opportunity to make submissions on the Variation to the LAP before then proceeding to refuse the application on this basis, notwithstanding that the Variation had not been adopted when the appeal was lodged and was not therefore relied upon by the Council in refusing permission or addressed in any meaningful way in the appeal submissions.

82. While the Board has power to invite further submissions in respect of matters arising during the appeal process, it maintains that the exercise of powers under s. 131 of the 2000 Act is a matter within the jurisdiction of the Board and it is for the Board to determine whether an additional submission or observation is to be sought from a party. It is also pointed out that the proposed Variation was placed on public display between the 9th of January, 2020 and the 6th of February, 2020, during which period the public were entitled to make submissions on the proposal. At the time of submitting the appeal, KHL was therefore aware of the proposed Variation and the contents of same. The Board maintains that it was open to KHL to address the substance of that Variation and how the application should be considered in the event that it was adopted when submitting the appeal. The Board maintains that as KHL elected not to address the substance of the Variation despite having an opportunity to do so with reference to the then draft variation, there was no absence of fair procedures in the decision-making process.

83. I have been referred to the decision in *Wexele v. Dun Laoghaire County Council* [2010] IEHC 21 where Charleton J. considered the requirements of fair procedures in the planning context. At para. 13 of his judgment, Charleton J. stated with reference to statutory provisions in this context:

"13. Any complaint of lack of fair procedures in the operation of a statutory body has to take into account as a primary factor the legislative scheme within which it operates. There is no warrant for judicial intrusion by way of reformulating procedures where these have already been set out in statute. In so far as a legislative scheme may require to be interpreted in accordance with the presumption of constitutionality, nonetheless, a clear wording as to the steps to be followed in decision making cannot be substituted with principles based upon the familiar argument that a plenary civil trial is the only available model for arriving at a fair conclusion."

84. Charleton J. in turn referred to the decision of Murphy J. in *State (Haverty) v. An Bord Pleanála* [1987] I.R. 485 at 493 where he made the following comments within the context of an argument that a person making a detailed observation on a planning appeal should have been allowed to make a further observation by a way of a response to further submissions from an interested party:

"The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with the circumstances of the case. At one end of the spectrum it will be sufficient to afford a party the right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal aid and to cross-examine witnesses supporting the case against him. I have no doubt that on an appeal to the planning board the rights of an objector — as distinct from a developer exercising property rights — the requirements of natural justice fall within the former rather than the latter range of the spectrum. This flows from the nature of the interest which is being protected, the number of possible objectors, the nature of the function exercised by the planning board and the limited criteria by which appeals are required to be judged and the practical fact that in any proceedings whether oral or otherwise there must be finality."

85. In *Wexele*, Charleton J. considered the provisions of the 2000 Act which ensure that the plans for the proposed development as lodged, any correspondence with the planning authority, and all observations made by interested third parties or by the statutory bodies who must be consulted under the Act, are available to a developer appealing a decision. Once an appeal is commenced, the planning authority concerned must forward to the Board the relevant planning application, the submissions made on it, any report prepared for the planning authority and a copy of its decision. Section 128(2) provides that in determining such an appeal the Board "*may take into account any fact, submission or observation mentioned, made or comprised in any document or other information submitted.*" Charleton J. observed (at para. 18):

> *"It is clear, reading through ss. 126 to 138, that strict time limits are to be observed in the progressing of appeals. Under ss. 129 and 130 parties to the appeal, and those who make observations or submissions on the appeal, cannot elaborate on submissions already made and must lodge their comments within a strict time period of four weeks. Under s. 131, An Bord Pleanála can ask for comments from those with an interest in the appeal. Sections 132 and 133 are concerned with the powers of the Board to gather information; akin to discovery power in the High Court. Section 134 is concerned with when an oral hearing into a planning appeal might be held…."*

86. Having quoted s. 131 fully, Charleton J. observed (para. 19):

> *"To a limited extent, the principles of natural justice have an influence on the interpretation of this section. The Board is not obliged to bring every fresh submission to the attention of a party to the appeal and to ask for further observations. The first principal applicable is that of utility. The scheme under the Act is not to be replaced with a mechanical application of the notion derived from civil law that everything before the decision maker must also be before the parties and that everything which is submitted must be known to all sides and that they must be given a reasonable opportunity to counter to with submissions of their own. That is clearly outside the scheme of the Planning and Development Act, 2000.*

20. Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out for making a submission they must reveal what has been denied then, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it. In Ryanair v. An Bord Pleanála, [2004] 2 I.R 334 the applicant had been invited to make a submission under s. 131 but the time limit imposed by statute had not been adhered to. The question, as Ó Caoimh J. saw the matter was what else the applicant would have been able to say had the statutory opportunity been afforded to them. As a matter of fact as Ó Caoimh J. held, on p. 360, the applicant had made a submission."

87. In *Wexele*, Charleton J. concluded with reference to the s. 131 power (at para. 21):

"....it seems to me that s. 131 sets up an objective standard. The interests of justice are best met by seeking the comments of an interested party where the Board receives a novel submission on appeal that, reasonably construed, might affect its decision to grant or refuse planning permission or to impose a condition, and where that observation is not in substance already part of the papers on the appeal which had been notified to the complaining party."

88. If the standard is objective as Charleton J. found in *Wexele*, however, it means that the Board is not at large in the exercise of its discretion under s. 131 but must do so in accordance with that objective standard. Charleton J. goes on to identify the applicable standard or test at para. 23 of his judgment in *Wexele* in the following terms:

"The relevant question that should be asked in the context of a complaint of an unfair procedure is whether an appellant knew the points that might reasonably move An Bord Pleanála to grant or refuse planning permission, or to impose conditions, when it made its appeal or whether, on the other hand, an injustice

has been perpetrated through a new and objectively significant important point being brought into the equation of which they had no notice?"

89. While the primary focus of submissions in this case was directed to the power of the Board under s. 131 to request further information in vindicating rights to fair procedures, it seems to me that s. 137 is also relevant. Strictly speaking the s. 137 mandatory requirement to give notice in writing of a matter not raised by the parties but which it is proposed to rely on may not have been triggered in this case (and it was not contended that it was) because reference was made to the proposed variation by the parties in the papers. If it were accepted, however, that the fact of the adoption of the Variation by resolution was a matter not raised by the parties (and on one view it could not have been because it was merely in contemplation and had not yet been adopted when the application was under consideration by the Council and its decision appealed), then it would fall within the spirit of what was intended by the Legislature when enacting s. 137 in mandating (rather than permitting) a requirement to facilitate further submissions. I consider this relevant because the line between what is mandatory and permissive under the 2000 Act falls is drawn in a statutory context which acknowledges that there is a requirement to ensure that parties are on notice of the matters to be relied upon and should have an opportunity to address them.

90. Returning to s. 131, it must be acknowledged that the situation here is different to that under consideration in *Wexele* in that the question of affording an opportunity to make a submission to KHL arises not from material received from a party and a right of reply thereto but rather from the Variation of the CDP, which is clearly material to the Board's considerations as a matter of law and fact, but which occurred independently of KHL and the Board in a parallel process, after submissions on the appeal had been lodged. Although the circumstances are different, however, the principles underpinning the statement of the test in *Wexele* remain applicable.

91. Considering then whether the Variation might properly be treated as new and objectively significant and whether KHL had a full opportunity to make any reasonable or relevant point that they choose to pursue in respect of the Variation during the process, there is no doubt that the Variation was in contemplation when the

appeal was lodged by KHL and to that extent KHL was on notice. As clear from the express terms of the appeal submission made in March 2020, however, KHL took the ultimately correct position that the Variation did not apply until adopted. Of course, a submission might have been made in contemplation of a variation being adopted in the terms proposed, particularly as the Variation was itself prompted by the publication on the 28th of June, 2019 by the Eastern and Midland Regional Assembly of a RSES for the period 2019 to 2023. I have not been directed to the terms of the RSES, however, and there is nothing before me to suggest that the adoption of the Variation was required, necessary or inevitable such that there ought to have been a high degree of confidence that it would be adopted and therefore should be given detailed consideration in submissions made at the time the appeal was lodged.

92. It seems to me that the fact that the Variation might never have been adopted puts KHL in a different position to the applicants in both *Wexele* and *McMonagail agus a Mhic Teoranta v. Ireland & Ors.* [2023] IEHC 223 where the court found in both cases that applicants had been afforded a full opportunity to make any reasonable or relevant point that they chose to pursue. It would not be fair in the circumstances to characterise KHL's position that the proposed variation had no effect unless adopted (true when the submission was made) as KHL adopting the position of "*passive entity waiting to be informed as to what the decision maker regards as weak points in its application so that it can then make submissions or further submissions on those points*" (to quote Ferriter J. at para. 75 of his judgment *McMonagail agus a Mhic Teoranta v. Ireland & Ors.).*

93. Likewise, this case is quite different to that of *Kildare County Council v. An Bord Pleanala* [2006] IEHC 173 cited by the Board in written submissions because that case concerned a finding that an EIS was inadequate in circumstances where the question of the adequacy of the EIS has been canvassed in written submissions and ventilated at an oral hearing. As McMenamin J. stated in his judgment in *Kildare County Council v. An Bord Pleanala* (at para. 77):

"It was not necessary for the respondent to raise these issues. The issues were already there in stark terms, had been raised by others and has been passed on by the Board."

94. In this case the Variation upon which the ultimate decision was squarely based was adopted by resolution the Council some three months after the appeal was lodged. It was therefore "*new*" in the sense that it had no legal effect or status as part of the CDP until adopted. While KHL was on notice of the possibility that it might be adopted, there could be no certainty that it would be. Furthermore, given that it was the basis for the ultimate decision of the Board, it cannot be gainsaid but that this new feature was objectively significant and important.

95. Considering whether a submission could properly have been made on the speculative basis that the Variation would be adopted brings to the fore consideration of what the substance of that submission might have been. In a case decided under the equivalent of s. 131 of the 2000 Act, namely s. 7 of the Local Government (Planning and Development) Act 1992, *Evans v. An Bord Pleanála*, (High Court, Unreported, 7th November, 2003), Kearns J. focussed on the nature of the submission that might have been made and the effect that it could reasonably be argued to have had on the appeal.

96. I attach some weight in considering whether there has been a breach of fair procedures by the Board in this case to the fact that by the time the Inspector's Report was written in September, 2020 and the matter came before the Board for decision in October, 2020, there had in fact been consideration of the Variation in at least one other case (*Rycroft*). This is a relevant consideration because the reasons identified by the Board for granting permission notwithstanding a material contravention of the Variation in that case could have provided KHL with a helpful precedent in terms of framing an argument as to why permission should be granted in the interests of proper planning and sustainable development notwithstanding a material contravention referrable to the recently adopted Variation.

97. In its decision in *P.P.A v. RAT & Ors.* [2007] 4 I.R. 95 the Supreme Court (Geoghegan J.) agreed with McMenamin J. in the High Court that both decision

makers and parties to a decision-making process should, for the purposes of the application and interpretation of the law, have access to relevant prior decisions as an incident of fair procedures and equality of arms. This is not because the decision - maker, here the Board, would be bound to arrive at the same decision but rather because consistency in decision making on the same objective facts is a significant element in ensuring that a decision is objectively fair and not arbitrary. Accordingly, a submission made with reference to a previous decision of the Board should carry force with the Board, even if the Board is ultimately satisfied that a different outcome is warranted on the facts and circumstances of the particular case.

98. The *Rycroft* development has obvious differences to this one not least in view of the particular location in Kildare of the proposed development and other matters of planning concern such that it may offer very little precedential value in terms of outcome, it nonetheless represents an example of a case in which the Board considered the very Variation of the CDP relied upon to refuse the application in this case and decided that notwithstanding material contravention with reference to the Variation, it was in the interests of proper planning and sustainable development to grant permission.

99. While it might be said with some force that the objective facts as between this development and the *Rycroft* application are so different that the fairness of the Board's arrival at a different decision in this case is not imperilled, in my view, KHL might realistically have made a meaningful submission in support of the grant of permission in respect of the Kildare lands on the basis of the decision in *Rycroft*. Many of the same reasons advanced by the Board for deciding to grant permission notwithstanding a material contravention could properly have been relied upon in submission on behalf of KHL had an opportunity been afforded to KHL to make those submissions. The very basis for the Board's own decision in *Rycroft* illustrates what KHL might have been able to say in this case. In my view it cannot be said that KHL had a full opportunity to make any reasonable or relevant point in submissions because the future change to the CDP was in contemplation when it made its submissions in support of its appeal.

100. The change in status from proposed variation to adopted Variation is significant. The adopted Variation is so clearly material to the ultimate decision reached (being primary basis for the ultimate decision to refuse), that fair procedures requires that an opportunity be afforded to KHL to make submissions as to why permission should be granted in the interests of proper planning and sustainable development notwithstanding a material contravention of this Variation. Further, while it cannot be said that the Board is under any obligation to afford an opportunity to address every potentially relevant decision of the Board made after an application has been submitted or other potentially relevant planning developments, on the facts and circumstances of this case, it is my view the failure to afford KHL an opportunity to make submissions in respect of a key variation of the CDP was in breach of the requirements of fair procedures. Indeed, at the time the decision was made the Variation itself was the subject of legal challenge and a stay had been granted in those proceedings, additional factors which might have been the subject of meaningful submission on behalf of KHL.

Unfairness arising from inconsistency in the Board's approach to the Variation (Ground 5)

101. It is contended on behalf of KHL that the Board acted capriciously, so that in law the decision to refuse permission is unreasonable or irrational, due to inconsistency on the part of the Board in its approach to the Variation, between:

(i) the impugned decision in this case; and

(ii) its decision of the 19th of August, 2020 in the *Rycroft* case (ref. 306826), where permission for strategic housing development comprising 345 residential units on a site of c.11.56 hectares in Kilcock, County Kildare was granted notwithstanding a material contravention of the CDP as varied.

102. For its part the Board maintains that each application was different and considered on their respective merits. In particular, the two developments were for a

different number of properties, were in different locations in County Kildare, some 35 kms apart and were subject to different LAP. The Board maintains that a comparison cannot be drawn between the two developments.

103. I have been referred by the parties to the decisions in *P.P.A v. RAT & Ors.* [2007] 4 I.R. 95 and *Kelly v. Criminal Injuries Tribunal* [2020] IECA 342 in respect of this argument from which it is clear that access to previous decisions in a quasi-judicial decision-making process is an important element of ensuring fairness in that process and in fostering consistency. It is equally clear from these judgments, however, that such decisions do not enjoy precedential value and are not binding.

104. I am satisfied that the Board is correct in its position that the refusal in this case cannot be challenged as unlawful on the basis of an asserted inconsistency as to outcome when compared with a decision in a different case involving different considerations. It seems to me that the real relevance and significance of the decision of the Board in the *Rycroft* case is that it illustrates the type of submission which KHL might have made had it been afforded an opportunity to address the Variation post adoption. It is quite open to the Board to arrive at a different decision in each case, however, having regard to the particular facts and circumstances of the application before them.

105. While consistency is desirable as it demonstrates fairness in decision making and marked inconsistencies may well go towards establishing irrationality or arbitrariness in decision making where sufficient and compelling evidence of such inconsistency is available, there is no doctrine of *stare decisis* or binding precedent applicable to decisions of the Board on appeals in respect of planning matters. Insofar as this case is concerned, I do not see the decision in the *Rycroft* as evidence of inconsistency or irrationality in the decision to refuse in this case and would not interfere with the decision on this basis. The evidential basis for this ground of challenge advanced by KHL falls well short of what would be required to quash a decision as unreasonable or irrational by reason of inconsistency or otherwise in judicial review proceedings.

CONCLUSION

106. For the reasons given above, I am satisfied that I should extend time pursuant to s. 50(8) of the 2000 Act by 13 days until the 18th of January, 2021 when the leave application was opened before the Court.

107. The complaint that there was a failure to properly consider the exercise of a power to grant permission notwithstanding a material contravention of the CDP or to refuse to exercise that power in a reasoned manner has not been substantiated having regard to the terms in which the impugned decision was made and on the authority of *Cicol* and *Kenny*.

108. While the Board has a discretion under s. 131 of the 2000 Act whether to afford an opportunity to make further submissions, it is a discretion which falls to be exercised fairly, in a just and proper manner and in accordance with the principles of constitutional justice. I am satisfied the adoption of the Variation to CDP was a significant development which the Board was required to consider and which occurred after the appeal was lodged. It was clearly material to the ultimate decision reached. In consequence fair procedures require that an opportunity be afforded to KHL to make submissions as to why permission should be granted in the interests of proper planning and sustainable development notwithstanding a material contravention of the CDP as varied. KHL could have made meaningful submissions as to why the CDP as varied should not operate to prevent the grant of permission notwithstanding a material contravention of same. I have concluded that the power under s. 131 of the 2000 Act ought to have been exercised before proceeding to refuse permission on the sole basis of the CDP as varied.

109. In the circumstances I propose to make an order in terms of paragraph 1 of the Notice of Motion. In the event that the parties are unable to agree on the final form of order and confirm agreement through the Registrar within a period of two weeks, I will list this matter to hear the parties in respect of consequential matters and the form of the final order after the expiry of two weeks from delivery electronically of this judgment.