THE HIGH COURT
JUDICIAL REVIEW

Record Number: 2021/804 JR

In the matter of Section 50, 50A and 50B of the Planning and Development Act 2000 and in the matter of the Planning and Development (Housing) and Residential Tenancies Act 2016

Between

FERNLEIGH RESIDENTS ASSOCIATION
AND
BRIAN CASSIDY

Applicants

and

AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL

Respondents

and

IRONBORN REAL ESTATE LIMITED

Notice Party

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 27 SEPTEMBER 2023

Contents

INTRODUCTION[1]

1. The First Applicant ("Fernleigh") seeks certiorari quashing the decision ("the Impugned Permission") of the Respondent ("the Board") dated 15th July 2021[2] granting, under the 2016 Act[3] planning permission to the Notice Party ("Ironborn") to build a Strategic Housing Development ("SHD"[4]) of 445 Build-to-Rent ("BTR"[5]) 1- and 2-bedroom apartments in 9 blocks[6] of up to 8 storeys over basements, a childcare facility and associated works (the "Proposed Development") all at 2 non-contiguous sites in 'Sector 3', Aiken's Village, Stepaside, Dublin 18 ("the Site").[7] The total Site area is recorded at about 3.39 hectares.[8] Density is recorded at 156 units/ hectare.[9] In granting permission, the Board agreed with its Inspector's report.

2. As is well-known and is well-recognised judicially,[10] the 2016 Act was prompted by the national housing crisis which has for many years proved intractable and which subsists today as a consideration highly relevant to proper planning and sustainable development.

3. Fernleigh is an association of residents who live in the Fernleigh residential estate immediately east of and adjoining the Proposed Development. Fernleigh participated as an objector in the planning process. Fernleigh say they do not oppose residential development of the Site but

1 Headings are for general guidance only. In particular, my comments and observations are not confined to sections headed "Discussion and decision" or the like.
2 ABP Ref 309828- 21.
3 The Planning and Development (Housing) and Residential Tenancies Act, 2016.
4 Within the meaning of the 2016 Act.
5 §5.2 of the Apartment Guidelines 2020 define BTR as "Purpose-built residential accommodation and associated amenities built specifically for long-term rental that is managed and serviced in an institutional manner by an institutional landlord." §5.3 states "Ownership and management of BTR developments is usually carried out by a single entity that invests in the project as a long term commercial rental undertaking." §5.7 states that "A key aspect of the BTR is its potential to accelerate the delivery of new housing at a significantly greater scale than at present. For traditional housing, the pace of development is largely determined by the rate at which individual homes, including apartments, can be sold. With BTR, once constructed, the overall scheme is available to the rental sector over a much shorter timescale on completion and the investment model is therefore capable of delivering a much higher volume of housing than traditional models." §5.8 states "This potential for accelerated housing construction through BTR can make a significant contribution to the required increase in housing supply nationally, …." §5.9 states "The promotion of BTR development by planning authorities is therefore strongly merited …."
6 For general layout, see Figure 1 below.
7 The small site for proposed public services infrastructure is on separate open space lands south of the main Site but is not of present concern. The net site area is 2.84 Ha when that area is omitted.
8 All quantifications of area in the papers before me and, hence, in this judgment, are approximate.
9 Inspector's report p11 – Key Figures. Ironborn Design Statement p53.
10 E.g. Waltham Abbey Residents Association & Pembroke Road Association v An Bord Pleanála [2022] IESC 30 ([2022] 2 I.L.R.M. 417; Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.

that the Proposed Development would overdevelop it. It seems fair to illustrate Fernleigh's view, without adopting it, by noting that the planning history for the Site is of permitted density increased successively from 121 units to 243 units to 445 units.[11] Whether that is a good thing is not for the Courts to decide – it is a matter of planning judgment for the Board, which judgment it has exercised in favour of that increased density.

4. The Second Applicant is no longer prosecuting these proceedings. The Notice Party filed a Statement of Opposition but later abandoned participation in the proceedings. A challenge to the constitutionality of **s.28(1C) PDA 2000**[12] and all issues as against the State Respondents stand adjourned pending adjudication of the other issues in the case. So the State Respondents did not participate in the trial.

5. The Site is in the functional area of Dún Laoghaire-Rathdown County Council ("DLRCC") and the Dún Laoghaire-Rathdown County Development Plan 2016-2021 (the "Development Plan") applies. It is largely zoned residential. An existing area of DLRCC-owned open space is zoned for open space. There is no zoning controversy in the case.

6. The Inspector and the Board found a material contravention of the Development Plan as to building height.[13] The Development Plan, via its Policy UD6: Building Height Strategy, applies a general height limit of two storeys to the area in which the Site sits. But a maximum of 3-4 storeys may be permitted in appropriate locations. Minor modification of that maximum of 3-4 storeys, up or down by up to 2 floors, can be considered if identified "modifiers" are present. However, given the Proposed Development includes height of up to 8 storeys and as the Inspector and the Board found a material contravention as to height, it is not necessary here to interrogate the detail of Policy UD6. Given that material contravention, the validity of the Impugned Permission depends on the Board's satisfaction of the statutory requirements allowing it, in limited circumstances, to grant permission despite a material contravention of the Development Plan.

7. Fernleigh is prosecuting some only of the grounds on which it got leave to seek judicial review and this judgment is structured accordingly.

11 Permission D10A/0440, Permission D16A/0511 and the Impugned Permission respectively. See further under the heading "Incompatible Permissions" below.
12 Planning and Development Act 2000 as amended.
13 Inspector's report §12.3.4.

DLRCC REPORT

8. DLRCC's statutory report to the Board[14] recommended refusal of permission. DLRCC considered that the Proposed Development was, overall, not consistent with relevant objectives of the Development Plan. Amongst DLRCC's reasons for recommending refusal, the following are here relevant: [15]

- 1 – The Proposed Development would seriously impact on existing and future residential amenities … inter alia through a lack of quality open space and by way of breach of the Development Plan
  - Policy UD6 of Building Height Strategy[16],
  - §8.2.8.3, (headed "Landscape Plans"),
  - §8.2.8.3, (headed "Public/Communal Open Space – Quality").

- 3 – The Proposed Development would prevent completion of the partly-built development permitted by planning permission D10A/0440 and so would materially contravene a condition of an existing permission for development which has been partly-built and thus would be prejudicial to the orderly development of the area.

- 4 – The Site is not suitable for BTR apartments. It is not well-served by public transport and the application overestimates its proximity/ accessibility/ connectivity to good public transport. The Site is highly suburban and not sufficiently near large retail units and services or employment locations to negate the need for a car. So, the unrealistic low provision of car parking spaces in the Proposed Development would negatively impact existing residential amenity in an area already suffering traffic management issues.[17] The Proposed Development would endanger public safety by reason of being a traffic hazard or obstruction to road users or otherwise.

9. DLRCC summarises the issues raised in the 161 submissions[18] made in public participation. The elected members views[19] were broadly similar and, inter alia, included:[20]

- Excessive height and density.

- Luas capacity issues are such that residents already travel in the direction opposite to their destination to get access. It is "*bursting at the seams*".

14 Pursuant to s.8(5)(a) of the 2016 Act. Simons J in Redmond v An Bord Pleanála [2020] IEHC 151 noted the importance of such reports and the necessity that the Board engage with them. I consider this issue further below.
15 DLRCC report §9. Emphases added.
16 See above.
17 The implication is that residents of the Proposed Development would park off-Site in the surrounding area.
18 §3.
19 §4.
20 I have sought to fairly paraphrase submissions relevant to these proceedings rather than quote directly.

- Recent concerns raised by the OPR[21] regarding the ability of public transport to accommodate multiple developments along the M50 motorway and Luas lines.[22]
- Many other developments and the resultant population increase (listed and including "*enormous development at Cherrywood*"[23]) have not been considered in public transport capacity planning for the area and will more than consume the planned increased capacity of longer Luas carriages.
- Too few buses serve the area – only hourly.
- The availability and frequency of public transport will not suffice to result in the hoped-for high public transport use, and resultant low car ownership, by the tenants of the Proposed Development. Occupants will need cars as local transport is inadequate – including a lack of Luas capacity.
- Excessive traffic generation in an area which already has severe traffic problems. The roads can't take existing traffic. Long traffic delays are already a serious issue.
- The Proposed Development, with inadequate car parking and with 5 other named nearby SHD schemes, will put pressure on already insufficient local road parking.

- Lack of open/green space in the Proposed Development is "striking".

As its reasons set out above demonstrate, the executive of DLRCC essentially agreed with these submissions.

10. I will return to DLRCC's views on public transport when considering the challenge under that heading. Suffice it to say now that DLRCC – both its executive and elected members - clearly had significant concerns as to public transport. It also had significant concerns as to road traffic and parking – in considerable degree informed by what it saw as the inadequacy of public transport.

11. In addition, DLRCC states that the Developer's 'Sunlight, Daylight and Shadow Assessment' does not assess the kitchens to the applicable 2% ADF[24] standard set by BS 8203-2 – Code of Practice for Daylighting. Of the rooms tested, a significant number fall below 2% and so look dull, such that electric lighting is likely to be turned on.

12. As to communal/ public open space, DLRCC says the scheme "*appears to work towards the minimum standards required. Given the vacant nature of the site, this is disappointing*."[25] As has been seen, DLRCC's reasons for recommending refusal included a "*lack of quality open space*".

21 Office of the Planning Regulator.
22 I read this entry to refer to a submission by a member of the public citing his/her understanding of the OPR position rather than as reflecting a submission by the OPR.
23 The Site lies, in terms of the Luas route, between Cherrywood and the City Centre.
24 Average Daylight Factor. The ADF is a quantified measure of the overall daylight in a space.
25 P30.

BOARD'S DIRECTION AND ORDER

13. Insofar as relevant to these proceedings, the Board:

- "*Decided to grant permission generally in accordance with the Inspector's recommendation*".[26]

- Found a material contravention of the Development Plan as to building height.

- Applied **s.37(2) PDA 2000**[27] in granting permission despite that material contravention as to building height. It recorded:

    - As to **s.37(2)(b)(i)**, the application was lodged under the SHD legislation[28] and the Proposed Development is strategic in nature and relates to matters of national importance – the delivery of housing. The proposal represents the regeneration of an important site in Stepaside, and contributes 445 Build-to-Rent units to the housing stock, and, therefore, seeks to address a fundamental objective of the Housing Action Plan[29], and such addresses a matter of national importance, that of housing delivery.

    - As to **s.37(2)(b)(iii)**, the proposal has been assessed against the criteria set out in §3.2 of the Height Guidelines 2018 ("§3.2"), which state, inter alia, that building heights must be generally increased in appropriate urban locations subject to those criteria. (As §3.2 of the Height Guidelines 2018 sets the criteria for application of SPPR3 of the Height Guidelines 2018, this passage in substance invokes SPPR3.)

    - As to **s.37(2)(b)(iv)**, the Board cites precedent permission for material contravention as to height on a nearby site.[30]

- Screened out both AA and EIA. The Board does not record, and it is agreed it did not do, a Preliminary Examination[31] prior to its EIA Screening.

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26 This is recorded in the direction not the order.

27 37(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) ……..

(iii) permission for the proposed development should be granted having regard to …….. guidelines under section 28 ….

(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.

28 i.e. the 2016 Act.

29 The Government's "Rebuilding Ireland Action Plan for Housing and Homelessness 2016".

30 The Board previously granted permission (ABP-307415-20) for 200 units, at heights of up to 7 storeys, at Lisieux Hall, Murphystown Road, Leopardstown, Dublin 18, approximately 300 metres east of the Site.

31 Within the meaning of Article 299B(1)(b)(i) PDR 2001.

PRESUMPTION OF VALIDITY – HOW TO READ AN ADMINISTRATIVE DECISION

14. The Board makes a general allegation – or at least a repeated allegation, as to the questions whether,

- the Board found that the proposed open space is of exceptionally high quality,
- the materials before the Board and the Inspector's report identified the *rationale for design solutions compensatory for below-target daylight provision in the apartments, and*
- the Impugned Permission is invalid as inconsistent with an earlier Planning Permission

It alleges in these respects that Fernleigh is guilty of reading the Impugned Permission "*as invalid rather than valid (i.e., the opposite of the approach that should be taken …. which is to read such documents in a way that makes sense and renders them valid rather than invalid."*

15. It is worth briefly considering, from a general perspective, the principle invoked by the Board. **M.E.O.**[32] is authority that this principle derives from the presumption of validity of administrative decisions and that, "*on a fair reading*", *"An administrative decision should be read, where possible, in a way that renders it valid rather than invalid."* This approach was described in **M.R.**[33] as "*fundamental*" and in **O.A.**[34] the word "must" is used rather than "should". In the planning context, Humphreys J in a **Sweetman** case[35] considered it "*more appropriate to construe administrative decisions in a way that makes sense and renders them valid rather than invalid*".

16. The principle is undoubtedly correct and well-established in authority. But the phrases "*makes sense*", "*where possible*" and "*on a fair reading*" are important.

17. The presumption of validity of an impugned decision is potentially applicable to an administrative decision in various ways (I do not pretend to be exhaustive in this regard):

a. The presumption seems to be primarily a principle that, generally at least, a decision is legally consequential unless and until set aside by a court of competent jurisdiction[36] as *"…. in the interests of good order and administration. Citizens must be allowed to rely on public acts until they are set aside in the appropriate way and they should not be encouraged to take the law into their own hands."*[37]

32 M.E.O. (Nigeria) & U.O. (Nigeria) v The International Protection Appeals Tribunal; [2018] IEHC 782 (High Court, Humphreys J, 7 December 2018).
33 M.R. (Bangladesh) v The International Protection Appeals Tribunal & Anor [2020] IEHC 41, §6-§7.
34 OA v International Protection Appeals Tribunal [2020] IEHC 100, §13.
35 Sweetman v APB & Bord na Mona Powergen Ltd. [2021] IEHC 390 (High Court (Judicial Review), Humphreys J, 16 June 2021, §28.
36 Hogan, Morgan & Daly, Administrative Law, 5th Edition. §11-31. Also, de Smith, Judicial Review 6th Ed'n §4-061.
37 De Blacam on Judicial Review, 3rd Edition, §7.02.

b. In judicial review the presumption, being rebuttable, primarily emphasises that the onus of proof is on the applicant – see **Weston** and **Balz**.[38] But, on ordinary principles of litigation, that would be so in any event.

c. As a principle affecting the interpretation of an administrative decision, it seems to me that the presumption only arises where the decision is ambiguous and on one fair reading is valid and on another fair reading is invalid. If, where the decision is ambiguous, one fair reading keeps the decision valid, the presumption suggests that, ceteris paribus, it be the interpretation adopted. For example, that is how the principle was applied by the Supreme Court in **Krikke**[39] – though the court did not address whether the principle was confined to such situations. But genuine ambiguity is required before the principle takes effect and the courts do not strain to find ambiguity in formal consequential documents where none exists.[40] The principle does not seem to me to justify a strained, unreal or unfair interpretation of an administrative decision. The principle does not save a decision fairly capable only of a meaning or meanings which would result in its being invalid.

This last observation seems to me consistent, if by analogy, with the view of Barton J in **Balz**[41] that the presumption of validity cannot cure a deficiency in the record of an administrative decision where that deficiency results in inability to determine whether legal obligations have been met.

18. As Murray J noted in **Stanberry**,[42] the presumption of validity is associated with the principle of curial deference. He said that, without significant qualification, the proposition that Courts should be *"slow to interfere with the decisions of expert administrative Tribunals"* is "*apt to mislead*". While stating that the scope for deference was limited, he did, of course, emphasise that issues will arise which are "*peculiarly suited to the expert determination of the specialist body*" and "*where an appeal on a point of law presents an issue of underlying fact or inference in relation to matters within those zones of expertise, the Courts should certainly afford very significant weight to the decision of the expert body*". The same principle applies in judicial review. But **Stanberry** was a case in which Murray J considered that the Commissioner for Valuation was seeking to "*extract from 'curial deference' a supercharged presumption of validity*." Murray J continued:

> *"It was claimed at one point, for example, that the Court failed to observe due deference to a specialist body by failing to adopt one interpretation of the last paragraph of the conclusions section of the Tribunal's decision: the Commissioner has sought to contend that 'curial deference' means that if there were two possible interpretations of the decision of the Tribunal available, the Court is required to adopt the interpretation that upholds it. That is not a correct*

38 Weston Ltd v An Bord Pleanála [2010] IEHC 255: "The onus of prove [sic] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant." - cited in Balz v An Bord Pleanála [2016] IEHC 134 (High Court, Barton J, 25 February 2016) §54.
39 Krikke v Barranafaddock Sustainable Electricity Ltd [2022] IESC 41; [2023] 1 I.L.R.M. 81. Woulfe J §105.
40 For example, as to interpretation of contracts see Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168. As to conflicts within development plans, see Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 §156.
41 Balz v An Bord Pleanála [2016] IEHC 134 (High Court, Barton J, 25 February 2016), §59.
42 Stanberry Investments Ltd. v Commissioner of Valuation [2020] IECA 33.

> *statement of the principle. Deference means that in those areas touching on the Tribunal's expertise, the Court should be slow to interfere with the Tribunal's reasoning. It does not mean that where the Tribunal's reasoning is unclear so that there are differing possible interpretations of its decision the Court must simply assume that it was correct in the conclusion it reached. As Charlton J. said in EMI Records v. Data Protection Commissioner at para. 22, "curial deference cannot possibly arise where by statute reasons for a decision are required but none are given." 'Curial deference' is thus properly understood as depending on the Tribunal having provided a properly reasoned decision, not as affording a mechanism for compensating where the decision is not so reasoned."*

Murray J also observed that discerning the meaning of a decision should not require speculation and the court should not rewrite an impugned decision so as to sustain its validity.

19. In short, the presumption of validity, curial deference and the principle of reading a decision as valid rather than invalid where possible, are important. On occasion they are decisive in upholding an impugned decision. But they are not talismans against invalidity as a result of interpretation of an impugned administrative decision or a warrant for a strained, unreal or unfair interpretation of such a decision or a basis for assuming validity where a decision is inadequately reasoned. Both deployment of expertise and adequacy of reasons are pre-conditions of curial deference. And reliance by a decision-maker on the clarity of its decision is far more attractive than its recourse to the presumption of validity.

20. Though it is obvious and no argument to the contrary was made, it may be useful to observe that the principle of reading a decision as valid rather than invalid where possible applies only to the impugned administrative decisions themselves. It does not apply to other generally applicable documents relevant to the validity of an impugned decision. So, for example, one cannot read a development plan or a planning guideline on that principle with a view to validating a particular impugned decision. One way of explaining this is that, whereas impugned decisions are of particular application, development plans are of general application – including to decisions other than that impugned – and the development plan cannot mean different things depending on the light shone on it by the particular impugned decision under consideration.

MATERIAL CONTRAVENTION – SOME RELEVANT STATUTORY PROVISIONS, SPPR3 OF THE HEIGHT GUIDELINES & OTHER MATTERS

21. It is useful at this point to set out some statutory provisions relevant to the possibility of granting SHD planning permission despite material contravention of the relevant development plan.

S.9(3) & (6) of the 2016 Act

22. **S.9(3) of the 2016 Act** provides that:

> *"(3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.*
>
> *(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan."*[43]

"*Specific planning policy requirement*" is in practice generally abbreviated to "SPPR".

23. **S.9(6) of the 2016 Act** provides that:

> *"Where the proposed strategic housing development would materially contravene the development plan …… other than in relation to the zoning of the land, then the Board may only grant permission …….. where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development."*

S.37(2)(b) PDA 2000

24. **S.37(2)(b) PDA 2000** provides, as relevant, that

> *" ….. the Board may only grant permission ….. where it considers that—*
> *(i) the proposed development is of strategic or national importance,*
> *(ii) …….*
> *(iii) permission for the proposed development should be granted having regard to … guidelines under section 28, …*
> *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."*

43 S9(3)(c) reads: "In this subsection "specific planning policy requirements" means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development."

S.28 PDA 2000 – Guidelines & SPPRs

25. **S.28(1) & (2) PDA 2000** empower the Minister to issue guidelines – often referred to as "planning guidelines" and as "s.28 guidelines" – as to the exercise of planning functions, to which guidelines planning authorities and the Board shall have regard in the performance of their functions. The Height Guidelines 2018, addressed below, are such guidelines.

26. S.28(1C) PDA 2000 provides that such guidelines:

> *"…… may contain specific planning policy requirements with which planning authorities, … and the Board shall, in the performance of their functions, comply."*

McDonald J in **O'Neill**[44] observed that S.28(1C) "*imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with."*

SPPR3 of the Height Guidelines 2018 & Ironborn's Reliance Thereon

27. **SPPR3 of the Height Guidelines 2018** provides:

> *"It is a specific planning policy requirement that where;*
>
> *(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above;[45] and*
>
> *2. the assessment of the planning authority[46] concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework[47] and these guidelines;*
>
> *then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."[48]*

McDonald J in **O'Neill** observed that:

> *"It is clear from the text of SPPR 3(A) that its application is dependent upon (a) an applicant for planning permission setting out how a development proposal complies with the "criteria above" and (b) an assessment by the Board concurring with that conclusion. The relevant criteria for this purpose are set out in para.3.2 of the Building Height Guidelines. Paragraph 3.2*

44 O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356, §145.
45 This is a reference to §3.2 of the Height Guidelines 2018 – as to which see further below.
46 Here "planning authority" includes the Board.
47 Project Ireland 2040, National Planning Framework, 2018.
48 Emphases added.

requires that an applicant "shall demonstrate to the satisfaction of the [the Board] that the proposed development" satisfies a number of criteria which are set out over the next three pages of the Guidelines. ….. these criteria must be satisfied if SPPR 3(A) is to apply."[49]

28. Ironborn's statutory[50] Material Contravention Statement[51] invokes SPPR3 as a basis for a grant of permissions despite the proposed material contravention of the Development Plan as to building height.

S.37(2)(c) PDA 2000 – Reasons, Intermingling of Reasons & Discretion to Refuse Certiorari

29. **S.37(2)(c) PDA 2000** requires that in granting a permission in reliance on s.37(2)(b) PDA 2000, the Board must give "*the main reasons and considerations for contravening materially the development plan."* It is not uncommon that, in justifying permission despite material contravention, the Board, as it did in this case, will invoke more than one of s.37(2)(b)(i) to (iv) PDA 2000. S.37(2)(c) requires that the Board give its reasons for reliance on each.

30. **Clonres/Conway #2,**[52] **Ballyboden TTG**[53] and **Jennings**[54] are authority that, where the Board invokes more than one of the criteria found in s.37(2)(b)(i) to (iv), flawed reliance on one may not be fatal to the permission if reliance on one or more others is valid. That, in turn, depends on satisfaction of two requirements – such satisfaction to be objectively discernible from the impugned decision:

- First, it depends on the reasons given by the Board for its decision as to reliance on those criteria being discernibly discrete in their application to the criterion upon which reliance is flawed on the one hand and, on the other, the valid criteria. Or, to put it another way, while "intermingling" by the Board of its reasons for reliance on those criteria is not a problem as long as reliance on all criteria is valid, where reliance on one criterion is flawed, that flawed reliance can be severed and the permission saved if the reasons given for the flawed reliance on that criterion can be severed from the reasons given for the valid reliance on the other criteria. On the facts that first question was answered against the Board in **Clonres/Conway #2**.

- Second, survival of the impugned decision depends on whether, shorn of the invalid reason and on viewing the valid reasons remaining after severance, and bearing in mind the significance of

49 §§157 & 162.
50 S8(1)(a)(iv) 2016 Act.
51 P4 & §5.2.1 at p8 et seq.
52 Clonres CLG v An Bord Pleanála & ors incl Crekav Trading GP and Conway v An Bord Pleanála & ors incl Crekav Trading GP [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021), §101 et seq.
53 Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7, §§281-283.
54 Jennings v ABP [2023] IEHC 14, §507 et seq.

material contravention of the Development Plan, the Board can be read as having regarded the remaining valid reasons as sufficient to justify the material contravention in question.

31. That second question was answered against the Board in **Ballyboden TTG**:

> *"282. The Board urges that if the Board erred in its application of s.37(2)(b)(iii) I should refrain from quashing the impugned decision on the basis that the Board's reasons given pursuant to s.37(2)(b)(i)(ii) & (iv) PDA 2000 survive and suffice. The analogy of severance of invalid planning conditions and **Aherne v An Bord Pleanála**[55] are called in aid. I respectfully reject that submission.*
>
> *283. Aherne is authority that a "peripheral and insignificant" planning condition is severable if invalid and it is demonstrated that the Board would have granted the relevant permission subject only to the other conditions. While material contravention permissions by the Board are by no means unusual in practice, nonetheless as disapplications of democratically-adopted development plans, they are no small thing, are legally exceptional and should arise only for substantial reason – a consideration reflected in the obligations imposed on the Board by s.37(2) PDA 2000. As a matter of law I should not lightly conclude that any reason given pursuant to s.37(2)(b) PDA 2000 is "peripheral and insignificant" or in any degree analogous to "peripheral and insignificant. The Board has not stated that any individually its*[56] *reasons pursuant to s.37(2)(b) sufficed to justify its decision or whether the cumulative weight of some or all sufficed for that purpose and I do not consider that I can make an inference to that effect. Accordingly the Board's argument in this regard fails.*

32. In **Jennings**, despite the invalidity of the Board's reliance on '*strategic and national importance'* to justify material contravention, both the questions stated above were answered in the Board's favour and certiorari was refused accordingly. In passing, I note that since the hearing in this case similar reasoning in a somewhat different context saved the impugned decision in **Murtagh**.[57]

33. The question of intermingling of reasons in the application of s.37(2)(b) and (c) PDA 2000 arose in this case in a somewhat unusual way. The Board's application of s.37(2)(b)(iv) as to precedent permissions nearby was not impugned in these proceedings. The Board did not plead the point that even if the Board's application of s.37(2)(b)(i) and (iii) was invalid, its application of s.37(2)(b)(iv) sufficed to justify the material contravention. However Fernleigh, in its written submissions, specifically as to the issue of the Board's application of s.37(2)(b)(i) – the strategic nature of the Proposed Development – conceded that there was no intermingling of reasons and

55 [2015] IEHC 606.
56 Sic.
57 Murtagh v An Bord Pleanála [2023] IEHC 345 (High Court (General), Ireland – High Court, Owens J, 29 March 2023).

Fernleigh all but volunteered that certiorari was unlikely on that issue given remaining valid reasons.[58]

34. The Board's written submissions unsurprisingly took up the issue – but again in the specific context of the challenge to the Board's application of s.37(2)(b)(i) as to the strategic nature of the Proposed Development. The Board submitted that, having regard to **Jennings**[59] and to the discretionary nature of remedies in judicial review and as the Board had given valid reasons for its invocation of and had validly invoked s.37(2)(b)(iii) and (iv) PDA 2000 and had not Intermingled its reasons for invoking s.37(2)(b)(i), (iii) and (iv) PDA 2000 respectively:

> *"…….. the conclusion reached by the Board in relation to section 37(2)(b)(i) can be excised such that the remainder of the justification of the grant of permission despite material contravention survives, such that the Court should refuse certiorari on this ground."*

35. The respective oral submissions at trial adverted to, but did not expand or extrapolate, the written submissions in this regard. The oral submissions too were confined to the discretion to decline certiorari in the event that the Board's reliance on, specifically s.37(2)(b)(i) as to the strategic nature of the proposed development was invalid. Notably, Fernleigh did not concede and the Board did not argue that if the Board's invocation of s.37(2)(b)(iii) as to reliance on the Height Guidelines 2018, and specifically §3.2 and SPPR3 of those guidelines as to daylight provision and public transport, was invalid, certiorari should likewise be declined on discretionary grounds. It may be that standing on its invocation of s.37(2)(b)(iii) was a prudent tactical course by the Board. Perhaps the Board took the view that if it lost those arguments as to the important matters of daylight provision in the apartments and availability of high capacity public transport well-serving 445 Apartments, the decision as to material contravention was unlikely be saved from certiorari on a discretionary basis by the single swallow of a permission for 200 units, at heights of up to 7 storeys, 300 metres east of the Site (a question canvassed obiter but not answered in Ballyboden TTG[60]). Also, the Board may have noted that in Jennings, while an invalid reason for invoking s.37(2)(b)(i) as to the strategic nature of the proposed development was excised, the permission was nonetheless quashed on a ground as to SPPR3 of the Height Guidelines 2018 and Daylight Analysis. But all this is a bit speculative – what matters is that, whatever its reason, the Board did not argue that its decision under s.37(2)(b)(iv) should save the Impugned Permission from any infirmity of its invocation of s.37(2)(b)(iii).

58 Fernleigh Written Submissions §87.
59 Jennings v ABP [2023] IEHC 14, §507 et seq.
60 Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7, §227.

INSPECTOR'S REPORT – MATERIAL CONTRAVENTION AS TO HEIGHT & SPPR3 OF THE HEIGHT GUIDELINES

36. Save to the following extent, I will consider the Inspector's report when considering each ground of challenge to the Impugned Permission.

37. As stated above, as the Inspector and the Board found a material contravention as to height, given the proposed height of up to 8 storeys,[61] it is not necessary to interrogate the detail of Development Plan Policy UD6: Building Height Strategy. The Inspector[62] identified considerations relevant should the Board be minded to materially contravene the Development Plan as to height in exercise of its powers under s.9(6) of the 2016 Act and s.37(2)(b) PDA 2000. Those considerations include that the Proposed Development is of strategic or national importance. I will address this issue of strategic or national importance when considering the relevant ground.

38. Those considerations relevant to permitting material contravention also include the Building Height Guidelines 2018[63] to the effect that building heights must be generally increased in appropriate urban locations, subject to the criteria set out in §3.2 of the guidelines. This passage[64] is cross-referenced to §12.4 of the Inspector's report, which makes it apparent that, in invoking the criteria set out in §3.2, the Inspector is applying SPPR3 of the Height Guidelines 2018. Applying SPPR3 arises only where the Board is satisfied that a proposed development meets those §3.2 criteria. §12.4.17 of the Inspector's report reads:

> *"SPPR 3 of the Height Guidelines states that where a planning authority is satisfied that a development complies with the criteria under section 3.2 of the guidelines, then a development may be approved, even where specific objectives of the relevant development plan or local area plan may indicate otherwise (I refer the Board to Section 12.3 'Material Contravention' for further consideration of this issue as it relates to the Development Plan). In this instance the Building Height Strategy of the Development Plan set a notional limit of 6 storeys on this site. As such the criteria under section 3.2 of the Building Height Guidelines, provide a relevant framework within which to assess the merits, or otherwise, of this proposed development."*

39. Amongst the §3.2 criteria for the invocation of SPPR3 identified by the Inspector are that
- the Site be well served by high capacity public transport.[65]
- the proposed development maximise access to natural daylight.[66] In this regard, the Inspector[67] cross-references his consideration of the daylight issue at §12.5 of his report.

61 Inspector's report §12.3.4.
62 Inspector's report §12.3.7 et seq.
63 Urban Development and Building Heights, Guidelines for Planning Authorities, December 2018.
64 Inspector's report §12.3.14.
65 Inspector's report §12.4.19.
66 Inspector's report §12.4.29.
67 Inspector's report §12.4.30

40. In summary, and while he did so in a somewhat obliquely-expressed way and could have done so more explicitly, I am satisfied that, interpreting his report as a whole, the Inspector invoked SPPR3 of the Height Guidelines 2018 in invoking s.37(2)(b)(iii) PDA 2000 as to ministerial guidelines issued under s.28 PDA 2000. Thereby, he invoked also the §3.2 criteria for the invocation of SPPR3 – including those as to public transport capacity and as to daylight provision to apartments. This illuminates the significance of the Board's explicit invocation of §3.2. In fairness to all concerned, and quite properly, this was not in dispute. But it seems to me useful to state the position given that the Inspector was somewhat oblique on this issue and given it bears considerably on the consideration of the grounds of challenge as to daylight provision and public transport capacity.

1 – DAYLIGHT[68]

Daylight – Pleadings & Submissions

41. Fernleigh pleads that the Impugned Permission is invalid as contravening the daylight requirements of both §3.2 of the Height Guidelines 2018 (a criterion for applying SPPR3) and the Apartment Design Guidelines 2020, in breach of s.9(3) of the 2016 Act. It pleads that the Proposed Development does not comply with the BRE Guide and/or the Daylighting Code (to which §3.2 required "appropriate and reasonable regard") and/or contains material errors of fact. Fernleigh's pleadings do not, but its submissions do, assert contravention of s.28 PDA 2000. However it seems to me clear, given the terms of s.9(3) of the 2016 Act, that the plea necessarily implies reliance on s.28 PDA 2000.

42. In essence, the allegation is of misapplication by the Board of SPPR3, allowing the material contravention as to height, in that the §3.2 criteria for its application were not satisfied.[69] Fernleigh plead and submit 4 legal errors – each allegedly fatal to the Impugned Permission:

a. Ironborn in its Daylight, Sunlight and Overshadowing Report (the "Light Report"[70]) submitted with its planning application, and the Board in its Inspector's report, erroneously applied to combined living /kitchen/dining ("LKD") rooms a 1.5% "Average Daylight Factor" ("ADF") instead of the applicable 2% ADF and/or failed to justify a 1.5% ADF. The Inspector accepts this incorrect standard: "*I am satisfied that the alternative value of 1.5% for the living/kitchen/dining areas is appropriate*".[71]

b. Ironborn did not clearly identify any non-conformity with the BER Guide/Daylighting Code and its extent – as required by §3.2 of the Height Guidelines – see **Walsh**.[72] Instead, it

68 Ground 4 - §16 to §25 of §E(Part 2).
69 Put well by counsel for the Board – Transcript Day 2 p5.
70 By Chris Shackleton Consulting – Book of Exhibits, Tab 6, p. 359.
71 Inspector's report §12.5.8.
72 Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022), §55.

asserted 97% conformity by applying the wrong standard. The Inspector's *ad hoc* calculation based on a 2% ADF does not avail the Board (even if it had relied upon it) as the obligation to identify the non-conformity rests on the developer, presumably so that the public will participate on the basis of correct standards.

c. §3.2 of the Height Guidelines requires that, as to any identified non-conformity with the BER Guide/Daylighting Code, *"a rationale for any alternative, compensatory design solutions must be set out*". The Inspector cites "compensatory design solutions" but none of them were set out by Ironborn as such solutions. So they are irrelevant considerations for the purposes of §3.2.

d. The Inspector took account of another irrelevant consideration – that the Proposed Development is of BTR apartments. Residents of such accommodation are entitled to the same daylight as those in other forms of accommodation and no different standard applies or has been identified by the Board.

43. The Board pleads and submits that:

a. Ironborn justified its application of the 1.5% ADF standard instead of the 2% ADF standard.

b. In any event, the Board considered the Proposed Development "*against the 1.5% and 2% ADF standard"* and even at 2% overall compliance was high.

c. The Board did identify the extent of non-compliance with the 1.5% and 2% ADF standards. Ironborn's allegation of failure to do so is abstract, general and based on incomplete quotation of the Inspector's Report and the materials before the Board.

d. The Board accepted the compensatory design solutions proffered by Ironborn and their rationale, as it was entitled to in its discretion and as a matter of planning judgment. Fernleigh's challenge is essentially merits-based, is based on selective reading of the Inspector's report and on reading it "*as invalid rather than valid (i.e., the opposite of the approach that should be taken*".

Daylight – Introduction, §3.2 & SPPR3 of the Height Guidelines 2018 & Apartment Guidelines

44. All agree that:

- The Proposed Development is in material contravention of the Development Plan as to height.

- The validity of the Impugned Permission depends on the application of **s.9(3) of the 2016 Act**[73] (which allows material contravention on certain conditions), **s.28 PDA 2000**[74] (which requires compliance with SPPRs[75]), and **SPPR3 of the Height Guidelines 2018**.

- SPPR3 in effect allows the Board to override certain Development Plan building height constraints and to do so in favour of increased height in appropriate urban locations.

- Application of SPPR3 in turn depends on satisfaction of the "*Development Management Criteria*" set out in **§3.2 of the Height Guidelines 2018** ("§3.2"). It is not merely a matter of having regard to these criteria or to the Height Guidelines 2018 more generally. These §3.2 criteria must be satisfied before SPPR3 can lawfully be invoked and applied – **Jennings**.[76]

- §3.2 requires that, in making a planning application proposing increased building height,[77] the planning "*applicant shall demonstrate to the satisfaction of the* (the Board), *that the proposed development satisfies* (certain) *criteria".* Those criteria include the following "*At the scale of the site/building*":[78]

    - "*The form, massing and height of proposed developments should be carefully modulated so as to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light.*

    - *Appropriate and reasonable regard should be taken of quantitative performance approaches to daylight provision outlined in guides like the Building Research Establishment's 'Site Layout Planning for Daylight and Sunlight' (2nd edition) or BS 8206-2: 2008 – 'Lighting for Buildings – Part 2: Code of Practice for Daylighting'.*

    - *Where a proposal may not be able to fully meet all the requirements of the daylight provisions above,*
        - *this must be clearly identified and*
        - *a rationale for any alternative, compensatory design solutions must be set out,*
        - *in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning*

73 (3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.
(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.
(c) In this subsection "specific planning policy requirements" means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development.
74 S.28(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply.
75 Specific planning policy requirements – see s.28(1C).
76 Jennings v ABP [2023] IEHC 14, §391.
77 A concept found in §3.1 – in practical terms, increased building height means building height above that contemplated by the Development Plan.
78 Emphases below added.

> *objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution*."[79]

- In short, the validity of the Impugned Permission turns, on the facts of this case, on compliance with the daylight criteria of §3.2 as set out above.

- Ironborn's Material Contravention Statement[80] in this regard essentially referred to its Light Report.

45. It seems to me that the adjectival and other emphases in §3.2 as to daylight are striking – access to natural daylight is to be maximised, loss of light is to be minimised and the need to justify departures arises where "all" the requirements are not "fully" met. They are consonant with the recognition of the importance of daylight in apartments – to which recognition I will refer below.

46. I will refer to the Building Research Establishment's[81] 'Site Layout Planning for Daylight and Sunlight' (2nd edition) as the "BRE Guide" and to BS 8206-2: 2008 – 'Lighting for Buildings – Part 2: Code of Practice for Daylighting'[82] as the "Daylighting Code".

47. No question arises in this case of application of an SPPR of the Apartment Design Guidelines 2020,[83] and so, for present purposes, they are guidelines to which the Board was obliged only to have regard. Nonetheless, they cover some of the same Daylight/Sunlight ground as, and do so in terms, as one would expect of a coherent suite of planning guidelines, consistent with the Height Guidelines 2018 and SPPR3. So they bear some review here. The Apartment Design Guidelines 2020 make the important, general and indisputable observation that,

> *"the amount of sunlight[84] reaching an apartment significantly affects the amenity of the occupants."*[85]

In this they echo the BRE Guide, which says:

> *"People expect good natural lighting in their homes .."*[86]

48. In similar vein, as to content of planning applications and in terms echoing those of the Height Guidelines 2018, the Apartment Design Guidelines 2020, state:

79 Layout changed for exposition.
80 P15.
81 The British Research Establishment – BRE – is described by Humphreys J in Atlantic Diamond as "A private group of British planning consultants."
82 As revoked and replaced in identical terms by BS EN 17037:2018.
83 Sustainable Urban Housing: Design Guidelines for New Apartments (2020).
84 It is not necessary in this judgment to dwell on the distinction between daylight and sunlight.
85 §3.16.
86 §1.1.

> *"6.5 The provision of acceptable levels of natural light in new apartment developments is an important planning consideration as it contributes to the liveability and amenity enjoyed by apartment residents. In assessing development proposals, planning authorities must however weigh up the overall quality of the design and layout of the scheme and the measures proposed to maximise daylight provision with the location of the site and the need to ensure an appropriate scale of urban residential development.*
>
> *6.6 Planning authorities should have regard to quantitative performance approaches to daylight provision outlined in guides like the (BRE Guide and the Daylighting Code of Practice) when undertaken by development proposers which offer the capability to satisfy minimum standards[87] of daylight provision.*
>
> *6.7 Where an applicant cannot fully meet all of the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, which planning authorities should apply their discretion in accepting taking account of its assessment of specific.[88] This may arise due to a design constraints associated with the site or location and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution."*

That the Apartment Design Guidelines 2020 in substance echo the daylight requirements of the Height Guidelines 2018 will be readily apparent from the foregoing.

49. Humphreys J in **Walsh**,[89] articulated the importance of the issue of daylight in apartments:

> *"The clear language of the ministerial guidelines sends the message that the reasonable exercise of planning judgement requires that an enthusiasm for quantity of housing has to be qualified by an integrity as to the quality of housing. Among other obvious reasons, and speaking about developments generally rather than this one particularly, such an approach reduces the prospect of any sub-standard, cramped, low-daylight apartments of today becoming the sink estates and tenements of tomorrow."[90]*

My purpose in citing this excerpt is not to comment on or impugn the design of the Proposed Development by reference to the prospect identified by Humphreys J – it is to articulate the general importance of natural light in apartments to the amenity of their occupants, as recognised in the various guidelines.

87 Emphasis added.
88 Sic.
89 Walsh v An Bord Pleanála & St Clare's GP3 Ltd [2022] IEHC 172, §47 et seq.
90 §55.

Daylight – BRE Guide, Daylighting Code & Caselaw

50. The caselaw is significant to an understanding of this ground of challenge. It has proceeded, inter alia, from disputes as to the significance of the concepts of "*criteria*" and "*appropriate and reasonable regard"* in SPPR3, §3.2 of the Building Height Guidelines and the terms of the BRE Guide. The most recent authority is **Jennings**,[91] which considered **Atlantic Diamond**,[92] **Walsh**,[93] and **Killegland**.[94]

51. In **Killegland**, and by way of contrast with the generally light burden to "have regard" to something, Humphreys J observed that *" an intensifier such as to have … "appropriate and reasonable regard" (as in the relevant SPPR in the Building Heights Guidelines) … generally connotes an additional degree of weight to be given to the matter to which regard is to be had, with a general enhancement of the level of reasons that have to be given for not affording such weight."* He had said in **Atlantic Diamond**,[95] that *"The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why."*

52. The BRE Guide[96] and the Daylighting Code combine to set quantitative[97] standards explicitly as minima for adequacy of daylight in residential units. They are measured in terms of an ADF – a unit which measures the overall amount of daylight in a space using a "standard overcast sky"[98] as a reference point.[99] Generally (the proper application of the standards is contested), the applicable ADF minima are:

- 1% for bedrooms,
- 1.5% for living areas and
- 2% for kitchens.

Importantly, in multi-use rooms the highest applicable use standard applies.[100] So, for example, in a combined living/kitchen/dining ("LKD") room, the applicable minimum ADF is 2%.

91 Jennings v ABP [2023] IEHC 14.
92 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
93 Walsh v An Bord Pleanála [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
94 Killegland v Meath County Council [2022] IEHC 393.
95 §40.
96 BRE - Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice, 2nd Ed'n (BR 209) 2011 (Paul Littlefair). The British Research Establishment - BRE - is described by Humphreys J in Atlantic Diamond as "A private group of British planning consultants."
97 Emphasis added.
98 Thus, and for purposes of the BRE Guide, daylight is distinguished from sunlight, which is assessed separately.
99 For this and what immediately follows see the BRE Guide §2.1.8 & p53 Appendix C Interior Daylighting Recommendations §C3 & C4.
100 in Atlantic Diamond §34, Humphreys J noted that the Daylighting Code: "……. expressly provides that where rooms are used for combined purposes, the appropriate standard is the ADF that is highest for any of the uses. Thus, insofar as kitchens are combined with living rooms in the proposed development, the appropriate ADF would be the higher of the 1.5% standard for living rooms and the 2% standard for kitchens…."

1% ADF equates to 1% of outdoor unobstructed illuminance. 5% ADF equates to a "*well daylit*" space. 2% equates to a "*partly daylit*" space. Below 2%, the room will look dull and electric lighting is likely to be turned on.

53. Consistent with this understanding of the Daylighting Code, the BRE Guide says:

> *"The amount of daylight a room needs depends on what it is being used for."*[101]
>
> *"Living rooms and kitchens need more daylight than bedrooms."*[102]
>
> *"If a predominantly daylit appearance is required, then the ADF should be 5% or more if there is no supplementary electric lighting, or 2% or more if supplementary electric lighting is provided. There are additional recommendations for dwellings of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms. These additional recommendations are minimum values of ADF which should be attained even if a predominantly daylit appearance is not achievable."* [103]

So, the recommendations of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms are minima which do not achieve "*a predominantly daylit appearance*" but at 2% "*a predominantly daylit appearance*" can be achieved by use of supplementary electric lighting. The BRE Guide unsurprisingly comments that, while the minima can be used as targets for obstructed situations, better is desirable.[104]

54. The BRE Guide, though explicitly using the word "*minimum*" to describe its numerical guidelines, nonetheless states that:

> *"It is purely advisory and the numerical target values within it may be varied to meet the needs of the development and its location. Appendix F explains how this can be done in a logical way, while retaining consistency with the British Standard recommendations on interior daylighting."*[105]
>
> *"The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design (see Section 5). In special circumstances the developer or planning authority may wish to use different target values."*[106]

101 §2.1.6.
102 §2.1.13.
103 See Appendix C.
104 §2.1.9.
105 Summary – page v – emphasis added.
106 §1.6 – emphasis added.

55. In its own terms all that is clear enough. The interpretative difficulty arises where, as in §3.2 of the Height Guidelines which sets criteria for the application of SPPR3, the BRE Guide is explicitly adopted, not merely "*as an instrument of planning policy"* (a role it itself explicitly disavows) to which regard must be had – but as one to which *"appropriate and reasonable regard"* must be had, as that phrase is explained in **Killegland** and in **Atlantic Diamond**. In other words, the Height Guidelines explicitly adopt the BRE Guide for a purpose to which the BRE Guide explicitly says it is unsuited and, having done so, imposes a higher than usual duty of regard to it. Further, it does so in a context in which that regard operates as a mandatory criterion for the application of an SPPR which overrides Development Plans. In such circumstances, interpretive difficulties are, if not inevitable, at least predictable. It is entirely unsurprising that, from their different and partisan perspectives, developers emphasise the merely advisory nature and inherent flexibility of the BRE Guide and its ADF standards, whereas objectors emphasise the statutory context in seeking to characterize the BRE Guide and its ADF standards, at least where application of SPPR3 to a material contravention is concerned, as little less than mandatory. In this regard one can only repeat the importance which Collins J ascribed in **Spencer Place**[107] to careful and clear drafting of planning guidelines - not least where SPPRs are concerned and repeat also that, while incorporation by reference is a very useful drafting technique, it always requires careful consideration of the content of the document thus incorporated.

56. The ADF standards set in the BRE Guide are not merely explicitly minima, they are quantified minima which do not achieve a "*predominantly daylit appearance"*. Notably, the BRE Guide envisages departures from those numerical minima:

- in "*special circumstances*". (That inevitably prompts the question: are the circumstances special and what is special about them? The Board has not suggested that the examples of special circumstances[108] given in the BRE Guide as justifying lesser targets apply in the present case – either in terms or by analogy. Nor were any such special circumstances identified to the Board or to the Court.)
- in accordance with Appendix F.
- in a logical way.
- while retaining consistency with the Daylighting Code (which sets the ADF standards).

So, even in its own terms, the flexibility of the BRE Guide is not carte blanche.

57. Generally, (and this is no criticism of what was originally written and intended as a non-statutory guide for a use very different to that to which the Height Guidelines have put it) it seems to me that the word "*interpreted*" in the indication that the "*numerical guidelines, … should be interpreted flexibly",* is properly to be read as "*applied*". The Board's counsel agreed.[109]

107 Spencer Place Development Company Limited v Dublin City Council [2020] IECA 268; [2020] 10 I.C.L.M.D. 96, §77.
108 For example, in a historic city centre, or in an area with modern high-rise buildings, a higher degree of obstruction may be unavoidable if new developments are to match the height and proportions of existing buildings.
109 Transcript Day 2 p18

BRE Guide ADF Standards – applicable to Apartments?

58. The Statement of Grounds records that Ironborn asserted, in its Light Report that the BRE Guide does not apply or is applied in some generally attenuated way by "*the majority of councils in Ireland and the UK*", to apartment developments as opposed to "*traditional house layout and room usage*" and that "*This has been confirmed as acceptable and standard practice by the author Dr Paul Littlefair".* The full relevant text of the passage of the Light Report is as follows:

> *"We note that for apartment developments the majority of councils in Ireland and the UK accept the lower value of 1.5% assigned to living rooms to also include those with a small food preparation area (kitchen) as part of this space. The higher kitchen figure of 2.0% is more appropriate to a traditional house layout and room usage. The use of a reduced value accepted by Local Authorities is still compliant within the terms of the guidelines. This has been confirmed as acceptable and standard practice by the author Dr Paul Littlefair. We have thus used the minimum values of 1.0% for bedrooms and 1.5% for the Living room spaces."*

59. In effect, this passage purports to disapply the 2% standard to LKD rooms in apartments generally – as opposed to on foot of any specific characteristics of the Site, its locale or the Proposed Development. It falls little short, if at all, of baldly stating that the 2% standard does not apply to LKD rooms in apartments. For reason which follow, I reject that assertion.

60. I should recognise that Counsel for the Board, correctly in my view, placed little or no reliance on the reference in that that passage to the view of Dr Littlefair. He also agreed that the BRE Guide does not suggest that the treatment of daylight issues is to be attenuated as to apartments.[110] He was, as he was entitled to be, more equivocal as to the relevance of the rest of that passage – calling attention to the explicit invocation in the BRE Guide of flexibility, though conceding that the attitude of UK planning authorities was of little relevance. However, in my view, Fernleigh is correct in submitting that *"It is on the basis of this analysis that the Developer calculated its purported levels of compliance."*[111]

61. The Inspector recites[112] this passage of the Light Report in a section of his report which the Board's submissions describe[113] as his "analysis". But he does so without comment, analysis or scrutiny and, importantly, he does so in support of his own conclusion that he is "*satisfied that the alternative value of 1.5% for the living/ kitchen/dining areas is appropriate*". Indeed he later says, clearly referring to this passage of the Light Report, "*While the report does not apply a target of 2% for LKDs (a target of 1.5% is applied), justification is set out for this."* So I find, despite the Board's

110 Transcript Day 2 p17.
111 Fernleigh Written Submissions §7.
112 §12.5.8.
113 ABP Written Submissions §17.

disavowal of it at trial, that the Inspector did rely on this passage in the Light Report and did so, in at least considerable degree, in deeming a target of 1.5% ADR for LKD rooms appropriate. In my view, that reliance was in error – indeed, in error for the very reasons for which the Board did not rely on this passage at trial.

62. The Board's written submissions do not engage with the issue. So, despite counsel's concession, I should record the reasons why these observations by Ironborn are of minimal weight, if any weight at all, are as follows:

- First, a sweeping, unsubstantiated and likely unverifiable assertion as to what the "*majority of councils in Ireland and the UK*" habitually do or do not do, by way of the disapplication of a standard, inevitably invites healthy scepticism. That is especially so as to a standard to which "*appropriate and reasonable regard*" must be had in overriding planning policy as expressed in a Development Plan. At very least, attributing any weight to it would require that the planning-decision maker have independent verification of, or itself be in a position to confirm, the proposition.

- Second, it seems inevitable that the "*majority of councils in Ireland and the UK*" habitually apply the BRE Guide in contexts entirely unaffected by SPPR3 and the legal context in which SPPR3 sits.

- Third, the citation of the views of Dr Littlefair is entirely unattributed as to precise source or content or context, as to when or to whom they were expressed, in answer to what question or whether in public. While the rule against hearsay does not, of course, apply and weight is a matter for the Board, nonetheless some statements are just clearly and self-evidently weightless.

- Fourth, there is no recognition in the Light Report of SPPR3 or §3.2 of the Height Guidelines 2018 – indeed of the Height Guidelines at all or even of the Apartment Design Guidelines – much less of the legal context in which they sit – or that the BRE Guide has been transmuted by Irish law into the very "*instrument of planning policy*" which Dr Littlefair, explicitly in the BRE Guide, intended it not to be.

- Fifth, there is no evidence that Dr Littlefair was aware of SPPR3 and the legal context in which it sits – or that his BRE Guide has been transmuted by Irish law into the very "*instrument of planning policy*" which he intended it not to be.

- Sixth, even if he was so aware, his interpretation of his BRE Guide, while relevant is, by reason of his authorship of it, no more authoritative than any other interpretation – **St Kevin's GAA**.[114]

114 Flannery v An Bord Pleanála [2022] IEHC 83 (High Court (Judicial Review), Humphreys J, 25 February 2022) §155 citing Cicol Ltd. v An Bord Pleanála [2008] IEHC 146, [2008] 5 JIC 0810 (Unreported, High Court, Irvine J., 8th May, 2008). As to objective interpretation of Development Plans as a matter of law, the interpretation of a planning authority of the plan does not carry specific weight. Also Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §22. "The parties all agree that the general rule is

However, even to the extent it is relevant, in the absence of direct and reliable expression of his view, as opposed to a highly general aside, clearly no weight of consequence could reasonably be placed on it. In fairness, counsel for the Board[115] correctly placed "*little or no reliance*" on the fact that this was interpretation attributed to Dr Littlefair. However he did not elaborate on his assertion that the Inspector placed "*little or no reliance*" on it and, as I have said, the passage of the Inspector's report[116] which cites this content generally is the passage at the end of which he draws the conclusion that "*the alternative value of 1.5% for the living/kitchen/dining areas is appropriate*".

- Seventh, on my perusal of the BRE Guide there is no suggestion of such a distinction between apartments and houses. The necessarily objective interpretation of the BRE Guide discloses no such distinction. Had such a major point of distinction been intended, it would have had to have been expressed in the BRE Guide and it is not. Indeed, the illustrative photographs in the BRE Guide make clear that it is very much intended for application to apartments. That makes sense as it is primarily in the case of intensive apartment blocks, as opposed to extensive housing estates, that adequacy of daylight is an issue.

- Eighth, §6.6 and §6.7 of the Apartment Guidelines 2020, set out above, are perfectly clear that,
  - the BRE Guide and the Daylighting Code apply to apartment developments.
  - the aim is to "fully meet" their requirements.
  - where they cannot be fully met "*this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out*".

  There is no recognition of any of this in the Light Report – which, as I have said, does not even mention the Apartment Guidelines 2020. But the Apartment Guidelines 2020 are clear as to the underlying relevance of the BRE Guide and the Daylighting Code to apartment developments.

  Of course, these are guidelines to which planning decision-makers must have regard – as opposed to the obligation of appropriate and reasonable regard imposed by §3.2 of the Height Guidelines 2018 as to the BRE Guide and the Daylighting Code when it comes to satisfying criteria for the application of SPPR3 – which obligation was recognised as weightier in **Atlantic Diamond.**[117] And, whatever regard the Board must have, by inevitable implication planning applicants and their expert advisors must in practice have like regard.

63. The BRE Guide and the Daylighting Code apply to apartments just as much as to any other form of residential development. I reject any contrary suggestion. The Board's apparent lack of even curiosity, much less analysis, as to these assertions in the Light Report is, putting it at its least,

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that the interpretation of a plan is a question of law, and, accordingly, the court is not required to show deference to the views of An Bord Pleanála (or even to the views of the local planning authority who is the author of the plan)." While those cases applied to Development Plans, the principle is general.

115 Transcript Day 2 p12.

116 §12.5.8.

117 Atlantic Diamond Ltd v. An Bord Pleanála [2021] IEHC 322.

disappointing in light of the expectation articulated by O'Donnell J in **Balz**[118] (and in other cases I cite below) that the Board fulfil an *"important public function"* as *"an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual*". While "*detailed scrutiny*" of a planning application does not require exhaustive exploration of its every nook and cranny, the assertion that the BRE Guide is inapplicable to apartments in an important respect such as the applicability of ADF standards falls well within the requirement.

Developer's Failure to Demonstrate Compliance – Walsh

64. In **Walsh**,[119] the Board granted an SHD permission in material contravention of the applicable development plan as to building height. By s.9(6) of the 2016 Act, the validity of that permission depended on satisfaction of the requirements of s.37(2)(b) PDA 2000.

65. Of some note given it is also argued in this case, and presumably on foot of emphasis on the requirement in SPPR3 that the developer set out how its development proposal complies with the §3.2 criteria and the stipulation in §3.2 that the developer "*shall demonstrate*" satisfaction of those criteria, Mr Walsh asserted that the developer had failed to provide the Board with material from which the Board could find compliance with the §3.2 criteria and misconstrued the Height Guidelines, therefore failing to provide a basis for material contravention. However Humphreys J held:

> *"But a failure by a developer to provide material, in and of itself, is not generally a basis for certiorari. It is true that in certain contexts such as a defect in the application form itself or some other document essential to jurisdiction, any failing by the developer or applicant in a process might be a ground for certiorari as such, but in the context here, any shortcomings in the developer's material would only become a problem if they flow through into the decision-maker's analysis. Thus it is the approval of the application by the decision-maker without adequate material, not a failure by the developer to furnish material, that is a ground for certiorari*[120] *……. Applicants seem to misunderstand this conceptual point with almost predictable regularity, and the present case furnishes no exception."*

Counsel for Fernleigh suggested this observation by Humphreys J was a "side-wind" – the last sentence of the passage makes clear it was not.

66. It seems to me that the underlying rationale of the requirements of the Developer specifically made in SPPR3 and §3.2 is to ensure that the Board has adequate materials and

118 Balz & Heubach v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd [2019] IESC 90; [2020] 1 I.L.R.M. 367.
119 Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
120 Humphreys J cites Conway v An Bord Pleanála [2022] IEHC 136.

reasoning before it. A developer who fails to meet those requirements clearly runs a risk of an adverse decision by the Board. But if by other means the Board has adequate materials and can engage in reasoning adequate to support a decision to grant permission, such that the shortcomings in the developer's materials do not flow into the Board's analysis and if those shortcomings have not resulted in procedures unfair to other participants in the process (for example by way of their not being position to respond to materials and reasoning not proffered by the developer), I respectfully agree with Humphreys J, that the developer's failure is not a ground for certiorari. The requirements of fair procedures vary with circumstances and certiorari would require demonstration of real and substantive, as opposed to formal, unfairness – **Wexele**.[121] While I do not rule out the possibility of exceptions, it is difficult to see how, generally, justice would require certiorari where the developer's error has not flown into the Board's analysis.

The Applicable ADF Standard for LKD Rooms

67. As to the ADF standard for LKD rooms applicable by virtue of and on a correct interpretation of the BRE Guide and the Daylighting Code, Humphreys J put it pithily in **Walsh**: "*1.5% is not the standard, the standard is 2%".* In **Atlantic Diamond,** Humphreys J noted, as to the Daylighting Code, that "*insofar as kitchens are combined with living rooms in the proposed development, the appropriate ADF would be the higher of the 1.5% standard for living rooms and the 2% standard for kitchens ....*".[122] In **Jennings** it was said that "*The Daylighting Code standard for ADF in LKD spaces is 2%.*"[123] The position in this regard is entirely clear. The Inspector and the Board erred in applying 1.5%.

Appropriate & Reasonable Regard to the BRE Guide and to the BS

68. As noted above, by the criteria set by §3.2 of the Height Guidelines include that before the Board may lawfully apply SPPR3 it must have paid "*appropriate and reasonable regard*" to "*quantitative performance approaches to daylight provision outlined in guides like*" the BRE Guide and the BS. As I have noted, in **Killegland**[124] Humphreys J, citing SPPR3, described "*Appropriate and reasonable*" as an *"intensifier*" of the more common "have regard to" obligation. That intensifier "*generally connotes an additional degree of weight to be given to the matter … with a general enhancement of the level of reasons that have to be given for not affording such weight*". In this he

121 Wexele v An Bord Pleanála [2010] IEHC 21. At §20, Charleton J said: "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."
122 §34.
123 §403.
124 Killegland Estates v Meath County Council & Giltinane [2022] IEHC 393.

echoed his view, expressed in **Atlantic Diamond**,[125] of an argument that the BRE Guide is not mandatory:

> *" …. the reference to guidelines like the two identified certainly includes having regard to both of the two guides identified …"*[126]
>
> *"The mandatory s.28 guidelines require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the "not mandatory" simpliciter category."*[127]
>
> *"The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why."* [128]
>
> *"…… if the standards identified are not being complied with, it must be clear why."*[129]
>
> *"If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.*
> *(i). this must be clearly identified;*
> *(ii). a rationale for any alternative compensatory design solutions must be set out; and*
> *(iii). a discretion and balancing exercise is to be applied."*[130] (by the Board).

69. In **Atlantic Diamond**[131] Humphreys J noted that the developer's Daylight/Sunlight Study, as to ADF, identified the appropriate guidelines for kitchens at 2% and living rooms at 1.5% and, as recorded above, noted the 2% ADF standard applicable to LKD rooms.[132] He observed: *"Unfortunately, the developer applied a 1.5% standard to these combined rooms ..."*.[133] He observed of the Daylight/Sunlight Study:

> *"Crucially, however, that document does not articulate (and neither does the Board) that we are dealing here with combined kitchens and living rooms. They are simply treated as living rooms with no acknowledgment of the problem. That methodological gap in the reasoning would in my view be fatal in itself."*[134]

He continues:

125 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
126 §29.
127 §33.
128 §40 – See also §42 – Emphasis added.
129 §42.
130 §27 – Emphasis added.
131 Atlantic Diamond Ltd. v An Bord Pleanála [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021).
132 BS 8206-2: 2008 – the Daylighting Code of Practice.
133 §34.
134 Emphasis added.

> *"The second fatal aspect arises when combined with the fact that the British Standard*[135] *requires that the highest standard of a combined room be applied. That has a direct read-across to the BRE guidelines with which the developer claimed compliance, wrongly on this analysis. The board acted erroneously in endorsing that without properly stress-testing it against the guidelines. If they had done so, the incompatibility would have come to light. Thus the case illustrates a certain laxity in scrutiny, involving in effect the cutting-and-pasting of the developer's materials by the board without adequate critical interrogation."* [136]

70. In **Jennings**,[137] as to this passage of Atlantic Diamond, specific note was taken of the Board's obligation of "*active and critical interrogation*", failing which deference to it is not justified – citing **Weston**[138] to the effect that *"Any planning application must be processed with scrupulous rigour."* I have already referred to the need identified by O'Donnell J in **Balz** for *"detailed scrutiny".* In Jennings,[139] Balz was cited as to the importance of such scrutiny to public trust in the planning system and it was said that the Inspector and the Board "*are perfectly entitled to accept information tendered by a planning applicant - but only after rigorous scrutiny. And, as to significant issues, both scrutiny and its rigour must be apparent: that is a primary function of an Inspector's report. It is to contain not merely summary but analysis. Indeed, the very function of expertise, and the reason it is accorded deference, is to exercise judgment in analysis."* And recently Humphreys J in **Treascon**[140] emphasised *"the need for thoroughly independent and detailed expert scrutiny by the statutory decision-maker".*

Identification of Non-Compliance & its Extent & Justification thereof – Walsh

71. In **Walsh**, Humphreys J repeated that any departure from the BRE Guide and the BS[141] "*must be clearly identified*" and continued:

> *"That has to mean identifying the extent of the non-compliance. The concept of identifying the non-compliance is meaningless otherwise because the acceptability of a particular design hinges on its precise form and that of each of its parts. Thus, the impact and assessment of a design depends on the extent of non-compliance with design standards in precise terms. The mere fact that it can be said that some unquantified or not fully quantified part of a scheme does not comply with standards is totally inadequate information for the purposes of a proper and rational evaluation in planning terms or a logically watertight environmental assessment."* [142]

135 BS 8206-2: 2008.
136 Emphasis added.
137 [2023] IEHC 14, §410.
138 Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).
139 [2023] IEHC 14, §411 – 413.
140 Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700 (High Court (Judicial Review), Humphreys J, 16 December 2022).
141 He used the phrase "Daylight Standards".
142 §52.

> *"The need to identify in precise and clear terms the extent of any of failure to meet standards is critical to the evaluation of the acceptability of a project. The extent to which an application falls short of building design standards, and why, is critical to whether a sub-standard design such as this one should be accepted. It can't be lawfully accepted without first clearly identifying the extent of non-compliance, which wasn't done."*[143]

Humphreys J said of the inspector:

> *" …… her analysis is based on a false premise. Insofar as she assesses non-compliance, it is by reference to the debased standard proposed by the developer of 1.5% ADF …. She should have started with the applicable standard, which is 2%, then "clearly identified" the extent of the non-compliance, and only at that point interrogated the rationale for such non-compliance by reference to the objective planning considerations referred to in the guidelines. Instead ….. she accepted a basis for "defaulting to a 1.5% value" as a "target" ……. and thus found the 97.3% "complying with standards". But 1.5% is not the standard, the standard is 2%. Essentially she asked the wrong question and fell into an error of law in doing so. That error occurred at the outset of the analysis – we never even got to whether a departure from standards was really justifiable having regard to the sort of objective planning features envisaged by the guidelines ….."*[144]

72. So what are "*the sort of objective planning features envisaged by the guidelines*"? Humphreys J cites §3.2 of the Height Guidelines to the effect that:

> *".. a rationale for any alternative, compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution."*

73. It is important to remember that flexibility in guidelines is not carte blanche to degrade the norm set by guidelines such that the exception becomes the rule – or at least, something less than a true exception. Such an approach tends to degrade norms towards meaninglessness – not least incrementally in repeated decisions and over time. So, as a matter of proper rigour in decision-making, one must start with the norm, assess compliance against it and justify availing of flexibility to depart from it.

143 §55.
144 §§53 & 54.

74. Remembering to read the Height Guidelines on **XJS**[145] principles and not as if they were a statute, it seems to me that the foregoing passage from Atlantic Diamond envisages that the Board will balance "*local factors including specific site constraints*" against "*the desirability of achieving wider planning objectives*" when considering the adequacy of "*compensatory design solutions*" in mitigating the ill-effects of failure to meet ADF standards. All three elements are to feature in the decision:

- First, it must be noted that design solutions are "*compensatory*" – they may do much to mitigate non-compliance but are an "alternative" – not the preferred – solution. The preferred solution – the norm – is compliance with the applicable standard and the provision of daylight accordingly.

- Second, the necessity of non-compliance arises due to "*local factors*".[146] That is because the underlying presumption is that the standard is set in the expectation that compliance with it is, in the great majority of planning applications, ordinarily and generally compatible with other standards and "*achieving wider planning objectives*". If that were not so, planning policy, as expressed in s.28 guidelines, would be incoherent. While tensions between planning policies are inevitable, incoherence is found only in the last resort. So it is only in a minority of cases and due to specific local factors that a tension arises in practice between adhering to the ADF standards of the BRE Guide/Daylight Code/§3.2 of the Height Guidelines on the one hand and "*achieving wider planning objectives*". Of course, tension between ADF standards and "*wider planning objectives*" is not the only type of tension which may require flexibility and non-compliance with ADF standards "*since natural lighting is only one of many factors in site layout design*".[147]

Incidentally, I accept that local factors and constraints and general considerations tend to elide as the former often are functions of the latter. However the main point is that the reasons for reducing ADF standards will include local factors. Though they may be factors arising off-site (e.g. obstruction of light by pre-existing buildings), they will be site-specific in their effect on design. I would not rule out the possibility that non-local factors may in rare cases justify disapplication of standards but such cases will be rare and will require detailed articulation. Any other approach would be destructive of the standards and of the expectation that planning policy, as expressed in s.28 guidelines, is coherent.

75. The BRE Guide also states that *"In special circumstances the developer or planning authority may wish to use different target values."* It must be remembered that the BRE Guide was put by the Height Guidelines to a use as Planning Policy which the Guide itself explicitly disavowed. Setting reduced targets is permissible but **Walsh** makes clear that where, in an exercise of satisfying the criteria set by the §3.2 of the Height Guidelines for application of SPPR3, reduced targets are set, the non-compliance with the BRE Guide targets must be clearly and precisely identified, quantified and justified. This view seems to me coherent not merely with §3.2 but with the expectation of the BRE

145 Re XJS Investments Limited [1986] IR 750.
146 Emphasis added.
147 BRE Guide §1.6 & §5.

Guide itself that departures from its norms will arise in circumstances which are identifiable and identified as "special".

76. The BRE Guide[148] instructively gives examples of circumstances which might be considered "special" – in terms I note, of being "*unavoidable*".

> *"For example, in a historic city centre, or in an area with modern high rise buildings, a higher degree of obstruction may be unavoidable if new developments are to match the height and proportions of existing buildings."*

There is no suggestion of analogous special, or unavoidable circumstances in this case.

77. In an important sense it is true that, as the Inspector observes in this case, compliance with the BRE Guide ADF standards is not mandatory. In Walsh, Humphreys J said: *"Insofar as it was suggested that it is impermissible in principle not to apply an Average Daylight Factor (ADF) of 2%, that is clearly incorrect. The development criteria do allow for a departure from that in certain circumstances provided certain procedures and criteria are complied with."*[149] But, at least as to the application of §.3.2 criteria, the proviso is mandatory. As Humphreys J observed, if SPPR3 is to be applied despite such non-compliance, it is necessary to clearly identify the non-compliance and balance any desirability of achieving wider planning objectives against an assessment having regard to local factors including site-specific assessment.

Daylight – Ironborn's Light Report,[150] Planning Report & Material Contravention Statement

78. I have given above some account of Ironborn's Light Report. It was requested by the Board in its Pre-Application Consultation Opinion. It does bear repeating that the Report used a 1.5% ADF "*minimum value*" for "*living room spaces*" – which it described as "*living rooms with a small food preparation area (kitchen) as part of this space*". It did so explicitly and only on the allegedly generally applicable bases set out above,[151] – which I have rejected – as opposed to any bases specific to this development.[152] It is, importantly, in this light that the Light Report[153] must be understood when it asserts that the application "*generally complies with the recommendations and guidelines of*" the BRE Report and the Daylighting Code as to ADF.[154] And it is with reference to that 1.5% target that it asserts, as to ADF, that:

148 BRE Guide §1.6.
149 §48(ii).
150 Sunlight, Daylight and Shadow Assessment, by Chris Shackleton Consulting.
151 That the BRE Guide does not apply, or is applied in some generally attenuated way by "the majority of councils in Ireland and the UK", to apartment developments as opposed to "traditional house layout and room usage" and that "This has been confirmed as acceptable and standard practice by the author Dr Paul Littlefair".
152 See Light Report p13.
153 Executive Technical Summary & pp14 & 15 & 17 – the report is very repetitious.
154 The report considers issues other than daylight which issues are irrelevant here.

- 97% of tested rooms comply with the relevant requirements.
- This pass rate increases to 99% on including results which are just marginal.
- The development generally shows excellent ADF results.
- Average ADF for the tested living rooms is 2.7% and for bedrooms was 2.5%.

79. Ironborn's Planning Report and Material Contravention Statement ("Planning Report") essentially repeatedly[155] repeat the Light Report's conclusions - referring to the Light Report for the data and detail. It clearly depends on the Light Report and adds the gloss that *"Overall, 97% pass rate is an exceptionally high level of pass rate under these guidelines"* and *"Overall, the development achieves a very high level of daylight … access in accordance with the BRE Guidelines."* Again, clearly in reliance on the Light Report, the Planning Report asserts that *"The proposed development has been carefully designed to ensure maximum daylight and sunlight can be achieved. The development comfortably exceeds the standards for good design in the BRE Guidelines. In the very small number of units (4%) which not meet the standards (see table above) compensation by way of an attractive aspect and significantly larger than minimum requirement apartment have been proposed.*[156] The meaning, in context, of the words *"ensure maximum"* appears to depend on the assertion that the development "*comfortably exceeds*" BRE Guide standards but on the use of a 1.5% ADF "*minimum value*" for "*living room spaces*". Even then, it is unclear what is meant by *"ensure maximum"* given that the BRE Guide standards are explicitly minima, not maxima, and explicitly states that better is desirable.[157] Probably what is meant is that design has maximised daylight provision given other constraints but, at least as to ADF, that seems to be mere assertion as the constraints are not identified and their effect on the resulting design process is not described.

80. The Light Report cites its "Appendix 2 – Light Distribution – ADF Analysis" for "full details". Appendix 2 presents tabulated ADF results on a block-by-block and individual room basis. Whether a room is categorised as Pass, Marginal or Fail is, as to what are called "Living Rooms" but are in fact LKD rooms, erroneously assessed by reference to the 1.5% ADF standard. By "Marginal" is meant failure at 1.4% or 1.3%. It is unexplained, regrettable and disquieting that, in each table, whereas under the heading "Check", rooms which "Pass" or are "Marginal" are identified as such, as to those which fail, the relevant cell of the table is left blank. The omission is easily spotted and so, in the end, does no substantive harm. But such "spin" by omission is unimpressive in what is expected to be an objective expert report. Counsel for the Board, very properly, declined to disagree with a similar observation I made at trial.[158] In another case it may be necessary to consider arguments whether the integrity of the planning process calls for a culture and/or legal requirement of duties of experts towards planning authorities similar to those owed by expert witnesses to courts. In fairness, some experts properly have some advocacy role in the planning process but, without carrying the point to

155 Planning Report P27, 41, 63, 103 & 105. Material Contravention Statement pp15, 16.
156 Ironborn Planning Report p28. A table on this page identifies the Attractive aspect in the case of each such apartment and the extent to which each such apartment exceeds the minimum apartment size.
157 BRE Guide §2.1.9.
158 Transcript, Day 2 p13.

the present Light Report, it can at least generally be said that experts in planning processes cannot be merely creatures of the interests of their clients.

81. Whereas it is said that 97% of "tested rooms" comply, (and 99% if the "Marginals" are included), a compliance rate for specifically the "living rooms" is not expressly identified in the Light Report – even by reference to the erroneous 1.5% standard. It also appears to be implied[159] that as to "living rooms" compliance with the 1.5% standard is properly to be assessed by reference to the average ADF for all such "living rooms". Leaving aside that 1.5% is the wrong standard, and not least given that some living rooms greatly exceed 1.5%, it is difficult to see how such deployment of an average can be correct – though I do not say an average could not form part of the analysis. It is not as if the occupant of a room which fails is consoled that another tenant has a floodlit living room.

82. It will be seen from the foregoing that, just as Humphreys J said of the Inspector's report in **Walsh**, the analysis in the Ironborn Light report is based the "*false premise*" of a 1.5% standard when the true standard is 2%. He said: *"Essentially she asked the wrong question and fell into an error of law in doing so. That error occurred at the outset of the analysis – we never even got to whether a departure from standards was really justifiable having regard to the sort of objective planning features envisaged by the guidelines."* The same must be said of the Ironborn Light Report. It remains to be seen whether, as contemplated in **Walsh**,[160] the error of the Ironborn Light Report flows into the Board's analysis.

83. Before considering that question, it is useful to note that the Light Report Appendix 2 tabulates the actual ADF outcomes for each of what the tables call "Living Rooms". These are clearly, in truth, LKD rooms. In fairness, and as I have noted, the Light Report does describe "*living rooms"* as having *"a small food preparation area (kitchen) as part of this space*". Despite the subtle diminution of its status to *"a small food preparation area",* clearly what is in issue are kitchens and LKD rooms unless, which seems unlikely, Ironborn intends to sell apartments with no kitchens. A perusal of the Floor Plans[161] dispels all doubt – they both depict and explicitly label the relevant spaces as "*Living/Dining/Kitchen*". However, to the casual observer of the tables in Appendix 2, the attribution of a 1.5% ADF standard to what they list as "Living Room" might seem to pass muster as compliance with the Daylight Code standard of 1.5% for what the Daylight Code defines as a Living Room – as opposed to an LKD space. The potential for confusion resultant on this redefinition of "Living Room" is regrettable.

84. For all that, the data underlying the analysis is presented in Appendix 2. So it is possible, if one takes the trouble and the time, to figure out what is the pass/fail rate for the LKD rooms (properly so-called) by reference to the correct 2% ADF standard. Of course, one should not have to

159 See p47.
160 Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
161 See Ironborn's Planning Application Design Statement – Apartment Unit Types – p61.

take that trouble and time as, as Humphreys made clear in Walsh, Ironborn was required to "*identify in precise and clear terms the extent of any of failure to meet standards*" and the need to do so is "*critical*". Counsel for Fernleigh took that time and trouble and produced spreadsheets accordingly. I will consider them in due course.

Daylight – Inspector's Report

85. The Inspector, in considering Material Contravention,[162] identifies material contravention of Policy UD6: Building Height Strategy of the Development Plan[163] and the scope created by s.9(6) of the 2016 Act and s.37(2)(b) PDA 2000 for a grant of permission despite such contravention[164] – including by reference to the Building Height Guidelines and SPPR3 thereof in particular.[165] He considers the Development Management Criteria set by §3.2 of the Building Height Guidelines for the application of SPPR3 – including the necessity that "*Where a proposal may not be able to fully meet all*" daylight requirements "*this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out.*"[166] He says: *"I have set out my assessment of the internal amenity of the proposed units, as results to daylight and sunlight[167] in Section 12.5 below, and I am satisfied that, on balance a sufficient standard of daylight and sunlight would be provided to the units, and where targets for daylight and sunlight have not been achieved, sufficient alternative compensatory measures have been set out."* [168]

86. This conclusion is based on analysis set out later in his report under the heading "*Residential Amenities/Residential Standards*".[169] There, the Inspector notes:

- DLRCC concerns as to daylight: the absence of an assessment of kitchens and that a significant number of the kitchen, living, dining areas will fail to achieve the 2% standard.[170]
- that the proposed units contain combined kitchen/living/dining layouts, and that the Light Report *"sets a target of 1.5% for the living/kitchen/dining area, in lieu of a target of 2% …."*.[171]
- the content of the Light Report as, he says, "*based*" on the BRE Guide and the Daylight Code. [172]

87. The Inspector correctly recites, and the Board now emphasises, that the BRE Guide states, as set out above, that its advice is not mandatory, that its aim is to help, rather than constrain the designer and that its numerical guidelines should be interpreted flexibly *"since natural lighting is*

162 Inspector's Report §12.
163 Inspector's Report §12.3.4.
164 Inspector's Report §12.3.7 et seq.
165 Inspector's Report §12.3.13 et seq. & §12.4.16 et seq. §12.4.16 states "In relation to Section 28 Guidelines, the most relevant to the issue of building heights, is the Building Height Guidelines (2018)." §12.4.17 & .18 describe SPPR3 and §3.2 of the Height Guidelines.
166 Inspector's Report §12.4.29.
167 Sic.
168 Inspector's Report §12.4.30.
169 Inspector's Report §12.5 et seq.
170 Inspector's Report §12.5.1 & §12.5.11.
171 Inspector's Report §12.5.10.
172 Inspector's Report §12.5.4.

only one of many factors in site layout design, with factors such as views, privacy, security, access, enclosure, microclimate and solar dazzle also playing a role in site layout design …" However, the Inspector does not note the countervailing analysis of the status and effect of the BRE Guide required by reason of its incongruous[173] adoption by §3.2 of the Height Guidelines as part of the criteria for application of SPPR3 – which analysis had then-recently been identified in **Atlantic Diamond**.[174]

88. The Inspector correctly notes[175] the combined effect of the BRE Guide and the Daylighting Code to the effect that "*in a space which combines a living room and a kitchen the minimum average daylight factor should be 2%*." He notes[176] – without dissent, though he does note the absence of documents supporting the alleged view of Dr Littlefair – the Light Report's adoption of a 1.5% ADR value for LKD rooms for reasons which, as I have noted above, were in no way specific to any special circumstances of the Proposed Development, which in reality disapplied the 2% standard in LKD rooms in apartments generally, and which I have held above to be erroneous.

89. However, it is not merely a matter of non-dissent. The Inspector notes that Ironborn said it had endeavoured to achieve greater values where possible but he is in any event:

> *"…… satisfied that the alternative value of 1.5% for the living/kitchen/dining areas is appropriate, …… while measuring success/compliance with the alternative set ADF in terms of compliance with 1.5% for L/K/Ds."*

90. It seems to me that the Inspector both acknowledged the general applicability of the 2% standard for LKD rooms in apartments and noted that 1.5% had been adopted in the present case by Ironborn as an "appropriate" "alternative". While this avoided the error of accepting Ironborn's view that the BRE Guide did not apply to apartments, it is clear that there was error in this approach: as Humphreys J said in Walsh:

> *"She should have started with the applicable standard, which is 2%, then "clearly identified" the extent of the non-compliance, and only at that point interrogated the rationale for such non-compliance by reference to the objective planning considerations referred to in the guidelines."*[177]

91. To put it another way, one does not reduce the standard, justify that reduction and allege compliance with the BRE Guide by reference to that reduced standard. One must maintain the

173 Incongruous for reasons stated above – the BRE Guide was explicitly not intended by its author as a statement of planning policy.
174 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
175 Inspector's Report §12.5.7.
176 Inspector's Report §12.5.8.
177 [2022] IEHC 172, §54.

standard, clearly identify and quantify non-compliance by reference to that standard and only thereafter justify the non-compliance. In justifying the non-compliance and by reason of "*special circumstances*" it may be acceptable to set reduced targets.[178] It might be said that these are merely two routes to the same substantive result, but the former obscures non-compliance with the BRE Guide by calling it compliance and tends to evade the necessity to search for special circumstances in terms of local factors. And that is what was done in the Light Report here.

Inspector's Report – 2nd half of §12.5.8

92. As noted earlier, Humphreys J in Walsh required justification of non-compliance by reference to "*the sort of objective planning features envisaged by the guidelines*." The Inspector addresses this in the second part of §12.5.8 of his report. While that content is to be considered as a whole, it helps to consider its elements discretely. He states:

> *"I note the accessible urban location of the development, that supports higher density and apartment development, and therefore accept that traditional housing typologies that would provide a 2% ADF for L/K/Ds is not appropriate."*[179]

Structural incongruity aside, the meaning is tolerably clear. In my view it is in error. It invokes purely general planning policies as to location of apartment developments. Its reasoning is far from any concept of "special" circumstances, much less local such circumstances, rendering non-compliance "unavoidable". It is a rationale not particular to this Site but for the general disapplication of the BRE Guide ADF standards to urban apartment developments. It is a rationale for turning the disapplication of the BRE Guide ADF standards into the norm as to urban apartment developments. In essence, it makes the same error of law as did Ironborn's Light Report.

93. The Inspector does not move on to "*local factors including specific site constraints*" as justifying the lesser ADF standard. Neither he nor the Light Report set out any site-specific factors which require that lesser ADF standards be applied. He earlier mentions that the BRE Guide cites factors *"such as views, privacy, security, access, enclosure, microclimate and solar dazzle also playing a role in site layout design …"* but neither he nor the Light Report identify any respect in which those or other factors require lesser ADF standards on this specific Site – either because of their tension with general planning considerations or because of tensions internal to local site constraints.

94. Having skipped the "*local factors*" element of the analysis of the justification for lower standards, the Inspector moves directly, and hence prematurely, from very general planning considerations to compensatory design solutions. He does so in an entirely conclusionary sentence:

178 See above sub "Identification of Non-Compliance & its Extent & Justification thereof – Walsh".
179 Inspector's Report §12.5.8.

> *"I am satisfied that the quality of the spaces, aspect, and amenity spaces (including balconies etc) also ensure the quality of residential, amenity to compensate for any potential reduction in residential amenity as a result of the use of the lower ADF."* [180]

95. Fernleigh takes particular objection to the last sentence of this passage: *"I also note that the units are BTR."* Fernleigh says it is a consideration irrelevant to the issue of ADF standards.

96. I find it difficult to know what exactly to make of that sentence – what the Inspector intended by it. It is tacked on to the end of the passage. He clearly intended it as part of the justification of lower ADF standards but he does not explain its relevance. It is not apparent that it can be a compensatory element. Nor is it a site-specific constraint. Nor is it apparent why occupants of BTR apartments should be entitled to less daylight than others – perhaps especially as, it seems, they are expected to provide opportunities for longer-term tenancies than other apartment types.[181] I find Fernleigh's argument attractive that there is at least some analogy here with the finding in **Jennings**[182] that there was no evidence in that case *"that, as to their need for light in kitchens, students' requirements are any less than those of the general population".* Nor is it suggested that design features of BTR apartments tend to inhibit attaining the ADF standards set by the BRE Guide. Indeed, if that were the generally case one would have expected to find it reflected in guidelines as to ADR standards specific to BTR apartments and there are none. However, as will be seen, I do not find it necessary to decide the alleged irrelevance of the consideration that the units are BTR as I am satisfied to quash the decision on other grounds relating to the daylight issue.

180 Inspector's Report §12.5.8.
181 Apartment Guidelines 2020 §5.5 refers to BTR as providing "…..the opportunity for renters to be part of a community and seek to remain a tenant in the longer term, rather than a more transient development characterised by shorter duration tenancies that are less compatible with a long term investment model."
182 §386.

Inspector's analysis at 2% ADF – §12.5.11 et seq

97. In my view and as stated above, in accepting a 1.5% ADF standard for the LKD rooms the Inspector adopted the error of the Light Report and made the same error as led to certiorari in **Walsh.** However, he did one further thing which distinguishes his analysis from that both of the Light Report and of the inspectors in Atlantic Diamond and Walsh. He set out, in response to the concerns of DLRCC, to analyse the LKD rooms in the Proposed Development by reference not merely to a 1.5% ADF standard but also to the correct 2% standard.[183]

98. No doubt from the data in Appendix 2 of the Light Report, he produced a table which concluded that 93.1% of the rooms tested – i.e. both bedrooms and LKD rooms – complied applying 2% ADF, as opposed to 97% applying 1.5% ADF, to LKD rooms. The inspector continued:

> *"Where the target of 2% for LKD has not been achieved, in the vast majority of cases (97% ….), the shortfall is not substantial (ADF values are above 1.5%). This, to my mind, indicates that the kitchen area of the LKD will be served by a well-lit living room, in line with the BRE Guidance. While not a specific target per se within the guidelines, the average ADF achieved for the LKD areas is 2.7%, indicating the majority of LKDs achieve an ADF value well above the 2% target. Where an LKD falls below 1.5%, the ADF values in all of these rooms are above 1%, save for Room 45 in Block FG where the ADF is 0.9%. However overall, I am satisfied that the levels of daylight achieved to the proposed units will, on balance be acceptable, having particular regard to the need to develop sites such as these at a sufficient density and to the non-mandatory nature of the BRE targets."*[184]

99. Of his table and the foregoing passage, some observations may be made:

- Fernleigh characterises it as, despite an ad-hoc calculation using the 2% ADR criterion, the Inspector's proceeding on the basis of the 97% compliance rate claimed by Ironborn using the 1.5% ADR criterion. That seems to me an excessively restrictive reading of his report. In my view, the Inspector is to be read as having satisfied himself by reference to both criteria.

- The inspector clearly and correctly eschewed the phrase "*living rooms*" used in the Light Report – he correctly identified the rooms in question as LKD rooms.

- As had the Light Report, he noted the average ADF achieved for the LKD rooms but, unlike the Light Report, noted that "*this was not a specific target per se within the guidelines*". This seems to me a reasonable observation.

183 Inspector's Report §12.5.11.
184 Inspector's Report §12.5.12.

- However, the inspector did not, in his table, distinguish between LKD rooms and bedrooms. To put this in some context, I note that those rooms comprised 445 LKD rooms[185] and 715 bedrooms.[186] So, a high compliance rate in the bedrooms could yield an overall compliance rate appreciably in excess of that for the LKD rooms considered alone. As will be seen, that was in fact the case. But it was not identified by the Inspector.

100. The Inspector's assertion that ADF values between 1.5% and 2% indicated "*that the kitchen area of the LKD will be served by a well-lit living room, in line with the BRE Guidance*" seems to be based on a misinterpretation of the BRE Guide and is in error. To properly have regard – a fortiori to properly have appropriate and reasonable regard – to a document, one must first interpret it correctly. As was said in **Redmond**[187] of the statutory obligation to have regard to the development plan: *"A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood."*

101. The inspector does not identify the element of the BRE Guide with which this observation is said to be "in line". The phrase/word "well-lit" does not appear in the BRE Guide. However, the phrase/word "well-daylit" does appear – and makes sense when one considers that the focus of the BRE Guide (as here relevant) is specifically on daylighting. What matters here is daylighting. It seems that the Inspector must have been referring to the following passage from the BRE Guide:

> *"Non-daylit internal kitchens should be avoided wherever possible, especially if the kitchen is used as a dining area too. If the layout means that a small internal galley-type kitchen is inevitable, it should be directly linked to a well daylit living room."*[188]

That by "well-lit" the Inspector meant "well-daylit" appears to be confirmed by his later observation[189] that *"BRE recommendations are that kitchens are attached to well day-lit living areas, and for the vast majority of units here, this is the case."*

102. I note from the floor plans that at least some LKD layouts include kitchens without windows and daylit via the living/dining areas.[190] In any event, it is necessary to consider what does the BRE Guide consider to be a "*well-daylit*" living room. The answer is that the Daylighting Code:

> *"recommends an ADF of 5% for a well daylit space and 2% for a partly daylit space. Below 2% the room will look dull and electric lighting is likely to be turned on."* [191]

185 1 per unit.
186 1080/93.1x100 = 1,160 rooms. 1,160 - 445 = 715
187 Redmond v. An Bord Pleanála [2020] IEHC 151, §94.
188 Inspector's Report §2.1.14.
189 Inspector's report §12.5.16.
190 It does not seem to me necessary, as was necessary in Jennings, to consider what is or is not a galley kitchen.
191 BRE Guide §2.1.8.

True, such a "dull" space meets the BRE Guide ADF Standard for a living room (not incorporating a kitchen) but, obviously, "dull" is not "well-lit". Given that passage, I respectfully cannot see how the Inspector interpreted the BRE Guide as considering that an LKD space represents, at between 1.5% and 2% ADF, a "*a well-lit living room, in line with the BRE Guidance".* On the contrary, and explicitly, it is "*dull*". Even at a 2% ADF (which these rooms did not achieve) a room is only "*partly daylit*". In marked contrast, "*well-daylit*" means 5% ADF – see also **Jennings**.[192] In my view the Inspector erred in this regard.

103. The Inspector's invocation of the "*non-mandatory nature of the BRE targets*" is understandable in terms of the flexibility for which the BRE Guide itself allows. However, it fails to reflect the incongruous use to which the BRE Guide is put by §3.2 of the Height Guidelines in setting planning policy criteria for the application of SPPR3 to overthrow development plans as to height. As Humphreys J said in **Atlantic Diamond**:

> *"The developer's study states explicitly that the BRE guidelines are not mandatory. That is something of a downplaying of the situation. The mandatory s.28 guidelines require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the "not mandatory" simpliciter category."* [193]
>
> *"……. the 2018 ministerial documents are binding mandatory statutory guidelines which require as a matter of legal obligation that the decision-maker have appropriate and reasonable regard to identified standards."* [194]
>
> "*What is required is appropriate and reasonable regard, and if the standards identified are not being complied with, it must be clear why*." [195]

104. What is left thereafter of the Inspector's justification as cited above is that *"the levels of daylight achieved to the proposed units will, on balance be acceptable, having particular regard to the need to develop sites such as these at a sufficient density".* There is no suggestion that the phrase "*sites such as these"* refers to unusual or rare sites. This appears to be a general assertion of the prioritisation of density over daylighting. In terms, it applies to the generality of apartment developments on "*sites such as these"*. There is no analysis of "*local factors including specific site constraints"* as is required by §3.2 of the Height Guidelines where a development may, as here, not "*fully meet all the requirements of"* the BRE Guide and the Daylight Code. There is no analysis suggesting that "*local factors"* specific to this Site justify or underlie the exercise of a discretion to relax ADF standards in order to achieve required densities.

192 §§398 et seq.
193 §33.
194 §41.
195 §42.

Inspector's Report & Fernleigh's Daylight Tables

105. It is necessary to return to the prior question whether, in accordance with Walsh, the Inspector precisely and clearly identified the extent of the failure to meet the ADF standards. As recorded earlier, counsel for Fernleigh interrogated the data in the Light Report and produced spreadsheets accordingly. Counsel for the Board helpfully confirmed that he did not dispute those spreadsheets.[196] Counsel for Fernleigh identified certain relatively unimportant counting and calculation errors on which he properly did not rely and which I will ignore. His main point was that the Inspector did not precisely and clearly identify the true extent of the failure to meet the BRE Guide ADF standards as to LKD rooms specifically.

- Counsel corrected the Inspector's calculation of overall compliance for all rooms (including bedrooms), assuming a 2% ADF standard for LKD rooms, from 93.1% to 91.3%. (The Light Report had claimed 97% at 1.5% ADF for LKD rooms).

- Counsel identified that at a 1.5% ADF standard for LKD rooms as applied in the Light Report, 18 LKD rooms failed – that is 4%. Counsel for the Board disputed this figure of 18 as a misinterpretation of the Ironborn Planning Report[197] which, he says, refers to 18 units failing a sunlight, not a daylight, standard. However, I have satisfied myself that, even if counsel for the Board is correct that this reference in the Planning Report is to 18 units failing a sunlight not a daylight standard, counsel for Fernleigh is correct that the Light Report found only 18 of 445 "Living Rooms" failing at a 1.5% ADR standard. This is readily apparent from counsel for Fernleigh's tabulation of the Light Report tables inserting explicit identification of failures.[198] That both sunlight and daylight failures were said in the Light Report to be in 18 units seems to be a coincidence.

- Counsel identified that, at a 2% ADF standard, 85 LKD rooms failed – that is 19%.[199] So, very nearly 1 in 5 of the LKD rooms – and hence very nearly 1 in 5 units[200] – failed the correct ADF standard. That is not recorded in Ironborn's Light Report. Neither is it recorded by the Inspector. In my view, that omission can only be described as striking.

196 Transcript Day 2 p126.
197 At p28.
198 From the collection at the bottom of the tables relating to each block the failures in each block can be easily calculated as follows:

Block	Total # of LKD Spaces	@ 1.5% ADR	
		Pass	Fail
AB	108	100	8
C	46	45	1
D	53	50	3
FG	104	100	4
H	63	61	2
Total			18

199 In fact, counsel's table explicitly identified pass rather than fail rates – 96% and 81 – but the corollaries necessarily follow.
200 As every unit has 1 LKD space.

- Counsel adds that the 18 units which failed at 1.5% necessarily failed the 2% standard by a very considerable margin.

Inspector's Analysis – Continued – §12.5.14 et seq.

106. Having briefly addressed sunlight issues, the Inspector returns to daylight – ADF results – expressing satisfaction that *"where shortfalls have been identified, they are not significant in number or magnitude, and are generally limited to those units on the lower floors, or which have balconies or opposing blocks that partially obstruct daylight/ sunlight provision."*[201]

It is, with respect, difficult to see that where very nearly 1 in 5 LKD rooms is non-compliant, the shortfall can be described as "*not significant in number"* and the conclusion of insignificance in magnitude appears to be based on a misinterpretation, described above, of the BRE Guide concept of "well-daylit".

107. The Inspector notes[202] the requirements of §3.2 of the of the Building Height Guidelines which I have set out above and that *"there are some shortfalls in daylight provision, on the lower floors in particular. The extent of these shortfalls are evident within the Daylight and Sunlight report." While the report does not apply a target of 2% for LKDs (a target of 1.5% is applied), justification is set out for this. However, even when the target of 2% is applied, the overall compliance rate remains high."* The Inspector continues:

> *"I acknowledge that, given the need to development[203] sites such as these at an appropriate density, full compliance with BRE targets is rarely achieved, nor is it mandatory for an applicant to achieve, full compliance with same."*

108. Again, here we have, in essence, an acceptance of general, as opposed to site-specific, reasons for failure to achieve BRE Guide ADF standards. This passage echoes, at least implicitly, the erroneous idea that the BRE Guide does not apply to apartment developments or applies to them only in some generally attenuated way. It implies an incoherence, as opposed to a mere flexibility, in the applicable standards adopted as to, respectively, daylighting and density (and the additional height closely associated with increased density[204]). Standards rarely achieved are standards undermined. A premise or assumption that increased density generally requires failure to achieve BRE Guide ADF standards both undermines those standards and results, as here, in a failure to interrogate whether local factors specific to the Site in fact require that BRE Guide ADF standards be disapplied in order to achieve the required densities. It is important to observe that it is no answer

201 Inspector's Report §12.5.14.
202 Inspector's Report §12.5.15.
203 Sic.
204 Inspector's Report §12.3.15.

on this issue to point to compensatory design features and the like: compensation arises only once the need for it has been identified.

109. It is, of course, open to the State to adopt different daylighting standards generally or for apartment developments or for particular types of apartment or for apartment developments on particular types of sites. Or it might adopt different daylighting standards in setting criteria for the application of SPPR3. But it has not done so.

Inspector on Compensatory Design Solutions & his Conclusion

110. The Board emphasises that the Inspector notes[205] relevant compensatory design solutions facilitating a reduction in daylight standards. I will tabulate them here with Fernleigh's response. But first I will deal with two general points.

- Fernleigh makes the point that these compensatory design solutions were not proffered by Ironborn as such solutions - as is required by §3.2 and SPPR3 of the Height Guidelines. The Board replies that the Ironborn's planning report describes the design features in question even if not proffering them as compensatory design solutions. Fernleigh does not dispute that the planning report describes those design features but says that the public and participants in the planning process were not alerted to their mobilisation as compensatory design solutions. I reject Fernleigh's point for reasons addressed above – any failure by Ironborn to identify compensatory design solutions clearly did not flow into the Board's analysis and I do not see that Fernleigh has shown that any real unfairness resulted from Ironborn's not proffering these compensatory design solutions.

- The second point relates to the idea of compensation – as in the phrase compensatory design solutions. While tensions and trade-offs as between planning standards will inevitably arise in particular circumstances, the system of planning standards must be understood as coherent – that, at least ordinarily, all can be complied with in a given development. It seems to me that, as a matter of logic and law (in the sense of interpretation of the Height Guidelines), a design solution compensatory of a failure to meet one standard cannot consist merely in meeting another standard. To pick an absurd example, it is no answer to an assertion of failure to meet a standard as to open space to respond that a standard as to the number of lift and stair cores has been met. Compensation must consist in exceeding the other standard in order to be compensatory. Or, if the other standard is merely met, there may be some particular and identifiable aspect of the design or other circumstances (other than an aspect regulated by standards – perhaps a qualitative aspect) which can be considered compensatory. Also, given the nature of compensation, it would seem in principle that, as daylight is an issue of amenity of

205 Inspector's report §12.5.17.

residents, design features compensatory of a failure to meet daylighting standards should enhance amenity of residents in respects other than daylight. Once these requirements are met, thereafter what is compensatory or adequately compensatory is a matter of planning judgment for the Board.

111. I have below tabulated the analysis of design features compensatory of failure to meet daylighting standards in this case:

Compensatory design solutions identified by the Inspector[206]	**Fernleigh Response**	**Comment**
1 – The favourable orientation of the majority of the units, with most having a westerly, southerly or easterly aspect.	Fernleigh say that, in logic, orientation and dual aspect cannot compensate for a reduction in daylight standards. The primary benefit of orientation and dual aspect is to increase daylight – despite which, in this case, standards are not met. Nor does the inspector correlate those compensating features with the specific units which need compensation. Also, as the minimum standard is 50% dual aspect,[207] an additional 2% is difficult to see as compensation.	Ironborn was somewhat unclear whether the 33% or 50% standard applied.[208] Indeed, at hearing counsel for the Board accepted that the 50% standard applied.[209] If 50% applied an extra 2% is difficult to see as substantively compensatory – though it is a matter of planning judgment for the Board. However the Inspector's finding (which he explains) was that only 45% of units are dual aspect but that the 33% standard applied.[210] That finding is not challenged. Subject to the observations which follow, the additional 12% could in principle be considered compensatory. The inspector's finding that only 45% of units are dual aspect is inconsistent with and tends to undermine his reliance for compensation purposes on Ironborn's claim that 52% are dual aspect. He relies
2 – 52% of the units are dual aspect. (I note also that no north-facing apartments are single aspect.[212])		

206 Inspector's report §12.5.17.
207 The Apartment Design Guidelines §3.17 state "a policy requirement that apartment schemes deliver at least 33% of the units as dual aspect in more central and accessible and some intermediate locations , i.e. on sites near to city or town centres, close to high quality public transport …." and "Where there is a greater freedom in design terms, such as in larger apartment developments on greenfield or standalone brownfield regeneration sites where requirements like street frontage are less onerous, it is an objective that there shall be a minimum of 50% dual aspect apartments. Ideally, any 3 bedroom apartments should be dual aspect."
208 Ironborn's Planning Report p51.
209 Transcript Day 2 p42.
210 Inspector's report §12.5.30.
212 Ironborn's Planning Report §7.3.3.

Compensatory design solutions identified by the Inspector[206]	**Fernleigh Response**	**Comment**
		for compensation on a claim he has found to be incorrect. Fernleigh's logic seems flawed. As noted above, ADF is measured with reference to a "standard overcast sky". So it is difficult to see that orientation/aspect affects it much, if at all – though dual aspect will. However westerly, southerly or easterly aspect, including dual aspect, may well affect the distinct issue of sunlight – exceedance of targets for which could in principle be compensatory of non-compliant ADF. It would certainly assist transparency and would amplify the compensatory effect to correlate compensating features with the specific units in need of compensation. But given the trade-offs of the many considerations affecting design, it would be too restrictive to require such correlation as a matter of law. The applicability of the 33% standard may require reconsideration in any remitted decision given it depends on proximity to the Luas.[211]
3 – Generous provision of communal amenity spaces, over and above the minimum requirement ….. which will achieve good levels of sunlight.		Ironborn's Planning Report,[213] identifies 2 courtyards of communal amenity space in a total of 4,579 m^2 which, it says, exceeds by 63.5% the minimum communal amenity space set out in the Apartment Design Guidelines 2020. This seems a proper application of the concept of compensation.

211 See my conclusions below as to the Public Transport Capacity issues.
213 P52.

Compensatory design solutions identified by the Inspector[206]	**Fernleigh Response**	**Comment**
4 – Each unit has either a ground floor terrace or a balcony space that meets or exceeds minimum requirements.		To the extent that these spaces merely meet minimum requirements, and for reasons indicated above, I have difficulty seeing how they can compensate for failure to meet ADF standards. However, Ironborn's Planning Report/Statement of Consistency states that each apartment has a private balcony/terrace which exceeds requirements.[214] This assertion has not been impugned and so I will not discount this design aspect as compensatory.
• 5 – 537m^2 of internal residential amenity spaces including, a gym, yoga studio and co-working spaces.		This seems a proper application of the concept of compensation.
• 6 – The public open space is also of benefit to the amenity of the units.		This can be said of any provision of public open space, the quantum of provision of which is governed by standards, and hardly sets it apart as a compensatory benefit.

112. The Inspector's conclusion is as follows:

"Having regard to above,[215] on balance, I consider the overall the level of residential amenity is acceptable, having regard to internal daylight and sunlight provision and having regard to the overall levels of compliance with BRE Targets, to the compensatory design solutions provided, and having regard to wider planning aims, including providing much needed housing on land zoned for that purpose, and the regeneration of a brownfield site. As such, in relation to daylight and sunlight provision for the proposed units, the proposal complies with the criteria

214 P52. As, it is said, demonstrated in the Floor Plans and the Housing Quality Assessment by Ferreira Architects.
215 Sic.

as set out under Section 3.2 of the Building Height Guidelines, and provides a satisfactory level of amenity for future occupiers."[216]

Daylight – Further Discussion & Decision

113. First, it must be noted that the Inspector's conclusion[217] is not merely a planning judgment on balance as to overall adequacy of residential amenity. It is explicitly a conclusion of satisfaction of the criteria in §3.2 of the Height Guidelines as to daylight provision and hence as a basis for the application of SPPR3 in overriding the Development Plan as to building height. Accordingly, the law as set out in **Atlantic Diamond**,[218] **Walsh**,[219] **Killegland**[220] and **Jennings**[221] is engaged.

114. Second, it seems to me inevitable from a consideration of the BRE Guide that bedrooms requiring 1% ADF are considered to be very different in their daylight requirements from LKD rooms requiring 2% ADF. That makes sense. They serve, respectively, very different functions of residential amenity and typically do so at appreciably different times of the day. The ADF of a bedroom matters little at night when it is dark – and especially when one is asleep. The ADF of an LKD space matters far more when living there during the day. These are necessarily imprecise and incomplete observations but are generally valid nonetheless.

115. That being so, it seems to me that, applying **Walsh**[222] in considering departures from ADF standards, "*appropriate and reasonable regard*" to the BRE Guide, the "*clear and precise*" identification of the extent of the failure to meet standards, and the identification of "*why*" the design falls short, which identification is "*critical to the evaluation of the acceptability of a project*", without which the non-compliance "*can't be lawfully accepted*", may well require, and did in this case require, more than simply a consideration of "*overall levels of compliance with BRE Targets*" without distinction as between bedrooms and LKD rooms. That is not just because of their different functions and daylight requirements as noted above, but because there are typically, and were in this case, many more bedrooms than LKD rooms in an apartment development, such that the adequacy of bedroom ADF will tend to predominate in weighing the *"overall levels of compliance"* and thereby convey an erroneous impression of real residential amenity as to daylighting.

116. That is clearly so in the present case. The Inspector's finding of 93% overall compliance obscured the fact that almost 1 in 5 units will have LKD rooms deficient as to lighting. This latter fact

216 Inspector's report §12.5.18.
217 Inspector's report §12.5.18.
218 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
219 Walsh v An Bord Pleanála [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
220 Killegland v Meath County Council [2022] IEHC 393.
221 Jennings v ABP [2023] IEHC 14.
222 §55.

was not identified either clearly or precisely – or indeed at all – by the Inspector. It seems to me impossible to consider it insignificant. This cannot be overlooked as a matter of merits or planning judgment for the Board – the correct identification and quantification of the facts of non-compliance with BRE Guide ADF standards must precede the application of judgment to such non-compliance. This failure to properly distinguish between different types of rooms seems to me to be a fatal "*methodological gap in the reasoning*" analogous to that found in **Atlantic Diamond**. So, the decision falls to be quashed. That said, the decision provisionally strikes me as fit for remittal for reconsideration.

117. Given that finding, I need not decide the other points raised as to daylight issues. But on any remittal the Board will wish to consider those issues as canvassed above.

118. However, and for the avoidance of doubt, I find that Ironborn erred in suggesting that the ADF standards of the BRE Guide apply in some attenuated way to apartment developments generally and in asserting that a 1.5% ADF standard applied to the LKD rooms in the Proposed Development. While the Inspector erred in finding that 1.5% ADF standard appropriate, he did perform an analysis at 2%. So, with appreciable hesitation and as limited to the specific issue of identification of the correct ADF standard, I will apply the principle of reading an impugned decision as valid rather than invalid[223] in holding that Ironborn's errors in these regards did not flow into the Board's decision. However, given my findings as to identification of the extent of non-compliance, this finding in the Board's favour does not save the Impugned Permission.

119. Lest the foregoing be thought an unrealistic or over-rigid application of the BRE Guide, it bears repeating that what is at issue here is not the application of the BRE Guide as planning policy to apartment developments generally. It is, rather, a question of their application in the very particular context of the overthrowing of the Development Plan as to height via SPPR3 and §3.2 of the Height Guidelines. Those Guidelines require "*appropriate and reasonable regard*" to the BRE Guide and the Daylighting Code in a context and role to which, it is clear, the author of the BRE Guide did not consider it suited. In that light, I confess to some sympathy with the Board's attempts to discern whether the requirements of §3.2 of the Height Guidelines had been fulfilled. Nonetheless, I must find that it erred in the present case.

223 See above as to the law on this issue.

2 – OPEN SPACE – MATERIAL CONTRAVENTION[224]

Open Space – Introduction

120. I will consider the pleadings on the open space issue in more detail later. For now, it suffices to note that the Board did not consider that the Proposed Development would materially contravene the Development Plan as to open space and it pleads accordingly. Fernleigh pleads that was wrong - such that the Board acted ultra vires **s.9(6)(c) of the 2016 Act**[225] in permitting material contravention of **§8.2.8.2(i) of the Development Plan** as to open space without applying **s.37(2)(b) PDA 2000**.[226]

Figure 1 – Layout of the Proposed Development – general illustration[227]

- The central green area surrounded on 3 sides by Blocks A, D, E H and G is the proposed public open space. A small square is depicted at the northern end of the public open space.

224 Ground 1 – §1 to §7 of E(Part 2).

225 (6) (c) Where the proposed strategic housing development would materially contravene the development plan … other than in relation to the zoning of the land, then the Board may only grant permission ….. where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.

226 37(2)(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.

227 This is an extract from the Proposed Site Layout Plan at p26 of Ironborn's Design Statement.

- DLRCC sought omission of Block E to improve the quality of open space in the event its recommendation to refuse permission was not accepted.
- The blocks either side of the central open public space, respectively "A, B, C, D" and "F, G, H, J" are described in the planning application papers as the "*courtyard buildings*" grouped around communal courtyard open spaces.
- The arrival area is just south of blocks C & D.
- A new underground attenuation and flood storage tank of about 667m^3 is proposed in the open space between Blocks D and H and just north of Block E.[228]

Open Space – Quantification

121. The quantification of areas of open space is apt to confuse in the particular circumstances of the case. That is because two parts of the Site are owned by DLRCC, which consented to Ironborn's making its planning application.[229] DLRCC owns the small separate parcel, south of the main Site, on which a new storm overflow storage is to be built. DLRCC also owns an existing open space and pedestrian walkway depicted on Figure 1 above as most of the lands lying south of Blocks E, H and J. It comprises 4,869m^2.[230] It is included in the Site with a view to landscaping works improving it as open space and as to paths improving permeability and connectivity with the surrounding area.[231] [232]

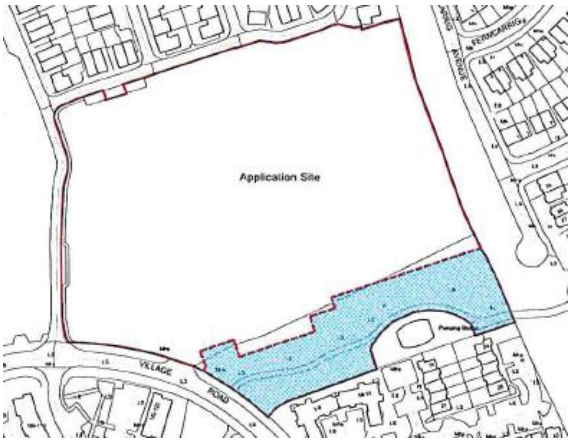

Figure 2 – DLRCC-owned open space and walkway.
(as depicted in a map attached to DLRCC's letter of consent dated 10 March 2021)

122. As stated earlier, the total Site area is recorded at about 3.39 hectares. It can be broken down as follows: [233]

228 Inspector's report p16, Ironborn's planning report at p19. Ironborn's AA Screening report p4. An "existing underground attenuation" tank on Ironborn lands just south of Block E did not feature in argument.
229 Note that such consent merely consents to the making of the application as relates to lands not in Ironborn's title. It does not constitute a consent to or even support of the grant of permission on foot of the application. Buckley & Grace v Bord Pleanála [2015] IEHC 572.
230 Ironborn Design Statement p53.
231 Ironborn Planning Report p13 & 38. Ironborn Landscaping Design Report – contrast aerial photo at p5 with permeability plan at p6.
232 §4.
233 Inspector's report p11 – Key Figures. Ironborn Design Statement p53.

- Ironborn's residential site, excluding DLRCC-owned lands = 28,414m^2 (2.84 ha).
- DLRCC-owned lands contiguous to and south of Ironborn's residential site = 4,869m^2. (Figure 2 above)
- Subtotal - Ironborn's residential site + DLRCC-owned contiguous lands = 33,282m^2 (3.33ha).
- DLRCC-owned lands non-contiguous to and further again south of Ironborn's residential site 693m^2.

It will be seen that the total Site area is more correctly about 3.4 hectares[234] - but nothing turns on that.

123. The absolute quantification of open space types[235] is clear as follows:[236]

- existing public open space on DLRCC-owned lands - 4,869m^2.
- proposed public open space on Ironborn lands - 4,930m^2.
- total public open space on Ironborn lands and DLRCC-owned existing public open space - 9,799m^2.[237]
- proposed communal open space - 4,579m^2 – all on Ironborn lands.[238]
- total open space on Ironborn lands – public and communal – 9,509m^2 [239]

124. The confusion arises when one translates these figures into percentages. I extract below and verbatim part of the "Key Site Statistics" table in Ironborn's Planning Report and add comments of my own.[240]

Key Site Statistics		**Comment**
Public Open Space	*c. 4,930 sq. m (c. 14.9% of total Site Area without DLRCC owned open space lands)*	The word "without" is confusing. As recorded above 4,930m^2 is the proposed public open space on Ironborn lands <u>only</u>. However, though the figures do not precisely match, by calculation one can discern that this area on Ironborn

234 28,414m2 + 4,869m2 + 693m2 = 33,976m2.
235 Excluding the non-contiguous 693m2 south of the main Site destined for public services infrastructure. Though it is open space, as it is some distance from the main Site its exclusion is proper.
236 Ironborn Design Statement p53. All figures are approximate.
237 4,869 + 4,930 = 9,799.
238 Ironborn Planning Report p35 – Inspector's report p11 – "Key Figures". Ironborn Design Statement p53.
239 4,930m2 public open space + 4,579m2 communal open space = 9,509 m2
240 Ironborn Planning Report p35. Excluding the separate part of the Site destined for public services infrastructure is on open space lands south of the main Site. As that area is some distance from the main Site area its exclusion is deemed proper.

Key Site Statistics		Comment
		lands only is in fact expressed as 14.9% of the 33,282m^2 comprising both Ironborn's lands and the contiguous DLRCC lands.[241] This area on Ironborn lands only constitutes 17.4% of the 28,414m^2 comprising Ironborn's lands only.[242]
	c. 9,799 sq. m (c. 34% of total Site Area with DLRCC owned open space lands)	The word "with" is confusing. As recorded above 9,799m^2 comprises total public open space on both Ironborn lands and the contiguous DLRCC lands. However, again the figures do not precisely match. By calculation one can discern that this area on both Ironborn lands and the contiguous DLRCC lands is in fact expressed as 34% of the 28,414m^2 comprising Ironborn's lands only.[243] So total public open space on both Ironborn lands and the contiguous DLRCC lands in fact represents 29.4% of the 33,282m^2 comprising Ironborn lands and the contiguous DLRCC lands.[244]

241 4,930/14.9 x 100 = 33,087.
242 4,930/28,414 x100 = 17.4%.
243 9,799/34 x 100 = 28,761.
244 9,799/33,282 x 100 = 29.4%.

125. One may add that the proposed communal open space of 4,579m^2 – all on Ironborn lands – represents 16.1% of the 28,414m^2 comprising Ironborn's lands only[245] and 13.8% of the 33,282m^2 comprising Ironborn lands and the contiguous DLRCC lands.[246]

126. It follows that total open space provision – public and communal – on Ironborn's lands only, represents 33.8% of Ironborn's 28,414m^2 [247] and represents 28.7% of the 33,282m^2 comprising Ironborn lands and the contiguous DLRCC lands.[248]

127. I should add that the figures I have identified as correct are consistent with those set out in Ironborn's Design Statement.[249]

128. A rationale for what may properly be demanded from and credited to Ironborn, for the purpose of calculating compliance with Development Plan requirements as to percentage provision, does not appear to me to have been teased out by Ironborn or the Inspector or in argument. More specifically, and assuming Ironborn can be credited only with the open space which it, as opposed to DLRCC, provides, should that be viewed as a percentage only of Ironborn's lands (yielding a higher percentage – 33.8%) or of the entire site including DLRCC lands (yielding a lower percentage 28.7%)? I incline to the former but, in the end, I am not sure it much matters. That is for two reasons. First, if relevant, both fall to be compared to a Development Plan minimum standard of 10%. I will come to the second reason presently. However it must be said that time would have been saved had the matter been teased out properly in the planning application and the contents of the table in the Planning Report would have been different.

129. Despite its table, Ironborn's Planning Report later[250] identified the public open space as comprising approximately 17.4% of the "*total Site area*" – that phrase is confusing as suggesting that it included the DLRCC lands. It did not. This, albeit less clearly, made its way into the Inspector's report. He described the 4,930m^2 of public open space (i.e. on Ironborn lands only) as "*equating to 17.4% of the site area*".[251] Properly, the Site includes the contiguous DLRCC lands. Nonetheless, the Inspector did correctly ignore the 14.9% figure in the table of Ironborn's Planning Report and he identified the percentage which could matter as 33.8%.[252]

245 4,579/28,414 = 16.1%. Ironborn Design Statement p53.
246 4,579/33,282 = 13.8%.
247 17.4% + 16.1% = 33.8%.
248 14.9% + 13.8% = 28.7%.
249 P53.
250 Pp78 & 82.
251 Inspector's Report §§12.5.20 & 12.5.22.
252 Inspector's Report §12.5.22. In fact he said 33.5% but nothing turns on the difference.

130. It seems to me, given the confusion they caused (if only to me), important to record and clarify these percentages. Fortunately, and given the second reason to which I adverted above, these percentages are, as I hope to demonstrate and on a proper understanding of the Development Plan, of very considerably less importance than a particular absolute figure on which the parties are, fortunately, agreed.

131. That agreed absolute figure is that the total open space proposed on Ironborn lands (public and communal) – of 9,509m^2[253] equates to 14.25m^2/resident.[254]

Open Space – §8.2.8 of the Development Plan – Dispute as to Interpretation & Decision Thereof

132. §8.2.8.1 of the Development Plan provides the following descriptions:

> *"Public Open Space generally derives from a development that is defined as being generally freely available and accessible to the public and has, or is intended to be, 'taken-in-charge' by the Local Authority. .."* (However see further below.)
>
> *Communal Open Space is intended to be made available to a set group of residents only and would ordinarily be maintained by a Management Company. This would be typical of apartment – type residential developments."*

133. §8.2.8.2 of the Development Plan, as to quantitative open space standards, must be read as text in context. §8.2.8.3, headed "Public/Communal Open Space – Quality", bears quoting first. It reads:

> *"Open space is fundamental in contributing to a high quality of life*[255] *……. It provides a basis for active and passive recreation, fosters community spirit, and helps mitigate the impacts of climate change. It can also improve the image, add to the sense of identity and define the quality of the area."*

134. §8.2.8.2 of the Development Plan is headed "Public/Communal Open Space – Quantity". Its general principle is:

> *"To provide existing and future communities with adequate active recreational and passive leisure opportunities the Council will employ a flexible approach to the delivery of public open*

253 i.e., 4,930m2 public open space + 4,579m2.
254 Transcript Day 2 pp80 & 114. This is calculated at 1.5 persons per unit with two or fewer bedrooms as stipulated by Development Plan §8.2.8.2(i). 9,509/(445 x 1.5) = 14.25. In this context I will use "resident" and "person" interchangeably.
255 Emphasis added.

> *space/communal open space and more intensive recreational/amenity/community facilities. ….[256] The Planning Authority will require public and/or communal open space to be provided within new residential and large scale commercial developments. …"*

Fernleigh say this flexibility is limited to the type, content and mix of open spaces and does not encompass its quantity. The Board says it encompasses quantity also. In general terms, I agree with the Board but in my view the flexibility is limited: its extent is to be discerned from the relevant terms of the Development Plan.

135. Though merely footnoted to §8.2.8.2, the Development Plan's definition of public open space for the purpose of quantification of open space is notable:

> *"'Public' open space refers to all areas of open space within a new development (be that public (taken in charge), communal, semi private or otherwise) that is accessible by all residents/ employees of the development and in certain cases may be accessible by the wider general public. 'Public' open space within new developments may not necessarily be taken in charge or be publicly owned/controlled by the Council."*

136. It will be seen that this definition of public open space is much wider than and quite different from that set out in §8.2.8.1 cited above. Indeed, it allows open space to be considered public which is not in fact open to the public (as opposed to occupants and users of the development) at all. This concept of public open space appears to subsume that of communal open space. Its relationship to the concept of public open space described at §8.2.8.1 is unclear to me and, at least potentially, confusing. However, little may turn on my lack of clarity as, as will be seen, §8.2.8.2(i) of the Development Plan sets quantified standards in terms merely of undifferentiated "Open Space" – which clearly must include all forms and types of open space – public and communal – save those elements excluded[257] by the Development Plan.

137. §8.2.8.2(i) of the Development Plan is headed "Residential/Housing Developments". It reads:[258]

> *"Open Space: For all developments with a residential component – 5+ units - the requirement of 15 sq.m - 20 sq.m. of Open Space per person shall apply based on the number of residential/housing units.*
>
> *For calculation purposes, open space requirements shall be based on a presumed occupancy rate of …… 1.5 persons in the case of dwellings with two or fewer bedrooms.*

256 I omit a reference to hierarchical classification of public open spaces.
257 See list below. It includes bicycle parking structures and underground flood attenuation tanks.
258 Layout changed for exposition purposes.

> *A lower quantity of open space (below 20 sq.m per person) will only be considered acceptable in instances where exceptionally high quality open space is provided on site and such schemes may be subject to financial contributions as set out under Section 8.2.8.2 (iii) below.* [259]
>
> *The Planning Authority shall require an absolute default minimum of 10% of the overall site area for all residential developments to be reserved for use as Public Open and/or Communal Space irrespective of the occupancy parameters set out in the previous paragraph. …"*[260]

138. Fernleigh takes the position that the correct interpretation of §8.2.8.2(i) of the Development Plan is that $15m^2$ of open space per person is a "hard minimum" provision below which is necessarily a contravention of the plan – indeed any provision below $15m^2$ is ipso facto not merely contravention but material contravention given that less than $20m^2$ is a contravention save in light of "*exceptionally high quality*" open space.

139. The Board submits that "*the absolute default minimum*" is 10% of the overall site area such that provision below $15m^2$ per person which nonetheless exceeds 10% of the overall site area does not contravene the Plan.

140. Fernleigh counters that the 10% minimum is clearly included in the Development Plan in case the open space calculation at 20 or $15m^2$/person yields less than 10% of the Site. That could happen in the case of low density development. It is not a basis for departure from those calculations, at 20 or $15m^2$/person, as to high density development such as that at issue.[261]

141. In effect, Fernleigh says the requirement is to satisfy either the per person standard or 10% whichever is the greater, whereas the Board says whichever is the lesser. The Board disavowed putting it that way, but it seems to me that that is what their submission amounted to.

142. Fernleigh has the better of this argument. Interpretation of a document must take its nature into account. The concern and object of this section of the Development Plan is to secure the amenity of both the residents of the Proposed Development and the public – albeit the latter to a lesser extent. This section of the Development Plan seeks to do so precisely because "*Open space is fundamental in contributing to a high quality of life*". And a standard based on the number of residents likely to use the open space is entirely logical and functional from a planning and amenity

259 Emphases added.
260 Emphasis added. I omit a reference to open space requirements in the development of Institutional Lands but will refer to it later.
261 Fernleigh suggests that at best the 10% minimum is, with some strain, a conflicting provision of the Development Plan which, if the Board had wished, it could have relied on in applying s.37(2)(b)(ii) PDA 2000 as identified in Heather Hill v An Bord Pleanála [2019] IEHC 450 §56. As to the Apartment Guidelines, one might add reference to s.37(2)(b)(iii) PDA 2000.

point of view. Taking the text of the quantified standards in that context, it seems to me clear that the quantified normative ordinary minimum is 20m^2/person. Less is allowed in circumstances which, explicitly, are characterised by exceptionality – specifically, exceptionality of the quality of open space. So, less than 20m^2/person is permissible only exceptionally - as an exception to the norm - and then only to at least 15m^2/person. It seems to me inherently unlikely that such a clearly expressed quantified norm and exceptional, quantified and limited relaxation of that norm, both based on the number of residents likely to use the open space, is intended to be swept aside by a general, crude and lower standard of 10% of the Site area divorced from any view of its adequacy to meet the needs of the quantified population expected to use it. On the other hand, providing for an irreducible minimum open space requirement is entirely comprehensible in planning terms. It is, as it were, a safety net – not a lowest common denominator.[262] I agree with Fernleigh that it is in this sense that the word "default" is, perhaps a little imprecisely but nonetheless comprehensibly, used in the phrase "*absolute default minimum of 10%*". I therefore consider that the phrase "*irrespective of the occupancy parameters*" is to be understood as indicating that even if those parameters would allow for open space of less than 10% of a site, 10% is nonetheless required. Indeed, that seems to me to be the natural and ordinary meaning of "*irrespective",* as text in context.

143. I am not a planner - much less the planning decision-maker. I can take no view as to whether these development plan open space standards are insufficiently demanding, adequate, too demanding or even impractically burdensome on developers. But as a matter of the interpretation of this section of the Development Plan - that is, as a matter of law - I agree with Fernleigh and hold that the 10% figure is a baseline below which the application of the 20 or 15m^2/person will not be permitted to take the open space provision. The requirement is to satisfy the 20 or 15m^2/person standard (the latter only if the open space is of exceptionally high quality) or 10% - whichever produces the greater area in a given case.

144. The Board cited in support of its argument, and by way of contrast with that part of §8.2.8.2(i) of the Development Plan cited above, a succeeding part of §8.2.8.2(i) as to DLRCC policy to retain the open space context in the development of Institutional Lands which incorporate significant established recreational or amenity uses. It states that *"For this purpose a minimum open space provision of 25% of the total site area - or a population-based provision in accordance with the above occupancy criteria[263] – will be required, whichever is the greater."* The Board contrasts the presence here of the phrase "*whichever is the greater"* with its absence from the earlier part of §8.2.8.2(i). In my view that is to read the Development Plan legalistically as if a statute and chopping it into discrete over-analysed parts rather than reading it as a whole and in the round and as an intelligent layman would read it on **XJS**[264] principles. Such a layman's reading would consider that the part relating to institutional lands, in substituting 25% for 10% as a minimum default provision, intended a coherence of approach within §8.2.8.2(i) as a whole. On that view, the phrase "*whichever*

262 I appreciate that, in strict mathematical terms, I am misusing the phrase "lowest common denominator". But I imagine my more colloquial meaning is tolerably clear.
263 i.e. 15 – 20 m2 of Open Space per person.
264 Re XJS Investments Limited [1986] IR 750 – as elaborated in many cases since.

is the greater" illuminates rather than contradicts the earlier part of §8.2.8.2(i) and illuminates it consistently with the expressed view that *"Open space is fundamental in contributing to a high quality of life".*

145. In **Ballyboden TTG**,[265] as to an appreciably vaguer development plan reference – to density of *"(say up to 70 dph)"* - it was said as to the XJS standard of interpretation of development plans as if by an intelligent layperson: *"But even assuming flexibility, the numbers are not meaningless and do set a context and, in general terms, influence the expectations of the intelligent layperson – who will expect at least some reasonableness of relationship between those numbers and determinations whether or not a particular planning application is in material contravention of the Development Plan by reference to density."* And later, *"Where indicative numbers appear they must be taken to indicate something – and something capable of being relied upon."* It is in that context of overtly indicative numbers that the judgment refers to the "*ballpark of acceptability".* But the numbers relevant in this case are not merely indicative – the Development Plan says: "*the requirement of 15 sq.m - 20 sq.m. of Open Space per person shall apply"* and *"…(below 20 sq.m per person) will only be considered acceptable .. where exceptionally high quality open space is provided."* I agree with counsel for Fernleigh when he says this isn't a "ballpark" situation.

146. It seems to me that, as the norm of open space provision is a minimum of 20 m^2/person and as exceptionality of quality of open space is specifically identified as permitting open space below 20 m^2/person and then only above 15m^2 per person, 15m^2 per person is intended to delimit the flexibility allowed. And while I would not go so far as to hold, as Fernleigh suggest, that below 15m^2 per person is inevitably a material contravention, it does follow that anything below 15m^2 per person is a contravention. That is because anything below 15m^2 is below even that which is exceptionally permitted. And, given that even below 20m^2 per person is permissible only if the quality of the open space is exceptional, it will at least ordinarily follow that open space provision below 15m^2 per person is a material contravention.

147. The touchstone however is that 20m^2 per person is the norm set by the Development Plan. Anything between 20m^2 and 15m^2 per person is permissible by the Development Plan as an exception to that norm and then only if the open space in question is of exceptionally high quality. Though I have emphasised, and perhaps belaboured, the point, it must be said that the Board accepted it.[266]

265 Ballyboden Tidy Towns Group v. An Bord Pleanála [2022] IEHC 7, §§178 & 169.
266 Transcript Day 2 p61 & p74.

Open Space – Ironborn's Planning Application and Reports

148. Ironborn's Planning Report & Statement of Consistency (a single document) addresses the issues of open space as follows:

- The Proposed Development will provide *"new, high quality public open space (and) …therefore enhance the community infrastructure that exists in the area."*[267]

- 9 blocks of apartments will be arranged around two courtyards, with a large area of legible accessible open space provided between the two, "increasing"[268] residential amenity and permeability on site. The layout provides increased connectivity through the site and open space to the existing surrounding housing estates. Further, safe and legible connectivity will be provided through dedicated cycle / walking routes which will encourage and facilitate walking and cycling. The overall landscape approach is to provide a variety of hard and soft landscaped spaces that create a high quality aesthetically pleasing, functional and practical public realm designed to be an active space ideal for children to play safely and to benefit from the best solar orientation and passive surveillance – being entirely overlooked by the Proposed Development. The resulting passive surveillance will encourage use and effectively deter anti-social behaviour.[269]

- The two communal courtyards amount to 4,579m^2 *"which significantly exceeds (+63.5%) the minimum standards set out in the Guidelines*[270] *and provides an exceptional level of residential amenity for future residents."* [271]

- *"The Proposed Development creates new, high quality public open spaces which interact with the proposed buildings and integrate well within the existing urban grain and which will make a positive contribution to place-making in this part of Stepaside. ….. Public linkages through the scheme in a north south direction engages*[272] *with the neighbouring residential area, provides new public realm and an enhanced permeability for residents in the area generally ……the development will make a positive contribution to place-making, incorporates new links/streets and public spaces ……. Open spaces are carefully located to maximise visual amenity for neighbouring residents. …… A new central public open space is proposed between the blocks to facilitates increased movement and connection of existing community to wider surrounding area. …… The proposal has been developed using best practice urban design principles including permeability, legibility and connectivity. The proposal consists of a clear and legible streets, routes and spaces accessible by all. Valuable routes are provided for cycle and pedestrian movements throughout the site connecting the open spaces within the scheme to the surrounding context"*[273]

267 P6.
268 It is not apparent compared to what amenity and permeability is increased.
269 Pp47 & 48 – I have attempted to summarise the relevant content.
270 This is a reference to the Apartment Design Guidelines 2020.
271 P52 – repeated variously through the report.
272 Sic.
273 P60-62.

- *"In the main central public open space, a central lawn enables kick about active play, playground facilities cater for individual play, group play and social interaction forms part of a north south public connection between the route to the LUAS and the wider residential population to the north. That link is open, publicly accessible, coherent and improves the greater legibility in the area. In the communal open spaces, the arrangement of the buildings around courtyards spaces allows for communal gardens that serves the immediate residents overlooking the spaces. The proposal provides for direct active frontage onto all public open space within and outside the scheme, with permeable and pedestrian friendly streetscapes. Further enhancements are proposed as part of this development to the existing public open space to the south of the apartments being proposed. These enhancements are in the form of greater north south connectivity through this space, so as to link with the connections in the development itself and thereby improving the overall connectivity and legibility for residents in Thornberry to the north to the amenities and facilities of the wider area lying to the south at Belarmine Village, the local schools and the LUAS stop."*[274]

- *"The application includes proposals for high quality public realm in a variety of forms, which will add to the existing provision of open space and amenities in the local area, and which is passively overlooked by the apartments and complies with the standards set out in the Development Plan and other Guidelines. The proposed development will provide additional amenities including ….. a significant quantum of public open spaces which will support greater connectivity to the surrounding area."*[275]

149. §10 of the Planning Report is Ironborn's Statement of Consistency with the Development Plan. It refers[276] to the 10% default minimum set by §8.2.8.2 of the Development Plan as to open space and refers also to its per person requirements. As to open space, it repeats much of the content set out above.

150. The Planning Report[277] approaches the per person open space requirements of the development plan via an analysis of Phases 1, 2 and 3 of Aiken Village as implying overall open space provision of 19.63m^2/person.[278] It states: *"Therefore, it can be reasonable*[279] *demonstrated that the minimum standard of 15 sq. m per person can ultimately be achieved within Sector 1, 2 and 3."* At least some of that open space was to be provided by a different Developer and remained hoarded off – though it is asserted that it is or can be controlled by DLRCC. In this particular context it is asserted that *"When the significant provision of public open space is considered in conjunction with the high quality communal open spaces provided for prospective residents it is considered that an exceptional level of open space amenity is provided."* It is clear from the Inspector's report that that

274 P62.
275 P111 – Conclusion.
276 P82.
277 P82.
278 See Table at p82 – 19.63m2 = 29,900/30,890 x 20.
279 Sic.

the Board, in my view correctly, did not adopt Ironborn's method of calculation via an analysis of Phases 1, 2 and 3 of Aiken Village. Indeed, Ironborn also call in aid an existing Fernhill public park described as 800m away (described in Ironborn's Landscaping Report Open Space analysis as 950m away) to the south as further demonstrating *"an exceptional level of open space available to the prospective residential of the proposed development as well as existing residents in the area."* While perhaps correct as a general observation, that does not affect the quantified provision of open space or satisfaction of the exceptionality criterion of the Development Plan.

In short, 19.63m^2/person is wrong. The agreed correct figure is 14.25m^2/ person.[280]

151. Notably, the Planning Report[281] recites the Development Plan verbatim as to calculation of open space per person but cites the *"minimum standard of 15 sq. m per person"* without at all adverting to the requirement of the Development Plan that that standard applies "*only*" if the open space is of "*exceptionally high quality*". I may add that I have been directed to, and found, no instance in the Ironborn planning application documents to that criterion of "*exceptionally high quality*". I confess to finding this striking.

152. Ironborn's Planning Report commends to the Board a high quality of open space to be provided in accordance with best urban design practice. I have no reason to doubt it. Ironborn's Landscape Design Report[282] describes the open spaces in some greater detail and, to my inexpert eye, tends to the same impression. The same can be said of the Ironborn's Design Statement.[283] All are consistent with the high quality to be expected as the norm in large apartment developments. None of these documents cite, much less engage with §8.2.8.2(i) of the Development Plan in its exceptionality criterion for the application of a reduced open space standard of 15m^2/person. None of this is, of itself, to doubt, much criticise, the high quality (as opposed to quantum) of the public space provision (criticism I am unqualified to make). However, high quality and compliance with best urban design practice is, one would have thought, to be expected in applications for high density development as a norm rather than as an exception.

Open Space - DLRCC Report

153. As I have noted and as to open space, DLRCC considered that the scheme "*appears to work towards the minimum standards required. Given the vacant nature of the site, this is disappointing*."[284] DLRCC refers[285] to the Development Plan provisions set out above and to some others as to quality of open spaces. It calculates the open space offered by the application in the

280 Transcript Day 2 pp80 & 114.
281 P82.
282 P8.
283 P53 & 53.
284 P30.
285 §8.7.

same terms as does the Inspector[286] and concludes that it falls short of the 15m^2/person standard and, a fortiori, of the 20m^2/person standard, though meeting the 10% default standard.

154. It will be apparent from the foregoing that DLRCC is correct in these regards. This implies that the Proposed Development contravenes the Development Plan – even if the open space is of exceptionally high quality – given provision below 15m^2/person. It also implies that any argument that such contravention is immaterial depends on the open space being of exceptionally high quality as, if it is not, the comparator with 14.25m^2/ person as provided is a norm, not of 15m^2/person, but of 20m^2/person – from which 14.25m^2 per person represents a 29% shortfall.

155. Notably, DLRCC, in the cause of open space, suggests, if permission is granted,

- the removal of an entire block ("E") of the 9 proposed[287] – inter alia "*to increase usability, permeability and function of the Public Open Space for this development and surrounding areas*" as it "*in particular will affect the penetration of light and needlessly enclose the space*". This was one of a number of reasons for DLRCC's view that "*the scheme does not sit well within the site context and does not represent a high-quality development*."[288]

- various "*improvements to the play provision, general landscaping, topographical finishes, cross sections*".

- alterations to increase the usability of "*much needed*" public open green space for all age groups in the locality, permeability and linkage through the central area of the scheme - e.g. relocation of exercise areas, extension of green areas, relocation of furnishings and paths.

- linkage openings and installed pathways along the eastern boundary outside the red line to promote permeability accessibility and linkages for all residents in the locality.

156. As has been seen, DLRCC's reasons for recommending refusal included a "*lack of quality open space*". It is inescapable that DLRCC did not consider the open space provision to be of "*exceptionally high quality*". While one should not over-parse such a report, it nonetheless bears observing that DLRCC did not consider it "quality" open space, much less "high quality" open space, much less again "exceptionally high quality" open space.

157. All this implies that the validity of the Board's not finding a material contravention depends, at least in the first instance, on a finding of exceptionality of the quality of the open space.

286 See below. DLRCC says that at 15-20 sq. m per person, the required public/communal open space is 10,012 to 13,350 m2. The development falls short by 854 to 4,192m2.
287 Block E is the standalone block at the south end of the open space lying between the two main sets of blocks. See Figure 2 below.
288 As to these issues see generally § 8.5 Design, Form and Layout.

A Distinction – Interpretation/Irrationality

158. In considering what follows, it seems to me important to bear in mind the distinction between two concepts which overlap in practice but are distinct. Consideration of alleged irrationality of an impugned decision must be preceded by interpretation of that decision. One cannot know if a decision is irrational without first discerning what it means. On **O'Keeffe** principles[289] (and leaving aside any controversy as to their present status in law) a decision is rational if there are materials before the decision-maker capable of supporting the decision.[290] However if, as a matter of interpretation of the impugned decision, a conclusion or finding necessary to the validity of the decision has not been drawn or made, materials before the decision-maker which would have supported such a conclusion or finding had it been drawn or made will not save it.

159. That distinction between interpretation and irrationality is, it must be said, a bit too neatly expressed above as a decision falls to be interpreted in light, inter alia, of the materials before the decision-maker (**Connelly**[291] and **Crekav**[292]) and, in case of ambiguity and where possible, with a view to its validity rather than its invalidity. And interpretation is closely related to the obligation to give reasons: if, in the absence of an express conclusion or finding, reasons required for a particular conclusion or finding have not been given, then inference of such conclusion or finding as a matter of interpretation is all the less likely – though the impugned decision would fail for want of such reasons in any event. To close the loop of interconnection between interpretation, reasons and rationality, I note that it has been said in **St. Audeon's NS**[293] and **Stanley**[294] that the starting point in assessing rationality must be to identify what precisely the public authority has decided, *"There is a correlation between the reasons advanced and assessing the reasonableness of a decision."*[295] and *"in assessing the reasonableness of the decision, it is necessary to consider the reasons stated for the decision."* Nonetheless, the distinctions between interpretation, adequacy of reasons and irrationality do seem to me to remain. These distinctions facilitate systematic analysis. And their necessity is also illustrated by the observation of Simons J in **St. Audeon's NS** that the threshold to be met by an applicant for judicial review who alleges that a decision was "*unreasonable and disproportionate*" *"is extremely high and is almost never met in practice" "because an applicant must demonstrate that the decision impugned is fundamentally at variance with reason and common sense."*[296] That is not the case as to a decision impugned for want of reasons.

289 O'Keeffe v An Bord Pleanála [1993] 1 IR 39.
290 Salmon Watch v ALAB [2023] IEHC 129.
291 Connelly v An Bord Pleanála, & Clare County Council [2018] IESC 31, [2021] 2 IR 752 §50 et seq.
292 Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 (High Court (Judicial Review), Barniville J, 31 July 2020) §175.
293 Board of Management of St. Audeon's National School v An Bord Pleanála [2021] IEHC 453.
294 Stanley v An Bord Pleanála & McGuirk [2022] IEHC 177.
295 Stanley §53.
296 §32.

Open Space – Board Decision and Inspector's Report

160. The Board's decision does not address the possibility of material contravention of the Development Plan as to provision of open space. That is not, per se, a difficulty – it simply means that the issue falls to be considered in light of the Inspector's report as adopted by the Board.

161. Once only in his report,[297] does the Inspector refer to the "*exceptionally high quality open space"* criterion in the Development Plan. He does so, not in his planning analysis, but in his recital of Development Plan content. Though, it seems, confining it incorrectly to communal open space, he notes that *"A lower quantity of open space (below 20 sq.m per person) will only be considered acceptable in instances where exceptionally high quality open space is provided on site."* Beyond this single recital, he does not engage with or analyse that requirement of exceptionality.

162. The Inspector, noted:

- in considering the Urban Residential Guidelines 2009[298] Urban Design Manual, that the proposal complies with criteria as to connections and permeability and *"[a] variety of active spaces are provided including the courtyard communal spaces, the public open space, the play areas and the internal amenity spaces. The proposal makes efficient use of land, as discussed above. The proposal provides a high quality environment and I am generally satisfied in relation to the layout and the public realm provision".* [299]

- that the Light Report records that all proposed open spaces "*achieve or exceed" BRE Targets*" as to sunlight.*[300]*

Of this analysis, counsel for Fernleigh said *"That I think is as close the inspector comes to saying that there's anything of exceptional quality about this open space and I respectfully don't think that that will do. ……..that is plainly insufficient to meet the criterion of exceptionality that's laid down in the development plan and on that basis also, ….. there's plainly material contravention here .."*[301]

I respectfully observe that, as high quality spaces are expected as a norm, this content of itself does not express exceptionality of the quality of open space provision.

163. The Inspector, at §§12.5.21 & 22, noted that the Development Plan *"sets out a requirement for public/communal open space of 15 sq. m to 20 sq. m. per person, with a default minimum of 10% of the overall site area."* He makes here no reference to the criterion that the open space be of

297 §6.4 p23.
298 Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas 2009.
299 Inspector's Report §12.4.32.
300 Inspector's Report §12.5.19
301 Transcript, Day 1 p70.

exceptionally high quality to justify provision below 20m^2/person. As far as this reference goes, the reader is given erroneously to understand that the norm set by the Development Plan is 15m^2 to 20m^2 per person when, correctly, provision in that range is acceptable only exceptionally and the correct norm is a minimum of 20m^2 per person.

164. The Inspector notes[302] at this point also that the Proposed Development provides 4,930m^2 of public open space – 17.4% of the Site and 4,579m^2 of communal open space in 2 courtyards – 16.1% of the Site and a total of 9,509m^2 or 33.5% of the Site.

165. The Inspector calculated[303] the Development Plan per person requirement as 10,012m^2 (at 15m^2/person) or 13,350m^2 (at 20m^2/person) and thus a shortfall of 503m^2, or about 5%, at 15m^2/person.[304] The Inspector considered the shortfall – from the 15m^2/person standard – to be "*not material*" and noted that "*in any event … well above the minimum default of 10% … has been provided (33.5%).*"[305] The Inspector does not record but his figures imply, as against the 20m^2/person standard, a deficit of 3,841m^2 or 28.8% - which accords with the calculations set out above and again illustrates that any finding that the contravention is immaterial would depend, at least, on a finding that the open space was of exceptionally high quality.

166. On the basis of his analysis described above, the Inspector was "*satisfied also with the overall quality of communal and public open space provided*."[306] Again, he makes here no reference to the criterion that the open space be of exceptionally high quality to justify provision below 20m^2/person. I respectfully cannot agree with the Board's submission that, taken in context, this sentence expresses the Inspector's view that the quality of the open space was not merely high but exceptionally so.

167. The Inspector returns[307] to the issue of open space in considering the DLRCC recommendation of refusal of permission – but, contrary to the Board's plea[308] in this regard, saying only *"I consider the proposed open space provision is of high quality and exceeds minimum standards for same."* Counsel for Fernleigh submits,[309] and I agree, that the modest observation that the proposed open space "*exceeds minimum standards*" hardly transmutes "*high quality"* to "exceptionally" high quality. One may add that the Board has incorrectly argued that exceedance of the 10% safety net suffices where the per person provision is deficient. More importantly, one may add, as to the objectively more relevant criterion of provision per person, that the provision did not

302 Inspector's Report §§12.5.20 et seq. See also Ironborn Design Statement p53.
303 Inspector's Report §12.5.22.
304 DLRCC identified a larger shortfall of 854m2 or ≈8.5%, at 15m2/person but the lesser figure is agreed.
305 §12.5.22.
306 Citing also § 12.4 of his report.
307 Inspector's report §12.14.2 p177.
308 Opposition Statement §29 pleading "clear and comprehendible (sic) reasoning as to why he did not concur with the views of the Planning Authority (at e.g., §12.14.1 to §12.14.6 of the Inspector's Report)."
309 Transcript Day 2 at 16.10.

even meet the lower 15m^2 standard. And, of course, the standards are quantitative. Exceptionality must be qualitative to justify provision less than 20m^2.

Open Space - Fernleigh Pleadings & Submissions

168. Fernleigh's essential complaint is of the ultra vires grant of permission in material contravention of the Development Plan as to open space provision in that the Board did not find such material contravention and hence did not invoke the statutory authority which could have enabled such a grant of permission.

169. Fernleigh pleads errors of law in that:

a. the Board did not identify any or all of the open space as of exceptional high quality – (such identification being necessary to a conclusion that, at much less than 20m^2/person, open space provision was nonetheless not in material contravention of the Development Plan).[310]

b. open space that includes bike parking or which is sited over attenuation tanks (see Development Plan §8.2.8.1) or which fails minimum sunlight requirements cannot be regarded, and was not regarded by the Board's Inspector, as being of exceptional high quality.

c. Any conclusion that open space was of exceptional high quality, if drawn,
    i. was unsupported by adequate reasons.
    ii. failed to take into account relevant considerations.
    iii. was irrational.

d. The Board permitted a development which does not provide even the reduced minimum of 15m^2/person permissible if the open space is of exceptional high quality.

170. Fernleigh's submissions as to Open Space are largely repetitive of the content of the Inspector's Report and of its pleadings on those issues. Otherwise Fernleigh:

- cites **Jennings,**[311] in which the same development plan requirement was considered, to the effect that "*Read as a whole, the relevant content is clear*". (This clarity was to the effect that *"§8.2.8.2(i) of the Development Plan says that less than 20m^2 of open space per person is acceptable only where exceptionally high-quality open space is provided on site.*"[312])

310 These words in brackets are my gloss but clearly reflect the gravamen of the plea.
311 Jennings v ABP [2023] IEHC 14, §134.
312 These words in brackets are my gloss but clearly reflect the gravamen of the submission.

- distinguishes Jennings, in which a "*superficially similar argument*" was rejected, on its facts, as a case in which open space provision exceeded 15m^2/person[313] such that Mr Jennings relied almost entirely on the non-satisfaction of the 'exceptionality' criterion. In contrast, here open space provision is below 15m^2/person such that there is a contravention simpliciter (i.e. regardless of the quality of the open space)[314] and such in turn that the Inspector here is to be understood as having accepted that there was a contravention but considered it immaterial.

171. As to the view that such a contravention was immaterial, Fernleigh submits:

- 15m^2/person is prescribed in the Development Plan §8.2.8.2 in substantively mandatory terms as a "hard minimum"[315] below which application of the "flexibility" prescribed in the Development Plan does not arise.

- A 5% shortfall from 15m^2/person (at 14.25m^2) is "undoubtedly material" – just as would be a 5% pay cut or a 5% reduction in the number of units in the development.
  - While the general point requires consideration, it seems to me that these analogies are flawed. That 5% may be material in monetary terms does not imply it is material in planning terms or, more specifically, <u>in planning terms</u> as relating to open space provision as opposed to in terms of the number of units in a development.

- The "Roughan" test of materiality set in **Ballyboden TTG, Redmond** and **Byrnes**[316] is satisfied. And as that test invokes "*the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests*"[317] it is relevant that DLRCC,
  - considered the open space provision "minimal" (In fact it considered it *"disappointing*" as working "*towards the minimum standards required*"[318]).
  - recommended refusal for lack of "*quality public open space*".
  - noted that public submissions had concerns as to over-development of the Site and a "striking" lack of green space short of Development Plan standards.[319]

- the Board's reliance on flexibility in the application of the open space criteria of the Development Plan is misplaced. Quoting the preface to §8.2.8.2 of the Development Plan[320] Fernleigh says that flexibility relates to the mix or types of open space and not to its quantum and that immediately thereafter the Development Plan states the quantity requirements in mandatory terms.

313 15.8m2/person – §135 of the judgment.
314 These words in brackets are my gloss but clearly reflect the gravamen of the submission.
315 Fernleigh's phrase – not in the Development Plan.
316 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §111 et seq; Redmond v An Bord Pleanála [2020] IEHC 151, §75; Byrnes v Dublin City Council [2017] IEHC 19 §23. Roughan v. Clare County Council, unreported, High Court, Barron J., 18 December 1996.
317 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §140.
318 DLRCC report P30.
319 DLRCC report P10.
320 DLRCC "will employ a flexible approach to the delivery of public open space/communal open space and more intensive recreational /amenity/community facilities".

172. Fernleigh cites the Board as pleading[321] justifications of the finding of immateriality.

- Reliance on the Development Plan's express flexibility.
- Satisfaction with the quality of the open space.
- Compliance with the Apartment Guidelines.
- Exceedance of the 10% minimum cited above.

173. Fernleigh says none are relevant to materiality. It says:

- As to flexibility – see above for Fernleigh's view.

- Quality of public space is relevant only to justify provision less than 20m^2/person and more than 15m^2/person. It is irrelevant to provision less than 15m^2/person.

- Significant elements of the alleged open space were taken up with such as bicycle storage. Given bicycle storage cannot "*normally be considered … Open Space*" at all,[322] it cannot be quality open space, much less of exceptional quality.

- Compliance with a s.28 Guideline, such as the Apartment Guidelines, can't avail in deeming a contravention immaterial. The Board must have regard to such guidelines but they are not a basis to evade clear Development Plan requirements.

- The 10% default minimum is in the Development Plan in case the open space per person calculation yielded less than 10% of the Site – for example in a low-density development. It is not a basis for departure from those per person calculations as to high density development such as that at issue. I have already resolved this dispute in Fernleigh's favour.

- The Board misunderstands the Roughan test of materiality – which is not whether, as Fernleigh puts it, the Inspector can marshal some materials to justify a departure from an unequivocal requirement of the Development Plan.

<u>Open Space – ABP Pleadings & Submissions</u>

174. Beyond traverses, the Board stands on its finding of no material contravention as to open space as not irrational or otherwise unlawful and as based on adequate reasons. A plea that Fernleigh lacked standing to raise this issue was not pursued. The Board says Fernleigh misinterprets the Development Plan as to open space and mischaracterises the content of the Inspector's Report, certain materials that were before the Board, and the Board's Decision. Inter alia, the Board

321 Opposition §26.
322 §8.2.8.1 of the Development Plan.

emphasises the "*flexible approach to the delivery of*" open space for which the Development Plan provides.[323]

175. The Board accepts[324] that by §8.2.8.2(i) of the Development Plan, *"if a proposed development provides for anything less than 20sqm of Open Space per person, same should be of exceptionally high quality."* It pleads that *"When the Inspector's Report is read as a whole and properly construed, it is evident and/or reasonable to infer that the Inspector's satisfaction as to the quality of the open space is referrable to the "exceptionally high quality""* requirement.

176. The Board pleads,

- the Apartment Guidelines 2000 standards as to open spaces and the content of the Ironborn Planning Report as set out above – inter alia as to quantum of communal open space standards exceeded by 63.5%.
- its understanding (which I have found erroneous) of the 10% minimum standard set in the Development Plan.
- the content of the Inspector's report as set out above.

177. The Board's submissions assert that,

- a similar complaint was rejected in **Jennings**.
- DLRCC did not consider or state that a material contravention arose in relation to the issue of open space.
- Fernleigh has "selectively read" the inspector's report instead of reading it as a whole – including its express recognition of the requirement for "*exceptional high quality open space*".[325]
- 15m^2 per person is not set by the Development Plan as a "*hard minimum*". The absolute default minimum is set by the Development Plan at 10% of the site area – which was significantly exceeded.
- the Board was satisfied that the open space provided on site was of the "requisite" exceptionally high quality.
- The Development Plan *"allows for a departure from the 15 sq.m - 20 sq.m. per person standard where the open space provided on site is of exceptional high quality".*

323 Development Plan §8.2.8.2.
324 Opposition Statement §25.
325 Inspector's report §6.4.

- It is important to immediately reject this confusing submission:
  - It directly contradicts the Board's plea[326] that by the §8.2.8.2(i) of the Development Plan, "if a proposed development provides for anything less than 20sqm of Open Space per person, same should be of exceptionally high quality."
  - I have held above that the Development Plan criterion of "exceptionally high quality" authorises no less than 15m^2.

178. Notably, the Board's submissions reject Fernleigh's submissions as to materiality of contravention. The Board states that it has:

> *"not pleaded that the Inspector determined there to be a contravention of the Development Plan (but not a material contravention) as the Applicant contends. The word "contravention" is not contained in the relevant paragraphs in the Board's Statement of Opposition or the Inspector's Report."*

In other words, the Board here stands on the high ground of insisting that there is no contravention of the Development Plan as to open space and disavows any argument that there is a contravention but one which is immaterial. However, in argument the Board did adopt the fallback position 14.25m^2/person is not a material contravention as 15m^2/person is the applicable standard.[327] It is important to observe that even this fallback position depends on the open space being of exceptionally high quality as, otherwise the standard must be 20m^2/person from which 14.25m^2/person clearly falls materially short.

Open Space – Board's Characterisation of DLRCC Position

179. The Board's position that that DLRCC did not find a material contravention of the Development Plan as to open space lacks reality. DLRCC's reasons for recommending refusal[328] commence with the introductory assertions that *"overall the proposed development is not considered consistent with a number of relevant objectives of"* and *"fails to accord with"* the Development Plan, inter alia. It is difficult to see that these inconsistencies could constitute reasons for recommending refusal if immaterial. The first following example of these phenomena given by DLRCC cites *"a lack of quality open space provision".*

180. More generally, and as importantly, the DLRCC report, as recorded above, is incompatible with a view that it considers the open space provision to be of "*exceptionally high quality*" – which is the yardstick accepted by the Board for non-contravention of the Development Plan as to open space.

326 Opposition Statement §25.
327 Transcript Day 2 p80 – it is clear from the numbers cited that counsel's reference to percentages were to metres squared. See also p82.
328 DLRCC report §9.0 p40.

Open Space - The Exceptionality Criterion

181. A number of initial observations seem to me important:

a. As to quality of open space in large apartment developments, it can hardly be doubted that high quality must be the norm – not the exception. Ceteris paribus and as a general proposition, the open space to be provided in all such developments is to be of high quality. That general requirement flows inexorably from the principle of proper planning and sustainable development. That is not to say that, in particular circumstances for particular reasons, departure from the general proposition is necessarily impermissible. But the general proposition need only be stated to be recognised as correct. It is against that general proposition that the Development Plan criterion of "exceptionally high quality" is to be understood. It represents an exception to the norm and an exception characterised by a degree of high quality recognisably beyond that norm.

b. Exceptionality is inherently and inevitably a relative criterion – relative in comparison with that which is not exceptional. That which is not exceptional must be identified if that which is exceptional is to be discerned. It does not seem possible to discern what is open space of exceptionally high quality without an understanding of that high quality of open space which is ordinarily to be expected in large apartment developments. To put it another way, the question must be: what is it about the quality of this open space which sets it apart from and above the quality ordinarily found in large apartment developments considered to comply, as to quality of open space, with ordinary requirements of high quality?

c. What is deemed exceptional is clearly intended to reflect a latitude to depart from a standard otherwise applicable. So the exercise of that latitude cannot be permitted to degenerate into approaching a norm or a "get out clause" instead of an exception, for want of analysis of the particular "*fact-specific*" (**PB**[329]) circumstances in each case of its exercise and the application of a criterion of exceptionality thereto. So, reasoning and rationale must be evident in the decision. While a discursive judgment is not required, merely conclusionary reasoning will not suffice. The decision-maker must occupy the "middle ground" between those poles – see **Connelly,**[330] **Damer,**[331] **Crekav**[332] and **Glassco**.[333] How far along that middle ground towards one pole or the other the decision-maker must go will vary - even greatly - with circumstance – **Connelly**,[334] **Crekav**.[335]

d. Each case of the exercise of a latitude grounded in exceptionality to depart from a standard otherwise applicable must be justified by reference to its particular and exceptional circumstances – not least so that the finding of exceptionality can be understood and it can

329 PB v The Minister for Health [2018] IECA 81.
330 Connelly v An Bord Pleanála, & Clare County Council [2018] IESC 31, [2021] 2 IR 752, §30.
331 Damer v An Bord Pleanála [2019] IEHC 505 (High Court, Simons J, 11 July 2019), §§5, 33, 40, 42.
332 Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 (High Court (Judicial Review), Barniville J, 31 July 2020). §§193, 209.
333 Glassco Recycling Ltd v An Bord Pleanála [2023] IEHC 293 (High Court (Judicial Review), Ferriter J 25 May 2023), §§77, 78, 80.
334 Headnote §1; Judgment §§27, 28, 47.
335 §174.

> be discerned whether judicial review of the finding might succeed (those being functions of reasons for decisions – **Connelly**[336]). A finding of exceptionality must be expressed in terms capable of interrogation for validity. To put it yet another way, whatever it may mean in context, a criterion of exceptionality, whether in a development plan or in any other document, must be demonstrated to have been taken seriously.

PB, McE & St Kevin's GAA

182. **PB**[337] is noteworthy for Ryan P's agreement with the Federal Court of Australia in **Hicks**[338] to the effect that *"like beauty, exceptional circumstances lies in the eye of the beholder"* as echoing his view that exceptionality is a *"criterion which is both vague and subjective".* Ryan P said *"Nobody can say just what exceptional circumstances amount to, in the sense of saying what they do not amount to. One has to say, it all depends. …. all of these cases about knowledge and exceptional circumstances are extremely fact-specific. This is a feature that cannot be ignored."* That suggests appreciable curial deference to a finding of exceptionality. But part of the price of curial deference is transparency of decision-making so it also suggests the need for the decision-maker to clearly ground a finding of exceptionality in the specific facts of the case and give reasons accordingly.

183. While the question whether a requirement of exceptionality poses a legal test is one of interpretation of the Development Plan - I consider that it is such a test in this case – that it can pose a legal test and that the Board must in its decisions engage specifically with such an exceptionality test is illustrated in the **St Kevin's GAA** case.[339] While the phrase at issue there was "highly exceptional" the difference is only of emphasis and Humphreys J found that:

> *"The inspector here and the board simply did not engage with the highly exceptional circumstances test and demonstrated no such highly exceptional circumstances. …….. The highly exceptional circumstances have to relate objectively to the planning situation on the ground …"*[340]

184. A broad and liberal standard of exceptionality was applied in **McE**[341] - in which the issue was whether exceptional circumstances justified the extension of a statutory time-limit within which a claim for redress might be made by victims of child sexual abuse. The context was one of a remedial statute. McE was applied and a similar view taken in **PB**[342] as to Hepatitis C redress. I mention these cases to illustrate the importance of context. But the present context is not analogous to that of

336 §36 et seq. to §40.
337 PB v The Minister for Health [2018] IECA 81.
338 Hicks v Aboriginal and Torres Strait Islander Commission [2001] FCA 586 (21 May 2001) (Federal Court of Australia).
339 Flannery et al v An Bord Pleanála [2022] IEHC 83. §96 et seq. The relevant phrase in that case was "highly exceptional".
340 §102.
341 McE v Residential Institutions Redress Board [2016] IECA 17.
342 PB v The Minister for Health [2018] IECA 81.

remedial statutes for compensation of vulnerable victims. Indeed, the present circumstances seem to me to provide a contrast to, rather than suggest analogy with, those cases in their adoption of a broad and liberal standard of exceptionality.

R v Kelly

185. I have observed the importance of context in construal of the phrase exceptional circumstances. Care must be taken in applying construal of a statute to construal of a quite different form of document such as a development plan. However, given the emphasis in the law, as to the construction of a development plan, on the meaning which would be drawn from it by the intelligent informed layperson, it seems to me that the particular formulation adopted by Lord Bingham CJ in **Kelly**[343] does assist. Lord Bingham was considering a statutory provision as to sentencing for serious criminal offences - a very different context from the present. Nonetheless, his formulation seems to have derived from a general approach to the concept of exceptionality rather than from the particular context. I find it helpful even in the present context. What he said is explicitly grounded in ordinary rather than technical meaning and strikes me as expressing the right balance in terms of degree of departure from the norm which a layperson would understand by the word "exceptional" and as representing a useful and moderate, as opposed to exaggerated, understanding of the word. He said:

> *"We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."*

An Taisce v ABP & McQuaid Quarries

186. **McQuaid Quarries**[344] was a planning case in which the validity of an impugned substitute consent[345] depended on "*exceptional circumstances*" justifying its grant. That was a question – for purposes of assessing the compatibility of domestic statutory provisions with EU Law - of interpreting an exceptionality test set by caselaw of the CJEU[346] for allowing a significant exceptional derogation from the EIA Directive. The Court declared that the domestic statutory provisions were insufficiently demanding of exceptionality to satisfy the requirements of the EIA Directive. It must be said that the context was different to the present and, in EU law generally, exceptions are narrowly construed.

343 R v Kelly; Attorney General's Reference (No 53 of 1998) [1999] 2 All ER 13.
344 An Taisce v An Bord Pleanála, J. McQuaid Quarries Limited, et al [2020] IESC 39, [2021] 1 IR 119.
345 S.177C PDA 2000 et seq.
346 Commission v Ireland (Case C-215/06) EU:C:2008:380, [2008] ECR I-4911 and other cases cited.

187. When it came to construing the concept of "*exceptionality*", McKechnie J observed *that "The word or phrase could have a number of different meanings: it could connote something remarkable, extraordinary or special, or that the underlying events must be rare or unusual. However, context is important."* As I have said, the present context is quite different. But it is generally helpful that, in considering the posited elements of exceptionality in McQuaid Quarries, McKechnie J observed that,

> *"These factors, in the context under discussion, are relatively general and ordinary, are undeniably broad and widely drawn and have a commonality to them which is immediately recognisable on enquiry. It is, therefore, exceedingly difficult to assign "exceptionality" to such matters. The fact that only a limited number of projects might be able to benefit from this provision is not the point. The point is the broadness or generality of the parameters which are applicable to this pathway (s 177C(2)(a) and s 177D(1)(a) of the 2000 Act). Such are unlikely to have the dissuasive effect which is a key objective of the [EIA] Directive."*

188. McKechnie J here uses the word "commonality", not in the sense that the factors under discussion are similar to each other, but in the sense that they are common as opposed to exceptional. It seems to me also that the concept of "dissuasive effect" is not irrelevant here. The Council, by its Development Plan, legitimately seeks to dissuade development which fails, by its standard, to provide sufficient open space.

Jennings, Redmond, Sherwin, Crekav & Mulholland

189. In **Jennings**[347] the application arose of the same Development Plan as to open space, and of the same criterion as to exceptionality, as justifying a lesser then normally required provision of open space. As here, the issue was whether the open space provided was of exceptionally high quality such as to justify provision less than 20 m^2/person. The facts were different in that 15.8m^2/person had been provided and so the provision lay between 15m^2 and 20m^2. In reality, as here, the question was whether, as a matter of interpretation of the Inspector's report, she had in fact applied the exceptionality criterion.

190. Jennings included an obiter as follows:

> *"… while disagreement – even significant disagreement - in matters of professional judgment is, per se, entirely unremarkable (judges are often overturned on appeal), it is nonetheless the expectation that such disagreements are framed in a context of commonly understood and consistently applied professional standards. That is in the nature of a profession – though I*

347 Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.

> *entirely accept that planning is a profession particularly concerned with at least some issues requiring considerable subjectivity of judgement. Nonetheless, in at least generally similar circumstances, and with a considerable margin of appreciation, generally similar judgements are generally to be expected. It seems to me regrettable, in terms of confidence in the planning process and the prospect of public acceptance of planning decisions, that two sets of impartial and professional planners could look at this Proposed Development as to open space and not merely disagree but conclude in the one case that it is of exceptionally high quality and in the other that it doesn't even meet the basic standards. That is a gulf of difference rather than a difference of degree. In a slightly different context, Humphreys J has recently expressed similar concerns as to public confidence in the planning process as it is affected by the relationship between the Board and planning authorities.*[348]

191. The contrast in the present case is only slightly less dramatic. As to communal/ public open space, DLRCC considered that Ironborn's scheme "*appears to work towards the minimum standards required. Given the vacant nature of the site, this is disappointing*."[349] As has been seen, DLRCC's reasons for recommending refusal included a "*lack of quality open space*". One must be wary of excessive parsing of documents such as these. But the fact is that, as I have said, DLRCC did not consider the open space to be "quality", much less "high quality", much less again "exceptionally high quality". Yet the Board submits in the present case that the Inspector is to be interpreted, as a matter of inference despite his not having said so in terms, as having concluded that the open space to be provided is not merely adequate, "quality" and "high quality" but is of "exceptionally high quality". I emphasise the entitlement of the planning authority and the Board to disagree and that the Board's view must prevail. But such a conflict of professional and expert planning characterisation of the quality of open space would be striking, unwelcome and disappointing for the reasons stated in Jennings. That prompts careful inquiry as to whether such a conflict has in fact arisen and emphasises the necessity of clarity and reasons on the part of the Board.

192. Another way of looking at the issue of disagreement between DLRCC and the Board is from the perspective taken in **Redmond.**[350] In **Jennings**[351] it was said that "*The significance of the role of the Planning Authority, its chief executive's report and its recommendation in the SHD process, having regard, inter alia to Article 28A of the Constitution, were described by Simons J in Redmond."* Simons J said that:

> *"Whereas An Bord Pleanála is not, of course, in any sense bound by the recommendations in the chief executive's report, it should be evident that the board has considered the recommendations."*

348 [2023] IEHC 14, §144 citing Sherwin v An Bord Pleanála [2023] IEHC 26, §238.
349 P30.
350 Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §115 et seq., citing Balz v An Bord Pleanála [2019] IESC 90.
351 Jennings v ABP [2023] IEHC 14, §505.

> "*The obligation for An Bord Pleanála to engage with the recommendation set out in the chief executive's report is more obvious than the obligation to engage with an internal report such as that prepared by a board inspector.*
>
> *"…….. in any event, there is an implied obligation upon a decision-maker to address submissions which are properly made to it."*[352]
>
> *"This does not entail an obligation to produce a discursive judgment nor a point-by-point refutation of the statutory report. It must, however, be clear to a person reading An Bord Pleanála's decision, in conjunction with the inspector's report, as to why the planning authority's recommendation to refuse planning permission was not accepted."*
>
> *"This requirement derives from the obligation to be fair to individuals affected by binding decisions, and also contributes to transparency."*

Simons J had also noted that *"The report contains not only the views of the chief executive, but also those of the "relevant elected members".*

193. As Humphreys J said in **Sherwin**[353] the Board *"… does have to give the main reasons on the main issues. Where the relevant local authority identifies its concerns in any formal submission, such issues are virtually by definition major issues. Thus if the board disagrees, reasons are required*." Barniville J in **Crekav**[354] cited Kelly J in **Mulholland**[355] to the effect that it was "*no more than common sense*" that the Board's reasons for not accepting the recommendation of its inspector "*must be clear and cogent*". It follows, from these cases and Simons J's observations in **Redmond**, that the Board's reasons for rejecting the local authority's concerns and recommendation must be at least equally clear and cogent as those required when it disagrees with its inspector.

194. The concept of cogency was elucidated in a **Ballyboden TTG** case:

> *"While dictionary meanings must be treated with care, "cogent" is notably defined by Cambridge as both "clearly expressed" and "persuasive" and by Merriam/Webster as "appealing forcibly to the mind or reason: convincing" and "pertinent, relevant". Collins defines it as a reason that is "strong and convincing" or "compelling". The Oxford Dictionary's definition of cogent is perhaps the most striking: "Constraining, impelling; powerful, forcible; Having power to compel assent or belief; argumentatively forcible, convincing". Generally, these seem to me the senses in which lawyers speak of "cogent" evidence. Perhaps the most useful synonym is "persuasive" in the sense of capable of persuading. Certainly, there is no*

352 Citing Balz v An Bord Pleanála [2019] IESC 90, §57.
353 Sherwin v An Bord Pleanála [2023] IEHC 26 (High Court (Judicial Review), Humphreys J, 27 January 2023) §227.
354 Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 (High Court (Judicial Review), Barniville J, 31 July 2020), §161.
355 Mulholland v An Bord Pleanála (No. 2) [2006] 1 I.R. 453, §464. As to clarity and cogency see also Harten v An Bord Pleanála [2018] IEHC 40; T.A.R. v Minister for Justice, Equality & Defence [2014] IEHC 385; S v Minister for Justice [2022] IEHC 578.

> *question of requiring that the "loser" in a particular planning application actually be convinced by the cogency of reasons given. It also is important not to require too burdensome a standard of decisionmakers as to reasons for decisions. But the word "cogent" is, to my mind, at very least a useful counterweight, not just to box ticking and name-checking, but also to the anodyne."* [356]

195. As prefaced above and as to interpretation of the Development Plan, the decision in Jennings held that:

> *"§8.2.8.2(i) of the Development Plan says that less than 20m^2 of open space per person is acceptable only where exceptionally high-quality open space is provided on site. I reject the Board's submission that the Plan is unclear in this regard. Read as a whole, the relevant content is clear."* [357]

196. The Inspector in **Jennings** found 15.8m^2/person acceptable in terms of §8.2.8.2(i) of the Development Plan as the public open space to be provided was "*high-quality usable open space*". Jennings argued that that conclusion did not identify exceptionality and so did not suffice to avoid material contravention. It was held that:

> *"Given the Inspector repeatedly recited the criterion of exceptionality, including in the sentence immediately prior to the allegedly insufficient finding as to "high-quality usable open space", and given also her explicit view* [358] *that the Proposed Development is in accordance with §8.2.8.2 of the Development Plan which states the exceptionality criterion, I cannot conclude that she did not have it in mind in making that finding. I reject the Applicants' plea in this regard as formalistic and insubstantial."*

And later:

> *"This seems to me to be a case of alleged material contravention in which the Inspector was called upon to make, not merely a planning judgement as to an issue of quality, but a relative planning judgement as to the exceptionality of that quality. While the Planning Application documents did not use the word "exceptional" they did repeatedly assert high quality and the plans plainly illustrated the open space. The issue is not the use of "magic words" but is one of substance. Colbeam relies, and I accept its relevance, on the observation of Hogan J in Waltham Abbey* [359] *to the effect that "The Board was perfectly capable of interpreting the data and the analysis furnished by the developers and it is well used to navigating complex environmental and planning documents." And in the present case they were not very complex.*

356 Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §272.
357 [2023] IEHC 14, §134.
358 Inspector's report §§10.3.16.
359 Waltham Abbey v An Bord Pleanála [2022] IESC 30 (Supreme Court, Hogan J, 4 July 2022).

> ……. *exceptionally high quality can include elements of open space of poor quality. In my view, the Inspector was entitled to take an overview of the entire of the open space, the better with the worse, and form a view whether the entire was of exceptionally high quality. It is clear that she did form that view."*

197. As always, context matters. In the present case and if, as a matter of interpretation of his report and of the Development Plan, the Inspector did not correctly apply the test of exceptionality, then there is a material contravention as to open space. That is so, not least where the open space provision is less than $15m^2$/person against a norm of $20m^2$/person in the absence of exceptionality of quality of open space. I am conscious that the question of interpretation of an Inspector's Report is not one of "magic words" or slavish repetition of development plan formulae – see **Jennings**.[360] Yet I cannot help observing that it is prudent, the simplest of things and very helpful to apply a standard such as this in terms. Not merely does it promote discipline in analysis, it promotes transparency. It is difficult to see, if a finding of exceptionality was intended by the inspector, why he left out the word most obviously and readily effective to express that finding. Just as there is no "magic" in the world "exceptional", there is even less magic[361] for present purposes in the phrase "high quality" as necessarily implying exceptionality – not least given, as I have said, "high quality" is merely the norm required as to the open space in all such development.

198. In Jennings, context and repetition in the Inspector's report of the exceptionality criteria and its repetition in close proximity to the finding of high quality open space was highly relevant to the decision that the exceptionally high quality requirement was satisfied. The issue does not necessarily turn on a mechanistic analysis of how close in physical terms in the inspector's report lies the reference to the exceptionality criterion to the finding of high quality open space. That said, it is a point of difference between the inspector's report in Jennings and that here that, here, the Inspector's single reference to the exceptionality criterion is in his recitation of it amongst the other relevant extracts from the Development Plan in that section of his report devoted to reciting applicable planning policy. There is no exploration of, or engagement with, what exceptionality might mean or require in this context.

<u>Open Space – New Underground Attenuation Tank, Bike Spaces & Sunlight - Decision</u>

199. It is convenient to dispose of one of Fernleigh's arguments at this point. As recited above, §8.2.8.1 of the Development Plan describes the concepts of "Public Open Space" and "Communal Open Space". As to both, it continues:

> *"The following will not normally be considered as part of any Open Space provision:*

360 §138.
361 Please forgive the illogicality.

- *Car/bus parking.*
- *Bin/fuel stores.*
- *Bicycle parking structures.*
- *ESB substations or other service infrastructure.*
- *Underground flood attenuation tanks."*

200. The rationale behind the last entry, as to underground flood attenuation tanks, is unclear to me. It seems inconceivable that the space within an underground tank could even arguably be proposed by a developer as open space such that the possibility needs to be excluded. The issue might just arguably turn on whether the tank is covered, though "underground" suggests it is – as, I suspect, would safety considerations. On the other hand, why an open space above a covered tank should not be regarded as open space is not apparent to me and could, depending on the facts of a case, be relevant to the materiality of any contravention in that regard. But those views may proceed from my ignorance of the practicalities or planning significance of the issue. I must take the Development Plan's terms on their face. It seems to me that, whatever the rationale for it, the exclusion can only be read in the sense that space above a tank, covered or not, is not open space.

201. In the present case, a new underground attenuation tank[362] is proposed on assertedly open space lands, owned by Ironborn, between Blocks D and H and just north of Block E. As far as the Development Plan is concerned, that space is not open space unless, via the word "normally", it could be considered such exceptionally. As far as I can see, neither Ironborn nor the Inspector addressed that issue. They should have – though, of course, I do not suggest what their conclusion should have been.

202. Fernleigh did not formally stand on the exclusion of the area above the tank from the open space calculation. Instead, they argued that such a space cannot be considered "*exceptionally high quality*". Given §8.2.8.1 of the Development Plan, that seems to me correct in principle. However, in **Jennings**[363] it was held that *"that exceptionally high quality can include elements of open space of poor quality. In my view, the Inspector was entitled to take an overview of the entire of the open space, the better with the worse, and form a view whether the entire was of exceptionally high quality."* It does not seem to me that an area of 667m^3 proffered as open space, but under which lies an attenuation tank, would render irrational, if drawn by the Board, a conclusion that, overall, the open space on the Site was of exceptionally high quality. Equally, it might inform a conclusion that open space on the Site was not of exceptionally high quality. So, while it ought to have been addressed by the Inspector and the Board, I do not see the tank issue as of consequence in my decision. The same reasoning applies to the similar point Fernleigh made, but did not pursue in any real way, as to bike spaces.

362 Inspector's report p16, Ironborn's planning report at p19. Ironborn's AA Screening report p4 states that "A new 667m3 underground surface water attenuation tank is proposed on public open space lands between the two main proposed apartment blocks."
363 Jennings v ABP [2023] IEHC 14, §139.

203. Likewise, Fernleigh did not pursue in any real way the assertion that parts of the open spaces fail to meet minimum sunlight requirements[364] and so cannot be regarded as of "exceptional high quality". As best I can tell, this assertion proceeded from a misinterpretation of a drawing in Ironborn's Light Report[365] showing, in red, relatively small areas which will receive less than 2 hours of sunlight on 21 March. Despite the legend to the drawing incorrectly using the word "fail", these areas do not represent failure to meet the relevant standard. The Light Report records the BRE Guide recommendation[366] as being that "*at least half of a garden or amenity area should receive at least two hours of sunlight on 21 March*." It is immediately clear from the drawing that the "red" areas are in all cases far less than half of the amenity areas in question. Absent any challenge to the methodology, the tabulated results asserting passes at rates of 86.3%, 89.8% and 91.4% are clearly correct. The Light Report, inevitably correctly, describes these as "*High percentages …. well in excess of the required > 50%*." So, Ironborn's assertion that these results are incompatible with open space of exceptionally high quality fails.

204. These specific issues apart, there remains the more general question as to application of the exceptionality criterion in this case.

Open Space – Decision

205. For reasons which I hope I have made apparent, I find that:

a. Given the open space proposed is of 14.25m^2/per person and given that, by the Development Plan, exceptionally high quality of open space permits reduction of the quantum of open space to no less 15m^2/per person, it follows that there is a contravention of the Development Plan as to open space.

b. I would not go so far as to hold with Fernleigh that that 15m^2/per person is an "absolute" minimum such that anything less, however slightly less, is necessarily not merely a contravention (which it is) but a material contravention. I prefer to hold, that as 15m^2/per person is itself an exception from, and is 25% less than, the standard of 20m^2/per person and is, moreover, an exception dependent on circumstances of exceptionality, the tolerance for any provision less than 15m^2/per person as representing an immaterial contravention must necessarily be very low and the requirement that reasons be "clear and cogent" would have a particular application to any conclusion of immateriality.

364 Ironborn's Light Report p16 records that communal and public amenity spaces pass the BRE requirement relating to the area which can receive 2 hours of sunlight on the 21st of March. High percentages of 86%+ are well in excess of the required > 50%. This has not been challenged.
365 See generally pp15 & 16.
366 BRE Guide §3.3.17.

c. Whatever argument there might have been that 14.25m^2/per person is an immaterial contravention as against a standard of 15m^2/per person, there is none and could be none, that it is an immaterial contravention as against a standard of 20m^2/per person. Correctly, the Board all but conceded that point.[367]

d. The possibility that the contravention is immaterial therefore depends, in the first instance, on the open space being of exceptionally high quality sufficient to reduce the applicable standard to 15m^2/per person.

e. For reasons explained above and given in particular,
- its disagreement with DLRCC on the issue,
- that the open space provision here would clearly be a material contravention of the Development Plan by reference to the normal standard of 20m^2/per person,
- the dependence of a finding of no material contravention on an exceptionality requirement,
- the nature of, and importance of not degrading, exceptionality requirements and
- the fact that the open space provision here is below even 15m^2/person,

the Board bore in this case a considerable obligation to explain itself as to any finding of exceptionality,
- by way of clear reasons,
- by way of cogent reasons in the sense described above,
- as a matter comparative to the norm of high quality open space to be expected in any apartment development.

206. I am far from suggesting that a finding that the proposed open space of exceptionally high quality would have been irrational for want of evidence capable of supporting it. Indeed I am of the contrary view – not least as it was held in similar circumstances in Jennings that *"This seems to me to be a case of alleged material contravention in which the Inspector was called upon to make, not merely a planning judgement as to an issue of quality, but a relative planning judgement as to the exceptionality of that quality"*[368] and so the type of material contravention in question was reviewable only for irrationality.[369] However, disavowing, as I do, a finding of irrationality puts the cart before the horse. It is not the same thing as holding that a finding that the proposed open space of exceptionally high quality was made and that adequate reasons have been given for it in the particular circumstances I have just summarised.

207. I am conscious that the decision in **Jennings** survived this particular ground of challenge in circumstances not unlike the present – not least in the difference between DLRCC and the Board as to open space quality and in the finding of "*high quality*" open space. Not least in light of Jennings, I have found this a difficult decision. The judgment in Jennings records[370] that the decision impugned

367 Transcript Day 2 p80.
368 Jennings v ABP [2023] IEHC 14 §138.
369 Jennings v ABP [2023] IEHC 14 §112.
370 Jennings v ABP [2023] IEHC 14, §137.

was upheld "*with some hesitation not least as, over time, decisions which fail to convince on the merits could erode confidence in the Board's decisions, especially if findings of exceptionality became less than exceptional".* In particular it was made, inter alia *"Given the Inspector repeatedly recited the criterion of exceptionality, including in the sentence immediately prior to the allegedly insufficient finding as to "high-quality usable open space", …."*. Each case turns on its own facts and the arguments made and each interpretive exercise is particular. In the end, on a conspectus of the material before me I am struck by the Inspector's,

- single, brief, reference to the exceptionality criterion in a recital in his report - and even then in terms suggestive of its being misunderstood as confined to issues of communal open space. Given the well-understood importance of planning policy and the standard form of inspectors' reports in reciting it, it would be unfair to call the reference merely prefatory, but there is no demonstration in the report that the exceptionality criterion informed the analysis on open space – to which analysis, in these circumstances, it was, in law, critical.

- absence of engagement with the meaning of and resolution of the exceptionality criterion.

- failure to recognise that by the Development Plan,
  - $20m^2$/person of open space was the starting point – the norm.
  - anything less than $20m^2$/person depended on open space being of exceptionally high quality.
  - even exceptionally high quality did not allow less than $15m^2$/person.
  - less than $15m^2$/person is a contravention of the Plan and likely a material contravention.

- defaulting to the $15m^2$/person standard without analysis of why it was proper to drop from the $20m^2$ standard by reference to site-specific characteristics.

I find that I cannot interpret his report, by way of inference (which would be necessary), as making, much less giving adequately clear and cogent reasons for, a finding that the proposed open space was of exceptionally high quality such as to permit the application of the $15m^2$ standard instead of the $20m^2$ standard.

208. On that basis I could quash this decision as granting permission in material contravention of the Development Plan - in that open space provision was only $14.25m^2$/person against an applicable Development Plan standard of $20m^2$ /person in the absence of a finding of exceptionally high quality open space. However, I have expressed the view that it has not been shown that a finding of exceptionally high quality open space, such as to permit the application of the $15m^2$/person standard, would have been irrational for want of evidence to support it. Indeed I have expressed the contrary view. I have also declined to hold with Fernleigh that $15m^2$/per person is an "absolute" minimum such that anything, however slightly, less, is necessarily a material contravention - albeit I hold that the tolerance for any provision less than $15m^2$/per person must necessarily be very low. It seems to me not impossible that proper analysis and application of the exceptionality criterion, if it permitted the application of the $15m^2$/person standard such that anything lower would be a

contravention, could also inform a consideration whether a 5% deficit at 14.25m^2 [371] was not a material contravention. I take no view on that, as any such view could be informed by proper analysis and application of the exceptionality criterion – which analysis has not occurred.

209. All that being so, it seems to me to me the preferable course to quash the decision for failure to give clear and cogent reasons, properly engaging with the concept of exceptionality, for the finding of no material contravention as to open space provision.

210. It follows that my provisional view is that, as far as this finding is concerned and unless findings on other issues suggest a different view, the quashed decision should be remitted for re-decision. However on any remittal, the Board will wish to consider the issues other than adequacy of reasons which I have canvased above.

3 - PUBLIC TRANSPORT CAPACITY[372]

Transport – Introduction

211. Fernleigh pleads error:

- in interpreting and applying SPPR 3A(1) and §3.2 of the Height Guidelines as to the capacity of public transport to service the Site and
- in failing to give reasons for rejecting submissions identifying lack of such capacity - citing **Balz**.[373]

212. It is important to note that both these assertions relate not to general planning considerations as to public transport but to the specific requirements of SPPR 3A(1) and the criteria for its deployment set by §3.2 of the Height Guidelines.

213. I have set out SPPR3 of the Height Guidelines in the introduction to the part of this judgment headed "Daylight" and have there explained that application of SPPR3 requires compliance with the "*Development Management Criteria*" set out in §3.2 of the Height Guidelines. Amongst those criteria is that "*The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport."* This is to be understood in the context of §3.1 of the Height Guidelines, which requires "*good public transport accessibility*".

371 (15-14.25)/15 x 100 = 5%.
372 Ground 9 – §40 to §48 of E (Part 2).
373 Balz v An Bord Pleanála – Fernleigh cite [2018] IEHC 309 but doubtless counsel intended to refer to [2019] IESC 90.

214. It will be seen that this requirement of public transport has three elements: frequency, high capacity and quality of service. All three are required. Service is a function not merely of supply – frequency and capacity – but of demand. That demand emanates from both the Site and from the other sources of demand for the service – in the case of the Luas, from the general catchment of the station serving the Site and from up and down the Luas line. As to service, what is required is that the Site be "well-served". That at least, in substance, requires that the service be adequate to meet the demand to be generated by the Site for the particular transport system being considered (in this case the Luas), having regard, inter alia to the effect on availability of service of the other demands on that transport system. It may be that these phenomena cannot be precisely measured but that does not mean that they may not be informatively and usefully estimated or may be ignored. The same can be said of the adequacy and performance of roads yet surveys and reports on such matters are routine. In that regard I refer to a question I posed at trial[374] - whether in the planning process anyone had looked empirically at the question whether the practical capacity of the Luas at is now such that it will well serve the Proposed Development. Or whether at rush hour, as the objectors said (I might as well have added reference to DLRCC's concerns), it is already full of people from further out the line and the future residents of the Proposed Development aren't going to get on because it will be full by the time it gets to Glencairn Luas stop. Counsel for the Board, properly, replied that there was no evidence of that exercise having occurred.

Transport – Traffic & Transport Assessment, Material Contravention Statement & Planning Report

215. As part of its planning application, Ironborn submitted to the Board a Traffic and Transport Assessment by AECOM. Its account of the available, relatively infrequent, bus services was not disputed. Nor was the view that they did not represent, or much contribute to, a finding that the Site is well served by public transport with high capacity, frequent service. It is common case that satisfaction of §3.2, as to public transport, depends on the Luas. As to that, the Traffic and Transport Assessment considers[375] the Site as an Intermediate Urban Location within the meaning of the Apartment Design Guidelines 2020 and states:[376]

> *"The existing site is located in close proximity to two Luas stops along the Green line. These stations are serviced approximately every 8 minutes during peak periods and every 15 minutes during the off-peak period … and are within a 10 to 15 minute walk from the development."*
>
> *"The Glencairn Luas Greenline stop is situated approximately 900m from the site, which provides frequent services to and from Dublin City Centre, which will assist to promote accessible travel to and from the site."*

374 Transcript Day 2 p93.
375 Traffic and Transport Assessment §2.8.
376 Traffic and Transport Assessment §2.4.2.

216. The foregoing comprises, I think it fair to say, the Traffic and Transport Assessment as to the Luas, apart from a reference to a contemplated MetroLink connection at Charlemont (a 25 minutes Luas trip away[377]), which will link to the Luas line in question, and its invocation of the pending Luas tram-lengthening upgrade to add capacity. It does not in terms address the present capacity (as distinct from frequency) of the Luas or the criterion as to public transport, set out at §3.2 of the Height Guidelines 2018, for the application of SPPR3 of those Guidelines.

217. While the Traffic and Transport Assessment goes into considerable detail as to what the Ironborn Planning Report calls a demonstration that "*the traffic generated by the proposed development will have a minimal impact on the transportation infrastructure in the local area*",[378] that exercise is performed only as to the existing and expected performance of the roads network. No similar assessment is made of the existing and expected performance of the Luas and Bus networks having regard to the demands upon it. As counsel for Fernleigh observed, there is nothing akin to the mobility statement at issue in **Jennings**.

218. The Traffic and Transport Assessment includes a figure,[379] part of which I reproduce below, relating the Site to the nearest Luas station – at Glencairn.

Figure 3 – Site relationship to nearest Luas Station

219. Comparing Figure 2 with Figure 1 (site layout) above, the practicality of the claimed 900m and 11-minute walk time to the Luas, and whether it is correct, as to a large development site, to measure the distance from the nearest point of the Site to the Luas Station as opposed to from a point fairly representing the average actual distance to be walked having regard to the positioning of residences on the Site, would seem to fall within the Board's role of active scrutiny of the application. If only by way of confirmation, if that is the view taken, that no issue arises. Indeed, it may be that the figure is apt to mislead and that the 900m was not measured from the nearest point

377 Ironborn's Planning Report p59.
378 Ironborn's Planning Report pp100 & 108.
379 Figure 2.5 – Luas Accessibility from the site.

of the Site to the Luas station. However, as no such issue was argued, these observations have no bearing on my decision.

220. Ironborn's Material Contravention Statement describes the Site as:

- *"proximate to quality public transport and major employment centres. It is therefore considered that the subject site is an appropriate location for increased building heights and increased densities to support the objectives of the NPF.*[380] *The proximity of the Glencairn Luas Stop (c. 900m) is of particular relevance given the new national guidelines."* The Proposed Development is *"consistent with the objectives of the NPF by utilising this strategically located land to provide for the critical mass to support … the high quality public transport infrastructure."* [381]

- "*a highly accessible location adjacent to an established neighbourhood centre and frequent Luas and Dublin Bus services*".[382]

- *"strategically located land to provide for the critical mass to support … the high quality public transport infrastructure*."[383]

- "*conveniently located proximate to the Luas (c. 900m to the Glencairn Luas Stop). There has been significant development within the Aiken Village/Belarmine area which has seen a general intensification of such areas in proximity of high frequency public transport which is wholly consistent with national planning policy*." [384]

221. That Material Contravention Statement cites the NPF's aim to increase densities and building heights in appropriate urban locations to increase the sustainability of public transport networks. The Material Contravention Statement in terms addresses[385] the criterion as to public transport, set out at §3.2 of the Height Guidelines 2018, for the application of SPPR3 of those Guidelines. Having recited certain material identifiable as taken from the Traffic and Transport Assessment, it states, *"It can be seen from this that the site is well served by public transport at present, including that with high capacity and high frequency and that there are good links to other modes of public transport in the area also and as a result of this existing public transport provision."* Its reference to the Luas is in terms identical to and reliant entirely on that in the Traffic and Transport Assessment. It asserts that the Traffic and Transport Assessment *"provides details of the frequency and high capacity of the existing LUAS service and the bus services serving the area."* As to the Luas, I have set out that content above and as I have said, the Traffic and Transport Assessment does not in terms address the present capacity (as distinct from frequency) of the Luas. In that specific respect the Material Contravention Statement is mere assertion.

380 Project Ireland 2040, National Planning Framework, 2018.
381 P8.
382 P15.
383 P17.
384 P19
385 P11.

222. Though not directly related to the Height Guidelines 2018 or to the §3.2 criteria for the application of SPPR3, assuming (as I should) general consistency of ministerial guidelines, it is noteworthy that Ironborn's Planning Report[386] cites the Apartment Design Guidelines 2020 as suggesting increased scale, density and extent of apartment developments at "*Intermediate Urban Locations"* – being, inter alia, "*sites within walking distance (i.e. between 10-15 minutes or 1000 - 1500 metres) of high capacity urban public transport stops (such as … Luas) …".* Specifically however, and remembering that SPPR3 and the §3.2 criteria relate to an issue of material contravention, it bears noting that Ironborn's Planning Report cites the Development Plan as imposing a higher standard applicable to the Site - contemplating increased density (which, I observe, is different to, but is generally associated with, increased height) in "*close proximity to transport hubs - i.e. 1km of Luas and DART Stations*".

223. Ironborn's Planning Report amplifies its case by asserting that *"the site is extremely well served by existing and proposed public transport connections, especially the Glencairn Luas Stop, which is c. 900m or a ten-minute walk away from the site*" and by asserting "*excellent Bus Connections*"[387]. It also refers to "*excellent transport links*" *"which will support the development of a transport orientated residential development*".[388] It is said that the site is located *"in an existing urban village, well served by public transport. Car parking has been reduced in this instance, due to new national guidelines and the proximity of the proposed development to well-connected public transport links which will assist in encouraging a modal shift."* Otherwise, and as to public transport, the Planning Report repeats and refers to the Traffic and Transport Assessment and elements of the Material Contravention Statement and refers to various other relevant planning policies which I need not recite here but as to compliance with which, proximity to Glencairn Luas Stop is cited.

Transport – DLRCC CEO Report & Transport Report

224. As noted earlier in this judgment, DLRCC recorded submissions/observations from the public generally asserting inadequacy of public transport and that the Luas lacks capacity.

225. DLRCC's suggested refusal reason #4 above, to the effect that the Site is "*not well served by public transport*" is in terms informed by an appended DLRCC Transport Planning Department report recommending refusal. In addition to the text of reason #4, the following is notable in §8.11 of the DLRCC CEO report and its annexed Transport Planning Report:

386 §9.4.3.
387 An assertion on which no reliance is now placed.
388 Pp73 & 74. I presume this to invoke public transport as opposed to car usage.

- *"The reality on the ground is that the area is suburban in nature and residents of the locality are heavily dependent on car transport. This is particularly evidence[389] at evening time when undesignated/inappropriate/illegal car parking is very commonplace throughout the Aiken's Village, Stepaside area."*

- *"The Glencairn Luas stop is 950 metres from the main pedestrian access to the proposed SHD BTR development, …. or an 11 minute walk, which exceeds the 10 minute walking distance included in Section 4.20 of the DHPLG Design Standards for New Apartments, and hence not as attractive to residents of the proposed development as suggested."*

- There is a detailed analysis of the bus services, almost all of which operate only hourly - *"The frequency of these bus services are less than that considered required to provide the appropriate level of service for good/reliable public transport."*

- *"On the basis of the walking distances/times to the Luas and bus services, and the lack of frequency of the bus services, Transportation Planning do not consider that the proposed site location is well served/connected/in close proximity to public transport services with associated ease of access, as the Applicant has purported in the submitted planning application."*

- DLRCC *"do not consider that the site is well served by public transport, nor agree with the applicant's opinion of the site's proximity/ accessibility/ connectivity to good public transport which is deemed an overestimation."*

226. It seems to me significant to consider together two of DLRCC's observations set out above – that the Site is not well served by public transport and that the "*residents of the locality are heavily dependent on car transport".* This assertion of dependency amounts to an assertion that the capacity of the existing public transport, on which satisfaction of §3.2 depends, is insufficient to satisfy existing local demand even in advance of the Proposed Development. This is consistent with the observations by members of the public that the Luas is already operating, as to service of existing local demand, in excess of capacity.

227. DLRCC also said:

> *"… taking into consideration its distance to the Luas and bus services and the frequency of those bus services, as well as distance to services, Transportation Planning consider that the proposed residents car parking ratio .. too low … the proposed development is deficient in the provision of car parking spaces …. (and) is unacceptable. The lack of sufficient car parking spaces may create inappropriate/illegal parking on the adjoining roads which would endanger public safety as well as negatively impacting upon the amenity of the area. Based on the above assessment of the area in general and the proximity /accessibility/ connectivity to public*

389 Sic.

transport, Transportation Planning consider that one car parking space should be available for each unit."[390]

228. I cite this content of the report not in that parking is relevant in itself but as DLRCC says the parking issues flow from the inadequacy of public transport via resultant car dependence. It bears observing that BTR developments are characterised, as here, by lesser car parking provision than is made in non-BTR developments. The vital premise of that lesser car parking provision is that BTR occupants will use public transport, not cars. DLRCC were clearly concerned that inadequate public transport capacity will force the occupants of these BTR apartments to use cars in numbers for which insufficient on-Site parking will be provided, thereby forcing the occupants to park off-Site. Whether substantively correct or not, this seems to me an example of the "intensely practical" approach to analysis of the public transport capacity issue raised by §3.2 of the Height Guidelines and required of the Board in **Ballyboden TTG.**[391]

229. Clearly, DLRCC considered its concerns as to traffic and parking to be substantial and to be informed in considerable degree by what it saw as the inadequacy of public transport. Its suggested refusal reason #4 above was to the effect that the Site is "*not well served by public transport*". That view is clearly inconsistent with compliance with the criterion as to public transport set by §3.2 of the Height Guidelines 2018 and the application of SPPR3 of those guidelines. Of course, the Board was free to reject that view, as it did. But, equally clearly, that view of the DLRCC could lawfully be rejected only following careful consideration by the Board and on the Board's giving clear and cogent reasons for its rejection – see **Redmond,**[392] **Jennings,**[393] **Sherwin,**[394] **Crekav**[395] and **Mulholland**[396] as cited above.

Transport – A note on the Apartment Design Guidelines 2020

230. As will have been seen, Ironborn and DLRCC cite different elements of the Apartment Design Guidelines 2020 as they relate to distance from Luas stops. Essentially, Ironborn categorises the Site as an "*Intermediate Urban Location*" which is defined as including sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as .. Luas).[397] The Council cites §4.20 of the Apartment Design Guidelines 2020 to the effect that the Proposed Development fails a standard of "*10 minutes walking distance of … Luas stops* .." . However, that standard relates not to Intermediate Urban Locations but to the minimisation of

390 DLRCC Report p73.

391 See below as to Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §92 et seq.

392 Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §113 et seq.

393 Jennings v ABP [2023] IEHC 14, §505.

394 Sherwin v An Bord Pleanála [2023] IEHC 26 (High Court (Judicial Review), Humphreys J, 27 January 2023) §227.

395 Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 (High Court (Judicial Review), Barniville J, 31 July 2020) §161.

396 Mulholland v An Bord Pleanála (No. 2) [2006] 1 I.R. 453, §464.

397 Apartment Design Guidelines 2020 §2.4.

parking provision in "*Central and/or Accessible Urban Locations*". DLRCC's suggestion that the Glencairn Luas stop is not as attractive to residents of the Proposed Development as is suggested by Ironborn seems to misstate Ironborn's claims in this regard. However on the case as pleaded, as it relates to specifically to transport capacity within the meaning of §3.2 of the Height Guidelines 2018, it seems to me that I need address that dissonance no further.

Transport – Caselaw - O'Neill, Ballyboden & Jennings

231. In **O'Neill**,[398] in which the height of proposed apartment blocks materially contravened development plan height limits and the application of SPPR3 and the criteria for its application set in §3.2 of the Height Guidelines were at issue, McDonald J held that the planning applicant must, by demonstration, satisfy the Board that the site of the proposed development is well served by public transport with high capacity, frequent service and good links to other modes of public transport. McDonald J observed that "*This is an express requirement that must be fulfilled if the criteria set out in para. 3.2 of the Guidelines are to be satisfied*."

232. Importantly, McDonald J noted that the requirement is expressed in the present tense - which clearly requires that the site be currently well served. Plans to improve public transport in the future are irrelevant. Also, McDonald J was impressed by evidence of local objectors as to the inadequacy of public transport - as a practical matter.[399] It has since been said in one of the **Ballyboden TTG**[400] cases that O'Neill is authority that *"…. the answer to the frequency question, while relevant, is not per se the answer to the capacity question."* [401]

233. That Ballyboden TTG judgment includes a general view of the significance of public transport in planning policy and decision-making:

> *"It is notable that the policy documents advocate residential development – denser and higher – along public transport corridors. The phrase "high capacity public transport" appears in the Inspectors' account of the policy documents. Why that should be so hardly requires explanation. It makes obvious sense in terms of realising the value of investment in public*

398 O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356.
399 McDonald J said at §177(a) "… Ruirside's evidence in relation to this issue was questioned by the Inspector in para. 12.3.14 of her report where she said: "Notwithstanding the assertion of the applicants, the site is not located proximate to any major employment hub. Public transport at present is largely limited to public bus and the submissions from observers would suggest that capacity is poor. The site is not particularly accessible by rail. …". (emphasis added). This observation by the Inspector is strongly supported by the extensive evidence provided by a number of local objectors to the proposed development. This is evident, for example, in the observation submitted by Lesley Shoemaker who stated that she has to be on the bus by 7.30 a.m. to get into work for 9 a.m. because, if she leaves it any later, the buses travelling into the city centre are already full by the time they pass the entrance to the Glenhill Estate on Finglas Road. A similar point is made by Ms. Barbara O'Reilly, Ms. Caroline Green, Ms. Linda Sheridan, Ms. O'Neill herself, Ms. Nicola Kelly, Avril and Brian Murray, Andy Canning, Barry Gallagher, Derek Reynolds, Justin Vogelsang and Ciara McCaffrey, Lucy Leiriao, Morven Connelly, Niamh Delaney and Noel Masterson."
400 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §92 et seq.
401 [2022] IEHC 7, §96.

> *transport, minimising car dependency and encouraging modal shift from cars to public transport. There can be no doubt that in a planning application such as this, the position as to public transport must feature amongst the "Main Reasons and Considerations" which the Board must articulate …"*[402]

That observation was followed by the following as to bus services, which seems to me applicable in the present case as to the Luas:

> *"But obviously, as to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical - issue. Accordingly it is entirely to be expected that §3.2 of the Height Guidelines sets as its very first criterion that "The site is well served by public transport with high capacity, frequent service and good links to other modes of transport." …….. this sentence, to my mind clearly identifies "capacity" and "frequency" as distinct concepts. ……. as a matter of ordinary meaning, they are distinct concepts. Shannon Homes point out that no guidelines define "capacity" as it relates to public transport and suggest that the closest to such a definition is found in §5.8 of the 2009 Urban Residential Guidelines as to Public Transport Corridors: "The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities." As I pointed out at trial "e.g." is not "i.e." and I accept the Inspector's view that capacity is "related" to frequency and*[403] *the implication that they are not the same thing. That apart, and as a matter of both simple English and practical planning, they are clearly related but equally clearly not the same thing. Why that should be so also hardly requires explanation. That busses are frequent is no consolation to the commuter standing at peak hour on the way to or from work at a bus stop at which busses pass every 15 minutes or more frequently if all are already full, or even if the first two are full. As I observed at trial, to assess public transport capacity at a bus stop serving the site requires information not merely as to the frequency of busses but as to how full or empty the bus will probably be arriving at the bus stop and how many people must be presumed to be standing at that bus stop already before you build the proposed development? No doubt one will not have perfect information in those regards and planning judgment will be called for but that is not a basis for ignoring these issues. The point was made in* ***O'Neill****, in which an objector, one of many to similar effect, "stated that she has to be on the bus by 7.30 a.m. to get into work for 9 a.m. because, if she leaves it any later, the buses travelling into the city centre are already full by the time they pass ….". Though I do not have similarly eloquent material in this case it is clear from the papers that multiple expressions of similar concern were made in the present case. Such unreliability of actually getting onto a bus is a recipe for car dependency – a considerable concern of the planning authority in recommending refusal of the planning application. Also, the criterion is that the site itself be "well served" – by which I understand well served actually as opposed to theoretically - and not just that the public transport corridor generally is well served."*

402 [2022] IEHC 7, §92 et seq.
403 On reflection, the word "and" might better have read "but also".

The last sentence of this passage strikes me as being of some importance to the present case. Notably, the Board has not suggested that the foregoing passage is incorrect in law. Rather, it suggests that its application is confined to busses, for a reason to which I will come.

234. The judgment in **Ballyboden TTG**[404] continues:

> *"I do not suggest that this site is not well-served – nor would I have the jurisdiction or expertise to decide that issue. However, the information before the Board was limited to lists (in themselves impressive to my inexpert eye) of bus services and their frequency. And I think I can take judicial notice that from their frequency and knowledge of the capacity of a bus <u>when empty,</u> an Inspector can draw some conclusions about theoretical capacity. However, practical conclusions are a different matter and are what matters and are what the Board must address. The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the busses in question and by the expected populations of developments already permitted in reliance on existing public transport – of which the MPA Technical Note identifies 1,440 residential units. Perhaps precision is unattainable in this regard but neither, it seems to me, can the issue be ignored when the guidelines clearly require that it be addressed."*
>
> *…… frequency and capacity are not the same thing and both must be addressed before the first of the criteria set out in §3.2 of the Height Guidelines can be considered satisfied. Otherwise the analysis is merely theoretical and superficial as opposed to practical.*
>
> *That this is so is notably illustrated by the view of the SDCC,[405] who in this respect can be expected to be familiar with the realities of their functional area ….*
> *…….*
>
> *Shannon Homes assert that the Applicants have not pointed to the availability of information which would provide the capacity information in question. I do not think that avails them. Objectors clearly raised the issue before the Board, as did SDCC. And §3.2 of the Height Guidelines required the Shannon Homes to "demonstrate" public transport capacity. It is for Shannon Homes to obtain that information. If the suggestion is implicit in their submission that surveys similar to traffic surveys and the like and other available information cannot address the capacity question, that is an inference which, for want of evidence, I do not draw.*
>
> *The policy documents identify capacity of the public transport network, as serving the site in question, as a consideration highly relevant to making the impugned decision. In my view, in this respect, the Board failed to take into account a relevant consideration – the capacity of the public transport network. The Board also failed to give an adequately reasoned decision as*

404 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §97 et seq.
405 South Dublin County Council, the planning authority for the Ballyboden area.

> *to the capacity of the public transport network. The decision must be quashed on this account."*

235. In **Jennings**[406] it was noted that what had been at issue in Ballyboden, as in the present case, *"was what might be called an ordinary SHD of dwellings to be occupied by a population likely, in considerable degree, to be commuters reliant on public transport."* Jennings essentially repeated the view taken in Ballyboden and, as to the criterion that "*the site itself be "well served" – by which I understand well served actually as opposed to theoretically …",* added the clarification, of some present relevance, that,

> *"… what is to be well-served is the Site as it would be developed pursuant to the Impugned Permission and so the concept of being well-served is relative to the public transport requirements of the Proposed Development. I do not think that it is incumbent on the Developer or the Board or any other participant in the process to state the very obvious: that where public transport is frequent and broadly high-capacity, the adequacy of that capacity is likely to be issue only in the morning and evening rush-hour*[407] *unless particular circumstances indicate otherwise."*

Transport - Fernleigh Pleadings & Submissions

236. Fernleigh pleads error,

- in interpreting and applying SPPR 3A(1) and §3.2 of the Height Guidelines as to public transport capacity and
- in failing to give reasons for rejecting submissions identifying lack of such capacity - pleading **Balz**.[408]

237. Certain of Fernleigh's pleadings and submissions are considered in my analysis, set out below, of the Inspector's report on the public transport issue. Inter alia, Fernleigh pleads that, contrary to §3.2, there was no assessment of public transport capacity - whether as to busses or the Luas and whether as to current demand or by reference to other already-permitted developments along the Luas Line (e.g. Cherrywood SDZ, Golf Lane SHD, Murphystown SHD etc.). Fernleigh says that Ironborn and the Board assessed frequency only. It pleads that frequency and capacity are distinct elements of the §3.2 criterion and no matter how frequent the Luas it is no use to a future resident who can't get on it because it is already full when it arrives at his/her Luas station.

406 Jennings v ABP [2023] IEHC 14, §§472 & 473. In that case, of student accommodation, the outcome was different to that in Ballyboden primarily because the students were expected to primarily walk or cycle to and from a nearby university rather than take public transport to and from the city centre.
407 Emphasis added.
408 Balz v An Bord Pleanála – Fernleigh cite [2018] IEHC 309 but doubtless it was intended to be [2019] IESC 90.

238. Fernleigh pleads error in that Ironborn, in breach of SPPR3(A), failed to "*set out how*" the Proposed Development complies with the §3.2 criterion that it "*demonstrate*" that the Site is well-served by high capacity, frequent and well-connected public transport and error by the Board in that no information or evidence was before it as to the high capacity of public transport to well-serve this Site, as was required for the purposes of SPPR3. It had no evidence on the basis of which to lawfully find such capacity – a deficiency which had been pointed out in observations in the planning process.

239. Fernleigh cites **Ballyboden**[409] and **O'Neill**[410] to the effect that it is Ironborn who must "demonstrate" to the Board's satisfaction that the Site is well served and cites **Ballyboden** to the effect that capacity and frequency are related but are not the same. Fernleigh says that Ironborn submitted no information on the actual capacity of the Luas to serve the Site and the only information on that issue before the Board was submitted by observers to the effect that the LUAS was inaccessible at morning peak and by DLRCC to the effect that "*DLR's Transport Section do not consider that the site is well served by public transport*" and that "*The reality on the ground is that the area is suburban in nature and residents at the locality are heavily dependent on car transport."*

Transport – The Board's Pleading & Submissions - GDA Transport Strategy & Comment thereon

240. The Board's Opposition papers are largely a traverse of Fernleigh's grounds, asserting the adequacy of the evidence before the Board to support the Inspector's proper assessment. It also says that the Inspector properly recorded the DLRCC and public submissions[411] and properly considered and rejected them for clear and comprehendible reasons.[412]

241. The Board's primary position at hearing was that a development within 900 metres of a Luas stop is ipso facto well served by high capacity, high frequency public transport as stipulated by §3.2 of the Height Guidelines. Failing that, its fallback position was that the absence of objection by Transport Infrastructure Ireland ("TII")[413] in this case determined the issue in its favour. [414]

242. The central plank of the Board's response to O'Neill, Ballyboden and Jennings was, in effect, that mere proximity of the Site to the Luas (specifically as opposed to bus services) ipso facto

409 Ballyboden Tidy Towns v ABP & Shannon Homes [2022] IEHC 7, §101.
410 O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356, §§157 & §162.
411 At §7.1 of his Report.
412 At §12.4.19 of his Report.
413 Somewhat confusingly, there is, in the formal legal sense, no such legal entity as Transport Infrastructure Ireland. By the Roads Act 2015, the functions of the former Railway Procurement Agency were assigned to the National Roads Authority. However instead of renaming the National Roads Authority, the course was taken, by S.I. 297/2015 – Roads Act 2015 (Operational Name of National Roads Authority) Order 2015, of specifying Transport Infrastructure Ireland "as a name by which the National Roads Authority may describe itself for operational purposes." The explanatory note to S.I. 297/2015 explains that this is done "to better reflect its expanded remit following the transfer of functions of the Railway Procurement Agency to the National Roads Authority".
414 Transcript, Day 2 p96.

satisfies the §3.2 criterion. That they say for the specific reason that the **NTA's GDA Transport Strategy 2016**,[415] describes the Luas, as a "*light rail network*" and in the following terms:[416]

> *"These lines provide a high frequency, high capacity service along these corridors, with trams operating at a frequency of up to every 3 minutes at peak hours."*
>
> *"In terms of the service provided, Luas is generally regarded as frequent and reliable."*

This strikes me as a general description of the Luas rather than as a definition preclusive of assessment of its actual capacity to well serve particular sites – much less this particular Site.

The Board makes a similar argument on the basis of a description of the Luas in the Apartment Design Guidelines 2020. But it does not seem to me to raise additional issues to those turning on the GDA Transport Strategy.

243. The Board seeks, in my view incorrectly, to elevate this description into a definition of the Luas as a high capacity service binding for purposes of the §3.2 criterion. Even if one accepted that view, it seems to me that the Board would have to go further and argue, which it did not, that the high capacity of the Luas thus formally defined, will be in substance available to the expected demand from the Site (incidentally, a demand not quantified in the planning application – a point of difference from the facts in Jennings) such as to render the Site, in particular, "well-served". Instead, it argues that such a definition is preclusive of inquiry into the capacity of the Luas to well serve any particular site – or at least absolves the Board of any such inquiry.

244. It follows, the Board in effect submits, that it may ignore, in the teeth of submissions by the Planning Authority and the public, any question that the Luas may in fact as a practical matter and as relates to the specific Site in question, not provide a high capacity service and not "well serve" the Site. I cannot see that blinding oneself to realities alleged not merely by members of the public but by the Planning Authority - not least by its expert transport planners - has any place in planning law or rational decision-making - save in the case of clear compulsion, which is absent here. No argument was made to me as to what purpose of proper planning and sustainable development such an approach might serve. To put it at its lowest, such a purpose is not obvious. That is not to say that such realities would necessarily determine a planning application: for example, the prospect of improved public transport services may well be weighty. But not so, given **O'Neill**, as to satisfaction of the present-tense criterion of §3.2 for the application of SPPR3 as justifying a material contravention of the Development Plan.

415 National Transport Authority: Transport Strategy for the Greater Dublin Area 2016 – 2035.
416 Transport Strategy for the Greater Dublin Area 2016 – 2035 §3.2.2.

245. In making these observations, I do not suggest that the "realities" are in fact as suggested by the Planning Authority and the public. I merely say that those realities are relevant and the Board needs to know what they are. And so, and explicitly by SPPR3 and §3.2 of the Building Height Guidelines, the planning applicant must demonstrate them before SPPR3 can be applied. I see no reason to conclude, on the arguments made to me in this case, that the NTA Transport Strategy 2016 absolves the Board from considering those realities – whatever they may be. In another case it may be arguable that, absent an issue being credibly raised as to public transport capacity, the Board may infer such capacity from the proximity of the Luas. And in Jennings the particular facts sufficed to demonstrate the absence of a capacity problem. But neither is the case here.

246. Importantly, I should add that while the Board pleads the GDA Transport Strategy 2016 as defining the Luas as high capacity, such as to preclude any necessity of its inquiry into the actual capacity of the Luas to serve this Site and pleads also that the Inspector refers to that Strategy, the Inspector did so in very general terms.[417] Indeed, the description in the GDA Transport Strategy 2016 of the Luas as a high capacity service is not even mentioned by the Inspector – much less invoked for a binding definition of the Luas as high capacity and much less again as absolving him from considering the practical capacity of the Luas to serve the Site. That elsewhere in his report[418] and without elaboration or explanation relevant to whether it will well-serve this Site, the Inspector describes the Luas as "high capacity" does not, in my view justify reading that report as invoking the definitional effect of the GDA Transport Strategy 2016 for which the Board argues. This argument by the Board is an attempt to retrofit in these proceedings a rationale for its Impugned Permission - of which rationale there is no evidence in the decision. That is impermissible - see **Owens**[419] and **Damer**[420] and **Delaney**[421] - the legality of an impugned decision turns, as to reasons, on the reasons given in that decision, not on those which might have been given but were not. For the avoidance of doubt, I should add that retrospective reliance on the alleged definition of the Luas in the GDA Transport Strategy 2016 as being high capacity - in effect as precluding argument to the contrary in a planning application as to a particular Site - does not seem to me to fall, in the circumstances of this case, within such limited scope as may exist in law for the retrospective elaboration or explanation of reasons given in an impugned decision.

247. It is also of at least some interest, that the GDA Transport Strategy 2016 also says, as of 2016 at latest, that *"…… significant investment is required to develop this system into a full network and provide the capacity required in the future, most notably the integration of the Red and Green Lines, and the introduction of Metro services."* Viewed from the perspective of the Board's decision date in July 2021 and in considering a planning application calling in aid anticipated Luas tram-lengthening not yet effected, the 2016 Strategy must be read as very likely implying that *"the capacity required in the future*" had not yet been provided to cater for a future which, by then and in greater or lesser

417 §6.2.
418 §12.4.19 – and see below.
419 Owens v An Bord Pleanála [2021] IEHC 532 (High Court (Judicial Review), Barrett J, 27 July 2021) §12.
420 Damer v An Bord Pleanála [2019] IEHC 505 (High Court, Simons J, 11 July 2019) §36.
421 Delaney v Irish Prison Service [2021] IEHC 702 (High Court (Judicial Review), Hyland J, 5 November 2021).

degree, was likely to have arrived. I should say that the papers were unclear as to the extent to which the tram-lengthening project had progressed by the time the planning application was made. However, I don't think I need to decide this matter on that basis. And I can take judicial notice that the Metro services described by the GDA Transport Strategy in 2016 as "*notably*" required to "*provide the capacity required in the future"* had not been provided by July 2021.

248. The description by the NTA of the Luas as a "*high capacity service*" is undoubtedly generally correct. But it is not objectively to be interpreted as recording a prescription, either by the NTA in its Strategy or by the Minister in §3.2 of the Height Guidelines 2018 as a criterion for overriding a Development Plan via SPPR3, to irrefutably and permanently predetermine, for all potential development sites along the entire of the Luas corridors, the answer to the explicitly site-specific question posed by §3.2. That question is whether the Site is, as a matter of fact, "well-served" by the Luas and whether the general "high capacity" of the Luas is in fact available in a practical sense to the specific site under consideration. The view that this description amounts to such a prescription does not conform to any sensible and practical view of planning practice. I see no reason to consider myself compelled to take it absent clear wording to that effect.

249. I reject also the Board's argument that the public transport criterion is met and the requirement for reasons is met because the GDA Transport Strategy 2016 says that bus and Luas capacity will be increased as demand increases. The Inspector does not invoke the proposition - which the Board now seeks to retrofit to its Impugned Decision. That aside, no doubt the policy aspiration that bus and Luas capacity will be increased as demand increases is genuine and sensible. But the Strategy must be read as a whole – inter alia in the context of the statement that *"significant investment is required to develop this system into a full network and provide the capacity required in the future".* The Strategy itself anticipates that capacity existing as at 2016 will become progressively inadequate. In any event, the argument that the Strategy says that Bus and Luas capacity will be increased as demand increases falls foul of the decision in **O'Neill**. In that case, McDonald J held that satisfaction of the public transport criterion of §3.2 of the Height Guidelines requires that the Site must be <u>at present</u> well-served by high capacity public transport to serve the Proposed Development. For the specific purpose of satisfaction of §3.2 of the Height Guidelines as to public transport capacity, future increased provision of public transport is beside the point. That is especially so as what is in issue here are not general considerations of proper planning and sustainable development but a specific criterion mandatorily to be satisfied in order that SPPR3 be invoked to override the Development Plan. Public transport capacity must also be considered by the Board, and was not considered by it, in the context of the materials before it to the effect that, since the Strategy was written in 2016, capacity in the area of the Site has not in fact kept pace with demand. I do not find that capacity has not kept pace with demand. I merely find that the Board was not entitled to ignore the question.

250. The Board's second point on this issue is to rely on the absence of objection to the Proposed Development by TII.[422] While its silence may well be relevant to general considerations of proper planning and sustainable development as they relate to public transport, I do not see that it could lawfully weigh appreciably in satisfaction of the §3.2 criterion of the Height Guidelines as to public transport capacity as it bears on building height and as serving a particular site. I was not addressed on TII's statutory obligations. No doubt it has strategic obligations as to the planning and delivery of road and light rail infrastructure and, to that end, in assessing and projecting demand for such infrastructure with a view to supplying it. It is also a prescribed authority to be notified of an SHD planning application where the proposed SHD may have an impact on bus or rail-based transport.[423] Its silence is no doubt reassuring to the Board as to the likelihood of such impact in this case and to the effect that TII has no objection to the Proposed Development. But, though they are linked issues, impact on the Luas network is not the same issue as that whether the Luas will well serve the Site. TII will consider the matter from its point of view, inter alia, as to effect on current services (which may or may not already be overloaded) in light of contemplated future investment and upgrades – considerations irrelevant to satisfaction of the §3.2 criterion - as decided in O'Neill to the effect that adequacy of current services is what matters. In any event, TII's silence could not absolve the Board of its own decision-making obligation as to satisfaction of the §3.2 criterion. It was not argued, and it not apparent, that TII has a remit as to building height. While, no doubt, TII could be incidentally interested in building height as relevant to efficient utilisation of underutilised public transport, or overburdening public transport, interpreting its silence in this case as appreciably supportive of satisfaction of §3.2 of the Height Guidelines such as to permit application of SPPR3 seems to me a stretch too far. In any event, even if, which I doubt, the absence of TII objection could constitute evidence absolving the Board of irrationality, as will be seen, I do not propose to decide this issue on the basis of rationality or irrationality of the decision.

251. Counsel for the Board submitted[424] that, as to the adequacy of public transport, the "relevant State entity" is TII and not the local authority. I am not sure how strongly or literally this was being pressed. But for the avoidance of doubt, to whatever extent it posited exclusion of DLRCC's opinion from the issue of adequacy of public transport in satisfying §3.2 criteria for applying SPPR3 to material contravention of DLRCC's Development Plan, I have no hesitation in rejecting the submission.

422 Somewhat confusingly, there is, in the formal legal sense, no such legal entity as Transport Infrastructure Ireland. By the Roads Act 2015, the functions of the former Railway Procurement Agency were assigned to the National Roads Authority. However instead of renaming the National Roads Authority, the course was taken, by S.I. 297/2015 – Roads Act 2015 (Operational Name of National Roads Authority) Order 2015, of specifying Transport Infrastructure Ireland "as a name by which the National Roads Authority may describe itself for operational purposes." The explanatory note to S.I. 297/2015 explains that this is done "to better reflect its expanded remit following the transfer of functions of the Railway Procurement Agency to the National Roads Authority".
423 Art 295 Planning and Development (Strategic Housing Development) Regulations 2017. S.I. No. 271 of 2017.
424 Transcript Day 2 p88.

Transport – Inspector's Report, Board Decision & Comment thereon

252. The Board made its decision generally in accordance with the Inspector's report. The Board did not in terms address the issue of adequacy of public transport (save a brief reference to "*the availability in the area of a wide range of ... transport … infrastructure*"). That is not a criticism – it merely means that it is taken to have adopted the Inspector's report in this regard.

253. The Inspector addresses[425] the DLRCC's Reports and specifically DLRCC's recommended reason #4 for refusal, which includes its view that the Site is not well-served by public transport. However, his consideration consists only in reference back to earlier sections of his report, the relevant content of which I will address.

254. The Inspector cites,

- Development Plan Policy RES3 Residential Density as to promoting higher densities on sites "*located within circa 1 kilometre pedestrian catchment of, (inter alia) a ... Luas line, ...".*[426]
- public submissions that public transport is "insufficient" – including to the effect that Luas is running "at capacity" and public submissions citing an alleged OPR[427] warning as to negative impacts of multiple developments along the Luas lines. [428]
- the DLRCC report to the effect that its view that the Site is not well served by public transport informs its suggested reason #4 for recommending refusal of permission.[429]
- the elected members as to insufficient Luas capacity.[430]

255. The Inspector's planning assessment[431] notes that:

> *"… the Planning Authority state that the site is not a suitable location for the provision of a Build-to-Rent apartment scheme as it is not a central location that is well served by public transport and the Planning Authority's recommended reason for refusal No. 4 relates to same. I note the site is within 900m of Glencairn Luas Stop with good pedestrian connections to same, and <u>as such</u>*[432] *I am of the view that the site is well served by a high frequency public transport system."*

As far as it goes, this passage, phrased in terms as to frequency but not capacity, equates mere proximity to the Luas with a conclusion that the Site is well-served by it. As recorded earlier, that remains the Board's primary position on this issue.

425 Inspector's Report §12.14 et seq.
426 Inspector's Report §7.0, p20.
427 Office of the Planning Regulator.
428 Inspector's Report §7.0, p28.
429 Inspector's Report §8, p34, 36, 37.
430 Inspector's Report §8, p38.
431 Inspector's Report §12.2.9.
432 Emphasis added.

256. Having regard to the **Urban Residential Guidelines 2009**[433] as to density, the Inspector[434] locates the Site in a '*Public Transport Corridor'* as it is within 1km of a light rail stop and deploys a formula used in those guidelines[435] to the effect that *"The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities. …. Given the site is approximately 900m from the nearest Luas Stop, which is a high frequency transport service, the density is also supported, in principle, by these guidelines."* As was pointed out in **Ballyboden**,[436] as to this passage, "e.g." is not "i.e." and while capacity is related to frequency, they are not the same.

257. While the foregoing passages do illuminate the Inspector's analysis, his analysis specifically as to SPPR3 and §3.2 of the Height Guidelines 2018 is as follows:[437]

> *"The first criterion relates to the accessibility of the site by public transport. I have set out an assessment of same above, and I note that the site is relatively well served by public transport, namely by the Luas but does not have a high frequency bus service. However, it falls within the 1km corridor of a high frequency service and as such[438] I would consider there is some scope for increased height over and above the limitations as set out in the Building Height Strategy.[439] I consider that the site complies with the above criteria. Observers submissions have stated that there are capacity issues at peak hours on the Luas line and the bus route is not efficient. I concur that the bus routes are not of particularly high frequency. However, the Luas is an existing high capacity, high frequency, mode of transport proximate to the site capable of accommodating large numbers of people, more than can be accommodated in a private car. This area offers choice of modes of transport for peak hour movements, including luas, bus, cycle paths, pedestrian paths, and car."*

He says also that "*the transport network in place (rail, bus, road, bicycle, and pedestrian) can cater for the increase in population anticipated by this development*."

All this must be understood in light of the Board's "ipso facto" view described above and acceptance that these has been no substantive investigation or assessment of the actual ability the Luas to serve for that demand.

258. As to the passage set out above, counsel for Fernleigh criticised as irrelevant and counsel for the Board was unable to explain the relevance of the self-evidently factually correct words "*more*

433 Sustainable Residential Development in Urban Areas – Guidelines for Planning Authorities (2009).
434 Inspector's Report §12.4.8.
435 §5.8 of the 2009 Urban Residential Guidelines - as to Public Transport Corridors.
436 Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §93.
437 §12.4.19.
438 Emphasis added.
439 This is a reference to the Development Plan Building Height Strategy.

than can be accommodated in a private car". I agree with Fernleigh. It is also difficult to see the relevance of the availability of "*cycle paths, pedestrian paths, and car*" to satisfaction of the §3.2 criterion of high capacity public transport – i.e. in the Luas – at least where there has been no attempt to quantify the transport demand those other modalities will leave over to public transport. In any event, modal shift from cars to public transport is a crucial planning objective, a central point of transport policy and one of the very purposes of high capacity in the public transport system. Whatever about cycle paths (likely to facilitate relatively shorter journeys) it is difficult to see pedestrian paths offering (at least in any volume) alternative modes of travel on journeys otherwise likely to be taken on the Luas. Certainly, if that is what the Inspector intended - as it seems in context - citing availability of private car transport as a factor diminishing the capacity required of the Luas is very clearly counter to all planning policy.

259. However, the more fundamental flaw lies in failing to engage at all with the assertion of practical, as opposed to theoretical, capacity problems with the Luas. This failure to engage in turn, it seems to me, is what drove the Board to reliance, in retrospect and for the first time in the proceedings, on its "definitional" defence (which I have rejected) based on the NTA Transport Strategy for the Greater Dublin Area – a rationale the adoption of which is nowhere evident in its decision.

260. The inspector's analysis continued:[440]

> *"There are plans to continually upgrade and improve all such modes of transport."*

As McDonald J made clear in **O'Neill**, such plans are irrelevant to the satisfaction of the §3.2 criterion that the Site be now well-served by high capacity public transport.

261. The inspector's analysis concludes:[441]

> *"Peak hour pressures on public transport are common and to be expected in urban areas and to my mind do not constitute a reason for refusal. Transport Infrastructure Ireland (TII) have been consulted on this application and has not submitted an objection to this proposal on the basis of lack of public transport capacity nor has it raised this as an issue in terms of prematurity of development pending any further upgrades or increase to services. I am satisfied that the transport network in place (rail, bus, road, bicycle, and pedestrian) can cater for the increase in population anticipated by this development."*

440 §12.4.19.
441 §12.4.19.

262. Here, it seems to me, the inspector conflates two issues distinct in law: whether peak hour pressures constitute a reason for refusal is not the issue; the issue is whether the criterion of §3.2 that the Site in particular be well served by high capacity public transport is satisfied such as to permit and require application of SPPR3 as to building height and thereby to justify material contravention of the Development Plan as to height. Though it is not a novel proposition, Humphreys J recently made a not dissimilar point in the **Four Districts** case[442] in observing that *"the board did not pause to consider whether the plan was being contravened, and if so whether this would be material, but rather proceeded directly to the question of whether permission should be granted."*

263. The Inspector's somewhat despondent observation that "*Peak hour pressures on public transport are common and to be expected in urban areas*" effectively – one might even say dismissively - declines to engage, not just in any meaningful way but at all, with the positions in this regard of members of the public as well as those of the Planning Authority and its elected members. The Inspector's observation, in itself, is no doubt factually correct and a legitimate introductory observation. But it is not analysis nor does it absolve the Board from analysis nor does it address the questions posed by §3.2 or by DLRCC.

264. It is worth, in this regard, recollecting the legal significance of the Planning Authority and its elected members. Simons J in **Redmond**[443] observed in light, inter alia, of the Constitutional order[444] that "*The obligation for An Bord Pleanála to engage with the recommendation set out in the chief executive's report is more obvious than the obligation to engage with an internal report such as that prepared by a board inspector*." Simons J, citing **Balz**, also recounted the general duty of a decision-maker to engage with submissions by members of the public and held that : *"It follows that the same obligation must apply a fortiori to a statutory consultee, such as the local planning authority, which is required to submit a formal report in prescribed form to An Bord Pleanála."* In effect the Inspector's approach – and that of the Board in these proceedings - treats those positions of the Planning Authority, its elected members and members of the public as irrelevant and as absolving the Inspector and the Board of any real inquiry into real and practical public transport capacity serving the Site. It seems also incompatible with my analysis above of the requirements as to clear and cogent reasons for disagreeing with the Planning Authority view given **Jennings**,[445] **Sherwin**,[446] **Crekav**[447] and **Mulholland**.[448]

442 Four Districts Woodland Habitat Group, et al v An Bord Pleanála, et al Including Romeville Developments Limited [2023] IEHC 335, §169.
443 §115 et seq.
444 Article 28A of the Constitution of Ireland expressly recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities. Simons J cited generally, Christian v Dublin City Council (No. 1) [2012] IEHC 163; [2012] 2 I.R. 506, §17.
445 Jennings v ABP [2023] IEHC 14, §505.
446 Sherwin v An Bord Pleanála [2023] IEHC 26 (High Court (Judicial Review), Humphreys J, 27 January 2023) §227.
447 Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 (High Court (Judicial Review), Barniville J, 31 July 2020) §161.
448 Mulholland v An Bord Pleanála (No. 2) [2006] 1 I.R. 453, §464.

265. It may be possible that, having so inquired, the Board might have taken the view that a predicted degree of pressure on public transport at peak hours, as specifically related its effect on quality of service of this Site, is consistent with satisfaction of the §3.2 criterion. But it is not permissible to say without analysis and investigation that that all and any degrees of such pressure can be ignored and left unassessed as irrelevant to that criterion - such as to activate SPPR3 to override a material contravention of the Development Plan as to height. As was said in **Jennings**,[449] it is precisely at rush hour that high capacity is needed and it is at that time that its adequacy is to be judged as to whether the Site – and specifically the Site – is "*well served actually as opposed to theoretically*":

> *" … to state the very obvious … where public transport is frequent and broadly high-capacity, the adequacy of that capacity is likely to be issue only in the morning and evening rush-hour*[450] *unless particular circumstances indicate otherwise."*

The Inspector's observation also fails to reflect the fact that the Urban Residential Guidelines 2009 and the Apartment Guidelines 2020 explicitly stipulate consideration of public transport capacity at "*peak hours*" in considering appropriate densities.[451] It is precisely as to rush hours that the analysis falls to be made.

266. Given he recorded it, it is also surprising that the Inspector does not state whether the submission is correct that the OPR had expressed concern as to development overburdening the Luas. Perhaps the OPR did not do so, or did so in terms not relevant to this Site, and the submission was misconceived. But presumably if it had not, that would be easily ascertained. And if it had, presumably it could be significant.

267. I emphasise that I make no factual findings as to whether the Luas is overburdened such as to degrade its capacity to serve this Site. It is not my place to do so. But, taken to its logical conclusion, the Board's position is that no matter how overloaded the Luas might ever become, and no matter the degree or duration for which residents of the Proposed Development might be unable to get on already-full Luases at rush hour, and no matter how long they might have to wait for a Luas they could get on, such eventualities could never dislodge the Luas from satisfying the §3.2 criterion that the Site be *"well served by public transport with high capacity, frequent service and good links to other modes of public transport."* I do not in this observation seek to describe the present capacity of the Luas to serve this Site. I have no idea what that capacity may be. It is, rather, a reductio ad absurdum of the Board's "definitional" argument that it may ignore concerns such as those expressed by the Planning Authority. The Board has not suggested any sensible reason why the law should take such a view. O'Neill, Ballyboden and Jennings are authority that it does not.

449 Jennings v ABP [2023] IEHC 14, §§472 & 473.
450 Emphasis added.
451 Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) May 2009. §5.8 – "The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities." See also §2.4 Apartment Guidelines. Both cited in Ballyboden Tidy Towns Group v. An Bord Pleanála [2022] IEHC 7.

268. Neither Ironborn (whose primary duty of demonstration it was) nor the Board made any attempt to ascertain whether, as a matter of practical fact, the Planning Authority (who, including its elected members, are presumed to well-know their functional area) or the public were correct in saying that the Luas is operating, at least as to serving this Site, in excess of capacity - "*bursting at the seams*" - such that "*residents already travel in the direction opposite to their destination in Dublin to get access*" and that the demand already placed on the Luas by many other developments (effected and permitted) has degraded and will degrade its capacity to "well-serve" this Site. It is important to state that, on investigation Ironborn and/or the Board, might have come to the view that these positions of the Planning Authority and the public were factually incorrect or exaggerated and in any event that the §3.2 criterion as to public transport was satisfied. But it is difficult to see that those concerns of the Planning Authority, its elected members and the public (remembering also that the Planning Authority is an expert planning authority entitled to curial deference when it makes planning decisions and that the public are not expected to deploy expertise in their submissions[452]) could properly be ignored as irrelevant such that no reasons need be given for dismissing those concerns.

269. As to reasons, **Balz**[453] (a case in which reasons were lacking because the objection to the proposed development was dismissed as irrelevant) was considered in a **Ballyboden TTG** case[454] in terms I need not repeat here but which generally invoke the vital role reasons play in maintaining public trust and confidence in the planning system. In Balz, **O'Donnell J** said:

> *"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."*[455]

270. Of this and of **Connelly**[456] it was said in that **Ballyboden TTG** case that the requirement that relevant submissions be addressed and an explanation given why they are not accepted was one "*of real substance*" and that where the obligation lies, in a particular case, in that middle-ground along a spectrum between narrative, discursive essay (which is not required) and the mere anodyne or box-ticking or name-checking (which do not suffice[457]), will depend on the circumstances of that case.

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452 Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540, §236 citing Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019) – "The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."

453 Balz v An Bord Pleanála [2019] IESC 90.

454 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, §257 et seq.

455 Emphases added.

456 [2018] IESC 31.

457 A view requiring some adjustment specific to the "have regard to" obligation – see above.

Reasons must be adequate to the circumstances. Ballyboden also cites **NECI**[458] to the effect that *"Balz makes clear that a decision-maker must engage with significant submissions"* and that reasons must show that the decision-maker *"truly*[459] *engaged with the issues which were raised".* Ballyboden cites **St Audeons NS**[460] as citing Balz to the effect that *"The right to make submissions carries with it, as a corollary, a right to be informed of the reasons for which those submissions are not accepted."* And, Ballyboden noted, reasons must be both clear and "*cogent*", in the sense of "*capable of persuading*" and *"what matters is that the decision-maker's reasons show that it has "cogently", "adequately" and "truly" engaged with the substantive issues."* **Sliabh Luchra**[461] was cited in Ballyboden, inter alia to the effect that what is *"crucial is that the points made in submissions should be addressed."*

271. It is true that in Ballyboden the protagonists in the planning application submitted competing expert traffic and transport reports and that is not so here. I am far from convinced that such a factor could make a difference such as to allow disregard of the views of the elected members and the public (who are entitled to raise issues but are not obliged to tender expert reports and are entitled to rely on the expert Board to investigate[462] planning applications with scrupulous rigour[463]). But in any event here there was a clear competing opinion of the planning authority and its Transport Planning department. They are not merely experts - their expertise is specific to the circumstances of their functional area and is entitled to curial deference when they make planning decisions. It is no disrespect to planning consultants to observe that the planning authority is not retained by interested parties and is distinguished by a statutory duty that its views be formed primarily by the public interest in considerations of proper planning and sustainable development. So, in my view, Ballyboden is not to be distinguished on the basis that the objectors in that planning process submitted competing expert traffic and transport reports, whereas here they did not.

272. In **St Kevin's GAA**,[464] though disavowing any distinct requirement for enhanced reasons for the Board's disagreeing with the Planning Authority, Humphreys J acknowledged the authority in caselaw for such an enhanced duty of engagement and, bearing in mind the council's detailed rationale for rejecting the planning application, quashed the impugned permission as the Board had not properly engaged with the council's reasoning. As Humphreys J observed in **Killegland**,[465] there is no *"superhuman obligation to explicitly give every micro-sub-reason for every micro-sub-issue that parties may seek to make in voluminous submissions or buried somewhere in thousands of pages of materials."* But satisfaction of the public transport criterion of §3.2, as necessary to the application of SPPR3 to allow material contravention of a development plan, is very far from a *"micro-sub-issue"*

458 Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta v The Labour Court, et al. [2021] IESC 36. See generally §152 et seq.
459 Emphasis added.
460 The Board of Management of St Audeons National School v An Bord Pleanála & Merchants Quay Ireland CLG [2021] IEHC 453.
461 Sliabh Luchra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888, §38.
462 See above.
463 Weston Ltd. V An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).
464 Flannery v An Bord Pleanála [2022] IEHC 83 (High Court (Judicial Review), Humphreys J, 25 February 2022).
465 Killegland Estates Ltd v Meath County Council [2022] IEHC 393.

– either generally or on the facts of this case. Far from being "buried", the issue was explicit, front and centre in DLRCC's reasons for recommending refusal of permission and was prominent in its reasoning.

Transport - Conclusion

273. For the reasons set out above, there is a considerable argument for the proposition that, as to the actual and practical high capacity of the Luas to "well-serve" this Site, there was no evidence or materials before the Board capable of justifying its decision. Whether or not that is so, it is clear that the Board erred in law in considering, as it argued at trial, that the issue of actual capacity to "well-serve" this Site was irrelevant merely because the Luas is, as it clearly is, in general terms a high capacity form of public transport and is so described (not, in my view, "defined") in planning policy. In effect, the Board argued that the NTA Transport Strategy precludes arguments to the contrary as to the quality of service to particular sites. But the general high capacity of the Luas is not the point when it comes to applying §3.2 of the Height Guidelines such as to activate SPPR3 and thereby materially contravene the Development Plan as to height in respect of this, or any, particular Site. What matters for that purpose is the actual capacity of the Luas to serve this, or any, particular Site. And in any event, the reasoning that the NTA Transport Strategy defines the Luas as High Capacity and so precludes argument on this issue is not found in the Impugned Permission but was retrofitted by the Board in legal argument for purposes of these proceedings.

274. Had no issue been raised in that regard, it may have been that the Board could have relied the general high capacity of the Luas to ground an inference that its high capacity will well-serve this Site. I need not decide that question as the issue was raised. It is the relevance of that general high capacity which restrains me, just about on balance, from finding there was no relevant material before the Board. But once the issue was raised not merely by members of the public but by DLRCC (after all, the statutory planning authority for the area) and not least by its elected members in a report to the Board having statutory status – the Board was obliged to engage with the issue and with those submissions, to base its rejection of them in materials before it and to give clear and cogent reasons for its decision. It did not do so. Its decision will be quashed accordingly.

275. Some further observations may assist. There can be no doubt that the issue of high capacity of the Luas to well-serve this Site was a "main issue" for which "main reasons" were required of the Board. It was a main issue as it was a criterion for application of SPPR3 in justifying material contravention of the Development Plan. It was a main issue also as the inadequacy of public transport to serve the Site was an explicit basis of DLRCC's recommendation that permission be refused. It is true that, as the Board emphasises, the Inspector explicitly asserted the "high capacity" of the Luas. But, as is clear, the adequacy of reasons varies with circumstance – **Connelly**.[466] Or, to

466 Connelly, v An Bord Pleanála, Clare County Council and McMahon Finn Wind Acquisitions Limited [2021] 2 IR 752.

put that in **Mulholland** terms, what is required by way of clarity and cogency and, to put it in **Redmond**[467] and **Jennings**[468] terms, what is required by way of engagement with submissions, varies with circumstance. In my view and in light of the concerns expressed by DLRCC and objectors, the Inspector's finding of high capacity in the Luas well-serving the Site was no more than a conclusionary assertion (as to the distinction between mere conclusions and reasons, see **Damer**[469]). It fails the test of engagement with the issues and with submissions, not least those of the Planning Authority, and it fails the test of clarity and cogency of reasons. Indeed, this inadequacy is illustrated by the very fact that the Board was driven to rely in these proceedings and by way of retrofitting reasons to the Impugned Permission, on an allegedly prescriptive, binding and formalistic definitional meaning of "high capacity" – an allegedly binding deeming of the Luas both as "high capacity" and as well serving this particular Site. Once this argument is rejected, what is left in the Impugned Decision as to adequacy of public transport to satisfy §3.2 is mere assertion.

4 - EIA - NO PRELIMINARY EXAMINATION[470]

276. The essential, and simple, complaint here is that Ironborn and the Board did not do a Preliminary Examination under **Article 299B(1)(b)(i) PDR 2001** of the question whether sub-threshold EIA, or EIA Screening was needed but instead and impermissibly proceeded directly to EIA Screening under **Article 299B(2)(b) PDR 2001**. In that exercise they screened out the need for EIA.

277. Article 299B(1)(b) provides that as to certain types of SHD planning applications (of which this is one)

> *"(i) The Board shall carry out a preliminary examination of, at the least, the nature, size or location of the development.*
>
> *(ii) Where the Board concludes, based on such preliminary examination, that—*
>
> *(I) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,*
>
> *(II) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, ……"*

Simplifying somewhat, in the case described at (II) above, Article 299(2)(b) requires the Board to carry out an examination of - at the least - the nature, size or location of the development for the purposes of making an EIA Screening determination whether there is a real likelihood of significant effects on the environment arising from the proposed development. If there is, it proceeds to EIA.

Clearly, the envisaged sequence is that preliminary examination precedes screening.

467 Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §115 et seq., citing Balz v An Bord Pleanála [2019] IESC 90.
468 Jennings v ABP [2023] IEHC 14, §505.
469 Damer v An Bord Pleanála [2019] IEHC 505; Olaneye v Minister for Business [2019] IEHC 553.
470 Ground 7 – §33 and §34 of E(Part 2).

278. As to the impermissibility of skipping preliminary examination and proceeding directly to EIA Screening, counsel for Fernleigh cite Humphreys J in **Waltham Abbey**[471] to the effect that Article 299B:

> *".. envisages three levels of engagement with the EIA process. Firstly, there is "preliminary examination" which is required in every case by reg. 299B(1)(b). Following that the board may decide that "screening" is required and this is undertaken under reg. 299B(2)(b)(ii). The third and highest level of engagement following that process would be full EIA."*

279. Fernleigh interpret this passage as confirming that the PDR 2001 *"provides no direct entry point at either EIA Screening or EIA".*[472] Preliminary examination is always required. It says that preliminary examination is both mandatory in law and fulfils a substantive role in the hierarchy identified in **Waltham Abbey**.

280. In response to the Board's plea that the complaint is of a pure technicality which cannot yield relief in judicial review, Fernleigh asserts that the Board accepts the allegation of breach and that its characterisation is "bizarre". (This strikes me more as heat than light.) Fernleigh says that the point of preliminary examination is clearly to identify, as a condition precedent to screening, that there is "significant and realistic doubt" as to the likelihood of significant effects on the environment. It is those areas of "significant and realistic doubt" that inform the screening. The same argument was put slightly differently by way of a submission, in substance though it was not quite put that way, that preliminary examination serves as a scoping exercise for EIA Screening.

281. No doubt preliminary examination can serve in practice as a scoping exercise for EIA Screening. But that does not make it a pre-requisite to the legality of EIA Screening. Nor has Fernleigh pointed to any deficiency in the EIA Screening in this case alleged to have resulted from the absence of preliminary examination. There is no suggestion that the screening was scoped too narrowly or that information before the Board was lacking which preliminary examination would, as a probability, have supplied. Much less is there any suggestion that such wider scope of EIA screening or additional information could, even arguably, have materially affected the screening outcome. I agree with the Board that this is an entirely technical complaint – formalistic and without discernible purpose in environmental protection.

471 [2021] IEHC 312, §11.
472 Ex hypothesi, this is an observation limited to sub-threshold development.

282. The purpose of preliminary examination and its relationship to EIA screening were addressed in **Shadowmill**[473] and **Jennings**.[474] Preliminary examination and screening don't differ in subject matter of inquiry. They differ as to its depth. Preliminary examination was introduced to allow a less demanding form of inquiry into the need, or otherwise, for EIA - which inquiry would suffice in obvious cases to exclude the need for EIA, thereby avoiding the unnecessary burden of the more searching enquiry required in EIA Screening. Preliminary examination is essentially in ease of competent authorities and developers: as to both, it conduces to efficient and non-wasteful use of public and private resources, an aim recited in the EIA Directive.[475]

283. Statutory interpretation should seek a "*workable and coherent*" interpretation – **Save Cork City**[476] and **Waltham Abbey**.[477] As a regulation implementing EU Law, Article 299B should also be given a purposive interpretation. Just as preliminary examination allows the less burdensome exclusion of EIA where it is obviously not required, where it is obvious that preliminary examination will not exclude the need for EIA and it is obvious that at least EIA screening is required, I see no reason for imposing a wasteful, unnecessary, time consuming and duplicatory burden of preliminary examination on the Board (even if that is a relatively light burden). And as between preliminary examination and screening, in all practical senses, the greater (screening) includes the lesser (preliminary examination). Given the essential question to be answered in preliminary examination and in screening is the same and that in screening it is answered on foot of more searching inquiry than in preliminary examination – see **Shadowmill** and **Jennings**[478] - it is difficult to see how, if the competent authority moves directly to the more searching form of inquiry, any environmental purpose will be in the slightest imperilled.

284. Despite its literal terms, I respectfully do not think that Humphreys J in **Waltham Abbey**[479] required any other view. He was not considering the issue before me and his observation is entirely correct in the context in which it was made. I venture to imagine that, had the argument been made to him, which is made to me, he would have said something along the lines of "<u>at least</u> preliminary examination is required in every case".

285. I reject this ground of challenge as unfounded in law. If I am wrong in doing so, I reject it a matter of discretion as serving no useful purpose.

473 Shadowmill v An Bord Pleanála [2023] IEHC 157, §59.
474 §§614 – 616, 651 et seq.
475 EIA Directive Recital 27.
476 Save Cork City Community Association CLG v. An Bord Pleanála [2022] IESC 52.
477 [2022] IESC 30 ([2022] 2 I.L.R.M. 417).
478 §§653 & 654.
479 [2021] IEHC 312, §11.

5 - BATS – EIA SCREENING[480]

Bats – The Facts & Comment thereon

286. Simplifying slightly, the Site is a 3.3 hectare and clearly brownfield Site.[481] Ironborn's expert's reference to the "*highly disturbed state of the site*"[482] is readily comprehensible, as is the description of it as predominantly bare disturbed ground which has been heavily anthropogenically influenced.[483] Indeed, it served as a construction compound for earlier developments.[484] There is no suggestion that there are any bat roosts or significant bat commuting or foraging routes on the Site itself. There is, off-Site, a row of trees running along and just on the other side of the eastern boundary wall[485] of the Site, beyond which, to the east, there is a corridor of green area. The aerial photos make all this obvious even to a non-expert.

287. With its planning application, Ironborn submitted an expert "Bat and Bird Technical Note". No doubt it is my ignorance, but I am often unclear what exactly is intended, in the specific context of planning practice, by an expert entitling his/her document submitted to the Board as a "Technical Note" as opposed to a "Report". I do have a very general, though clear, impression that it is intended as a generally a less exacting and comprehensive document than a report and to be perhaps more likely to be based on a desktop study than on a site visit. There is nothing necessarily wrong with a desktop study and for certain purposes they suffice. But whether or not my impression is correct, and whatever the title of the document, a document produced by an expert for submission to any tribunal must always, as a matter of basic good practice, make its method clear and explicit. This must include, where the question is relevant, whether it is based merely on a desktop study or is based on Site visitation and it must provide appropriate detail in those regards. More generally, it must make any limitations of the study on which it is based clear. Had that been done in this case it would have saved at least some inquiry, doubt, time and argument at trial. What is clear from the Bat and Bird Technical Note is that no formal dedicated bat surveys were done.[486]

288. The same experts also prepared Ironborn's AA Screening Report. It does refer to a "desktop study", though not in terms explicitly exclusive of having also visited the Site. But surprisingly, that Report does not state either whether they visited the Site. The EIA Screening was done by different experts and so sheds no light on whether the bat experts paid a Site visit.

480 Ground 13 – §58 to §62 of E (Part 2).
481 Save the open green area at the south on which no substantial growth beyond grass is apparent. See Bat and Bird Technical Note Figure 1: Location of the study area in the context of the immediate surrounding environment.
482 Bat and Bird Technical Note p2.
483 AA Screening Report.
484 Ironborn Planning Report p61.
485 The existence of the wall is noted in Ironborn's Arboricultural Assessment Report.
486 See also §12.8.4 of the Inspector's report.

289. Consistent with my understanding of the typically narrower and specific scope of a technical note, the Bat and Bird Technical Note in this case described itself as *"prepared to address the potential effects on local bird and bat populations of the heights and materials of the proposed buildings".* It is, explicitly, a "*Bat and Bird Technical Note to address Building Height Guidelines"*. It records that *"The potential effects of the heights and materials of the proposed buildings on local bird and bat populations have been assessed, in particular with regards to collision risk and disruption of commuting routes."* So, it addresses only the possible effects on bats of the "operational" phase of the Proposed Development, as opposed to its "construction" phase.

290. Skipping to its conclusion, the Technical Note states that *"The effect of the building heights and materials proposed has been assessed with regard to their potential effect on local bat and bird populations. It has been concluded that the building design and materials used will minimise the potential collision risk for bats and birds and that, given the low suitability of the habitat on the site,* (in)[487] *already densely built residential surroundings, the proposed development is not expected to cause any significant effect on these species at a local scale or any other geographic scale."*

291. Informing that conclusion, the Bat and Bird Technical Note states that, although bat surveys were not done, the Site is not considered to be particularly sensitive for bats. Its highly disturbed state, with very limited treeline habitat, is very unlikely to support any significant bat populations. It is unlikely to be part of any bat important commuting route. Furthermore, the surrounding environment comprises generally densely-built residential land. The removal of the limited available foraging/commuting habitat on Site does not represent a significant negative impact on any local bat populations.

292. The Inspector's EIA Screening Determination[488] asked *"Could any protected, important or sensitive species of flora or fauna which use areas on or around the site, for example: for breeding, nesting, foraging, resting, over-wintering, or migration, be affected by the project?"* He replied: "*No such uses on the site and no impacts on such species are anticipated*." The Inspector, who did inspect the Site, noted[489] the absence of a bat survey and that observers had both pointed that out and expressed concern as to the impact of the Proposed Development on the trees to the east of the Site. Explicitly aware of this absence of a survey, he observed as to bats:

> *"…. I am satisfied that the site itself has very little potential to accommodate bat roosting, or bat foraging, given the brownfield nature of the site, with very limited biodiversity value, and with very limited treelines. In relation to the treeline to the east of the site, this does have has the potential to support foraging, in my view, although this has not been established. There is no detailed discussion of this treeline's potential for same in the Bat and Bird Technical Note. However I do note that this treeline is to be retained as part of this application and there is a*

487 Word "in" omitted but the sense is clear.
488 Inspector's report p137 et seq at p143.
489 §12.8.1 & 4.

setback of at least 8m from the eastern site boundary. The open nature of the space to the east of the tree line remains unaffected. I note also that the majority of the site is zoned for residential development and that there is an extant development on this site[490] *… and of*[491] *a development of scale on this site has been previously accepted and subsequently acceptance*[492] *of any potential disturbance to bats has been established, and in any event it is not considered significant. I am not of the view that installation of the pumping station and foul storage tank will have an impact on bats given the tank is located underground and there is only very limited above ground infrastructure."*[493]

Bats - Fernleigh Pleadings & Submissions

293. Fernleigh pleads and submits that the Board breached **Article 299B(2)(b)(ii)(I) PDR 2001** and/or **Article 4(4) and Annex IIA §3(b) of the EIA Directive**, as it was not open to the Board to exclude in EIA Screening the possibility of significant effects on the environment, in the absence of any survey information in relation to bats such that the basis of assessment is unclear. It says the Inspector had no objective information on which to base his finding, contrary to the requirement of Barr J. in **Baile Eamoin**[494] that findings be based on cogent evidence. Notably, it says, the conclusion of no significant effect related only to the potential of collision and not to the impacts from loss of roosting, foraging or commuting.

294. Fernleigh (tactically wisely given the uphill struggle it generally portends) does not plead irrationality in terms. But in the end, that is what its plea amounts to. It pleads that the Board "*could not have concluded*" that no EIAR was required in circumstances where "*no survey information*" had been submitted by Ironborn and the Board "*had no information upon which it could have*" concluded that "*no impacts on such species are anticipated".*

295. Fernleigh cites **Annex IIA §3(b)** ,[495] which requires of the developer *"A description of any likely significant effects, to the extent of the information available on such effects, of the project on the environment resulting from: (b) the use of natural resources, in particular … biodiversity"* as requiring adequate scientific surveys of relevant species. So too, Articles 4 and/or 11 of the EIA Directive. Fernleigh cites **Waltham Abbey**[496] and **Jennings**[497] as emphasising that all significant effects must be taken into account prior to the exclusion of EIA. Fernleigh relies on the approach

490 D16A/0511 for 243 apartment and duplexes ranging in height from 3 to 6 storeys.
491 Sic in Inspector's report.
492 Ditto.
493 §12.8.5.
494 Baile Eamoin Teoranta v An Bord Pleanála [2020] IEHC 642, §34 et seq.
495 Information to be Provided by the Developer.
496 Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 312, §§48-51.
497 [2023] IEHC 14, §666 et seq.

taken in **Shadowmill**[498] as to bats, species strictly protected by Article 12 of the Habitats Directive. Fernleigh cites Shadowmill as follows:

> *"121. The main point arising from the foregoing is that a decision-maker, even one having no competence under the Habitats Directive in strict protection of species, must in conducting an EIA have regard to the nature, extent and requirements of strict protection of species under the Habitats Directive in considering for EIA purposes, the question of significant effect on the environment … the scope of what may be considered a significant effect for EIA purposes given the view taken in **Namur Est** that any effect prohibited by Article 12 is, for EIA purposes, likely significant by its very nature."*
>
> *"180. Thus interpreting the Bat Report, and given the requirement to apply the precautionary principle (found inter alia in the **Polish Case C-526/16**) – so that the risk of significant effect to the environment exists when it cannot be objectively excluded – it does not seem to me that there was an objective basis on the papers before the Inspector and the Board on which to conclude by way of Preliminary Examination that there was no real likelihood of significant effect by reason of destruction of bat roosts in Stone Villa. The Impugned Permission is defective in this regard and will be quashed on that account as, to adopt the wording of Shadowmill's plea, wrong in law and incompatible with the EIA Directive, by reason of a failure to properly assess whether there is any real likelihood of significant impacts on bats entitled to strict protection."*

296. Fernleigh says the same applies here as the Board had no information as to bat commuting, foraging or roosting and hence no basis to objectively exclude the risk of significant effect on bats.

Bats – Board Pleadings & Submissions

297. The Board says Fernleigh's is essentially a merits-based challenge to the EIA Screening based on Fernleigh's non-expert, factual[499] allegations as to the alleged inadequacy of the information before the Board as to bats. The adequacy of information for EIA purposes is primarily a matter for the discretion of the Board[500] and it cites English authority [501] for the proposition that the court should allow a substantial or enhanced margin of appreciation to judgments by expert statutory regulators based upon scientific, technical or predictive assessments. The Board says Fernleigh has

498 Shadowmill v An Bord Pleanála [2023] IEHC 157, §§121 & 180.
499 The Board cites Ballyboden Tidy Towns Group v An Bord Pleanála & Ors [2021] IEHC 648 §16 in which, it says, Humphreys J. characterised a similar ground as comprising "certain essentially factual allegations that inadequate surveys were conducted. Those statements do not amount to a legal ground. A legal ground has to postulate a basis for an entitlement to relief by reference to some identified legal provision or doctrine and an explanation as to how that gives rise to an entitlement to the remedy sought."
500 Citing Cork Harbour Alliance For A Safe Environment v An Bord Pleanála [2021] IEHC 203, §479; M28 Steering Group v An Bord Pleanála [2019] IEHC 929, §76, §177; Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146, §232, §237, and §238).
501 R(Camilla Swire) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 1298 (Admin) §61; R(Goesa) Limited v Eastleigh Borough Council v Southampton International Airport Limited [2022] EWHC 1221 (Admin) §102; (R (Mott) v Environment Agency [2016] 1 WLR 4338, §30; R (Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214, [2020] P.T.S.R. 1446; §§176, 177.

failed to establish that the Board had before it no relevant material which would support its decision and says that there was no evidence before the Board contradicting the Technical Note as to effects on bats. Fernleigh, the Board says, has failed to point to any legal requirement for bat surveys – merely asserting without evidence or expert evidence that the materials before the Board were inadequate. The Board replies that as a reasonable person with sufficient expertise, it was entitled to rely on the materials before it.[502] The Board cites **Reid** by analogy:

> *"… if the issue is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process that raises such a doubt, if doubt wouldn't otherwise arise. Failure to do so maybe doesn't preclude being allowed to go through the motions of a challenge later but it renders the challenge empty, and devoid of any prospect of success, because the issue in that challenge would be whether there was doubt by reference to the material before the decision-maker, not by reference to new matters the applicant thought of after the event."* [503]

298. The Board also objects to Fernleigh's raising an issue as to bats which it could have but did not raise before the Board. It cites **Goesa**,[504] as to an "after-the-event" challenge alleging the inadequacy of EIA, to the effect that "*The absence of any contemporaneous complaint about the adequacy of the ES is itself an indication of the unrealistic and unpersuasive nature of the subsequent legal challenge…".* The Board cites also one of the **Ballyboden TTG** cases[505] as a case in which,

> *"The applicant now, armed with the wisdom of hindsight, claims that some developments were not considered without having put those to the board at the relevant time. That unfortunately is an exercise in gaslighting the board, in the sense of manipulatively moving the goalposts by criticising somebody for the outcome of their having done something without having given that person a fair opportunity to do it correctly by making one's point at the time that that thing was due to be done. The sort of retrospective criticism that is now being engaged in is always possible. The applicant has not established any effective challenge to the board's methodology and certainly did not do so at the relevant time and I do not see how it can legitimately succeed on this point now in those circumstances. While there are exceptions to the principle that you have to first put your point*[506] *… they don't apply here."*

299. The Board disputes Fernleigh's reliance on the High Court judgments in **Waltham Abbey**, **Jennings** and **Shadowmill** as misplaced in that they are distinguishable on their facts. In Waltham Abbey there was no "*particular analysis of the flora and fauna on the site"*[507] and the impact of that proposed development on bats was "*not dealt with in any great detail, albeit that the inspector …*

502 Reid v An Bord Pleanála (No.2) [2021] IEHC 362, §45.
503 Reid v An Bord Pleanála (No.1) [2021] IEHC 230, §19.
504 Goesa Limited v Eastleigh Borough Council v Southampton International Airport Limited [2022] EWHC 1221 (Admin) [2022] PTSR 1473. §129.
505 Ballyboden Tidy Towns Group v An Bord Pleanála & South Dublin County Council [2021] IEHC 648, §15.
506 Citing Reid v An Bord Pleanála (No. 1) [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12 April, 2021).
507 [2021] IEHC 312, §4.

did refer somewhat in passing to the view that "[t]he site does not generally provide suitable habitats for wildlife or species of conservation interest."[508] In contrast here the Board cites the Technical Note as to bats and the Inspector's express consideration of potential impacts on bats. The Board contrasts what it calls this Inspector's "considered analysis" as to bats with that in Shadowmill[509] and says that the facts in Jennings are distinguishable.[510]

Bats - Discussion & Decision

300. As to raising the bats point for the first time in judicial review and not before the Board, I am unconvinced that the **Goesa** decision is of great significance for Irish law on this issue. Discussion in Irish law of the contrasting "gaslighting" and "homework" principles is well-advanced. Even in its own terms, the cited observation in Goesa is hardly expressive of a binding legal principle or requirement. While Holgate J found the "after-the-event" nature of the challenge "troubling" and devoted some attention to the relevant law, [511] his observations were explicitly obiter.[512] Most recently, in **NGGSPS**[513] Humphreys J, though agreeing that the distinction between the "gaslighting" and "homework" principles could be difficult to apply in a given case, said:

> *"The basic inflection point in relation to situations of this kind is whether the point is one that has to be considered by the decision-maker autonomously*[514] *or whether it only has to be considered only if and to the extent that it is raised in the process. Normally a point only has to be considered autonomously if it is an issue that the legal framework (whether constitutional, domestic, European or international and legally-applicable) requires the decision-maker to consider, or if it is an issue that a reasonable expert decision-maker would see as arising on the face of the materials (including what is evident on the ground in any case where the decision-maker is required to access, or actually accesses, any given location or physical item)."*

301. More fundamentally, the Board is not being gaslit here. Fernleigh does not in these proceedings seek to adduce new evidence on the bat issue and the Board clearly considered the bat issue in making its decision. Not only that but the Inspector had noted[515] that observers had

508 §48.
509 Citing §22 which reads: "The Inspector does not refer in her Preliminary Examination to the presence of bats and potential bat roosts on Site – despite the fact that all bat species are protected by the Habitats Directive. Other than noting that the issue of effect on species was raised by objectors, the inspector's entire and laconic treatment of bats appears under her "Assessment – "Other Issues" and reads as follows: "Bats: Three species were identified during the survey work which forage in the site. Mitigation measures are proposed including roost boxes and light survey to minimise disturbance and I consider this to be adequately addressed."
510 In Jennings, 4 trees for removal had bat roost potential, as did a building on site. Loss of treelines and foraging space on the site was to result in loss of ecological connectivity and foraging habitat for bats.
511 §129 et seq.
512 He states at §136 "However, because this aspect of the case was not the subject of full argument, I do not base my rejection of ground 3 upon the fact that it involves matters not raised by participants in the consultation process. But these issues may need to be considered in another case."
513 North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241 (High Court (Judicial Review), Humphreys J, Ireland – High Court, 15 May 2023), §30.
514 In which case it can be raised for the first time in judicial review.
515 §12.8.1 & 4.

expressed concern as to the absence of a bat survey. Accordingly, the Board is not taken by surprise or unfairly in these proceedings. This is far from a case of manipulatively moving the goalposts. Fernleigh merely argues that, on the evidence before the Board and on an issue which the Board in fact considered and decided, such evidence did not suffice in law for its decision. To paraphrase **NGGSPS**, rather than framing effect on bats as an issue a reasonable expert decision-maker would see as arising on the face of the materials before it but failed to decide, Fernleigh argues that it is an issue which the Board did see as arising but did not decide in accordance with law in that that those materials did not suffice in law for its decision.

302. **Baile Eamoin**[516] is clear, if authority is needed, that findings must be based on "cogent" evidence. The meaning of cogency – though as to reasons not evidence - was considered in a **Ballyboden** case.[517] The concept was described as a "*useful counterweight, not just to box ticking and name-checking, but also to the anodyne*" and as one of which the *"Perhaps the most useful synonym is "persuasive" in the sense of capable of persuading."* In considering the concept of cogency as applied to evidence or materials capable of grounding a decision however, it is necessary also to bear in mind that in judicial review of expert decisions the framework of analysis of adequacy of evidence is that of irrationality. I need not here revisit the complexities of the law of irrationality and the status of the **O'Keeffe**[518] test in planning and environmental law.[519] Even on the O'Keeffe test, and though its threshold is "*extremely high and is almost never met in practice*" - **St. Audeon's**[520] **-** what is required to uphold an impugned decision is not merely "*any material*" but *"any material … capable of supporting"* it. It is also useful to note **Holohan**[521] to the effect that the court can't "*quash for unreasonableness"* merely on a basis that it considers that "*the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong)".*

303. The cogency of evidence is a fact-sensitive issue. The facts of Shadowmill were very different to those in the present case. In **Shadowmill**,[522] bats were found on site and "*numerous potential bat roosting features including cracks in the walls and window frames*" were found on a building on which very considerable works were intended and the interior of which had not been inspected for bats. No possibility of destruction of bat roosts is disclosed on the evidence or asserted by Fernleigh here. The analysis in Shadowmill of the Habitats Directive (Article 12) prohibition on disturbance of protected species need not be repeated here. Suffice it to note that not every disturbance colloquially so-called will breach the prohibition, that a harm criterion applies and that disturbance may properly be considered in terms of effect on "*local populations*" of the species concerned.

516 Baile Eamoin Teoranta v An Bord Pleanála [2020] IEHC 642, §34 et seq.
517 Ballyboden TTG v An Bord Pleanála & Shannon Homes [2022] IEHC 7, §272.
518 O'Keeffe v An Bord Pleanála [1993] 1 I.R. 39.
519 Recently considered, for example, in Jennings §15 et seq.
520 Board of Management of St. Audeon's National School v An Bord Pleanála [2021] IEHC 453 (Simons J).
521 Holohan v An Bord Pleanála [2017] IEHC 268.
522 Shadowmill v ABP & Lilacstone [2023] IEHC 157, §136.

304. There is no rule that a formal bat survey is required in every planning application. In some, a survey would be obviously pointless. In others, it will be inevitably required. There is inevitably a cohort of applications, lying between those two poles, in which the answer will be less obvious and will require the exercise of expert judgment by the planning decision-maker. Given the issue is risk of significant effect, it is noteworthy that the concept of significance was addressed in **MRRA**[523] and in **Shadowmill.**[524] In the latter it was noted that **Tromans**[525] asserts that "*A key principle so far as the courts are concerned is that significance is not a hard-edged concept and the assessment of what is significant requires an exercise of judgement. …….. they will, therefore, not lightly interfere with the decision reached by the planning authority".* However, such judgments must always be informed by both the precautionary principle and the requirement that protection of Article 12 species is strict. That said, depending on the particular facts and circumstances, a greater or lesser intensity of inquiry will be required into the issue of risk to bats. Often, perhaps very often, that will require a formal bat survey (and indeed such surveys come in greater and lesser degrees of inquiry) but there is no absolute requirement to that effect.

305. It does not appear to me that, on the particular facts of this case, it can be said that the material before the Board, on which it relied, was incapable of objectively supporting the conclusion it reached, in EIA Screening, on the bats issue. In my view, the Inspector's analysis at §12.5.5 of his report, as cited above – which was preceded by his explicit appreciation that there was no formal bat survey and of the limitations of the Technical Note as to the foraging potential of the off-Site treeline – cannot be impeached as irrational or as lacking objective basis. Noting that the Inspector inspected the Site, and though I assume he is not formally a bat expert, he can be taken of his general expertise as a planning inspector and as to an issue which arises time and again in planning applications, to have been able to consider the bats issue in light of that Technical Note and his Site visit. Having, as I have said, specifically noted the deficiency of the Technical Note as to the foraging potential of the off-Site treeline, he considered himself able to form a view on the issue himself. I have no reason to doubt his ability in that regard. On the facts of this case, I take this view whether or not the authors of the Technical Note paid a Site visit.

306. For completeness I should add that the parties did not cite the most recent instalment of the **Waltham Abbey** litigation,[526] in which questions as to adequacy of consideration of bats in EIA Screening were referred to the CJEU. In that case, the site is close by an area of the river Lee in Ballincollig, Cork which is, it is asserted, specifically a habitat for rare and endangered species of bats and there is evidence of possible bat usage of the site and allegedly significant tree-felling (possibly involving bat roosts) on site is intended. Of course, these issues may be disputed and my purpose here is merely to note assertions recorded in the latest judgment in the case. However, they suffice to make it clear that the parties here were correct in not citing it, as the facts of that case seem very different to those in this case.

523 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022).
524 Shadowmill v ABP & Lilacstone [2023] IEHC 157, §55.
525 Environmental Impact Assessment, 2nd Edition §3.141.
526 Waltham Abbey Residents Association v An Bord Pleanála [2023] IEHC 146.

307. Given my findings above, I do not find it necessary to determine whether the authors of the Technical Note paid a Site visit – though I see the force in Fernleigh's submission that had they done so they would surely have said so.

308. More generally, one might suggest that the fact that an inadequate bat survey was fatal to the permission in Shadowmill and a finding in favour of the Impugned Permission here would combine to advantage not doing a bat survey at all for fear of what one might find. Such a conclusion would, in my view and in most circumstances, represent a very high-risk approach by a planning applicant, not least in light of the precautionary principle and the principle of objectivity which the Board must apply to such questions. The Bat Guidelines[527] provide fair warning to developers in that regard - though doubtless as to most, responsible, developers, no such warning is needed.

309. As a further general observation, I suggest that not paying a site visit at all, even if determining that formal ecological surveys are unnecessary, is likely to be a high-risk course. Though I do not suggest it was so in this case, the Board and the Courts must be alert to any possibility of an approach of not, by way of a survey, turning over stones for fear of what might be found under them and have to be put before the Board when, otherwise, it might not reach the Board, such that, in turn, arguments could be made in judicial review that the Board's decision was correct on the evidence which had been in fact before it.

310. But in this case and on these facts, it does not appear to me that Fernleigh, in challenging the Impugned Permission as to bats, has discharged the onus of demonstrating error. I therefore reject this ground of challenge.

527 Waltham Abbey Residents Association v An Bord Pleanála [2023] IEHC 146 §21 & 22 – the Bat Mitigation Guidelines for Ireland – v2, Irish Wildlife Manuals No. 134 (2022, NPWS) §5.1 states "The importance of a thorough site survey prior to considering development cannot be overemphasised. … Without a sound survey that includes an assessment of all available evidence, it is difficult to predict the likely impact of development. From the developer's perspective, the primary objective of a survey for protected species is to ensure that any development can proceed without breaking the law. The consequences of not carrying out a survey on sites which subsequently prove to have a significant protected species interest can be severe and may include delays, additional costs and, in exceptional cases, the cancellation or curtailment of projects."

6 - S.37 PDA 2000 – STRATEGIC NATURE OF PROPOSED DEVELOPMENT[528]

311. In the end, the resolution of this issue against certiorari is reasonably simple given concessions wisely made by Fernleigh. However, as the underlying issue was argued and is difficult, it merits some attention.

Introduction & Caselaw on the meaning of "Strategic"

312. As stated above, s.9(6) of the 2016 Act and s.37(2)(b) PDA 2000 combine to allow the Board to grant an SHD permission in material contravention of the Development Plan, inter alia, where "*the proposed development is of strategic or national importance*". As applicable to SHDs, every one of which is in a statutory sense strategic (the clue is in the name) within the meaning of the 2016 Act, the concept of "*strategic or national importance"* in s.37(2)(b)(i) PDA 2000 has proved difficult to both interpret and apply. This is despite the fact that the 2016 and 2000 Acts are, for this purpose, to be construed together[529] such that one would expect the word "strategic" to ordinarily bear the same meaning in both. But a view that all SHDs are ipso facto of "*strategic or national importance"* in the sense contemplated in s.37(2)(b)(i) PDA 2000 would essentially give carte blanche to material contravention permissions for all SHDs when, on an interpretation of the statutory scheme as a whole, that is clearly not intended. On the other hand, it is difficult to articulate a sense in which an SHD, ex hypothesi strategic within the meaning of the 2016 Act, can be considered, as it were, "super-strategic" so as to fall within s.37(2)(b)(i) PDA 2000. Even the use of the, non-statutory, word "super-strategic" suggests an unwarrantedly restrictive interpretation of s.37(2)(b)(i) PDA 2000 and an interpretation, perhaps paradoxically and counterproductively, more exacting in the case of SHDs than it would be the case of material contravention by an "ordinary" development other than an SHD. Though the paradox may be explicable in that what is at issue in SHD applications is material contravention in the context of an atypical process which skips the usual planning application first to the Planning Authority which is the guardian of its Development Plan and goes directly to the Board. But adopting a less dramatic concept, such as "more strategic", merely emphasises the fineness of any distinction to the point where it may lose real meaning. Reliance on the word "or" as suggesting that strategic importance may be in some degree less than national importance, tends to the same effect. And it seems unlikely to have been the subjective intention of the Oireachtas to make material contravention permissions more difficult to obtain (at least on the "*strategic or national importance"* basis) in the case of SHDs than in the case of non-SHD developments. Statutory interpretation is an exercise in objectively discerning the intent of the Oireachtas and in doing so from the words it has chosen to use. That is a particularly difficult task in this case – but it has already been decided.

528 Ground 10 – §49 to §51 of E (Part 2).
529 S.1(2)(a) of the 2016 Act.

313. This interpretative difficulty was first addressed in **Clonres/Conway #2** - the reasoning in which was revisited and applied in **Jennings**.[530] Generic and simple recitation of the SHD status of a proposed development for the purposes of satisfaction of the s.37(2)(b) PDA 2000 criterion of "*strategic or national importance*" was deemed insufficient in **Clonres/Conway #2** and a very similar formula fell short in **Jennings**. Since the hearing of these proceedings, Humphreys J has, in **Clane**,[531] reiterated the law in this regard – stating that to satisfy the criterion *"The particular project has to be in some way pivotal. Not routine, run of the mill, replaceable, repeatable."* In referring to *"The particular project"* Humphreys J is clearly referring to a particular SHD as opposed to the normal run of SHDs.

314. For reasons explained in those decisions, and though the outcome is in some degree counterintuitive, it is clear that an SHD is not ipso facto of "*strategic or national importance"* for purposes of s.37(2)(b)(i) PDA 2000*.* Put simply, had the Oireachtas intended that material contravention permissions for SHDs would be automatically valid as being of *strategic and national importance,* it could very easily have said so and did not and the language it did use is incompatible with such a conclusion. That said, and not least given the necessity, as explained in those cases, of giving different meanings to the word "strategic" as between the 2016 Act and s.37(2)(b)(i) PDA 2000, it remains extremely difficult to articulate what additional quality or degree of importance is needed to elevate an SHD to "*strategic or national importance"* within the meaning of s.37(2)(b)(i) PDA 2000. The Oireachtas gave the Board no standard by reference to which to apply its planning judgment to the issue.

<u>The Facts, Discussion & Decision</u>

315. As has been seen, the Board's decision invoked the strategic and national importance of the Proposed Development within the meaning of **s.37(2)(b)(i) PDA 2000** for purposes of justifying its grant of the Impugned Permission despite the material contravention as to height. Fernleigh asserts that the Board was obliged, but failed, to identify why the Proposed Development was of strategic and national importance in that sense.

316. Ironborn's Material Contravention Statement asserted that as the Proposed Development meets *"the legislative definition of strategic housing development. It can therefore be deemed of strategic importance ..."*[532] "*By definition, "strategic housing development" is of "strategic … importance"".*[533] As the foregoing account of the law demonstrates, that assertion is incorrect. It is precisely the reasoning identified in **Clonres/Conway #2** as flawed. Ironborn assert that *"The significant shortfall in housing output to address current and projected demand is a national*

530 Jennings v ABP [2023] IEHC 14, §478 et seq.
531 Clane Community Council v An Bord Pleanála [2023] IEHC 467 (High Court (Judicial Review), Humphreys J, 28 July 2023).
532 P6.
533 P2.

problem, with lack of housing in Metropolitan Dublin, the Greater Dublin Area and elsewhere having social and economic ramifications for sustainable national growth. We would therefore submit that the proposed development is of strategic and national importance." This is an articulation of nothing beyond the reasoning and objective underlying the 2016 Act as a response to the housing crisis and so is flawed for the same reason. The treatment which follows in the Material Contravention Statement does not seem to me to add value in this regard. I should say that I have appreciable sympathy for Ironborn in this respect given the difficulty in applying the statutory criterion, for the reasons set out above.

317. The Inspector and the Board agreed with Ironborn, stating that the,

> *"… application has been lodged under the Strategic Housing legislation and the development is strategic in nature and relates to matters of national importance (the delivery of housing). The proposal represents the regeneration of an important site within Stepaside, and makes a contribution to the housing stock, of some 445 Build to Rent units, and therefore seeks to address a fundamental objective of the Housing Action Plan, and such addresses a matter of national importance, that of housing delivery."*[534]

318. The Board suggests that the reference to "*regeneration of an important site within Stepaside*" takes the case out of the generic reasoning deemed insufficient in the case. However important the Site is to Stepaside and however important to Stepaside is the regeneration of a brownfield site, and however strategic the Proposed Development is in the sense in which SHD is defined in the 2016 Act, I cannot see, and the Inspector does not explain, how that serves to elevate this Proposed Development on a 3.3 hectare site above the ordinary run of SHDs to the level of "*strategic and national importance*" required by s.37(2)(b)(i). If anything, the reference localises, as opposed to nationalises, the importance of the Proposed Development. What is strategic locally may well be merely tactical nationally. The remainder of the Inspector's reasoning merely articulates the rationale of the 2016 Act. Again, I express appreciable sympathy in this respect, this time for the Inspector and the Board, given the difficulty in applying the statutory criterion, for the reasons set out above.

534 Inspector's report §12.3.10.

319. However, in this case, the Board granted permission in material contravention of the Development Plan pursuant also to **ss.37(2)(b)(iii)**[535] and **(iv)**[536] - giving separate reasons accordingly. Fernleigh accepts that here, as in Jennings, there is no intermingling of reasons as between those the Board gave for purposes of s.37(2)(b)(i) as to strategic and national importance and those the Board gave for purposes of ss.37(2)(b)(iii) and (iv). I have found the Board's reliance on s.37(2)(b)(iii) as to the Height Guidelines invalid but Board's reliance on s.37(2)(b)(iv) as to a precedent planning decision in the area has not been challenged. I have addressed the law as to intermingling of reasons earlier in this judgment and the extent of the submissions made on this issue. As stated earlier, the Board urged discretionary refusal of relief and Fernleigh submitted merely that if I hold the Board's invocation of s.37(2)(b)(i) illegal, the appropriate form of relief is a "*matter for the Court*". In truth, Fernleigh all but conceded the point.

320. In those circumstances, it seems to me unnecessary to formally decide that the Board's reasons for purposes of s.37(2)(b)(i) as to strategic and national importance were inadequate (though I do express that view obiter). I need merely assume them inadequate and refuse certiorari on the grounds that,

- The reasons given are not intermingled with the Board's other reasons justifying material contravention and so the s.37(2)(b)(i) finding of the Board can be severed from the Impugned Permission and

535 "(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".
The reason given was as follows: "National Policy, Project Ireland 2040 National Planning Framework seeks to deliver on compact urban growth. It is set out that general restrictions on building heights should be replaced by performance criteria that seek to achieve well designed high quality outcomes in order to achieve targeted growth. The Project Ireland 2040 National Planning Framework also seeks to prioritise the provision of new homes at locations that can support sustainable development and seeks to increase densities in settlements, through a range of measures. In relation regional planning guidelines for the area, Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031 seeks to increase densities on appropriate sites within Dublin City and Suburbs.
In relation to section 28 Guidelines, the Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018 which state that inter alia that building heights must be generally increased in appropriate urban locations, subject to the criteria as set out in section 3.2 of the Guidelines. The proposal has been assessed against the criteria therein.
The Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of Housing, Planning and Local Government in December 2020 and the Guidelines for Sustainable Residential Developments in Urban Areas and the accompanying Urban Design Manual, A Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009, support increased densities in appropriate locations and the proposal has been assessed in relation to same. The proposal has also been assessed against the relevant criteria in the Urban Design Manual, associated with the Guidelines for Sustainable Residential Developments in Urban Areas and the accompanying Urban Design Manual, A Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009."
536 "(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." The reason given was "The Board has previously granted permission for a development of 200 number units with heights of up to seven storeys at Lisieux Hall (a protected structure), Murphystown Road, Leopardstown, Dublin 18 (An Bord Pleanála Reference Number ABP-307415-20) on a site located approximately 300 metres east of this application site. The Board considered the proposal materially contravened the Development Plan in relation to height. As such, there is precedent for a material contravention of the height parameters as set out in the Development Plan, and for a greater height than prevailing within the wider area." Fernleigh did not raise the issue "whether for purposes of S.37(2)(b)(iv) the single swallow of one nearby SHD planning approval can constitute the summer of a "pattern" of development or "permissions" (note the plural) granted in the area." Canvassed, obiter, in Jennings v ABP [2023] IEHC 14, §227.

- it is not apparent that the Board would not have regarded its remaining valid s.37(2)(b)(iv) finding insufficient to justify the material contravention in question but for its erroneous finding of the strategic nature of the Proposed Development.

321. Accordingly, I refuse relief on this ground.

7 - OTHER RELEVANT ENVIRONMENTAL ASSESSMENTS (ART 299B PDR 2001)[537]

Article 299B, the Pleadings, Facts and Context

322. For the purposes of EIA screening, and by **Article 299B(1)(b)(ii)(II)(C) PDR 2001**, Ironborn was required to submit, and the Board was required to satisfy itself that it had submitted, a statement,

> *"indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to"* EU legislation other than the EIA Directive *"have been taken into account."*

323. Fernleigh pleads that as Ironborn submitted no statement of the kind required by Article 299B as to the results of other environmental assessments, despite being specifically directed to do during pre-application consultation,[538] the Board was obliged by **Article 299B(2)(a) PDR 2001** and **s.8(3)(a) of the 2016 Act** to refuse to consider the planning application. In any event it could not have made a lawful EIA screening determination under Article 299C(1)(a)(iv), which requires that regard shall be had to the results of those other assessments, where available. Fernleigh says the required information – as to what results were taken into account and how, is absent from Ironborn's Environmental Report[539] and from the Board's Impugned Permission other than a passing reference to a Flood Risk Assessment that concluded that there was a low risk of flooding.

324. Article 299B PDR 2001 provides that where that statement is not provided by the planning applicant, the Board shall refuse, pursuant to **s.8(3)(a) of the Act of 2016,** to deal with the application. S.8(3)(a) provides that "*The Board may decide to refuse to deal with any application made to it under section 4(1) where it considers that the application for permission, .. is inadequate or incomplete, having regard in particular to the permission regulations .. or to any consultations held under section 6.*"

537 Ground 5 – §§26 to §30 of E (Part 2).
538 Notice of Pre-Application Consultation Opinion dated 16th November 2020 (ABP Ref. ABP-307684-20) as identified by the Inspector at §5.1.4 as requiring "The information referred to in article 299B (1)(b)(ii)(II) and article 299B(1)(c) of the Planning and Development Regulations 2001-2018 should be submitted as a standalone document".
539 At §14 of its Planning Report and Response to the Board's Opinion.

325. It is not disputed that, depending on circumstances, such results of other assessments could include such as Strategic Environmental Assessments of Development Plans,[540] Strategic Noise Mapping and Noise Action Plans,[541] Air Quality Assessments and Air Quality Management Plans,[542] Flood Risk Assessments[543] and assessments for the purposes of the Water Framework Directive.[544]

326. By Notice of Pre-Application Consultation Opinion dated 16th November 2020[545] ("the Consultation Opinion"), the Board required Ironborn to submit *"The information referred to in article 299B (1)(b)(ii)(II) and article 299B(1)(c) of the Planning and Development Regulations 2001-2018 should be submitted as a standalone document".*[546] Ironborn's Reply to the Consultation Opinion was incorporated in its Planning Report[547] submitted with its planning application. It referred the Board to §14 of the Planning Report as providing the information required to address Articles 299B (1)(b)(ii)(ll) and 299B(1)(c) PDR 2001.[548] This was not the standalone document requested but nothing turns on that as the Supreme Court has held in **Waltham Abbey**[549] that a standalone statement is not required.

327. As to the substance of the requirement, §14 of the Planning Report relates to EIA Screening.[550] There is a statement that *"Historical flood information was reviewed and confirmed that there has been no recorded flooding at the site or immediate surrounding area. The proposed residential development is fully within Flood Zone C. This indicates a low risk of fluvial, pluvial, groundwater and coastal flooding …"*[551] and reference is made to a Flood Risk Assessment.[552] There is also reference to the Appropriate Assessment Screening Report – prepared for purposes of the Habitats Directive. §14 of the Planning Report also refers to numerous expert reports submitted with the planning application which reports could conceivably have referred to assessments pursuant to EU legislation, but I have not been referred to any relevant content therein.

540 Pursuant to the SEA Directive (2001/42/EC).
541 Pursuant to the Environmental Noise Directive (2002/49/EC).
542 Pursuant to the Clean Air for Europe Directive (Directive 2008/50/EC).
543 For purposes of the EU 'Floods' Directive (2007/60/EC) via the Planning System and Flood Risk Management Guidelines for Planning Authorities 2009.
544 (2000/60/EC).
545 As identified by the Inspector at §5.
546 The requirement of a standalone document is interesting as having preceded all the judicial decisions as to that requirement, culminating in the Waltham Abbey decision of the Supreme Court to the effect that art.299B(1)(b)(ii)(II)(C) does not require a distinct and identifiable statement of this kind to be supplied by the developer. It suffices that An Bord Pleanála has the information to hand and adequately considers same when making its decision. See Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 597 (10 May 2021), Pembroke Road Association v An Bord Pleanála [2021] IEHC 403 (16 June 2021) and Waltham Abbey Residents Association v An Bord Pleanála [2022] IESC 30 ([2022] 2 I.L.R.M. 417).
547 Chapter 7 is entitled "Applicants Response To An Bord Pleanála Opinion".
548 §7.3.14.
549 Waltham Abbey Residents Association v ABP [2022] IESC 30.
550 It also addresses AA Screening.
551 P100.
552 Presumably site-specific.

328. However, the Inspector[553] cites Section 299B (1)(b)(ii)(II)(C) and the following as submitted with the planning application and as considered in the EIA Screening – as in fact they are:

- A Sustainability Report pursuant to the EU Energy Performance of Buildings Directive.[554]
- A Construction & Demolition Waste Management Plan, having regard to the EC Waste Directive Regulations 2011, European Union (Household Food Waste and Bio-waste) Regulation 2015, European Communities (Transfrontier Shipment of Waste), Regulations 1994 and the European Union (Properties of Waste which Render it Hazardous) Regulations 2015.
- A Flood Risk Assessment, in response to the EU Floods Directive.[555]
- An AA Screening Report, in support of the Habitats Directive (92/43/EEC) and the Birds Directive (2009/147/EC), which also addresses requirements arising from the Water Framework Directive[556] and the Urban Wastewater Treatment Directive.[557]
- The Strategic Environmental Assessment of the Development Plan for purposes of the SEA Directive.[558]

In this specific regard, the Inspector observes that "*The EIA screening report ...has under the relevant themed headings considered the implications and interactions between these assessments and the proposed development, and as outlined in the report states that the development would not be likely to have significant effects on the environment. I am satisfied that all other relevant assessments have been identified for the purposes of screening out EIAR*."[559] And he states, *"I am overall satisfied that the information required under Section 299B(1)(b)(ii)(II) of the Planning and Development Regulations 2001 (as amended) have been submitted."*[560]

329. Unfortunately, and for reasons not explained, §14 of the Planning Report does not refer to Article 299B. Neither does it, by reference thereto, at least overtly and conveniently list or identify the available results of other relevant assessments of the effects on the environment carried out pursuant to EU legislation other than the EIA Directive. Whatever about legal obligation, such a collection would at very least be helpful and represent good practice. That said, I am happy that the Inspector has collected them and that he did so on foot of the information in fact contained in §14 of the Planning Report and that he explicitly recorded satisfaction with the information provided by Ironborn for purposes of Article 299B PDA 2001.

553 Inspector's Report §10.1.6.
554 Most recently Directive (EU) 2018/844 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency.
555 Directive 2007/60/EC on the assessment and management of flood risks.
556 Directive 2000/60/EC establishing a framework for Community action in the field of water policy.
557 Directive 91/271/EEC concerning urban waste-water treatment as amended.
558 Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. This is cited at p124 of the Inspector's report.
559 §10.1.7. – An EIAR is an Environmental Impact Assessment Report for the purposes of the EIA Directive. Is it prepared by the intending developer and is the primary, though far from the only, source of information informing EIA.
560 §10.1.10.

Waltham Abbey, Discussion & Decision

330. The High Court had produced differing judgment in **Waltham Abbey**[561] and **Pembroke Road**[562] as to the formal requirements of Article 299B. In **Waltham Abbey**[563] the High Court held that compliance with this obligation had "four clear elements":

(i). a distinct identifiable document constituting a statement of all the relevant matters for the purposes of regulation 299B(1)(b)(ii)(II)(C);

(ii). identification of the relevant assessments that are available;

(iii). identification of the results of those assessments; and

(iv). identification of how those results have been taken into account."

In **Pembroke Road**[564] the High Court disagreed as to the requirement of a distinct identifiable document.

331. In an appeal in both cases, decided together, the Supreme Court held[565] that a distinct identifiable statement was not required. It considered the scheme of Article 299B. Importantly, Art 299B applies only if no pre-application EIA screening determination was made[566] and no EIAR is enclosed with the planning application. Importantly also, while public participation is central to EIA, it is not required in EIA Preliminary Examination or EIA Screening. That makes sense. The whole point of screening is to determine if a process – AA or EIA – characterised by, inter alia, public participation, is warranted.

332. Notably, if EIA is screened out, no right to public participation will have arisen. If EIA is screened in, public participation will be informed by the prescribed content of the EIAR which will necessarily ensue. This aspect of the statutory scheme led Hogan J in the Supreme Court to observe that,

> *"the requirement regarding the statement is addressed to the Board and not to or for the benefit of the general public. The public have no role in this pre-screening process since the dialogue here at this stage[567] is exclusively between the developer and the Board. ……*
>
> *"……. These provisions are instead directed towards the Board. They seek to ensure … in the interests of good administration that the Board has all the relevant information readily at its disposal. A statement of this kind would doubtless facilitate the Board[568] in its overall task by*

561 Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 597 (dated 10 May 2021).
562 Pembroke Road Association v An Bord Pleanála [2021] IEHC 403 (dated 16 June 2021).
563 Waltham Abbey Residents Association v ABP [2021] IEHC 312, §23.
564 Pembroke Road Association v An Bord Pleanála [2021] IEHC 403 (dated 16 June 2021).
565 Waltham Abbey Residents Association v ABP [2022] IESC 30 ([2022] 2 I.L.R.M. 417).
566 S.7 of the Act of 2016.
567 Emphasis in original.
568 As I have said above, whatever about legal obligation, such a collection would at very least be helpful and represent good practice.

> *providing a ready means of ascertaining the degree of compliance with these requirements of EU environmental law. I stress again, however, that these requirements are in the interests of good and simplified administration.*
>
> *The failure to supply such a statement was not, of course, in any sense a real impediment to the discharge by the Board of its statutory functions, at least if the present cases were anything to go by. The Board was perfectly capable of interpreting the data and the analysis furnished by the developers and it is well used to navigating complex environmental and planning documents. …"*[569]

Accordingly, the adequacy of the information to be provided by the applicant is not considered by reference to the requirements of public participation in the EIA process as, at this stage, no such requirements have arisen.

333. The judgment of Hogan J bears careful reading. He first interprets Article 299B discretely and literally – which approach he found to favour the view that a distinct identifiable Article 299B statement of the results of other assessments was required.[570] However, on interpreting Article 299B as text in context - as one must - and the context being that of the PDR 2001, he forms the alternative conclusion.

334. As to the requirement that the Board be "satisfied" that the requisite information has been provided, Hogan J observed:

> *"It is long established that the use of the statutory formula whereby a decision maker is required to be "satisfied" of a certain state of affairs connotes a requirement that the donee of that statutory power must discharge those powers in a manner which is bona fide, factually sustainable and not unreasonable*[571]*…. To this one might add that it is necessarily implicit in all of this that the decision-maker has correctly defined the ambit of the statutory power."*[572]

335. I read Hogan J in this observation, and more generally in his dismissal of the appeal in Pembroke, as essentially agreeing with the formulation he attributes to Owens J in the High Court in Pembroke. He describes Owens J as considering that Art.299B(1)(b)(ii)(II)(C) PDR 2001 "*requires simply some evaluative material to be included in the planning application which the Board can then assess and consider at its own accord - and with a due margin of appreciation - to determine whether the article has been complied with*"[573] and as holding *"whether an applicant has provided material that complies with the requirement …. is a question best left to the discretion of the Board".* The

569 §37 et seq.
570 Reasoning to a conclusion in §31.
571 See, e.g., State (Lynch) v Cooney [1982] I.R. 337, §361 and Kiberd v Hamilton [1992] 2 I.R. 257.
572 Hogan J §28.
573 Hogan J §7.

Court was precluded from interfering unless exceptional circumstances demonstrated clearly that the substance of what is required was not provided by an applicant or that the Board's acceptance of the adequacy of the material was irrational or unreasonable.[574]

336. While I entirely agree that that Ironborn should have helped the Board by conveniently collecting and listing the results of other environmental assessments, I respectfully reject Fernleigh's plea of illegality. The Inspector explicitly identified in Ironborn's Planning Report various results of other environmental assessments and, explicitly by reference to Article 299B, expressed satisfaction with the information thus provided.

337. Fernleigh cites an argument it says was correctly rejected by Humphreys J. in **Waltham Abbey**:[575]

> *"[37] (i) At para. 32 [of the Board's Statement of Opposition] it is pleaded that the board was satisfied that it had sufficient information to make a decision on the screening exercise. That is not an answer. Of course the board was satisfied that it had enough information to make a decision—that's why we're here. That doesn't address the question as to whether it was right to be so satisfied, or in particular whether it had the specific materials required by the regulations which include a statement under regulation 299B(1)(b)(ii)(II)(C), or even whether it gave any consideration at all to regulation 299B, although lack of reference to the regulation is not a specific pleaded ground here."*[576]

338. In my view, the underlined words above are correct. But in the present case it is perfectly clear that the Inspector did explicitly consider Article 299B. And the underlined words do not address and, no doubt are not intended to address, the standard by which the Board's satisfaction with the information before it may be reviewed. I have addressed that question above. I am not at all sure that Humphreys J in this passage intended to suggest that the Board bears the onus of proving the adequacy of its satisfaction. In any event, I read Hogan J, when read with Owens J in Pembroke, as clear that any such onus is on the party impugning that satisfaction to demonstrate that the Board's satisfaction was not "*bona fide, factually sustainable and not unreasonable*[577]*"* In my view, Fernleigh's case falls far short of discharging that onus. In this context it is also relevant that Hogan J identifies the Board's "*margin of appreciation*" as to the question of adequacy of the material provided and as a question "*best left to the discretion of the Board*".

574 Hogan J §11.
575 [2021] IEHC 312.
576 Emphasis by Fernleigh.
577 Apologies for the triple negative. It may be shortened to "such onus is on the party impugning that satisfaction to demonstrate that the Board's satisfaction was not ... reasonable".

339. Fernleigh says the Board's argument that they have failed to identify relevant results not taken into account is misplaced. Fernleigh say that they bear no burden to identify them. Whatever argument might be made in this regard had the Board ignored the Article 299B issue or identified no results taken into account must await another case. I cannot see that Fernleigh can be correct in this submission when the Inspector identified in the papers submitted to the Board multiple sets of such results – each identified as having derived from assessments under specific EU Directives other than the EIA Directive.

340. Fernleigh observed at trial that judgment was awaited in **Four Districts**[578] in which very similar arguments had been made as to compliance with Article 299B PDR 2001. That judgment is since to hand[579] and Humphreys J considered it unnecessary to decide that issue and did not do so.

341. I respectfully reject the challenge on this ground.

8 – INCOMPATIBLE PERMISSIONS – UNAUTHORISED DEVELOPMENT[580]

342. Fernleigh pleads that the Impugned Permission is invalid as the Proposed Development and the partly-completed development permitted by planning permission D10A/0440 are mutually incompatible such that the Proposed Development is therefore inconsistent with proper planning and sustainable development as determined by permission D10A/0440. It pleads that "*the Board has no function to, in effect, generate unauthorised development ….*"[581] By this it means what while development on foot of the Impugned Permission would be authorised, it would prevent completion of the partly-completed development permitted by permission D10A/0440 and thereby render unauthorised such development as has been completed under permission D10A/0440. It also says the Board failed to consider the issue despite DLRCCC having raised it in its report to the Board.

Incompatible Permissions – The Facts

343. Planning Permission D10A/0440[582] was a 10-year permission granted in December 2011 for 410 units – 206 houses and 204 apartments – on a site larger than, but which included, the subject Site as "Sector 3". Of these 410 units, 121 units were permitted in Sector 3. All save the 121 units in

578 Four Districts Woodland Group & Ors v An Bord Pleanála & Ors (2021/17 JR) tried by Humphreys J from 18th April 2023.
579 [2023] IEHC 335.
580 Core Ground 12 – §56 and §57 of E (Part 2).
581 Under s.2(1) of the 2000 Act "unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use. The terms, "use", "works", "structure", "unauthorised works", "unauthorised use" and "unauthorised structure" are also defined under s.2(1) of the 2000 Act.
582 ABP PL 06D.239332.

Sector 3 have been built.[583] Fernleigh says that the community infrastructure stipulated by that permission – 2 retail units, 4 office units, a creche, a sports hall, a community room and principal open space area – has not been provided. The DLRC report to the Board in the present application confirms that position as of May 2021. It cites **s.40 PDA**[584] as to the obligation to provide the community infrastructure. Ironborn, in its planning application in March 2021 had said that,

- the pedestrian and cycle link through open space lands immediately south of Sector 3 had provided and was in use as a route from the Belarmine and Aiken's Village area to the Glencairn Luas Stop.

- the remaining open space lands under Permission D10A/0440 remain hoarded off but the absence of enforcement proceedings suggested that DLRCC were satisfied that this area of public open space would be provided by the expiry of the permission in 2021. It seemed that this open space was owned by DLRCC.

344. Planning Permission D16A/0511, granted in December 2016, was for a revised scheme of 243 apartments[585] on Sector 3 – i.e. the subject Site – within the development granted planning permission D10A/0440. Permission D16A/0511 has not been implemented.

345. The DLRCC Report[586] noted that Condition 1 of Planning Permission D10A/0440 requires that the development be "*carried out in its entirety*" in accordance with the plans and particulars lodged and cited **Dwyer Nolan**[587] for the propositions that:

- a planning permission is indivisible – at least where a condition requires its construction in its entirety.
- it is impermissible to part-implement mutually inconsistent permissions for the same site.
- if a developer part-implements a permission and does not want to complete the development, it must seek a variation to the permission.

346. As has been seen, DLRCC recommended refusal of permission – inter alia as its grant would, DLRCC said, prevent completion of the development partly-built under Permission D10A/0440 and

583 This description is taken from p8 of the Planning Report & Statement of Consistency, March 2021, submitted with Ironborn's planning application.
584 s.40(1) provides that on the expiry of a permission, and without prejudice to the validity of anything done pursuant thereto prior to its expiry, the permission ceases to have effect as regards so much of the development as is not completed within that period. s.40(2) disapplies s.40(1) in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings.
585 For 11 residential blocks ranging in height from 3 – 6 storeys and comprising 243 apartments and duplexes; a 1 – 2 storey community building providing a crèche, residents sports hall and community rooms; 2 single level basements comprising residential car parking/bicycle parking/storage/plant; surface car – A total of 342 car parking spaces; Bicycle and bin storage at surface and basement level; an ESB substation (c. 24 sq. m); All site development works, services provision, open space, landscaping and boundary treatment works.
586 P22.
587 Dwyer Nolan v Dublin County Council [1986] I.R. 130.

so would materially contravene a condition attached to an existing permission for partly-built development and thus be prejudicial to the orderly development of the area.

Incompatible Permissions – The Inspector's Report and the Board's Decision

347. The Impugned Permission does not directly address this issue and, inasmuch as it is explicitly based on general accordance with the Inspector's report, is taken to have adopted his reasoning.

348. The Inspector considered this issue[588] – including recital of the content of permissions D10A/0440 and D16A/0511. He concluded that the question was essentially an enforcement issue – for the Planning Authority not for the Board. He considered that the fact that the Site was the subject of a previous permission in respect of a larger site, did "*not de facto preclude the consideration of the* (proposed) *development on its merits*."

Incompatible Permissions – Dwyer Nolan & South-West Regional Shopping Centre

349. In my view, **Dwyer Nolan** is authority that:

- Whether a partially completed development is an authorised development depends on whether the planning permission can be regarded as severable. (i.e. so as to apply discretely to and authorise that part of the permitted development which has been built).

- A developer may not develop part of a scheme under one permission and then develop the remainder of the site under a mutually inconsistent permission.

- Even if a partial development can be regarded as authorised, a developer is not entitled to draw on any other existing permission to complete the scheme but must instead apply for further permission, incorporating either directly or indirectly the partial development which had already taken place.

- Whether a later planning application is an application for variation of an earlier permission is a matter of construction.

In this last conclusion, **Dwyer Nolan** prefigured the **South-West Regional Shopping Centre** case[589] in which the jurisdiction (which had long been assumed) to grant a revision of or amend a planning permission by way of a subsequent grant of planning permission was confirmed.

588 Inspector's Report §12.2.7 & 12.14.4.
589 South-West Regional Shopping Centre Promotion Association v An Bord Pleanála [2016] IEHC 84, [2016] 2 IR 481.

Incompatible Permissions – Submissions and Decision

350. Fernleigh essentially pleads and submits that:

- The development permitted by Permission D10A/0440 and already part-implemented is indivisible and Permission D10A/0440 requires its completion in its entirety. (Fernleigh did not develop the argument as to indivisibility.)

- Development on foot of the Impugned Permission is inconsistent with Permission D10A/0440 and would render impossible the completion of that part-implemented development permitted under Permission D10A/0440.

- Therefore, development under the Impugned Permission would render the part-completed development under Permission D10A/0440 unauthorised development (in the form development carried out in non-conformity with Permission D10A/0440 or a condition thereof).

- Accordingly, the Impugned Permission is invalid as irreconcilable with the principles of proper planning and sustainable development applicable under s.34(2)(b) PDA 2000 Act.

351. Incidentally, the DLRCC report recorded an interesting submission from a member of the public that the Site already has permissions for development which contribute to addressing the national housing deficit. The point presumably is that addressing the national housing deficit was not in reality at stake, or was less at stake, in the application which resulted in the Impugned Permission. It is easy to see arguments on both sides of such a point and it seems likely to be a planning, rather than a legal, point. However, any issue in that regard is for another case.

352. Returning to this case, the Board makes a pleading point that Fernleigh's invocation of the Board's obligation by reference to principles of proper planning and sustainable development is advanced in the abstract and in general terms not properly particularised. It says it is unclear what the alleged inconsistency with those principles is. While there may be some force to this submission, I prefer not to deal with this ground on that basis. That Fernleigh's point is simple is more in its favour than otherwise. In my view its essential premise is clear enough.

353. The Board says that, conceptually, the assertion that a grant of planning permission of itself "generates" unauthorised development is untenable. It says that no issue of development unauthorised by Permission D10A/0440 will even theoretically arise unless and until development on foot of the Impugned Permission commences. It will then be for the Planning Authority, which – unlike the Board – has a competence in enforcement, to consider the issue and act, or not, as appropriate.

354. I would add that that consideration will presumably include assessments whether,

- the development permitted by Permission D10A/0440 and already part-implemented is indivisible.
- the Impugned Permission is properly to be considered, as a matter of construction of the Impugned Permission, a variation of Permission D10A/0440. I make no finding in that regard but do note that the Board granted the present Impugned Permission in the explicit knowledge both of Permission D10A/0440 and the fact that it had been built out save on the Site.

355. Meanwhile, the Board says that, as the Inspector said, the Board was entitled to consider "on its merits" the application which resulted in the Impugned Permission. I observe that "merits" in this context is a well understood shorthand for "planning merits" – which is, in turn, a well-understood invocation of the concept of proper planning and sustainable development.

356. The Board also cites s.10(6) of the 2016 Act to the effect that that a person is not entitled solely by an SHD permission carry out any development.[590] What is meant by this is that such development must comply not merely with such a permission but also with all other applicable requirements of law. Save as required by statute, the Board need not interrogate those other issues – which are left to the relevant other competent authorities[591] or private law protagonists[592] to address in legal processes other than the decision of planning applications. Indeed, the Board is limited in the exercise of its statutory jurisdiction to the grant or refusal of planning permission. The Board cites one of the **Heather Hill** cases[593] by analogy: *"There is no obligation on the Board to be certain that the development can be carried out before approval can be granted. S.34(13) implies precisely that."*

357. I prefer the Board's submissions on this issue. The Board's obligation is to make a decision consistent with proper planning and sustainable development. Of what proper planning and sustainable development consists is a matter of planning judgment for the Board. As the commonplace of multiple inconsistent planning permissions for a site demonstrates, consistency with proper planning and sustainable development for a given site can often be achieved in different ways and degrees and by different developments. Also, substantive considerations of proper planning and sustainable development are not frozen in time once a permission is granted, nor even once development on foot of such a permission commences. Development Plans are updated periodically for the very reason that considerations of proper planning and sustainable development change and develop with time and circumstance. It is, for example, important to say that the housing crisis which prompted the 2016 Act, and which subsists today as a consideration highly relevant to proper planning and sustainable development, may not have been recognised as

590 This mirrors s.34(13) PDA 2000.
591 In the case of regulatory restrictions on development.
592 For example, as to disputes as to property rights or by way of an application for an injunction under s.160 PDA 2000.
593 Heather Hill Management Company CLG v An Bord Pleanála & Ors [2022] IEHC 146, §80.

pressing to the same degree when Permission D10A/0440 was granted in December 2011. This is not to say that the housing crisis was not recognised at that time. I am making a more generally illustrative point that considerations of proper planning and sustainable development, as they bear on a given site, may differ considerably as between planning applications considered at different points in time. Therefore, it does not seem to me to follow that, as Fernleigh suggests, the Impugned Permission is necessarily in breach of the principles of proper planning and sustainable development by reason of incompatibility with Permission D10A/0440.

358. There is the further consideration that, as DLRCC pointed out, s.40 PDA[594] requires completion of the roads, services and open spaces necessary for, ancillary to or incidental to the buildings completed under Permission D10A/0440. But otherwise, it has ceased to have effect. I was not addressed on the implications of this position for the argument made by Fernleigh. Brief reference was made at trial to other litigation by Ironborn as to the status of that permission. I have not had regard to that litigation save in the very general sense in and degree to which it was mentioned at trial of these proceedings. However, these considerations – if anything – suggest that the Board was correct in sticking to its last of considering proper planning and sustainable development and leaving questions of unauthorised development and enforcement to the planning authority, where they belong.

359. I respectfully reject this ground of challenge.

9 – SUMMARY & CONCLUSION

360. In light of the findings, and for the reasons, set out above, I will quash the Impugned Permission as failing to:

a. clearly and precisely identify the nature and extent of non-compliance with BRE Guide ADF standards as to daylight provision in the apartments of the Proposed Development such that the criterion as to daylight provision set by §3.2 of the Height Guidelines 2018 for the application of SPPR3 in granting permission despite material contravention of the Development Plan as to Building Height was not satisfied. On any remittal of the Impugned Permission the Board will wish to consider my other findings as to the daylight issue.

b. give adequate reasons for its conclusion that the criterion for the application of SPPR3, set by §3.2 of the Height Guidelines 2018 as to public transport capacity, was satisfied.

594 S.40 addresses the duration and expiry of planning permission. s.40(1) provides that on the expiry of a permission, and without prejudice to the validity of anything done pursuant thereto prior to its expiry, the permission ceases to have effect as regards so much of the development as is not completed within that period. s.40(2) disapplies s.40(1), inter alia, in the case of a development comprising a number of buildings of which only some have been completed, in relation to the provision of roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings.

c. give adequate reasons, clear, cogent and properly engaging with the concept of exceptionality of quality of open space, for the finding of no material contravention as to open space provision.

I reject all other grounds of challenge.

I will list the case for mention only on 16 October 2023 for consideration of final orders.

DAVID HOLLAND
27/9/23