THE HIGH COURT

PLANNING AND ENVIRONMENT

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

[2023] IEHC 725

Record No. 2022/ 279 JR

Between

GRAFTON GROUP PLC

Applicant

and

AN BORD PLEANALA

and

Respondent

STRATEGIC POWER LIMITED

First Notice Party

and

OFFALY COUNTY COUNCIL

Second Notice Party

JUDGMENT of Ms. Justice Emily Farrell delivered the 22nd day of December 2023.

Introduction

1. The Respondent granted planning permission to Strategic Power Limited, the first notice party ('the developer') in respect of a renewable biogas facility on a 2.14 ha site at Ballyduff, Tullamore, Co. Offaly by Order made the 17th February 2022. The proposed facility would produce renewable energy and organic fertiliser through anaerobic digestion of farm by-product including silage, manure and chicken litter. The appearance of the proposed development during its operational phase was described by the Inspector as "*an industrial facility with large scale storage and processing vessels, boiler stack and flare for the flaring of gas*". It is anticipated that there would be 4-5 employees on site during the day, once the development would become operational. The Applicant operates a builders merchants store, trading under the name Tullamore Hardware/Chadwicks, which is approximately 150m from the plant buildings of the proposed development.

2. The application for planning permission was made to Offaly County Council, the second notice party ('the planning authority') on 23rd July 2020. Numerous observations were made, which included the submission that the proposed development would be contrary to the zoning in the Draft Offaly County Development Plan, which was anticipated to be adopted in 2021.

3. Further information was sought by the planning authority on 16th September 2020, which was furnished on 24th November 2020. The planning authority refused permission for the development, the subject of the proceedings, on 21st January 2021 on the grounds that the EIAR did not contain sufficient information to comply with Schedule 6 of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations'). Accordingly, the planning authority was not satisfied that the proposed development would not cause serious air pollution which may have a significant impact on the environment and public health. On that ground, it was considered that the proposed development was contrary to the proper planning and sustainable development of the area.

4. The developer appealed the planning authority's decision to An Bord Pleanála ('the Board') on 18th February 2021. The Applicant submitted a third-party observation to the Board in respect of the appeal on 16th March 2021. The Board did not publish the EIAR, which had been received from the planning authority and published by it on its own website. It is not in dispute that the EIAR had been published by the planning authority in accordance with its statutory obligations.

5. Observations were made by four parties, each of whom opposed the grant of permission. All four of the third-party observations submitted that the proposed development would be contrary to the zoning in the Draft County Development Plan. The Applicant and another observer expressly referred to the designation of the site as a Strategic Employment Zone ('SEZ') in the Draft Offaly County Development Plan. The response of the planning authority did not address the issue of zoning. Neither the observations nor the response of the planning authority referred to biodiversity, particularly habitats or bats.

6. The Offaly County Development Plan 2021-2027 was adopted on 10th September 2021 and came into effect on 22nd October 2021, after the Inspector's Report had been prepared on 6th September 2021, but before the Board's Direction and Order, dated 10th February 2022 and 17th February 2022 respectively.

7. The Inspector identified the following main issues to be considered in the assessment of the appeal:

- Validity of Planning Authority Decision and Substantive Reason for Refusal;

- Principle of Development and Land Use Zoning;

- Other issues.

8. The Inspector carried out an EIA at Section 8 of the Report, which included a consideration of Biodiversity, including habitats and bats.

9. The Applicant seeks an order of *certiorari* in respect of the Order of the Board made on 17th February 2022 and a declaration that the Board erred in law in failing to put a copy of the EIAR on its website contrary to the requirements of Article 114 of the 2001 Regulations.

10. Leave to apply for judicial review was granted by Meenan J. on 9th May 2022 and an order was made by Humphreys J. granting liberty to file an amended Statement of Grounds on 20th February 2023. A Statement of Opposition was filed on behalf of the Board and the developer. At the commencement of the hearing, counsel on behalf of the developer indicated that it adopted the written and (future) oral submissions of the Board. The second notice party did not take part in the proceedings.

The Issues

11. The Applicant maintains that the decision of the Board is invalid by reason of:

(i) Material Error on the part of the Board in relation to Zoning and the Development Plan;
  (a) material error of law in finding that there was no material contravention of the Development Plan;
  (b) failure to take account of all relevant considerations in particular, the designation as a Strategic Employment Zone and LUZO-15 and LUZO-16;
  (c) taking account of irrelevant considerations, in particular, that the site was at the bottom of the zoning area and consideration of the absence of significant environmental effects, having regard to the EIA.
  (d) failure to provide adequate reasons.

(ii) Failure to adequately consider all environmental effects of the proposed development for the purposes of sections 171A and 172 of the Planning and Development Act 2000 ('the 2000 Act'), in particular consideration of the cumulative effects on the environment, habitats and bats;

In addition,

(iii) the Applicant seeks a declaration that there was a failure on the part of the Board to publish the EIAR in compliance with Article 114 of the 2001 Regulations.

Core Ground 1 – The Development Plan

12. The planning application was made, determined by the planning authority and considered by the Board's Inspector under the Tullamore and Environs Development Plan 2010-2016 (hereinafter referred to as 'the Tullamore Plan'), which was then in effect. The parties agree that the Board was required to consider the Offaly County Development Plan 2021-2027 (hereinafter 'the Development Plan') which was adopted on 10th September 2021 and came into effect on 22nd October 2021, and not the Tullamore plan, as the appeal was determined after it came into effect.

13. The Inspector considered both the Tullamore Plan and the Draft Development Plan in his report dated 6th September 2021; he noted that the new Development Plan was likely to be adopted in its final form in autumn 2021. It is common case that the current Development Plan was adopted without any material change to the draft in existence at that time.

14. As appears from both the Board Direction and Board Order, the Board considered the Offaly County Development Plan 2021-2027, which had come into effect by the date of its Direction and Order, made on 10th and 17th February 2022 respectively.

15. It is clear from the submissions, both oral and written, that the parties agree that the correct approach to the interpretation of the Development Plan is that set out by the Supreme Court in *Re XJS Investments Limited* [1986] IR 750. As McCarthy J. stated, at p.756, planning documents "*are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and*

their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

16. Subsequently, in *The Attorney General (McGarry) v. Sligo County Council* [1991] 1 IR 99, 113, McCarthy J. described a development plan as "*an environmental contract between the planning authority, the council, and the community, embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan . . .*"

17. Barr J. concluded as follows in *Tennyson v. Dun Laoghaire* [1991] 2 IR 527, 535-6:

> "*In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions? What would he or she learn from the 1984 development plan as to the types of development which the planning authority might allow at Silchester Road?"*

18. I note that Humphreys J. has questioned reliance on a reasonably intelligent person who is ignorant of planning law in interpreting planning documents in *Clonres CLG v. An Bord Pleanála* [2021] IEHC 303, making the point that, in other contexts, knowledge of the law is to be imputed. In *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7 Holland J. applied the standard of a reasonably intelligent person who is "*not merely intelligent but careful*".

19. As the parties are in agreement that the appropriate test is that enunciated in *XJS* and applied to development plans in *Tennyson*, it is not necessary to resolve any differences in the approach to be taken to the interpretation of the Development Plan. As Clarke J. (as he then was) noted in *Lanigan v. Barry* [2016] 1 IR 656, the principles applicable to the construction of planning permission are well settled, by reference to *XJS*, which requires the Court "*to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them*." (para. 30)

20. It is clear from *Ballyboden, Eoin Kelly v. An Bord Pleanála* [2019] IEHC 84 and *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181 that the interpretation of the Development Plan must be carried out in a "*holistic way*" and that planning strategies and guidelines should not be interpreted in an excessively "*technical or over legalistic manner*", which is what was cautioned against in *XJS*. It is not appropriate to parse or over-analyse the Development Plan, or the decision under review.

21. The extent to which the interpretation of a development plan is within the jurisdiction of the Court has been considered on a number of occasions since *Tennyson.* As Barniville J. (as he then was) stated in *Eoin Kelly v. An Bord Pleanála*, this issue is more nuanced than a straightforward division between a pure question of law and the interpretation of the development plan on the one hand, and an assessment of planning considerations on the other.

22. Following *Navan Co-ownership* [2016] IEHC 181, Barniville J. further held in *Eoin Kelly*:

> "*in the first instance, at least, the interpretation of planning documents such as the development plan is a matter for the court. In carrying out that interpretative exercise, the court will apply the principles of interpretation and approach set out by the Supreme Court in* XJS. *However, it is equally the case, as adverted to by Lord Reed in* Dundee, *and as accepted and applied by McGovern J. in* Navan, *that, as interpreted, the relevant planning document such as a development plan, will contain a range of broad statements of policy, some of which may be irreconcilable and may contain provisions which themselves require the exercise of planning expertise and judgement in terms of their application to a given set of facts. While the division of responsibility as between the planning authority/the Board and the courts can broadly speaking be framed in such a way that the interpretation of the relevant planning documents is for the court and the application of the policies and provisions of those documents, as interpreted by the court, is for the planning authority/the Board in the exercise of their respective planning expertise and judgement. However, that division or allocation of roles is not always clear or straightforward. That is due to the fact that the provisions of planning documents such as a development plan or statutory guidelines often contain broad statements of policy, some of which may be mutually irreconcilable, and may be framed in language where the application of the relevant*

provision to a given state of facts requires the exercise of planning expertise and judgement itself." (para. 191)

23. In *Redmond v. An Bord Pleanála* [2020] IEHC 151 Simons J. reiterated that the interpretation of the Development Plan is exclusively a matter of law to be determined by the Court. Clearly the Board is required to take a view on the interpretation of the Development Plan in the course of the determination of individual applications and appeals. However, Simons J. held:

"*27 In some instances, objectives of a development plan will—on their correct interpretation—be formulated in broad terms, and it will be a matter of planning judgment as to how to apply those objectives to any given planning application. However, the correct interpretation of a development plan is always a logically anterior question to the application of the plan's objectives in the assessment of any particular development proposal*."

24. In *Ballyboden* and *Jennings v. An Bord Pleanála* [2023] IEHC 14 Holland J. considered the extent to which there was flexibility in the interpretation of a development plan. Holland J. cited the explanation of a development plan specified by McKechnie J. in *Byrne v. Fingal County Council* [2001] IEHC 141, [2002] 4 IR 565, 580:

"a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan" and do so *"openly and transparently"* …

25. In *Ballyboden*, Holland J. found that it must be so regarded,

"*so that the Court can discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan …. the Court must attribute clear meaning to the plan as best it can while respecting the tension between its proper flexibility (of which the decision-maker must have the benefit) and its being a plan by which the planning authority can be held strictly to account*" (para.139)

26. In *Jennings*, Holland J. identified five questions to be answered in determining whether or not there is a material contravention of a development plan. He held:

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

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

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

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

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

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

27. Holland J. endorsed the view expressed by Browne, Simons on Planning Law, 3rd Edition, Round Hall, 2021, that a development plan fetters the decision-maker by limiting its jurisdiction, and that, as a matter of law, no administrative body can be the final arbiter of the scope of its own jurisdiction. He continued:

> "*while the restrictions imposed by fetters must be delineated and enforced by law and the Courts, it does not seem to me that the law cannot recognise that fetters, of their nature, can be looser or tighter and may afford more or less scope for judgment to the fettered decision-maker. It is a question, not of the Courts abdicating their role as the final arbiter of the scope of a decision-maker's jurisdiction, but of the Courts recognising that the proper scope of that jurisdiction may afford scope for the exercise of judgment — especially expert judgment by the decision-maker — reviewable only for irrationality in its exercise. Incidentally, that is a view which does not seem to me to turn on the view one takes on curial deference and the continuing vitality, or not, of the* O'Keeffe *"no material" test. It seems to me that an insistence in such circumstances on "full-blooded" review is unnecessary to the rule of law and undesirable as forcing the court to purport to deploy planning judgement – invoking an expertise it does not possess.*" (para. 111)

28. He concluded, by referring to the analysis of Keane J. in *Byrne v. Wicklow County Council*, unreported, 3rd November 1994 and Laffoy J. in *O'Reilly v. O'Sullivan,* unreported, 25th July 1996 (upheld by the Supreme Court, unreported, 26th February 1997).

29. Holland J. found that: "*where a development plan, on a proper interpretation,*

> • *allows appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is for irrationality rather than full-blooded.*
>
> • *does not allow appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is full-blooded as the issue is one of law.*" (para. 112)

Significance of the finding that there is no material contravention – Core Ground (i)(a)

30. Unlike *O'Donnell v. An Bord Pleanála* [2023] IEHC 381, the question whether the proposed development materially contravenes the zoning of the site specifically, as

opposed to the Development Plan, is not critical to the jurisdiction of the Board in this case. Furthermore, the basis on which the application was refused by the planning authority did not involve a finding of material contravention.

31. What is in issue is whether the proposed development materially contravenes the Development Plan i.e. whether the Board erred in law in finding that there was no material contravention, and thereby erred in its consideration of the Development Plan.

32. The materiality of a contravention of the Development Plan depends on the grounds on which the proposed development is, or might reasonably be expected to be, opposed by local interests: *Roughan v. Clare County Council*, unreported, High Court, Barron J. 18th December 1996. If there are no real or substantial grounds in the context of planning law for opposing the development, it is unlikely to be a material contravention. (p. 5). Barron J. found that the local population is entitled to the benefit of the right to be consulted during the procedure of making a development plan. He held that "*to allow any alteration of the plan which would not have been anticipated by those reading the plan would be in breach of the rights of the local population to such consultation*." (p. 6). This was followed by Baker J. in *Byrnes v. Dublin City Council* [2017] IEHC 19 (para. 23) and by Simons J. in *Redmond* (para. 74- 76).

33. As Hedigan J. held in *Ryan v. Clare County Council* [2009] IEHC 115 "*... objections are only relevant when considering the materiality of a contravention as opposed to assessing whether one exists*." (para. 42)

34. It is accepted by the Applicant that the Board had jurisdiction to grant permission for a development which was in material contravention of the Development Plan. I accept the proposition that the Board may not rely on an incorrect interpretation of the Development Plan. The Development Plan is one of the matters which the Board is required to consider in determining an appeal: section 37(1)(b) and section 34(2)(a)(i).

35. As Simons J. held in *Heather Hill v. An Bord Pleanála* [2019] IEHC 450:

> *"37. It is important to understand the rationale underlying this principle that the interpretation of a development plan is a question of law for the court. The rationale is predicated on the legal effect of a development plan and, in particular, the manner*

in which it acts as a fetter on the discretion of An Bord Pleanála. An Bord Pleanála enjoys a broad discretion in determining planning applications, and its decision on whether proposed development is in accordance with proper planning and sustainable development is subject only to the most limited merits-based review under the principles in O'Keeffe v. An Bord Pleanála *[1993] 1 I.R. 39. The board is, however, required to 'have regard to' the provisions of the relevant development plan. Further, there are statutory restrictions on the board's jurisdiction to grant planning permission for proposed development in material contravention of the development plan. These statutory restrictions are stricter in the case of a 'strategic housing development' application under the PD(H)A 2016 than they are in the case of a conventional planning application.*"

36. The Board was required to have regard to the Offaly County Development Plan 2021-2027, and it did so. This is not in issue.

37. Chapter 12 of the Development Plan sets out the land use zoning objectives of the Plan. The most common forms of development land uses are set out in the Zoning Matrix at Table 12.1. Each use is classified as "√" - 'permitted in principle', "O" - 'open for consideration' or "X" - 'not normally permitted'. These classifications are defined, as follows, at para. 12.3:

"*1. 'Permitted in Principle' – The subject use is generally acceptable subject to the normal planning process,* ***compliance with the relevant policies and objectives, standards and requirements as set out in the County Development Plan****, and in accordance with the proper planning and sustainable development of the area. (Note: A proposal which is indicated as being 'Permitted in Principle' within the zoning matrix does not imply 'automatic approval' as each proposal for development is considered on its individual merits).*

2. 'Open for Consideration' – The subject use ***may be permitted where the Local Authority is satisfied that it is in compliance with the zoning objective and other relevant policies and objectives, standards and requirements as set out in the County Development Plan*** *and will not conflict with the permitted, existing or*

adjoining land uses, in accordance with the proper planning and sustainable development of the area.

3. 'Not Normally Permitted' – The subject use is ***generally incompatible with the written zoning objective and will not be favourably considered by the Local Authority, except in exceptional circumstances and in such instances, the development may represent a material contravention to the plan***." (emphasis added)

38. It is common case that the site of the proposed development is zoned "*Business/Technology Park*". Para. 12.4.7 of the Development Plan provides:

"*12.4.7* ***Business/Technology Park***

This zoning facilitates opportunities for technology based industry and advanced manufacturing, compatible office space and research and development based employment within high quality, highly accessible, campus style settings. The zoning accommodates locations for high end, high-quality, value-added businesses and corporate headquarters. An emphasis on high quality sustainable design and aesthetic quality will be promoted to enhance corporate image and identity.

Land Use Zoning Objective – Business/Technology Park
It is an objective of the Council to:
LUZO-08 Provide for technology based light industry, research and development and compatible offices in a high quality built and landscaped environment.

39. For lands which are zoned Business and Technology Park, the Zoning Matrix includes:

Industry – Heavy	X
Industry – Light	O
Materials Recovery Facility/ Composting/ Waste Transfer Station/ Waste Recycling Centre	X
Waste to Energy Facilities	O

40. Para. 12.5 of the Development Plan relates to uses which are not listed in the Indicative Zoning Matrix. It states:

"*Land uses which are not listed in the indicative land use zoning matrix will be considered on a case-by case basis having regard to the proper planning and sustainable development of the area and compliance with the relevant policies and objectives (including land use zoning objectives), standards and requirements as set out in this Plan, guidelines issued in accordance with Section 28 of the Planning and Development Act, 2000 (as amended) and guidance issued by other government bodies/ departments.*"

41. The site is part of the lands included in the Ballyduff Strategic Employment Zone under the provisions of the Development Plan. Strategic Employment Zones are provided for at paragraph 12.6.2 of the Development Plan, which states:

"12.6.2 Strategic Employment Zones (particular to Tullamore)

Reflecting Regional Policy Objective 4.27 of the Regional Spatial and Economic Strategy which states that Key Towns (such as Tullamore) shall act as economic drivers and provide for strategic employment locations to improve the economic base by increasing the ratio of jobs to workers, it is an objective of the Plan to provide two Strategic Employment Zones (SEZ) within the settlement boundary of Tullamore town in the following areas:

- *Ardan Road; and*
- *Ballyduff.*

The purpose of this objective is to facilitate strategic large scale employment in development zones in a sequential manner to promote sustainable compact growth in tandem with the delivery of infrastructure and enabling services. These zones have development capacity, good accessibility, availability of a land bank of at least 100 acres in size and potential to deliver significant economic development and employment creation.

The proposed Ardan Road SEZ has potential to cater for the expansion of Midland Regional Hospital Tullamore and its continued development as a Teaching/University Hospital and/or to provide a Med or Bio Technology Park with linkages to the Hospital, whilst the proposed Ballyduff SEZ has the potential to provide a Business /

Technology Park, leveraging its proximity to the Axis Business Park, Burlington Business Park and Srah IDA Business Park in the area."

Land Use Zoning Objective – Strategic Employment Zones (particular to Tullamore)

It is an objective of the Council to:

LUZO-15 Support the development of Strategic Employment Zones in Tullamore at;

(a) Ardan Road to cater for the expansion of Midland Regional Hospital Tullamore and its continued development as a Teaching/University Hospital, and/or a Med or Bio Technology Park with linkages to the Hospital; and
(b) Ballyduff for a Business and Technology Park.

LUZO-16 Planning applications for Strategic Employment Zones shall be brought forward in the context of a masterplan for the subject lands as detailed in Development Management Standard 72. The design and siting of individual units within Strategic Employment Zones shall comply with the principles of any Design Statement prepared as part of the masterplan for the overall site.

42. Strategic Employment Zones in Tullamore are referred to as a key initiative in the Development Plan at Table 5.2, by reference to Chapter 13. A further key initiative identified in the Development Plan is "***Potential for new energy initiatives*** *to facilitate climate action and energy transition as indicated in chapter 3 of this plan*."

43. The significance of the designation of lands as a Strategic Employment Zone is highlighted at para. 5.5.2 and 5.5.3 of the Development Plan, which state:

"*5.5.2. Large Scale Development*

… The Council supports that priority be given to IDA Ireland and Enterprise Ireland to developing sectoral clusters within Tullamore, a Key Town in the Regional Spatial Economic Strategy (RSES). Regional Policy Objective (RPO) 4.27 of the RSES states

*'*Key Towns shall act as economic drivers and provide for strategic employment locations to improve the economic base by increasing the ratio of jobs to workers*'. In response, sites are identified in the Tullamore zoning objectives map as 'Strategic Employment Zones'.*

The Council is supportive in encouraging and making provisions for increased employment and enterprise activity in the larger towns, including ensuring that sufficient land is zoned at optimum locations …".

5.5.3 Spatial Arrangement

…

Tullamore, a Key Town in the RSES (2019) must function as a driver of economic growth to complement the Regional Growth Centre of Athlone. It has a role as a major employment, retail and services centre with key assets being its existing jobs to resident workers' ratio, excellent quality of life and future strategic development sites known as 'Strategic Employment Zones'. The further development of the med-tech cluster on the IDA business park in Srah provides opportunity to drive development within the town. The need for complementary third level outreach facilities in Tullamore should be examined, particularly with regard to support for the Midland Regional Hospital and where appropriate, its continued development as a Teaching / University Hospital, together with potential for linkages to existing and new med-tech businesses and research facilities. Desirable economic investment for Tullamore would be in the form of green jobs and green technologies, innovation, digital technologies, circular bioeconomy, food and beverage (in particular due to its distilling heritage), advanced manufacturing, tourism, recreation and amenity and high quality town centre retail development."

44. Chapter 13, which provides Development Management Standards, refers to Strategic Employment Zones at DMS-72 and DMS-73:

DMS-72 New Business and Technology Parks, Strategic Employment Zones and Rhode Green Energy Park	Planning applications for new Business and Technology Parks and Strategic Employment Zones shall be brought forward in the context of a masterplan for the subject lands. The masterplan shall be consistent with the policies and objectives of the County Development Plan and shall include the following: • A Design Statement that ensures a strong visual presence for the park via high quality design and siting of buildings and which has regard to the sites location and neighbouring uses; • A comprehensive landscaping and boundary treatment plan for the overall site, with particular attention placed on boundaries facing public realm and roads; • A Green Infrastructure Plan which: Retains and enhances where possible existing wetland habitat, hedgerow, woodlands, meadows and habitats of species protected under European legislation and National Wildlife Acts; ➢ Creates new green infrastructure assets such as public open space, green roofs, green walls, tree planting and natural pollination zones; ➢ Increases and improves ecological corridor connectivity and pedestrian and cycle path linkages with existing green infrastructure assets in the area. Where a large site adjoins a Offaly County Development Plan 2021-2027 green corridor, a public open space or an area of high ecological value, any new public open space on the site should be contiguous to same to encourage visual continuity and expansion of biodiversity which can assist in expanding the green infrastructure network; and

	➢ Incorporates Sustainable Urban Drainage Systems (SuDS) such as ponds, bio-retention areas, detention basins, infiltration basins, filter strips, wetlands, swales and rain gardens. In addition, the following details shall be submitted with any planning application for new Business and Technology Parks and Strategic Employment Zones; • Full details of the proposed uses(s), including industrial processes (where applicable) and hours of operation; • Details of suitable access arrangements, internal roads layout, including details of footpaths, turning areas and loading bays. • Permeability and pedestrian and/ or cyclist friendly environments with the overall site in accordance the NTA's Permeability Best Practice Guide (2015); •Traffic Assessment as detailed in DMS-105; • Vehicle and cycle parking provision in accordance which DMS-99 and DMS-102, in a discreet, landscaped and well-screened environment with a view to minimising its visual impact, particularly when viewed from approach roads; • A Green Roof covering a minimum of 60% of the roof area shall be provided for roof areas greater than 300 m² unless a suite of complimentary or alternative "soft" SuDS measures as detailed above are proposed. A proposal that relies solely on attenuation storage systems and/ or permeable paving as an alternative to the provision of a Green Roof will not be acceptable). The minimum soil thickness shall be 2 to 4cm for a Moss/Sedum type of Extensive Green Roof and 10 to 15 cm for a grassed type of Extensive Green Roof.

	Provision for future access to adjoining third party lands will be required where significant areas of land are being developed. This list is not exhaustive and the Council may consider other requirements contained in the chapter on a case by case basis with planning applications should the need arise.	
DMS-73 Individual units in Business and Technology Parks, Strategic Employment Zones and Rhode Green Energy Park	The design and siting of individual units in Business and Technology Parks and Strategic Employment Zones shall comply with the principles of any Design Statement prepared as part as part of the masterplan for the overall site. In general, • Individual buildings should exhibit a high-quality contemporary design and finish, within an agreed scheme; • Car and bicycle parking shall be provided in a discreet, landscaped and well-screened environment with a view to minimising its visual impact, particularly when viewed from approach roads; and • The building line on all principle road frontages should generally be not less than 15 metres from the road and there should be a minimum planted strip of a width of 5 metres on all principle road frontages.	

45. A Masterplan has not been created and accordingly, no such Masterplan was before the Board when determining the appeal.

46. The only Strategic Employment Zones (SEZ) identified in the County Development Plan are those at Ardan Road and Ballyduff. The SEZ at Ballyduff includes lands zoned Enterprise and Employment, Open Space and lands, including the relevant site, which are zoned Business and Technology Park. There is an area within the Birr Town Plan which is zoned Business and Technology Park, but it is not a Strategic Employment Zone.

The Inspector's Report and Order of the Board

47. The Inspector identified "*Principle of Development and Land Use Zoning*" as one of the three main issues to be determined in the appeal.

48. Having included relevant extracts of the Offaly County Development Plan 2014-2020 (as amended) and the Tullamore Plan, the Inspector referred to the Draft Offaly County Development Plan 2021-2027, at para. 5.2 stating:

"***Draft Offaly County Development Plan, 2021-2027***

The appeal site will be included within the area covered by the new Offaly County Development Plan which is currently in draft form and in respect of which public consultation is nearing completion. It is anticipated that the plan will be adopted in its final form in the autumn of this year.

Under the provisions of the Draft Plan the zoning of the appeal site is proposed to be changed to 'Business and Technology' use with a stated objective to Provide for technology based light industry, research and development and compatible offices in a high quality built and landscaped environment.

Uses not listed will be considered on a case by case basis having regard to the proper planning and sustainable development of the area, other relevant plan policies and objectives, s.28 and other guidance.

Uses identified as not permitted include 'composting facility', 'Materials Recovery Facility/ Composting/ Waste Transfer Station/Waste Recycling Centre',

Open for consideration 'waste to energy facilities'.

Objective LUZO-08 *states that it is an objective of the council to Provide for technology based light industry, research and development and compatible offices in a high quality built and landscaped environment.*

Section 3.5.2 of the Plan states that

Anaerobic Digestion
Anaerobic digestion is a biological process in which microorganisms break down biodegradable material in the absence of oxygen. One of the end products is biogas, which can be combusted to generate electricity and heat, or can be processed into renewable natural gas and transportation fuels.

Anaerobic digestion of farm or other wastes and by-products, will be considered, as the process has the potential to combat GHG concerns and to provide alternative sources of incomes to farmers or commercial opportunities for standalone businesses on compatibly zoned sites as outlined in Table 12.1.

12.1 Land Use Zoning Matrix in Chapter 12
Uses that are identified as not permitted on lands zoned Business / Technology Park include Industry – Heavy, Composting Facility, Municipal Waste Incinerator. A Waste to Energy facility is identified as being open for consideration."

49. In identifying the grounds of appeal, at para. 6, the Inspector noted that the developer had submitted that the proposed development is consistent with the General Industrial zoning of the site in the 2010-2016 Plan, which was then in force. He summarised the developer's submission, made in respect of the Tullamore Plan and specifically identified the following:

"*While the zoning of the site is proposed to change in the draft development plan, this has no effect on the current assessment. Notwithstanding this, it is noted that there is a new use class (waste to energy facilities) introduced in the draft plan and that this use best reflects the nature of the proposed use*."

50. The developer had submitted that the site was zoned for industrial use in the Tullamore Town and Environs Development plan 2010-2016, which had been extended to 2021 and it was stated that General Industry was permitted under that zoning. The appeal, made on 18th February 2021, stated:

> "*The application site is zoned for Industry within the Axis Business Park. General Industry is a permitted use under the zoning. The proposed development, therefore, accords with the Development Plan. The draft Plan zoning has no effect. However, it is noteworthy to highlight that under the Business and Technology zoning in the draft Plan a category of development in the zoning matrix which does not exist in the Current Development Plan for Tullamore has been introduced which provides for "waste to energy facilities". This best describes the proposed development.*
>
> *…*
>
> *It is considered the proposed development is in accordance with the Development Plan industrial zoning.*"

51. In response to specific observations made by third parties to the planning authority the developer made the following observations:

- "*The proposed development was correctly assessed on the current Development Plan Industrial zoning and supported on this basis by the Planning Authority*";
- "*Issues surrounding matters for the EPA and HAS's role in regulating the development and Draft Development Plan are addressed above*";
- "*Issues concerning feed stock, the Draft Development Plan and public consultation are also addressed above.*"

52. Save insofar as is outlined at paragraphs 49 and 50 above, the developer did not address the zoning in the Draft Development Plan in the appeal. No submissions were made by the developer in relation to the conformity or otherwise of the proposed development with the Draft Development Plan.

53. As recited by the Inspector, at para. 6.2 of his Report, the planning authority's response to the appeal did not address the issue of zoning nor did it consider whether or not there was a material contravention of the Development Plan. The Board's attention was drawn to the planning and service department reports on the planning file. However, as with the Board, the opinion of the planning authority as to whether there is a material

contravention of the Development Plan is not decisive, as the interpretation of the Development Plan is a question of law for the Court.

54. At para. 6.3, the Inspector set out the grounds of the four observations received, each of which raised the issue of zoning, and two of which expressly referred to the fact that the site was in an area designated as a Strategic Employment Zone in the (then) Draft Development Plan. It was submitted by the Applicant that the proposed use, described by it as a waste to energy facility, was incompatible with the designations of the lands as Business/Technology Park and Strategic Employment Zone due to the low employment intensity proposed for the site. Having referred to the designation as a Strategic Employment Zone and LUZO-15, it was stated in the submission made by planning consultants on behalf of the Applicant, that "*The fact that only 4-5 employees will be employed in the proposed development on a 2.14 hectare site is not compatible with the zoning objective for a business and technology zone and the Strategic Employment designation. Such an employee ratio is more akin to warehousing site as opposed to business areas. Furthermore, the Draft Plan requires these lands to be included as part of an overall Masterplan for the entire Strategic Employment designation."* The observation made on behalf of the Axis Business Park, which is adjacent to the site of the proposed development, stated that the Axis Business Park had developed as a light industrial area, and which is reflected in the identification of the area as a Strategic Employment Zone in the Draft Plan. It was stated that, at that time, the Axis Business Park accommodated 40 businesses with approximately 440 employees.

55. The 'Planning Assessment' was carried out by the Inspector at para. 7 of his Report. He considered the principle of development and land use zoning at para. 7.3 of his Report. The conclusions of the Inspector were that the proposed development is consistent with national energy and waste policy and that it would have a role in meeting the State's renewable energy and climate change targets, which conclusions are not in dispute.

56. The nature of the proposed development, which the Inspector described as '*an anaerobic digester that aims to produce renewable biogas which can be injected into the natural gas grid*' (para. 7.3) was considered at para. 7.3.6 in the context of the 2010-2016 Tullamore Plan. It was stated:

"7.3.6 Industry – general' *is identified as a use that is 'normally permitted' on lands that are zoned for general industry. A '*materials recovery facility / composting / waste transfer station*' is also identified as being 'normally permitted' on lands so zoned. There is no specific use class for anaerobic digester listed in the land use zoning matrix and the above uses are in my opinion the closest use class is listed to the form of development proposed. I note the fact that observers to the appeal (namely the observation submitted on behalf of the Grafton Group) questioned the compatibility of the proposed development with the current land use zoning and specifically argued that the proposed development does not comprise a '*materials recovery facility / composting / waste transfer station*' which, it is contended, means a recycling centre. I agree that the proposed development does not clearly come within what would normally be considered to comprise a 'materials recovery facility / composting / waste transfer station'. In my opinion, the form of development proposed to us however come within what could be considered to comprise 'general industry'. I am also of the opinion that's the form of development proposed is consistent with the stated objective for the zone as recited above, in particular in so far as it specifically references industry and the treatment and recovery of waste materials."*

57. At paragraph 7.3.7 the Inspector noted that para. 15.4 of the Tullamore Town and Environs Development Plan related to other uses and that any land uses which are not listed within the land use zoning matrix will be considered on an individual basis. In this respect, he stated, regard will be had to the proper planning and sustainable development of the area, and compliance with the relevant policies and objectives, standards and requirements set out in that plan as well as guidelines issued by the Department of the Environment, Heritage and Local Government and other Government bodies/sections.

58. The Inspector referred to the observations on the appeal in relation to the Draft Development Plan (which Plan came into effect before the Board determined the appeal). The Inspector stated that the Draft Plan was not a statutory document nor a document to which the Board was required to have regard. Notwithstanding this, the Inspector acknowledged that the pattern of development in the environments of the site was proposed to change to Business and Technology use, and that objective LUZO-08 of the Draft Plan stated that it is an objective of the council to '*provide for technology based*

light industry, research and development and compatible officers in a high quality built and landscaped environment.'

59. The Inspector considered that the proposed development would not be inconsistent with the proposed Business and Technology zoning under the Draft County Development Plan. The manner in which the Inspector considered the question of compliance of the proposed development with the zoning of the site in the Draft Plan is fundamental to the first issue before the Court as the Board relied upon the Report, thereby adopting the reasons stated therein. The Inspector concluded:

"*7.3.9 … Uses that are identified in the Draft Plan as not permitted on lands zoned Business / Technology Park include Industry – Heavy, Composting Facility, and Municipal Waste Incinerator. A Waste to Energy facility is identified as being open for consideration. In my opinion, none of these use classes are clearly the same as the form of development which is the subject of the current appeal and the draft plan contains provision for uses not identified in the zoning matrix to be assessed on their merits. From the land use zoning map included with the Draft Plan, I also note that the appeal site is located at the far southern end of the area proposed to be zoned 'Business and Technology' with lands to the south (the Chadwicks site) and to the east on the opposite side of the estate road proposed to remain zoned 'Industrial and Warehousing'. The development of the appeal site would not therefore in my opinion act to fragment or impact in a very significant way on the overall parcel of lands that are proposed to be zoned for business and technology use. A full examination of the likely significant environmental impacts arising from the proposed development is set out at section 8.0 of this report below under the heading of EIA and no significant adverse environmental impacts on existing identified sensitive receptors / locations are considered likely to arise. The impact on the current undeveloped lands proposed to be zoned for Business and Technology use under the draft plan is not specifically addressed in the submitted EIAR, however given the location of these lands relative to the appeal site and the results of the assessment undertaken at section 8.0 of this report under the heading of EIA, and specifically the assessment under the heading of air quality, noise and landscape and visual, I do not consider that the proposed development would be inconsistent with the proposed Business and Technology zoning under the Draft County Development Plan or would act to mitigate against the future development of these lands for these uses.*"

7.3.10 The third party submissions on file, and notably that submitted on behalf of the Axis Business Centre, contend that the environmental impacts arising from the proposed development including odours, traffic and noise would have the effect of making business park a less attractive location for businesses. The submission references the fact that the business park currently accommodates 40 businesses with c.440 employees. I agree that the business park is an important employment centre for the town and that the future development of the park and adjoining undeveloped zoned lands will be import (sic) for the future development of Tullamore. Other third party submissions make reference to the potential impact of the proposed development of sensitive land uses located within and adjacent to the business park lands including a crèche /Montessori school and the football club grounds located to the north of the site. As set out in this assessment, I do not consider that the proposed development is likely to have a significant negative impact on the environment of sensitive receptors in the vicinity of the site including the Axis Business Park by virtue of the impacts on air quality, noise, traffic or other environmental impacts and do not therefore agree with the third parties that the existing or future operation of the business park would be significantly compromised by the proposed form of development or that there would be a potential loss of employment in the area if this development is allowed to be undertaken."

60. The issue of land use was also referred to by the Inspector at section 8.2, Population and Human Health. It was noted that there would be increased economic activity and employment during the construction phase in particular and that, accordingly, the development would have a short moderate positive impact in terms of employment and economic activity. The Inspector stated:

"*8.2.1 The proposed development will have impacts on the* ***population*** *in terms of increased* ***economic activity and employment*** *during the construction phase in particular. The construction phase is estimated to take approximately 12 months and to lead to the creation of between 50 and 70 direct jobs. The proposed development will therefore have a short moderate positive impact in terms of employment and economic activity. During the operational phase, the development is proposed to lead to the creation of 4 to 5 full-time jobs directly connected with the site. The level of long-term employment benefits arising from the development is therefore slight*.

"*8.2.2 the proposed development is not considered likely to have significant impact on the* **pattern of land use** *in the vicinity of site. Issues related to human health arising from the development are considered below and in subsequent sections relating to air and water, however conclusions of these assessments is that the proposed development would not be likely to have a significant negative impact on human health or the immunity of development land uses in the vicinity of the site. A number of observations to the appeal note the fact that the appeal site and lands to the north and west are proposed under the* Draft Offaly County Development Plan, 2021 – 2027 *to be rezoned from their existing Industrial zoning to 'Business and Technology' and contend that the proposed development would be inconsistent with this proposed zoning. Firstly, as highlighted in section 4.2 the Draft Offaly County Development Plan has not yet been adopted and is not the plan in effect at the date of writing this report. It is also noted that under s.34(2)(a) of the Act the Board is not bound by the provisions of the development plan making its decision and that, as also set out at 7.3 above, none of the uses identified in the land use zoning matrix in the draft plan are clearly consistent with the current proposal and that uses not identified in the matrix are to be assessed on their merits*." (original emphasis)

61. At paragraph 8.2.3 the Inspector found that the development of the appeal site as proposed would not act to fragment or impact in a significant way on the future development of the overall parcels of land which are proposed to be zoned for business and technology use.

62. The appearance of the development was considered from paragraph 8.5.17 of the Report and it was stated that the development, when operational, would have the appearance of "*an industrial facility with large scale storage and processing vessels, boiler stack and flare for the flaring of gas*." (para. 8.5.19) The Inspector found that, given the location of the site relative to the most sensitive visual receptors and the context of the site adjacent to commercially/industrially zoned lands and lands zoned for future development, "*the worst case visual impact would be moderate adverse*". This was consistent with the assessment in the EIAR. However, having regard to the mitigation factors, it was found that the proposed development would not have any significant adverse direct or indirect

effects on landscape individually or cumulatively with other permitted plans and projects in the vicinity. (para. 8.5.22)

63. The Inspector recommended that permission be granted for the proposed development, which he found to be an acceptable form of energy recovery from primarily agricultural waste subject to conditions set out at section 12.

64. The Draft Development Plan was adopted on 10th September 2021 and came into effect on 22nd October 2022, between the completion of the Inspector's Report and its consideration by the Board.

65. As appears from both the Board Direction and Order, the Board found that, subject to compliance with the conditions set out in its decision, the proposed development would be in accordance with the provisions of the relevant policies of the planning authority as set out in the Offaly County Development Plan 2021-2027.

66. The Board did not identify any aspects of the Inspector's Report with which it did not agree. Subject to the conditions imposed, the Board considered that the proposed development would comprise an acceptable form of energy recovery from primarily agricultural waste and would be in accordance with, *inter alia*, the Offaly County Development Plan 2021-2017 and the proper planning and sustainable development of the area.

Validity of decision regarding Zoning – Core Ground 1

67. The Applicant maintains that the Board has erred on the question of zoning as set out in Core Ground 1 and particularised in the Statement of Grounds.

> **Core Ground 1:** The decision of the Board, dated 17 February 2022, to grant planning permission for the Proposed Development (the "Impugned Decision") contains a material legal error as the Board incorrectly concluded that the Proposed Development was consistent with, and not a material contravention of, the relevant zoning objective that applies to the planning application site as per the Offaly County Development Plan 2021-2027, and/or failed to take into account relevant

considerations, and/or took into account irrelevant considerations, and/or failed to give adequate reasons.

Conformity with the Development Plan

68. In other words, the Applicant contends that the Board erred in law in finding that the proposed development was consistent with, and did not materially contravene, the Development Plan, having particular regard to the zoning of the site as Business and Technology and its designation as a Strategic Employment Zone or SEZ.

69. It has not been argued that the proposed development is of a type of development which is permitted in principle. Rather, the Board submits that, it is a waste to energy facility and that "*It is positively envisaged that a use of farm waste* and *by product would be included in* ***Table 12.1*** *and it seems entirely clear that reading the CDP as a whole, the clear intention was to make provision for the very kind of anaerobic digestion facility in Table 12.1 and in the* Business/Technology Park *zoning*."

70. The Applicant submits that the Inspector found that the proposed development is not a waste to energy facility.

71. In the Report, the Inspector stated "*uses that are identified in the draft plan as not permitted on lands zoned business/technology Park include industry – heavy, composting facility, and municipal waste incinerator. A Waste to Energy facility is identified as being open for consideration. In my opinion, none of these uses are clearly the same as the form of development which is the subject of the current appeal and the draft plan contains provision for uses not identified in the zoning matrix to be assessed on their merits*." (para. 7.3.9). At para. 8.2.2., the Inspector noted that the Draft Development Plan had not been adopted and was therefore not in effect at the date of writing the report. He referred to paragraph 7.3 and stated, "*none of the uses identified in the land use zoning matrix in the draft plan are clearly consistent with the current proposal and that uses not identified in the matrix are to be assessed on their merits*."

72. The Report of the Inspector is somewhat ambiguous as to whether or not the proposed development was found to be a waste to energy facility. The Board did not address this aspect of the Report and granted permission in reliance thereon. Therefore, it is fixed with

the language used and findings made by the Inspector. I do not consider it necessary to decide whether the language used by the Inspector, that the land uses including a waste to energy facility "*are not clearly the same as the form of development which is the subject of the … appeal*", amounts to a finding that the proposed development is or is not a waste to energy facility. The statements at para. 7.3.9 and para. 8.2.2 would attend to support the contention that the Inspector did not do so.

73. As appears from para. 12.5 of the Development Plan, the Board was required to consider a proposed land use which is not included in the zoning matrix on a case by case basis, having regard to the proper planning and sustainable development of the area and compliance of the relevant policies and objectives including land use zoning objectives, standards and requirements set out in the plan, guidelines issued under section 28 of the 2000 Act and guidance issued by the Government bodies/departments. Undoubtedly the designation of the lands in question as a Strategic Employment Zone and LUZO-15 were relevant to consideration of the proposed development, whether as a waste to energy facility or under para. 12.5.

74. The Zoning Matrix, explained at para. 12.3 of the Development Plan and set out at Table 12.1, provides that "*Waste to Energy Facilities*" are "*open for consideration*". In the course of the appeal, the Applicant described the proposed development as a waste to energy facility, but it was argued that in his Report, which was effectively adopted by the Board, the Inspector had found that the proposed development was not covered by the Zoning Matrix; he stated that that land use class is not "*clearly the same as the form of development which is the subject of the current appeal and the draft plan contains provision for uses not identified in the zoning matrix to be assessed on their merits.*" (para. 7.3.1)

75. Waste to energy facilities are not 'permitted in principle' within lands zoned Business and Technology Park, but such use is 'open for consideration' i.e. it "*may be permitted where the Local Authority is satisfied that it is in compliance with the zoning objective and other relevant policies and objectives, standards and requirements as set out in the County Development Plan and will not conflict with the permitted, existing or adjoining land uses, in accordance with the proper planning and sustainable development of the area*." The Zoning Matrix does not take into account other land use zoning objectives

provided in the Development Plan, including designation of lands as a Strategic Employment Zone under para. 12.6.2 and LUZO-15. There is no distinction in the Zoning Matrix between lands zoned Business and Technology Park only, and those which are also designated as a Strategic Employment Zone (as at Ballyduff).

76. It is clear, therefore, that in order to decide whether the grant of permission for a waste to energy facility is compliant with, or contravenes (materially or at all), the Development Plan, it is necessary to consider whether the proposed development complies with the zoning objectives and other relevant policies and objectives, standards and requirements as set out in the County Development Plan. One of the stated aims of the Development Plan, as specified at para. 2.1.1, is to ensure that the development objectives of the Plan are consistent with national and regional development objectives as set out in the Regional Spatial and Economic Strategy (RSES) for the Eastern and Midland Region 2019. The planning authority was required to have regard to this Strategy in making the Development Plan: section 10(1A), of the 2000 Act.

77. Regional Policy Objective 4.27 of the RSES for the Eastern and Midland Region 2019, is referred to at para. 12.6.2 of the Development Plan. At para.5.5.2, the Development Plan states that sites are identified in the Tullamore zoning objectives map as 'Strategic Employment Zones' in response to Regional Policy Objective (RPO) 4.27 of the RSES which states, '*Key Towns shall act as economic drivers and provide for strategic employment locations to improve the economic base by increasing the ratio of jobs to workers*.'

78. Chapter 5 of the Development Plan, Economic Development Strategy, sets out the employment and enterprise strategy and policies from a planning and economic development perspective for County Offaly over the term of the Plan. As appears from para. 5.1, the RSES for the Eastern and Midland Region 2019 was considered by the planning authority in making the Development Plan.

79. It is considered further, at para. 5.5.3 of the Development Plan, which provides:

"Tullamore and Surrounding Area Tullamore, a Key Town in the RSES (2019) must function as a driver of economic growth to complement the Regional Growth Centre of Athlone. It has a role as a major employment, retail and services centre with key

assets being its existing jobs to resident workers' ratio, excellent quality of life and future strategic development sites known as 'Strategic Employment Zones'. The further development of the med-tech cluster on the IDA business park in Srah provides opportunity to drive development within the town. The need for complementary third level outreach facilities in Tullamore should be examined, particularly with regard to support for the Midland Regional Hospital and where appropriate, its continued development as a Teaching / University Hospital, together with potential for linkages to existing and new med-tech businesses and research facilities. Desirable economic investment for Tullamore would be in the form of green jobs and green technologies, innovation, digital technologies, circular bioeconomy, food and beverage (in particular due to its distilling heritage), advanced manufacturing, tourism, recreation and amenity and high quality town centre retail development."

80. The planning authority states, at para. 5.4 of the Development Plan, that it

"recognises that it has an expanding role in coordinating and facilitating a competitive environment that maintains existing employment and supports employment growth. The Council will prepare and adapt to the changing landscape of enterprise agencies throughout the Plan period and continue to co-operate with and support the relevant enterprise agencies that can do most to promote the economic growth of the county. The Council takes a multi-faceted and dynamic approach in its strategy to promote and encourage employment, recognising the challenges that are outside of its control while also being mindful that each section of the Council has both direct and indirect influence in employment creation and economic activity on a daily basis.

...The Council, however, recognises that the biggest influence that it can have in the promotion and growth of the economy of County Offaly is contained within the policies and objectives of this plan."

81. The planning authority designated lands in the Ballyduff area of Tullamore, including the site of the proposed development, as a Strategic Employment Zone having complied with its obligation to have regard to the Regional Spatial and Economic Strategy for the Eastern and Midland Region 2019 in making the Development Plan. As indicated above, the stated purpose of the designation of the lands as a Strategic Employment Zone is:

"*to facilitate strategic large scale employment in development zones in a sequential manner to promote sustainable compact growth in tandem with the delivery of infrastructure and enabling services. These zones have development capacity, good accessibility, availability of a land bank of at least 100 acres in size and potential to deliver significant economic development and employment creation. …. the proposed Ballyduff SEZ has the potential to provide a Business / Technology Park, leveraging its proximity to the Axis Business Park, Burlington Business Park and Srah IDA Business Park in the area*."

82. The proposed development is within the sole area in County Offaly which is both zoned Business and Technology and designated a Strategic Employment Zone. There is only one other designated Strategic Employment Zone in the County.

83. The significance of the designation as a Strategic Employment Zone is evident from the Development Plan itself which describes the aim of the core strategy of the Plan as ensuring that its objectives are consistent with national and regional development objectives as set out in the RSES for the Eastern and Midland Region, 2019. (paras. 2.1.1 and 5.1 of the Plan). Paragraph 2.4.3 of the Development Plan describes the aims of the Gateway Region of the Eastern and Midland Region (which includes the Tullamore area), as provided for in the 2019 RSES. It is stated "*Tullamore Key Town plays a regional role in providing key employment and services for its own extensive hinterland*."

84. The Strategic Employment Zones in Tullamore Key Town are listed first in the list of Key Initiatives in County Offaly at Table 5.2. Other relevant key initiatives include "(*7*) *Adequate zoning in towns and villages to facilitate employment, enterprise and existing initiatives*" and "*(9) Potential for new energy initiatives to facilitate climate action and energy transition as indicated in chapter 3 of this Plan*."

85. Furthermore, Chapter 13 of the Plan, which includes DMS-72 and DMS-73 (quoted above at para. 44), is relevant. Other policies of significance in the Development Plan relate to the circular economy, bio-economy and green technology.

86. Green Energy:

"*Whilst Offaly has a long history of energy production related predominantly to the commercial exploitation of peatlands, national environmental policies are dictating the wind down of traditional fossil fuel powered stations and a diversification of our energy production towards green energy such Offaly County Development Plan 2021-2027 Chapter 5 Economic Development Strategy Page 176 as wind, solar and bioenergy. Offaly County Council recognises the potential economic benefit of a transition from fossil fuel based energy production through to investment in renewable energy, the promotion of the green enterprise sector and the creation of green collar jobs; all components of a local 'smart green economy'*

The Rhode Green Energy Park (GEP) is strategically located on the outskirts of Rhode, just 7 km from the M6 Dublin to Galway motorway. The business park has been established on the site of a former ESB Power Station and occupies approximately 5.3 ha with 13 serviced sites. The area has a strong heritage in energy production and is already home to a number of consented renewable energy generation proposals and facilities in the shape of wind, solar and flywheel battery storage. With the significant development of the business park infrastructure(s) in place and various energy related infrastructure and prospective developments nearby, Offaly County Council has identified the potential for a Green Energy Park at this location which can be a national exemplar of the transition from a historical dependency on fossil fuels to sustainable energy and energy innovation." (para. 5.6.2)

87. At para. 5.7 the Development Plan states:

"*The bio-economy comprises 'the production of renewable biological resources, such as crops, forests, fish, animals, and micro-organisms and the conversion of these resources and waste stream residues, by-products or municipal solid waste into value added products, such as food, feed, bio-based products and bioenergy' (E.C. 2012).*

The transition to a more circular economy and bio-economy, where the value of bio-based products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised, will provide an essential contribution to Offaly developing a sustainable, low carbon, resources efficient and competitive economy. The Council will support the development of the bio-energy industry in the county (including bio-gas) where appropriate..

Desirable economic investment for Tullamore would be in the form of green jobs and green technologies, innovation, digital technologies, circular bioeconomy, food and beverage (in particular due to its distilling heritage), advanced manufacturing, tourism, recreation and amenity and high quality town centre retail development."

88. The Zoning Matrix provides that a waste to energy facility is "open to consideration" in lands zoned Business and Technology; this expressly requires consideration of the relevant policies and objectives in the Development Plan. Therefore, in addition to considering the Business and Technology zoning, in para. 12.4.7 and LUZO-08, the policies and objectives of the Development Plan, including the designation of the lands as a Strategic Employment Zone and LUZO-15 are clearly applicable.

89. As appears from the appeal, and para. 1.5 of the Inspector's Report, the area of the site of the proposed development is 2.1379ha.. The total number of jobs which the developer states would be created by the proposed development is 50-70 jobs for the construction phase of approximately 12 months, and 4-5 jobs when the development is operational. The Inspector, and the Board which did not demur from the Inspector's Report, found that the "*The level of long-term employment benefits arising from the development is therefore slight*" (para. 8.2.1).

90. I do not consider that the creation of 50-70 jobs during the 12-month construction phase, and 4-5 jobs thereafter, is sufficient to comply with the policies and objectives as set out in the Development Plan, and in particular, the objective of designating the lands as a Strategic Employment Zone i.e. to "*facilitate strategic large scale employment in development zones*". The creation of "*slight*" long term employment on a site of almost 2.14ha is not consistent with para. 12.6.2 of the Development Plan or LUZO-15, or RSES Policy Objective 4.27 which the Development Plan seeks to apply. I am satisfied that this contravention of the Development Plan is material.

91. Therefore, I find that the proposed development amounts to a material contravention of the Development Plan, having regard to the zoning and objectives of the Plan. The Board accepts that if I find that the proposed development amounts to a material contravention, the Applicant must succeed in these proceedings.

92. If I am incorrect in interpreting the Development Plan in this manner, and the Development Plan is sufficiently flexible to require the Board to exercise planning judgment in interpretating how lands zoned Business and Technology Park (LUZO-08) and designated as a Strategic Employment Zone (LUZO-15) should be interpreted, the Court may not embark on a full-blooded review.

93. I find that the Board has not disclosed the basis on which it exercised planning judgment in this regard (if indeed it did so), whether by reference to the Inspector's Report or otherwise.

Reasons and consideration by the Board of Relevant Matters – Core Ground 1(b) and (d)

94. Reasons are fundamental to the validity of an administrative decision. As Fennelly J. stated in *Mallak v. Minister for Justice* [2012] IESC 59, at para. 66:

> "*The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded*."

95. Barniville and Holland JJ. held, in *Crekav Trading GP Ltd v An Bord Pleanála* [2020] IEHC 400 (para. 164) and *Ballyboden Tidy Towns Ltd v ABP* [2022] IEHC 7 (para. 257) respectively, "*Gone are the days when there was doubt even as to the existence of the obligation or in which it could be described as "*very light*" or "*almost minimal*".* The Board is clearly required to provide adequate reasons for its decision and, in accordance with section 34(10)(a) of the 2000 Act, the Board is required to state, "*the main reasons and considerations on which the decision is based*." The obligation in section 34(10)(b) does not arise in this case as the Board did not depart from the reasons or recommendations of the Inspector.

96. Having considered the obligation to provide reasons in *Mulholland v. An Bord Pleanála* [2005] IEHC 306, [2006] 1 IR 453, Kelly J. stated:

"*in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:*

(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;

(2) arm himself for such hearing or review;

(3) know if the decision maker has directed its mind adequately to the issues which it has considered or which it is obliged to consider;

(4) enable the court to review the decision." (para. 34, pp. 464 and 465).

97. Where reasons can be found was considered in detail by Clarke CJ. in *Connelly* (paras.7.3 – 7.5), in which case he considered judgments delivered by him in *Christian Christian v. Dublin City Council* [2012] IEHC 163 and *EMI Records (Ireland) Limited & Ors. v. The Data Protection Commissioner* [2013] IESC 34. At para. 7.5 – 7.6 of *Connelly*, Clarke CJ held that

"*it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, … this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined*

…

the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision."

98. Similarly, albeit in the context of the exercise of an absolute discretion, Fennelly J. placed emphasis on the need for the affected person to be able to ascertain whether or not s/he has a ground to apply for judicial review, and for the courts to effectively exercise their power of judicial review in *Mallak* v. *Minister for Justice, Equality and Law Reform* [2012] 3 IR 297.

99. *Mallak* was considered by the Supreme Court in the seminal judgment on the duty of the Board to give reasons in *Connelly v An Bord Pleanála* [2018] IESC 31, [2018] 2 IRLM 453. Clarke CJ stated, at para. 5.4:

"... One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."

100. Clarke CJ considered the judgment in *Oates v. Browne* [2016] IESC 7, [2016] 1 IR 481, where Hardiman J. held, having referred to *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750: "*it is an aspect that justice must not only be done but be seen to be done that the reasons stated must 'satisfy the persons having recourse of the tribunal. That it has directed its mind adequately to the issue before it.*" (para. 47) As is clear from the judgment of Clarke CJ. in *Connelly*, the word "*adequately*" in the *dictum* of Murphy J. in *O'Donoghue* and Hardiman J. in *Oates* is significant.

101. At paras. 6.15 – 6.16 of *Connelly*, while emphasising that the duty to give reasons depends on the nature of the decision, Clarke C.J. summarised the requirement to give reasons in the following way:

"*any person affected by a decision is at least entitled to know in general terms why the decision was made…. a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.*"

102. Whilst an administrative decision does not require a discursive determination, "*the reasoning cannot be so anodyne that it is impossible to know why the decision went one*

way or another" (para. 10.1). As is clear from para. 10.15 of the judgment of Clarke CJ in *Connelly* and, *Sweetman v An Bord Pleanála* [2021] IEHC 259 "*a successful challenge will arise where it is not possible either for interested parties, or the court itself, to know why the decision fell the way it did*." (per. O'Regan J. in *Sweetman,* at para. 30.1)

103. Subsequent to *Connelly*, O'Donnell J. (as he then was) held in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367:

"*57. … 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.*"

104. In *Balscadden Road Residents Association v An Bord Pleanála* [2020] IEHC 586 Humphreys J. observed that he did not read the judgment of O'Donnell J. in *Balz* as adding "*an additional layer of obligation as to reasons."* He described the passage cited above as "*a comment rather than a holding, but it is also a comment made in the context of rejection of a point in limine by the decision-maker*". Notwithstanding this, Humphreys J. found that the Board must provide "*broad reasons regarding the main issues*" and that, while there is no obligation to give a discursive narrative analysis, reasons must be judged from the standpoint of an intelligent person who has participated in the process and is appraised of the broad issues involved and should not be read in isolation. (para. 38-39) A similar conclusion was reached by Holland J. in *Ballyboden Tidy Towns v. An Bord Pleanála* [2022] IEHC 7 in which case he found that the finding at para. 57 of *Balz* is not limited in its relevance to issues which are rejected *in limine* as irrelevant. Holland J. stated:

"*276. It seems to me that for the Board to say, correctly, that there is no obligation on the Board to engage both with <u>every</u> submission made by the public and with the <u>minute detail</u> of those submissions does not answer the question whether there was an obligation to engage with <u>this</u> submission and, to a greater or lesser degree, <u>its</u> detail and whether the Board met that obligation. To put it another way, it would clearly be incorrect to say that there is no obligation on the Board to engage with any*

submission made by the public or with <u>any detail</u> of those submissions." (emphasis in original)

105. Simons J. cited *Balz* in *Board of Management of St Audeons National School v An Bord Pleanála & Merchants Quay Ireland CLG* [2021] IEHC 453 and held 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.*" Similarly, in the context of the Habitats Directive (Council Directive 92/43/EEC), McDonald J. held, in *Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála* [2019] IEHC 88 that it was not necessary to individually address every submission, but "*What seems to me to be crucial is that the points made in submissions should be addressed. …. that there should be complete, precise and definitive findings and conclusions regarding any identified potential effects on the qualifying interests of any European site.*"

106. The Board Direction recorded the decision of the Board "*to grant permission generally in accordance with the Inspector's recommendation, for the following reasons, and subject to the following conditions*." The only material difference between the reasons and considerations set out by the Board in its Direction and Order, and by the Inspector in his Report, is that the Board relied solely on the relevant policies of the planning authority set out in the Offaly County Development Plan 2021 – 2027. On the other hand, the Inspector relied primarily on the Tullamore Plan 2010-2016, although he also considered the current Development Plan, while stating that it did not apply. The Regional Spatial and Economic Strategy for the Eastern and Midland Region 2019 is also expressly referred to by the Board in its Direction and Order. It is not necessary to determine, in order to decide the issues arising in these proceedings, whether there was a higher onus on the Board to express reasons for its decision because there was a change in the relevant Development Plan between the preparation of the Inspector's Report and the Board making its Decision and Order. I consider it highly relevant that neither the Board Decision nor Order refer specifically to designation of the area as a Strategic Employment Zone, save insofar as the observations were summarised by the Inspector.

107. The fact that the proposed development would be an acceptable form of energy recovery from primarily agricultural waste, or that it accords with the EU, National and Regional Waste and Sustainable Energy Policies, is not in dispute in these proceedings.

The Board submits that it was unnecessary for it to state expressly that it is an acceptable form of energy recovery *at the specific location* and that, in finding that it is compatible with the Development Plan, the Board found its siting within the lands zoned Business and Technology Park, and designated Strategic Employment Zone, to be compatible with the zoning. The difficulty with this argument is that the Inspector's only reference to the Strategic Employment Zone is in the recitation of the observations made to the Board. The Inspector's Report, and Board Decision and Order do not disclose the reasoning or balancing of the various zoning objectives. The creation of 4-5 jobs in a site of almost 2.14ha, which was found by the Inspector to be "*slight*", is not consistent with the objective at para. 12.6.2 and LUZO-15. The sites designated as SEZ are stated to have "*development capacity, good accessibility, availability of a land bank of at least 100 acres in size and potential to deliver significant economic development and employment creation*."

108. In this case, three of the four observations made raised the issue of employment. This fact alone is relevant to the question of the materiality of a contravention of the Development Plan, if a contravention is found to exist: *Roughan v. An Bord Pleanála.*

109. These observations were summarised by the Inspector, at para. 6.2, as follows:

"*there is no community gain or employment benefit from the development*"

"*The development is contrary to the vision of the town set out in the plan and would have detrimental impact on existent employment and future employment creation.*"

And

"*The Axis Business Park has developed as a light industrial area and this is reflected in the identification of the area as a strategic employment zone in the draft plan….*

The business park currently accommodates 40 businesses with c. 440 employees. It is an important employment centre for the town and would be compromised by the proposed form of development. There is a potential loss of employment in the area if this development is allowed to be undertaken."

110. The observation made by the Applicant in the context of its objection based on zoning expressly raised the designation of the site as a Strategic Employment Zone. It was stated:

"*The fact that only 4-5 employees will be employed in the proposed development on a 2.14 hectare site is not compatible with the zoning objective for a business and technology zone and the Strategic Employment designation. Such an employee ratio is more akin to warehousing site as opposed to business areas. Furthermore, the Draft Plan requires these lands to be included as part of an overall Masterplan for the entire Strategic Employment designation.*"

111. The only references to employment or the Strategic Employment Zones in the Inspector's Report, other than the recitation of the observations made to the Board, are at paras. 7.3.10 and 8.2.1 (which are set out at paras. 59 and 60 above). At para. 8.2.1, the Inspector found that 50-70 people would be employed during the construction phase which would last 12 months, but that "*The level of long-term employment benefits arising from the development is therefore slight.*"

112. Para. 7.3.10 summarises the third-party submissions, in particular the submission that the environmental impacts arising from the proposed development would adversely affect the Axis Business Park and grounds adjacent thereto. The Inspector accepted that the Axis Business Park is an employment centre and rejected the submission that there would be a potential loss of employment in the area if this development is permitted. The submission that the proposed development failed to comply with the objectives of the RSES and the Development Plan in relation to the facilitation of strategic large-scale employment was not addressed.

113. The fact that the site of the proposed development is one of only two areas within the County which are designated as a Strategic Employment Zone (the objective of which is to facilitate large scale employment) is very significant. This is particularly having regard to the relevant Regional Spatial Economic Strategy for the Eastern and Midland Region. As the Board has contended, anaerobic digestion is singled out in the Development Plan as a means of production of renewable energy, but this does not mean that it can be sited anywhere in the County. Para. 3.2.5 of the Development Plan, which concerns anaerobic digestion, expressly states that applications for such uses, will be considered "*on compatibly zoned sites as outlined in Table 12.1 Land Use Zoning Matrix in Chapter 12*." Development of the type proposed is also consistent with the objective of developing Circular Bio Economy, as considered at para. 3.2.1 of the Development Plan. However,

that is a general objective and is not provided for in any of the Land Use Zoning Objectives specified at Chapter 12 of the Development Plan.

114. In contrast with SEZs, the objectives relating to the circular economy, bio-economy/ green-technology are not confined to strategic designated or specific geographical areas. The issue of designation as a Strategic Employment Zone, and LUZO-15, was required to be considered as part of the consideration of the Zoning and compatibility with the Development Plan. This is one of the main issues which was before the Board.

115. The Board relied on the well-established presumption that it, as a statutory body, must be presumed to act lawfully. Furthermore, as Hardiman J. held in *GK v. Minister for Justice* [2001] IESC 205, [2002] 2 IR 418, [2002] 1 IRLM 401,

> "*A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.*"

116. The jurisprudence in the area of asylum law, as in relation to planning and environmental law, is clear – it is not always sufficient to rely on a general statement that all relevant or listed matters have been considered; certain documents or matters require specific consideration depending on the specific facts under review. These presumptions may be rebutted, as occurred in *SR & LA v. Minister for Justice* [2023] IECA 227 (para. 122). This is consistent with the requirement to give reasons as considered in both *Connelly* and *Balz*. In *Balz*, O'Donnell J. concluded that the appellants had adduced sufficient evidence to infer that the Inspector had discounted submissions made on the ground that they were irrelevant. He found that the Board had not rebutted the inference that it relied on that error:

> "*47. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to*

the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."

117. Whilst the Board is correct in submitting that it is not required to expressly refer to every part of the Development Plan being considered, there are circumstances in which the failure to refer to a particular aspect is material. In *T.G. v. Refugee Appeals Tribunal* [2007] IEHC 377, Birmingham J. (as he then was) held that by reason of the importance of certain documents, fair procedures required the decision maker to provide a more transparent analysis of those documents. He held that not only must a particularly important document be considered, but it must also be seen to have been considered.

118. I find that the objectives at para. 12.6.2 of the Development Plan and LUZO-15 are of sufficient importance to the issues which were before the Board, that fair procedures required them to be considered transparently. The Board adopted the finding of the Inspector that the employment benefit of the development was "s*light*", and provided no reasons as to why the proposed development was consistent with the Development Plan, notwithstanding the development creating only 4-5 jobs in an area which is a Strategic Employment Zone (with the objective of facilitating strategic large scale employment). Therefore, I find that the presumption that the Board considered the objective designating the site as a Strategic Employment Zone in para. 12.6.4 and LUZO-15 is rebutted. The finding of Humphreys J. at para. 29, in *Concerned Residents of Treascon v. An Bord Pleanála* [2022] IEHC 700, which the Board relies upon, is distinguishable.

119. The Applicant has also argued that the Board failed to have regard to LUZO-16, which mandates that a Masterplan be considered. However, it is common case that no such Masterplan has been created. The Applicant has not contended that permission could not be granted prior to the making of a Masterplan. In those circumstances, the absence of reference to LUZO-16 in the Board Order and Direction, and the Inspector's report, does not invalidate the Board's decision.

120. If I am wrong in finding that the Board failed to consider the objective designating the site as a Strategic Employment Zone in para. 12.6.4 and LUZO-15, and in finding that the proposed development materially contravenes the Development Plan, I consider that the designation of the lands as a Strategic Employment Zone is of sufficient importance to the issues before the Board to give rise to an obligation to give reasons in relation thereto. Specifically, in circumstances where the site was designated as a SEZ, the Board was required to give reasons for granting permission despite finding that the level of employment created by the proposed development was "*slight*" i.e. 4-5 jobs on a 2.14ha site. This issue had been raised in observations, including those made by the Applicant, and was of such relevance to the Board's decision that it was necessary to provide reasons for rejecting that submission. It is not possible to ascertain from the Board Decision or Order, or the Inspector's Report, why permission was granted for a development creating such low employment on a relatively large site within a Strategic Employment Zone. I reject the submission, on behalf of the Board, that it has provided "*the broad reasons on the broad issues*", in reliance on *O'Donnell v. An Bord Pleanála* [2022] IEHC 381.(para.57) It has not provided the broad reasons for the broad issues.

121. As noted above, there may have been a heightened onus on the Board to expressly consider the Development Plan as it was not in effect when the Inspector completed his Report.

122. I find that the Board failed to provide sufficient reasons for rejecting the submissions made regarding employment and designation as a Strategic Employment Zone.

Irrelevant Considerations – Core Ground 1(c)

123. Having found that none of the use classes specified in the Zoning Matrix, which included waste energy facilities, were clearly the same as the form of proposed development, the Inspector considered the fact that the development of the appeal site would not act to fragment or impact in a very substantial significant way the overall parcel of lands that are proposed to be zoned for Business and Technology use. (paras. 7.3.9 and 7.3.10) That finding was made in the context of the Inspector's conclusion that the proposed development would not be inconsistent with the proposed Business

and Technology zoning nor, he found, would it act to mitigate against the future development of these lands for those uses.

124. At para. 8.2.3, the Inspector stated:

"*In terms of the potential impact on future pattern of development in the vicinity, I note that the appeal site is located at the far southern end of the area proposed to be zoned 'Business and Technology' under the Draft County Development Plan with lands to the south (the Chadwicks site) and to the east on the opposite side of the estate road proposed to remain zoned 'Industrial and Warehousing'. Taken in conjunction with the assessment set out below in terms of Human Health, Air, Water and Material Assets, I do not consider that the development of the appeal site as proposed would act to fragment or impact in a significantly [sic] way on the future development of the overall parcel of lands that are proposed to be zoned for business and technology use*."

125. There is nothing in the Development Plan which supports the interpretation that the importance of a particular land use zoning objective is weakened towards the edge of the lands subject to that zoning objective. If it were permissible to grant permission which otherwise contravenes the objectives and policies in a development plan on the basis that it did not fragment the area, over time, this would erode the importance of zoning, particularly where, as in this case, a planning authority chose to change the zoning of a significant tract of land.

126. Therefore, I find that the question whether or not the grant of the permission sought would fragment the development of the area zoned Business and Technology because the site was at the edge of the lands so zoned was not a relevant consideration.

127. The Applicant also contends that the Board erred in relying on the absence of significant adverse environmental effects in considering the compatibility of the proposed development with the Business and Technology zoning. The Inspector stated, at para.

7.3.9 of the Report:

"*A full examination of the likely significant environmental impacts arising from the proposed development is set out at section 8.0 of this report below under the heading of EIA and no significant adverse environmental impacts on existing*

identified sensitive receptors / locations are considered likely to arise. The impact on the current undeveloped lands proposed to be zoned for Business and Technology use under the draft plan is not specifically addressed in the submitted EIAR, however given the location of these lands relative to the appeal site and the results of the assessment undertaken at section 8.0 of this report under the heading of EIA, and specifically the assessment under the heading of air quality, noise and landscape and visual, I do not consider that the proposed development would be inconsistent with the proposed Business and Technology zoning under the Draft County Development Plan or would act to mitigate against the future development of these lands for these uses."

128. It is clear therefrom that the Inspector, and the Board which adopted the report, relied on the finding that there were no significant adverse environmental impacts in finding that the proposed development would not be inconsistent with the Business and Technology zoning.

129. As the Board noted in its submissions, the Axis Business Park had relied on adverse environmental impacts of the proposed development in its observations to the Board. In particular, the Axis Business Park had submitted that the developer had failed to demonstrate that air quality would not be affected and that odours emanating from the proposed development would adversely affect human health. Those observations were not made in the context of a zoning objection.

130. The Development Plan requires the Board to have regard to relevant policies and objectives, standards and requirements set out in the County Development Plan in considering proposed developments which are 'open for consideration' in lands subject to a particular zoning objective. These factors must also be considered for proposed developments which are considered on a case-by-case basis under para. 12.5 of the Development Plan. The environmental impact of a proposed development is not referred to in the Development Plan in the context of zoning, in particular Business and Technology Zoning or designation as a Strategic Employment Zone, nor is it incorporated into the concept of zoning by the definitions 'permitted in principle', 'open for consideration' or 'not normally permitted'. Environmental effects are not considered at

para. 12.5 of the Development Plan which relates to land uses which are not included in the Land Use Zoning Matrix.

131. Undoubtedly the Board was entitled, and required, to consider any significant adverse environmental impacts on the environment in determining the appeal, but the absence of such adverse impacts does not render the proposed development consistent with zoning. Therefore, I find that the Board did rely on an irrelevant consideration, namely the absence of significant adverse environmental effects, in deciding whether or not the proposed development was consistent with the zoning.

Core Ground 2 - Failure to adequately consider all environmental effects of the proposed development for the purposes of sections 171A and 172 of the Planning and Development Act 2000 ('the 2000 Act'), in particular to consider the cumulative effects on the environment, habitats and bats

132. The Applicant argues that the Board did not consider cumulative effects for the purposes of the Environmental Impact Assessment (EIA), specifically in relation to ecology, as mandated by sections 171A and 172 of the 2000 Act. This submission is made by reference to the Environmental Impact Assessment Report (EIAR), which the Applicant contends is deficient as cumulative effects were not identified and considered.

133. It is also contended that the Board erred in carrying out the EIA as the findings that there would be no significant effects on hedgerows and bats were not open to the Board, on the evidence.

134. The application for permission had been refused by the planning authority on the sole ground that, having considered the EIAR, it was not satisfied that the proposed development would not cause serious air pollution, and thereby a significant impact on the environment and public health. That finding was made after the developer had been given an opportunity to provide further details which ought to have been included in the EIAR. The issue of air pollution was addressed in the supplemental information provided by the developer to the planning authority in response to its request for further information. The Applicant makes no complaint in relation to that aspect of the EIA but contends that the EIAR did not correctly address cumulative effects on ecology and did not include information capable of satisfying the Board that there would not be significant

effects on bats. Accordingly, the Applicant contends that the Board's EIA is invalid and ought to be quashed.

135. In the observations made to the Board by the Applicant, it was contended that (a) the EIAR was incomplete; (b) that there was no assessment, or an inadequate assessment of alternative sites; (c) no assessment, or an inadequate assessment of the complete scope of works; (d) no assessment, or an inadequate assessment of the risk of explosion; and (e) no assessment, or an inadequate assessment of odour emissions. No complaint was made in relation to the issues raised in these proceedings in respect of the EIAR in the Applicant's observation to the Board, nor did the planning authority raise concerns in relation to these issues, either in its decision to refuse permission at first instance or its observation on the appeal.

136. The Board relies on *Ballyboden v. An Bord Pleanála* [2021] IEHC 648 to argue that the Applicant is precluded from raising the issues of bats, hedgerows and the alleged inadequate consideration of the cumulative effects of the proposed development in these proceedings as it could have done so in its observations on the appeal. It was submitted that, by failing to raise these issues before the Board, the Applicant is effectively '*gaslighting'* the Board.

137. As a general proposition, an applicant may not raise issues which were not relied upon before the decision maker, as it would give rise to an injustice: *Lancefort Ltd v. An Bord Pleanála (No. 2)* [1998] IESC 14, [1999] 2 IR 270. However, as Humphreys J. held in *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, this proposition requires qualification where the issue goes to the jurisdiction of the Board or raises certain issues of EU law. The jurisdiction of a decision-making body cannot be broadened by the failure of a third party to raise an issue prior to the impugned decision being made. As is clear from *Kerins v. An Bord Pleanála* [2021] IEHC 369, not all jurisdictional objections can be raised in judicial review proceedings if the evidence grounding them was not before the Board.

138. It is common case that the Board was required to carry out an EIA before it could grant the permission sought by the developer: section 172 of the 2000 Act. To that end, the developer was required to submit an EIAR prepared by appropriate experts to the planning authority in accordance with the 2001 Regulations. The Board was required to consider whether the EIAR was sufficient to enable it to carry out an EIA, as was the

planning authority at first instance. Whilst it would be of assistance to a planning authority or the Board on appeal if deficiencies in any EIA are raised by a third party before it, the absence of such submissions is not sufficient to enable the planning authority or the Board to rely on the contents of an EIA if it is inadequate. I agree with the following passage from the judgment of Humphreys J. in *Reid v. Bord Pleanála (No. 1)*:

> "*18. Where the party who becomes the judicial review applicant is not the applicant in the administrative process but is, say, an objector, it is not the function of the objector to correct the other party's homework or to point out omissions the correction of which during the process would enable the application (which is being opposed) to be corrected and improved. An objector is entitled to rely on the decision-maker to identify such gaps or omissions and retains an entitlement to complain to the court (for the first time) if that is not done.*"

139. However, as Humphreys J. noted, at para 19, if an objector wishes the decision-maker to take something positive into account (such as a risk which is alleged was not considered in an Appropriate Assessment) the objector must put the necessary information before the decision-maker. Although the failure to do so may not preclude an applicant from raising that issue in judicial review proceedings, it goes to the weight which the court could place on the submissions made. This is evident from *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424 and *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540.

140. Insofar as the Board, or a planning authority, must determine whether an EIAR is adequate to enable it to carry out an EIA, it is undoubtedly a matter within the expertise of the Board or planning authority, and is, accordingly one to which curial deference is due: *Ratheniska Timahoe & Spink v. An Bord Pleanála* [2015] IEHC 18 (paras. 71-76), *Environmental Trust Ireland* (para. 37), *Coyne & Ors v. An Bord Pleanála* [2023] IEHC 412 (para. 414). As Holland J. held, in *Heather Hill v. An Bord Pleanála* [2022] IEHC 146 (para. 232) "*The adequacy of information provided in a planning application must be assessed in context and, for planning, EIA and AA purposes, is primarily a matter for the Board*". I echo his statement and am satisfied that the expertise of the Board in these technical matters greatly exceeds the extent to which I can take judicial notice of such matters.

141. The argument that a test other than *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 392 is applicable was not advanced.

142. The EIAR was prepared by a firm of environmental consultants who engaged external consultants to bring in additional expertise. Their expertise is set out at para. 1.11 thereof. The Applicant has not put the expertise or qualifications of the experts who carried out the EIAR in issue in these proceedings, nor is this a case in which the expertise of the Inspector and/or Members of the Board has been questioned, by reference to section 172(1H) of the 2000 Act.

143. The Applicant impugns the EIAR but has not adduced any evidence to contradict any facts contained in the EIAR. There is no evidence of developments, including proposed developments, which the Applicant contends the Board failed to consider in relation to cumulative effects, nor is there evidence of adverse cumulative effects of the development on the environment which are alleged may arise. No further evidence has been put before the Court in relation to habitats or bats, and no submission or contradictory evidence was before the Board in relation to these issues. The Applicant relies on contents of the EIAR, and the consideration thereof by the Board (and Inspector), to contend that the manner in which the cumulative effects of the proposed development and bats were considered is invalid. It is also submitted that the finding that no bat commuting pathways would be severed is not supported by evidence.

The Environmental Impact Assessment Report

144. The need to carry out an EIA and the requirements thereof are set out at Part X of the 2000 Act. In particular, the Board is required to come to a "*reasoned conclusion … on the significant effects on the environment of the proposed development*", which includes a consideration of the "*direct and indirect significant effects of the proposed development*" on matters such as biodiversity, and the interaction of the effects on those environmental attributes. Schedule 6 to the 2001 Regulations, which prescribes the information which must be contained in an EIAR, includes "*a description of the likely significant effects on the environment of the proposed development*" and mitigation measures. At paragraph 2(e)(i) of Schedule 6, the Regulations provided that the EIAR must include:

"*(i) a description of the likely significant effects on the environment of the proposed development resulting from, among other things—*

(I) the construction and existence of the proposed development, including, where relevant, demolition works,

(II) the use of natural resources, in particular land, soil, water and biodiversity, considering as far as possible the sustainable availability of these resources,

(III) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste,

(IV) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters),

(V) the cumulation of effects with other existing or approved developments, or both, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources,

(VI) the impact of the proposed development on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the proposed development to climate change, and

(VII) the technologies and the substances used, and

(ii) the description of the likely significant effects on the factors specified in paragraph (b)(i)(I) to (V) of the definition of 'environmental impact assessment' in section 171A of the Act should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium term and long-term, permanent and temporary, positive and negative effects of the proposed development, taking into account the environmental protection objectives established at European Union level or by a Member State of the European Union which are relevant to the proposed development"

145. Annex IV of the EIA Directive (Directive 2011/92 EU as amended by Directive 2014/52/EU) also provides that cumulative effects must be included in the EIAR. The "*cumulation of effects with other existing and/or approved projects"* must be described "*taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources*".

146. Prior to the planning authority refusing the permission sought on grounds relating to air quality, further information was sought as the EIAR was considered to be lacking in certain respects. None of the information sought related to any potential impact on bats or the removal of hedgerows. The additional information provided by the developer to the planning authority on 23rd November 2020, prepared by the environmental consultants who had prepared the EIAR, included further information on interactions between impacts on the different factors in the EIAR at Appendix 2 thereof.

Impact on Bats and the Removal of Hedgerows

147. The impact of the proposed development, and in particular the removal of the hedgerow along the eastern boundary of the site, and the hedgerow across the middle of the site, on bats was examined in Chapter 6 of the EIAR.

148. A desk study was carried out of all European sites within a 15km radius and nationally designated sites within a 5km radius and records of legally protected and notable species within a 2km radius were examined. At para. 6.25 of the EIAR, it is stated that a field survey was carried out in June 2020 by two suitably qualified and experienced ecologists. The aim of that survey was to identify the extent and quality of habitats present on the site and it was extended to identify the potential for these habitats to support other features of nature conservation importance in particular species afforded legal protection under Irish or European law. It is stated that the field survey was undertaken at the time of the year considered optimal for botanical assessments.

149. There were no sightings of bats on the site during the field survey. The records of sightings of protected species within a 2km radius included four species of bat, the last sightings of which were recorded in 2014 (Common Pipistrelle, Soprano Pipistrelle and Lesser Noctule) and 2010 (Brown Long-eared Bat).

150. The site is described as being made up of two agricultural fields separated by a "*heavily managed*" hedgerow, made up primarily of hawthorn (Crataegus), brambles (Rubus fructiosus) and ivy (Hedera helix). The understory of the hedgerows consists of cleavers (Galium aparine), nettles and docks. There is one mature pedunculate (Quercus robur)

oak located within the western hedgerow (which is the subject of Condition 2-compliance with mitigation measures in the EIAR para. 6.6.1.1 and 6.6.1.2). Improved agricultural grassland is the dominant habitat within the site and the EIAR, and the Inspector, noted (para. 8.3.3) that the fields had been ploughed for the planting of crops.

151. The suitability of the habitats within the site to support bat roosting, foraging and commuting was assessed and mature trees were inspected for evidence of cavities, splits, cracks, loose bark and dense and woody ivy growth which can be used by bats for roosting. A more detailed bat survey was not carried out, a point which was noted by the Inspector at para. 8.3.4.

152. At para. 6.6.1.2 of the EIAR, it is stated that there are no buildings within the site and the mature tree within the western boundary hedge, which has been identified as having potential roost features, will be protected from damage and preserved. It is also stated that:

"*Hedgerows located along the western boundary, southern boundary and the hedgerows directly north of the proposed facility (outside the site boundary) will be retained and thereby provide suitable commuting habitat and maintain a degree of connectivity for bats within the wider landscape.*

A Berm will be constructed along the northern and eastern boundary of the site which will rise to ca.1.7m and ca.2m respectively planting of native hedge species will occur on top of the burns to provide screening and mitigate for the initial loss of painters. This is in line with the policy NHP-18 and NHP-20 of the County Development Plan."

153. The Inspector also had regard, at para. 8.3.3 and 8.3.5, to the fact that the hedgerows were a potential habitat for bats and provided potential breeding and foraging areas for bats. The Applicant contends that, as a bat survey was not carried out, the Board was unable to carry out an adequate EIA or satisfy itself as to the potential impacts of the development, in particular by the removal of the hedgerows, on bats.

154. The Applicant contends that the Bat Mitigation Guidelines were not complied with, which assertion is verified in the grounding affidavit, and it is submitted that a more complete bat survey was required. That assertion is contradicted in the Statement of

Opposition filed on behalf of the developer, which is verified in the affidavit of one of its Directors. Neither of the deponents claims to provide expert evidence; they are Directors of the Applicant and First Notice Party (developer) respectively. The Bat Mitigation Guidelines have been exhibited. It is clear from the Guidelines that the nature or level of the survey to be carried out is a matter to be decided by the consultant carrying out the survey, taking the Guidelines into account. (para. 5.2 and 5.7).

155. There are no averments of the nature made in *Hellfire Massy Residents Association*. In that case, there was evidence to the effect that increased vegetation in June to August may make it more difficult to spot otter holts (although surveys were permitted to take place throughout the year) and that such vegetation was not present at the survey site. As that evidence was not countered, Humphreys J. held that the applicant had not overcome the burden of proof under that heading. (para. 64 – 65) In this case, there is no evidence from which I could conclude that the failure to carry out a bat survey breached the Bat Mitigation Guidelines, or that the reliance on the EIAR was unreasonable by reason of the absence of a bat survey. As the Guidelines provide that the expert carrying out the survey should determine the nature and extent of the surveys which should be carried out in each particular case, I find that the Applicant has not discharged the evidential burden
on it to successfully challenge the Board's ability to carry out an EIA without a bat survey in this case.

156. The nature of the assessment carried out in the instant case is an EIA rather than a screening to rule out potential significant impacts in order to determine whether an EIA is required. The challenge in *Waltham Abbey v. An Bord Pleanála (No. 2)* [2023] IEHC 146 related to screening for EIA. As is clear from the judgment in *Waltham Abbey*, bats had been observed flying over that site, which fact formed part of the submissions made to the Board. In this case, the EIAR states that the last recorded sighting of bats within a 2km radius of the site was in 2014.

157. There is no expert evidence from which I can conclude that the EIAR was inadequate by reason of the absence of a bat survey; it has not been shown that there was an error of law on the part of the Board in determining the issue regarding bats and the removal of the hedgerows without such a survey. The Inspector, and the Board, clearly considered the methodology of the EIA and were cognisant of the limits of the survey which had

been carried out and considered that they had sufficient information to carry out the EIA. I accept that this decision was primarily one for the Board and I do not find that there was an irrationality or material error of law or fact which invalidates that decision.

158. The Report of the Inspector includes the following findings in relation to bats:

"8.3.3 Given the existing modified agricultural habitat of the site the overall biodiversity value is considered to be low although the existing mature hedgerows along the eastern, southern, and western have a higher biodiversity importance and are potential habitat and bats.

…

8.3.5 The proposed development would result in the removal of existing boundary hedgerows along the eastern boundary and the hedgerow across the middle of the site. These hedgerows are potentially important habitat for breeding birds and also as potential breeding and foraging areas for bats.

…

8.3.8 The potential for the site to be a significant habitat supporting ***bats*** *is noted in Paragraph 6.3.3 of the EIAR. Specifically, the location of the site with hedge lines on three sides of the site and in the wider area is noted as are records of the presence of four known bat species within 2km of the site. As noted above, the construction phase of the proposed development will result in some temporary loss of hedge lines and therefore some potential short term reduction in bat foraging habitat. The construction and operational phases have the potential to impact on bats by disturbance and lighting. At operational stage the development proposes replacement hedgerow along the roadside (east) boundary as well as along the northern boundary. During both construction and operational phases, regard should be had to the fact that the hedgerows are actively managed and are located in close proximity to existing developed industrial areas thereby reducing their potential bat foraging significance. No bat commuting pathways would be severed by the proposed development. In terms of lighting, construction works are not generally proposed to be undertaken outside of daylight hours and where such works are proposed mitigation in the form of consultation with the project ecologist is proposed. At operational phase, section 6.6.2.1 of the EIAR sets out measures for the minimisation of excessive lighting and avoidance of light spillage from the site. Subject to such*

mitigation measures being implemented I consider that the impact on foraging and commuting bats due to light spillage would be limited."

159. Para. 6.3.3 of the EIAR states:

"*The Site is located within agricultural land on the edge of an industrial area. There are areas of open agricultural land and hedge lines both on-site and in the surrounding area. The NBDC holds records for four bat species within 2km of the Site (Table 6-3). Bats are known to follow linear features as they commute through the landscape and therefore the sections of continuous hedge along the boundaries of the Site are considered suitable for this purpose. It should however be noted that these features are subject to management and given their location adjacent to an industrial area are not considered to be of high value for bats species. There is one mature oak tree along the western hedge, near the north western corner of the Site boundary that has features that are considered to be suitable to support roosting bats species, these features include thick ivy growth, knot holes, cracks and loose bark. This oak tree will be retained and protected during the lifetime of the development. The areas of improved grassland are also considered to provide suitable foraging habitat for bat species, be it suboptimal. There are no buildings or structures at the site.*"

160. There is no evidence before the Court to counter the statement in the EIAR that the hedgerows which will be retained along the western and southern boundaries of the site and the hedgerows directly north of the proposed facility outside the site boundary will continue to "*provide suitable commuting habitat and maintain a degree of connectivity for bats within the wider landscape*" (para. 6.6.1.2). The EIAR also states that the planting of native hedge species on top of the berms which will be constructed along the northern and eastern side of the site will mitigate for the initial loss of habitat.

161. The Applicant contends that the finding by the Inspector that "*no bat commuting pathways would be severed by the proposed development*" at para. 8.3.8, is unsupported by evidence.

162. Without the benefit of expert evidence, I am not in a position to conclude that the contents of the EIAR, in particular paras. 6.6.1.2 and 6.3.3, are incapable of supporting

the conclusion that no bat commuting pathways will be severed by the development. I am not in a position to assess whether the removal of one of two or three parallel hedgerows would have the effect of severing a bat commuting pathway, even allowing for the fact that they commute along linear features. Each of the hedgerows which are proposed to be removed are parallel to hedgerows which shall remain. Therefore, I cannot be satisfied that the finding that no bat commuting pathways would be severed by the proposed development is unsupported by evidence.

Cumulative effects

163. It is not in dispute that the Board was required to take account of the cumulative effect of the direct and indirect effects of the proposed development and to consider the cumulative effects with the effects of other existing and/or approved developments, taking account of any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources.

164. The purpose of an EIA was considered by the Supreme Court, Hogan J. in *An Taisce v. An Bord Pleanála & Ors (*'*Kilkenny Cheese*') [2022] IESC 8, [2022] 1 ILRM 281, [2022] 2 IR 173. At para. 4, Hogan J. found that:

> "*Article 3(1) of the Environmental Impact Assessment Directive 2011 (2011/92/EU) ("the EIA Directive") (as inserted by Article 1(3) of* Directive *2014/52/EU) articulates what at first blush seems a straightforward principle. It provides that every environmental impact assessment shall "identify, describe and assess" in an appropriate manner "in the light of each individual case, the direct and indirect significant effects of a project" on a range of matters, including biodiversity and "land, soil, water, air and climate." The object of the EIA Directive is itself perfectly clear, in that it seeks to ensure that the likely environmental impacts of any major project are themselves considered and assessed before any development permission is granted, even if, as this Court has already held, "the outcome of that examination, analysis, evaluation and identification informs, rather than determines, the planning decisions which should or may be made":* Fitzpatrick v. An Bord Pleanála *[2019] IESC 23, [2019] 3 IR 617 at 642, per Finlay Geoghegan J.*"

165. Hogan J. also held, at para. 107:

> "*... Important as the EIA Directive undoubtedly is, it was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) the climate change effects of such a project. Yet the proper scope of the EIA Directive should not be artificially expanded beyond this remit and, in particular, it should not, so to speak, be conscripted into the general fight against climate change by being made to do the work of other legislative measures such as the 2021 Act. …*"

166. The fact that an EIA is carried out on the basis of expert evidence and is within the sphere of decisions which the courts consider with appropriate curial deference is clear from the judgment of McMahon J. in *Klohn v. An Bord Pleanála* [2008] IEHC 111, and *Ratheniska Timahoe & Spink v. An Bord Pleanála* [2015] IEHC 18. In *Klohn*, McMahon J. held that:

> *"It is recognised in cases such as this that the court in reviewing the Board's decision will not interfere with the bona fide exercise of its discretion in these matters. It is not the court's function to second guess the respondent and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination. Although the attitude has been criticised as being over deferential, this judicial restraint is now well established in our jurisprudence. Whether it will have to be reassessed in future because of more recent European Union directives in this area remains to be seen. Such a reassessment does not arise in this case, however."*

167. However, if there is a legal error in the manner in which the EIA was carried out by the Board, it is appropriate that the Court would intervene.

168. The Board Direction and Order recite the fact that an EIA was carried out, in compliance with section 172 of the 2000 Act, and specifically, adopted the Report and conclusions of the Inspector. In the Board Order, the Board stated:

"***Reasoned Conclusions on the Significant Effects***

The Board considered and agreed with the Inspector's recent conclusions, that the main significant direct and indirect effects of the proposed development on the environment are, and would be, mitigated as follows:

The development has the potential to generate odours that would impact negatively on amenity and human health and these will be mitigated by on-site control of storage areas, procedures to minimise odour release including from vehicles and the installation of odour abatement equipment to the feedstock reception hall building.

(a) The development has the potential to negatively impact on air quality due to the operation of the on-site anaerobic digester and these potential impacts will be mitigated by good maintenance and operation of the facility including minimisation of use of the on-site flare.

(b) The development has the potential to impact negatively on ground and surface waters during the construction phase of the development and this will be mitigated by good construction practice in the management of the storage and handling of equipment and materials.

(c) The development also has the potential to have negative impacts on water during the operational phase due to the potential for spillages on site or accidents or other incidents and these impacts will be mitigated by on-site processes, bunding of the main operational areas and the design of the surface water drainage system.

(d) Potential indirect impacts on water arising from the sourcing of feedstock and the disposal of digestate will be avoided by the fact that no additional input material will be produced solely feed the proposed anaerobic digester and that the end digestive eight will be less potentially harmful to the water environment that the spreading of slurry. The fact that the activity will be licensed and that nutrient management plans will be prepared for the disposal of digestate will also mitigate indirect impacts on water.

(e) The proposed development will have a significant net positive impact on the environment under the heading of climate due to the replacement of non-renewable gas with the renewable biogas that will be produced on site.

The Board completed an environmental impact assessment in relation to the proposed development concluded that, subject to the implementation of the mitigation measures set out in the EIAR, and subject to compliance with the conditions set out below, the effects on the environment of the proposed development, both by itself and in combination with other development in the vicinity, would be acceptable. In doing so, the Board adopted the report and conclusions of the Inspector."

169. The Inspector's Report concluded, at para. 8.6.1:

"Having regard to the examination of environmental information contained above, and in particular to the EIAR and supplementary information provided by the developer including the response to further information submitted to the planning authority and the first party appeal, and to the submissions received from the Planning Authority, prescribed bodies and observers in the course of the application, it is considered that the main significant direct and indirect effects of the proposed development on the environment are, and will be mitigated as follows:

- *The development has the potential to generate odours that would impact negatively on amenity and human health and these will be mitigated by on site control of storage areas, procedures to minimise odour release including from vehicles and the installation of odour abatement equipment to the feedstock reception hall building.*
- *The development has the potential to negatively impact on air quality due to the operation of the on site anaerobic digestor and these potential impacts will be mitigated by good maintenance and operation of the facility including minimisation of use of the on site flare. The development has the potential to impact negatively on ground and surface waters during construction phase of the development and this will be mitigated by good construction practice in the management of the storage and handling of equipment and materials,*

- *The development also has the potential to have negative impacts on water during the operational phase due to the potential for spillages on site or accidents or other incidents and these impacts will be mitigated by on site processes, bunding of the main operational areas and the design of the surface water drainage system,*
- *Potential indirect impacts on water arising from the sourcing of feedstock and the disposal of digestate will be avoided by the fact that no additional input material will be produced solely to feed the proposed anaerobic digestor and that the end digestate will be less potentially harmful to the water environment that the spreading of slurry. The fact that the activity will be licenced and that nutrient management plans will be prepared for the disposal of digestate will also mitigate indirect impacts on water.*

The proposed development will have a significant net positive impact on the environment under the heading of climate due to the replacement of non renewable gas with the renewable bio gas that will be produced on site. Having regard to the above, I am therefore satisfied that the proposed development would not have any unacceptable direct, indirect, or cumulative impacts on the environment."

170. C-531/13 *Marktgemeinde Strasswalchen* [2015] All ER (D) 164 is a helpful decision in understanding cumulative effect, although it was considered in the context of screening for EIA rather than an actual Environmental Impact Assessment. It is confirmed that cumulative effects are not limited to projects of the same kind, and there are no particular limits in terms of proximity to the other developments. At para. 47, the CJEU held that
in carrying out an EIA, the decision maker "*must examine inter alia whether the environmental impact of the [development] could, due to the impact of other projects, be greater than what it would be without the presence of those other projects*."

171. In *Coyne v. An Bord Pleanála* [2023] IEHC 412, Holland J. noted that in *Finch v. Surrey County Council* [2022] EWCA 187 the Court of Appeal had reiterated that the existence and nature of indirect, secondary or cumulative effects of a development are matters of fact and evaluative judgment for the planning authority. Therefore, they are

reviewable as to merit, only for irrationality. The UK Supreme Court reserved judgment on the appeal from that judgment in June 2023 and is still awaited.

172. The complaint of the Applicant in this case is that the Board had erred in how it interpreted and considered cumulative effects. It is argued that the Board assumed that, as the proposed development was found not to have any significant environmental impacts, the possibility of cumulative effects can be discounted. It is also submitted, and I agree, that the EIA Directive requires both an assessment of the whole project *and* an assessment of the whole project with the cumulative effects of other relevant plans or projects.

173. In *Ratheniska,* Haughton J. held that:

> "*…. there is no explicit statement in the impugned decision that the Board has considered the cumulative direct or indirect effects on the environment of the proposed development. However, the court is of the view that the decision falls to be considered in its entirety and if on a fair reading it includes an evaluation of the cumulative environmental effects which it is required by law to consider including those impacts and matters canvassed in the EIS, the Inspector's Report and other documentation before it, then the Board complies with its statutory obligation to carry out an EIA.*"

174. The Board Order states that the "*the effects on the environment of the proposed development, both by itself and in combination with other development in the vicinity, would be acceptable*". It is clear therefrom that the Board sought to apply the correct test i.e. considering the cumulative impact of the development itself, and in combination with other developments in the vicinity on the environment.

175. "*Cumulative effects*" are defined for the purposes of the EIAR as "*The addition of many small effects to create one larger, more significant effect.*" (Table 1-7). Whilst the Applicant is correct in its submission that the EIAR and the Board (and Inspector) did not refer to any developments in the area with a view to assessing the cumulative impact on the environment of this development, this does not inexorably lead to a conclusion that the Board failed to consider cumulative impacts or misunderstood what was required.

176. Surrounding land use was considered at para. 5.3.4 in relation to Population and Human Health. At para. 5.6, the EIAR found that the proposed development, in combination with future developments in the area has the potential to have a significantly positive impact on the local and regional population in terms of employment opportunities and economic activities. It is also stated that the cumulative impacts with regard to human health are dealt with in each of the relevant chapters.

177. In relation to Biodiversity, the EIAR concluded that "*Overall, the Site is considered to be of low ecological interest. Taking into account the mitigation measures, it is considered that the impacts of the proposed development on ecology will be negligible.*" (para. 6.10) At para. 6.7, it was stated that "*the proposed development works are unlikely to have any significant impacts on valued ecological receptors. In addition, any potential cumulative impacts will be minimised as all works will be completed in line with the relevant best practice and legislation and mitigation measures as detailed within the EIAR. It is therefore considered unlikely that any significant cumulative impact will arise as a result of the proposed development*."

178. Paragraph 7.6 states that "*cumulative and in combination impacts on land and soils were considered and the EIAR it is not considered the proposed development will have any significant impact on land and soils, provided that the above mitigation measures are implemented. It is therefore unlikely that the proposed development will have any significant cumulative or in-combination impacts*." Similarly in relation to Water, having considered nearby watercourses and the flood risk on the site and close by, it was found that "*the proposed development will not have any significant impact on surface water/groundwater, provided that the outlined mitigation measures will be implemented. It is therefore unlikely that the proposed development will have any significant cumulative or in-combination effects*." (para. 8.6) It was also found at para. 8.9 that there will be no significant impact on surface water or groundwater quality as a result of the proposed development, and that the indirect effect of the proposed development on surface water quality would be "slight and positive." (paras. 8.8 and 8.9).

179. In considering Air Quality, the EIAR had regard to the sole Integrated Pollution Control/Integrated Emissions or Waste Licensed Facility within 3km of the proposed development and noted that it was more than 1km from the proposed development.

Therefore, potential impacts on air quality were included in the background concentration for Tullamore. (para. 9.3.2) It was noted, at para. 9.6, that there were no other industrial developments in the immediate vicinity of the site and that cumulative impacts were unlikely in terms of odour or air quality. The cumulative impact of the proposed development in terms of climate was found to be an overall positive impact on climate change by reducing greenhouse gas emissions (para. 10.6).

180. In relation to Acoustics (Noise and Vibration), the EIAR considered the local ambient acoustic environment and found that the proposed development would give rise to no significant impacts in relation to ambient noise levels. It is stated that "*existing noise emissions are incorporated to the ambient noise values utilised in this assessment. There are no newly authorised or applied for developments in sufficient proximity to the Site likely to result in a cumulative noise issue to identified NSL's*." (para. 11.6) At para. 11.7, the report considered interactions with other environmental attributes, and they were considered in relation to Biodiversity at Chapter 6 and Material Assets - Traffic and Transport in Chapter 15.

181. In considering Landscape and Visual impact, a 2km radius study area was used, with particular emphasis on receptors within 1km. It is clear from para. 12.6 that the impact assessment related mainly to the impact of the development with elements of the existing industrialised locale.

182. Cultural heritage was considered at Chapter 13 and the EIAR had regard to local sites of archaeological, architectural and cultural heritage potential together with the history of the area. It was found that there were no cumulative or in-combination impacts associated with the proposed development. The assessment of impact in relation to traffic was assessed by reference to existing road networks and traffic counts carried out in relation thereto. It was found that there would be a small increase in journeys during the construction and operational phases of the proposed development and that there would be a small change in cumulative traffic demands arising from the proposed development in the locality (para. 14.6)

183. The EIAR found that the proposed development would have a significant positive impact on waste management by taking feedstock and converting it to biogas and bio-fertiliser. It was also stated *"new developments in the vicinity of the site will be assessed*

by the relevant planning authority to ensure that the development will be in line with land zoning and is balanced with environmental protection and to ensure a sustainable approach to development in the area." (Para. 15.6).

184. I accept the contention that the Matrix set out at Chapter 16 of the EIAR is not sufficient to demonstrate a consideration of the cumulative effects of the different environmental impacts. However, further information was sought by the planning authority on 16th September 2020; a detailed statement to support the table on interactions was sought. The developer provided more detailed information in response to the request for further information at Appendix 2 to the response dated 23rd November 2020. No evidence was put before the Board, or the Court to challenge the contents thereof.

185. Unlike in *Toole v. Minister for the Environment* [2023] IEHC 378, there is no evidence that there are any relevant developments or proposed developments which were not considered in carrying out the EIAR, but which are asserted ought to have been considered. Neither the Applicant, nor any of the other parties who made observations, raised any issue before the Board regarding the adequacy of the consideration of cumulative effects in the EIAR, nor has the expertise of those who prepared the EIAR been challenged.

186. Having considered the impugned decision of the Board, together with the Inspector's Report which is endorsed, and the contents of the EIAR, I am of the view that the Board has not failed to evaluate the environmental impacts of the development including cumulative environmental effects. It is not for me to agree or disagree with the conclusions of the Board in this regard, unless the process by which those conclusions were reached is flawed, or the finding is unreasonable. The Court does not have the expertise of those who prepared the EIAR, nor those who considered it and carried out the Environmental Impact Assessment. On the basis of the materials before me, I do not find that the Board erred in law, in considering what amounts to cumulative effects, or made an error in respect of a material fact, nor that the findings of the Board in that regard were unreasonable.

187. Therefore, core ground 2 does not succeed.

Core Ground 3 - Article 114 of the Planning and Development Regulations 2001 as amended

188. The Applicant complains that the Board breached a mandatory requirement to publish the EIAR under Article 114 of the 2001 Regulations.

189. Article 114 provides:

> "*An EIAR received by the Board in connection with an appeal shall, as soon as maybe following receipt of the EIAR, be made available on its website for inspection and for inspection or purchase at a fee not exceeding the reasonable cost of making a copy during office hours at the offices of the Board or such other convenient place as the Board may specify.*"

190. The Applicant submitted that the Board was required to publish the EIAR on its website under Article 114 notwithstanding that it was publicly available, having been published by Offaly County Council in accordance with its statutory obligations. It is submitted that the identification of the EIAR by the Board as a document received from the planning authority under Article 116 is not sufficient to satisfy the obligation under Article 114. The Applicant does not contend that it, or any other party, has been excluded from participation in the planning process, or prejudiced in relation thereto, by virtue of the non-publication of the EIAR by the Board. For that reason, the Applicant seeks a declaration that the Board breached its mandatory obligation under Article 114 but does not contend that *certiorari* of the Board's decision should be granted as a result of its alleged failure to comply with Article 114.

191. The Board did not publish the EIAR on its website and contends that it was not required to do so; its non-publication was a deliberate act. Therefore, if Article 114 required the publication of the EIAR on its website, the Board failed to comply with that obligation.

192. It is accepted by the Board that the construction of Article 114 advanced by the Applicant is not absurd. However, it was submitted that requiring the Board to publish an EIAR which has already been published by a planning authority does not make sense. It was further submitted that the position of Article 114 within Part 10 of the 2001 Regulations leads to an interpretation that requires publication of the EIAR only where it had not previously been made available to the public.

193. The 2001 Regulations were adopted in part to transpose the requirements of Directive 2011/92/EU on EIA (as amended by Directive 2014/52EU). The detailed arrangements for informing the public of the EIAR are left to the Member States. Therefore, neither the interpretation proposed by the Applicant or the Board is incompatible with the State's obligations in relation to Environmental Impact Assessments.

194. Read literally and in isolation, Article 114 is not restricted by reference to Article 109 as it provides *"[a]n EIAR received by the Board in connection with an appeal shall…be made available on its website…*". This appears to require the Board to publish any EIAR received by it in connection with an appeal.

195. As Hogan J. held in *Pembroke Road Association v. An Bord Pleanála; Waltham Abbey Residents Association v. An Bord Pleanála* [2022] IESC 30, para. 31, by reference to *Monaghan UDC v. Alf-A-Bet Promotions Ltd.* [1980] ILRM 64, the use of the word "shall" *"would normally convey a mandatory legislative obligation, non-compliance with which cannot lightly be overlooked*." Therefore, if Article 114 applies to an EIAR received by the Board in connection with an appeal despite it having already been published by the planning authority, the Board had no discretion not to publish the EIAR in this case.

196. Counsel for the Board submitted that Article 114 must be read in the context in which it appears in Part 10 of the 2001 Regulations and that it is inappropriate to consider the wording of Article 114 in isolation. It was argued that only an EIAR submitted to the Board under Article 109 must be published under Article 114 and, as a corollary, an EIAR which had already been published by a planning authority need not be published by the Board. Furthermore, information regarding an EIAR which has been submitted to a planning authority is also available on the EIA Portal, maintained by the Minister for Housing, Local Government and Heritage under section 172A of the 2000 Act (as amended).

197. It has long been established that the primary method of statutory interpretation is the plain or literal method: *Howard v. Commissioner of Public Works* [1994] 1 IR 101; *D.B. v. Minister for Health* [2003] 3 IR 12; *ELG (A Minor) v. HSE (No. 2)* [2022] IESC 14.

198. As McGuinness J. summarised, in *DB v. Minister for Health* [2003] 3 IR 12, 50-51:

"*In the interpretation of statutes, the starting point should be the literal approach - the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole. As was stated by Keane J. (as he then was) in Mulcahy v. Minister for the Marine (Unreported, High Court, Keane J., 4th November, 1994) at p. 23:-*

> *"*While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole*."* "

199. More recently, in *ELG (A Minor) v. HSE (No. 2)* [2022] IESC 14 Baker J. held that:

"*109. The first principle of statutory interpretation is that, insofar as may be, a court is to interpret a section in the light of its plain or ordinary meaning, that is by not giving any special or technical meaning or sense to a provision. If ambiguity is found, or if as discussed above, if certain words are defined in an Act or some part of an Act, those words become words of art or technical words for the purposes of the legislation. The function of an interpretative or definition section is to add clarity, and sometimes to constrain the interpretation within a defined parameter.*

110. Again, as well established in the authorities there may be circumstances where a reading of legislation reveals an ambiguity. This is what was contented for in Bookfinders v. Revenue Commissioners. *The parties are agreed that in the event an ambiguity arises from a literal interpretation or a plain reading of the words in a section that the court is entitled to take a purposive approach …*"

200. In *Pembroke Road Association,* Hogan J. found the word "statement" in Article 299B to be capable of a variety of different meanings when read in isolation. He held that if the word "statement" in Article 299B was read literally and in isolation, it would lead to an interpretation which was contradictory and incoherent and would lead to a "*strange and*

contradictory state of affairs" and a "*contradictory interpretation of the relevant planning law*". It was in those circumstances, that Hogan J. held that it was necessary to look at the Regulations as a whole, with a view to ascertaining the proper interpretation of the provisions.

201. As Hogan J. stated, at para. 44 of *Pembroke Road Association*, many of the principles outlined therein now find statutory expression in section 5 of the Interpretation Act, 2005 which permits the Court to depart from the literal interpretation in certain circumstances, including absurdity or obscurity.

202. Section 5(2) of the Interpretation Act 2005 provides:

> "*(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,*
>
> *the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment.*

203. The proper approach to statutory interpretation has recently been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313. Murray J., writing for the Supreme Court, emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

204. The Board contends, relying on *Pembroke Road Association*, that a more natural reading of the 2001 Regulations as a whole does not require publication of an EIAR

received by the Board in relation to an appeal, except where it was required under Article 109. It is also stated that requiring the Board to publish an EIAR received from a planning authority as part of the papers of an appeal would be inconvenient. The case made by the Board is not that the interpretation proposed by the Applicant is absurd or incoherent, but simply that requiring publication of EIARs which have already been published on the planning authority's website makes less sense and is inconvenient.

205. Unlike in *Pembroke Road Association*, the plain and literal meaning of the words to interpret Article 114 do not create an unworkable obligation for the Board, nor would such an interpretation be absurd or incoherent. Requiring the Board to publish an EIAR which has already been published by a planning authority would amount to a duplication, which is strictly unnecessary, but this does not render it absurd, incoherent or unworkable.

206. Having regard to the authorities and section 5(2) of the Interpretation Act, 2005, I am satisfied that it is not necessary to depart from the plain, precise and unambiguous words in Article 114 to avoid an interpretation which would conflict with the purpose of the 2001 Regulations. I am reinforced in this view by the contrast between the language used in Article 114 and Article 115, which requires the Board to send a copy of an EIAR which has been sent to it "*pursuant to article 109*" to the relevant planning authority together with a link to the EIAR on the Board's website. Articles 97(1)(b), 112(1), (3) and (5), 113(3) and 112(5) also refer to an EIAR having been provided to the Board under Article 109. Article 113 refers to the situation "*[w]here an appeal involves an EIAR*" and Article 116 clearly applies only to an EIAR sent by the planning authority to the Board.

207. An EIAR received, published and made available for inspection by the Board under Articles 109 and 114 must also be made available for inspection or purchase by the planning authority under Article 115(2), although the planning authority is required to publish the URL to the EIAR on the Board's website, rather than the complete EIAR where the EIAR relates to an appeal against conditions under section 139 of the Act.

208. The fact that Articles 98-108 appear after the heading 'Planning Applications' and that Articles 109-116 are after the heading 'Planning Appeals' does not assist in the interpretation of Article 114. Had the Minister intended to restrict the obligation of the

Board under Article 114 to the publication of an EIAR which had not been received from a planning authority in making the 2001 Regulations, that could have been clearly stated, by reference to Article 109, as was done in Article 115.

209. Article 114 should be interpreted by reference to the natural and ordinary meaning of the words used therein, which are clear and unambiguous and, as conceded by the Board, are not absurd or incoherent. This interpretation is not inconsistent with the interpretation of Article 114 in the context of Part 10 of the 2001 Regulations as a whole.

210. As the Board has not published the EIAR on its website, there has been a breach of the obligation under Article 114.

Is it appropriate to make a declaration?

211. It has not been asserted that the Applicant or any other party has been prejudiced in their ability to participate in the planning process by reason of the breach of Article 114. The Applicant made submissions to the Board in respect of the developer's appeal, including a submission that the EIAR was deficient in certain specified respects. Therefore, quite appropriately, the Applicant does not seek *certiorari* of the Board's decision on this ground.

212. Order 84 r.18(2) provides that a declaration may be granted where it is "*just and convenient*" to do so. While the grant of a declaration is a discretionary remedy, it will normally be granted once the plaintiff's legal argument is upheld: *Recorded Artists Actors Performers Limited v. Phonographic Performance (Ireland) Limited & Ors* [2022] IECA 8.

213. The leading Irish authority on the granting of declaratory relief is *Transport Salaried Staffs' Association & Ors. v. CIE* [1965] 1 IR 180, in which case Walsh J. held:

> "*In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised "*sparingly*" and "*with great care and jealousy*" and "*with extreme caution*" can now,*

in the words of Lord Denning in the Pyx Granite Co. Ltd. Case, be exercised "if there is good reason for so doing," provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In Vine v. The National Dock Labour Board, Viscount Kilmuir L.C., at p. 112, cites with approval the Scottish tests set out by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd., who said, at p. 448:— "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought." *It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight*."

214. In *Recorded Artists Actors Performers Limited v. Phonographic Performance (Ireland) Limited & Ors* the Court of Appeal (per Costello J. at para. 53) held that the High Court does not normally refrain from granting a declaration in proceedings to give effect to a judgment of the Court of Justice, on a reference made in those proceedings. It was argued by PPI (a non-state body) that a declaration should not be granted in that case. It was held, at paras. 59 and 61, that although the grant of a declaration is a discretionary remedy,
it will normally be granted once the plaintiff's legal argument is upheld and should be granted absent a compelling reason to the contrary.

215. The submission was made on behalf of the Board that it is unnecessary to make a declaration as the Board will abide by the terms of the court's judgment in future appeals. Therefore, it contends that a declaration would serve no useful or practical purpose and accordingly, should not be made. The rationale of this argument applies equally to every statutory body or body exercising statutory functions, each of whom must be presumed to act in accordance with the law.

216. It was argued similarly in *Recorded Artists* that, where the Court of Justice has delivered a judgment on a preliminary reference, it was not necessary, or appropriate, for the Court to grant a declaration to give effect to the judgment of the Court of Justice as the State Respondent must be presumed to comply with their obligations or the law as clarified by the Court of Justice in future. *Lennon v. Cork City Council* [2006] IEHC 438 was distinguished in *Recorded Artists Actors Performers Limited*, and the Court found

that it could not be said that the declaration sought lacked utility or that the plaintiff had a purely theoretical interest in the matter. The Court of Appeal upheld the grant of the declaration.

217. The Board contends that declaratory relief should be refused on discretionary grounds, by reference to *Shannon v. McGuinness* [1997] IEHC 54, *Lennon* and *Sweetman v. An Bord Pleanála* [2021] IEHC 259. In *Shannon* and *Lennon* negative consequences would have flowed from the grant of the declaration sought. In *Shannon*, the declaration would have amounted to an indirect review of the DPP's decision, and the Court considered it would potentially lead to applications for mandamus against the DPP. Smyth J. held that the only useful purpose of the declaration sought in *Lennon* would be to assert an entitlement to a default permission, but there was no such entitlement.

218. In *Clifford & Sweetman v. An Bord Pleanála (No. 3)* [2022] IEHC 474 Humphreys J. granted a declaration in circumstances where *certiorari* had been refused by reason of the lack of prejudice to the applicant. He held:

"*81. The lack of prejudice to the applicant has already been catered for by the refusal of certiorari. However, that lack of prejudice does not automatically amount to a defence to a claim for declaratory relief. The purpose of a declaration is to uphold the rule of law even where the legal breach does not warrant quashing the decision. Thus, while it is true that the applicants cannot assert the rights of third parties (as the council were keen to stress), I think that has been adequately taken on board by refusing certiorari in the No. 1 judgment. When it comes to declaratory relief, the court has a broader scope to clarify the law and the legal position in the interests of the rule of law and the proper administration of the statute. The lack of prejudice to any individual applicant is not a fatal obstacle to doing so.*

Historic nature of the point and discretionary nature of declarations

82. The council expanded on this argument by saying that the point is moot and historic, and did not affect the rights of anybody and that, therefore, declarations were not necessary. While in fairness there is some logic to that submission, in that the particular transitional application of new legislation to pending planning applications in the specific circumstances of this case is indeed historic, there are

three reasons why that is not fatal here. Firstly, clarification of the general issues might assist in understanding analogous legal situations that might arise in other contexts and accordingly it seems to me that declaratory relief is warranted. Secondly and more immediately there is the fact that the board has failed to comply with the statute, and rule of law considerations militate in favour of that being marked in an appropriate way. And thirdly, these failures are ongoing and have yet to be rectified by the board."

219. Similarly, in *Save Cork City Community Association v. An Bord Pleanála* [2021] IEHC 509, declaratory relief was granted although Humphreys J. held that the non-compliance was sufficiently minor not to lead to the grant of *certiorari*, but was more than *de minimis* as there was a systemic issue rather than a one-off lapse. (para. 71) Humphreys J. held that:

"*disregard of or non-compliance with legal requirements (even if on a first occasion it might not amount to egregious disregard of the law) could still be a matter to be properly considered as appropriate to address with declaratory relief, not least because it puts down a formal marker so that any future non-compliance can be assessed by reference to whether there has been a pattern of action or inaction that amounts in effect to disregard of the legal obligations concerned.*"

220. The failure of the Board to publish the EIAR in accordance with Article 114 was deliberate and was caused by its earnestly held belief as to its obligations under Article 114. It was not a one-off, nor was it due to a technical error, as had occurred in *Sweetman v. An Bord Pleanála* [2020] IEHC 259. The failure to publish the EIAR was not caused by a mischievous act on the part of the Board. The technical error which led to the decisions in question not being uploaded by the Board in *Sweetman*, together with the absence of prejudice, led to the finding by O'Regan J. that a declaration would not be warranted.

221. On balance, it cannot be said that the grant of declaratory relief would serve no purpose, as it corrects the Board's erroneous interpretation of its obligations and there are no other countervailing factors in the instant case which would weigh against the grant of the declaration sought. I do not find that there is a compelling reason to refuse to grant a declaration.

Orders

222. I shall make an order of *certiorari* quashing the Order of the Board dated 17th February 2022 granting permission to the developer subject to conditions.

223. I shall also grant a declaration in the following terms:

> The obligation in Article 114 of Planning and Development Regulations 2001 (as amended) to publish an EIAR received by An Bord Pleanála in connection with an appeal is not limited to appeals where the Board had required the submission of the EIAR under Article 109 of the Regulations.

Approved Judgment

Emily Farrell.