THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

2022/157JR

BETWEEN

MARTIN STAPLETON

APPLICANT

AND

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

RESPONDENTS

AND

SAVONA LTD
AND
DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT OF MR JUSTICE DAVID HOLLAND, DELIVERED 13 FEBRUARY 2024.

Contents

INTRODUCTION & ISSUES

1. By Order[1] ("the Impugned Permission" or "the Impugned Decision") made on 23 December 2021 under s.4 of the 2016 Act,[2] An Bord Pleanála ("the Board") granted Savona Limited ("Savona") planning permission for a Strategic Housing Development ("SHD") of 131 Build-to-Rent[3] apartments[4] in 4 blocks of up to 6 storeys around a central roof-covered courtyard ("the Proposed Development"[5]) on a site at 'Redcourt', Seafield Road East, Clontarf, Dublin 3 ("the Site").

2. The Site is in the functional area of Dublin City Council ("the Council") as planning authority and the Dublin City Development Plan 2016 – 2022 ("the Development Plan") applied. The Board's Direction records that it "*decided to grant permission generally in accordance with the Inspector's recommendation*". Absent the Board's apparent disagreement with the Inspector on specific issues, I can therefore attribute the Inspector's reasoning to the Board.

3. The Applicant in these proceedings ("Mr Stapleton") seeks to have the Impugned Permission quashed on the basis of allegations which can be briefly described as follows:

- The Board failed to

[1] ABP-311333-21.
[2] Planning and Development (Housing) and Residential Tenancies Act 2016.
[3] Defined as "Purpose-built residential accommodation and associated amenities built specifically for long-term rental that is managed and serviced in an institutional manner by an institutional landlord." §5.2, Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities issued under Section 28 of the Planning and Development Act, 2000 (as amended) December 2020. §5.5 provides that "The provision of dedicated amenities and facilities specifically for residents is usually a characteristic element. …. This provides the opportunity for renters to be part of a community and seek to remain a tenant in the longer term, rather than a more transient development characterised by shorter duration tenancies that are less compatible with a long term investment model."
[4] 16 studio, 34 one-bed, 73 two-bed (including 21 duplex), and 8 three-bed units.
[5] A sense of the physical elements of the Proposed Development can be gleaned from the figures in the appendix to this judgment, although the appendix primarily relates two issues as to communal open space.

- have adequate and reasonable regard to relevant guidelines as to the availability of natural **daylight** in the proposed apartments.
- validly resolve a dispute ventilated in the planning process, as to the **adequacy of public transport** to serve the Proposed Development.
- adequately address the **sustainability** of the Proposed Development as to both Daylight provision and **adequacy of public transport.**
- identify a **material contravention** of the Development Plan requirements for **communal open space**.

- The Height Guidelines[6] are ultra vires s.28(1C) PDA 2000[7] and/or s.28(1C) is unconstitutional.

A ground as to asserted requirements of the Water Framework Directive[8] was abandoned at trial.

4. It will assist in understanding what follows to note that the 4 rectangular apartment blocks are arranged in 2 connected L-shaped pairs – such that the entire layout, seen in plan, forms a rectangle around an internal courtyard (the "Courtyard").[9] It is proposed that a roof formed of a steel frame be built over the Courtyard, on which is supported inflated cushions made of a translucent plastic material – ETFE.[10]

DAYLIGHT – Ground 2

5. There are overlapping pleas as to the issues of daylighting and artificial lighting of the apartments internally. While they cannot be entirely disentangled, Ground 2 relates to the issue of adequacy of daylighting, whereas Ground 4 relates to the issue of sustainability of the Proposed Development having regard to the greenhouse gas ("GHG") emissions of power generation required to artificially light the Proposed Development due to the alleged inadequacy of daylighting.

Introduction

6. By s.9(6) of the 2016 Act, the Board may grant SHD permissions in material contravention of a development plan only in limited circumstances – where the contravention does not relate to zoning and where the Board considers that, were s.37(2)(b) PDA 2000 to apply, it would grant permission. S.37(2)(b) applies, inter alia, where permission should be granted having regard to planning guidelines issued under s.28 PDA 2000. The Height Guidelines[11] are s.28 guidelines.

[6] Urban Development and Building Heights, Guidelines for Planning Authorities, December 2018.
[7] Planning and Development Act 2000 as amended.
[8] Directive 2000/60/EC establishing a framework for Community action in the field of water policy.
[9] See Figures in the Appendix to this judgment.
[10] Ethylene Tetrafluoroethylene.
[11] The Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018.

7. The Impugned Permission oddly records that the Board considered that permission "could" materially contravene §16.7.2 of the Development Plan as to building height. I say "oddly" as it seems to me that the Board should have decided that issue one way or the other – even if that decision is subject to the final decision of the Courts. However, that is not the legal issue pleaded. The Board considered that, despite any such material contravention, permission would nonetheless be justified in accordance with s.37(2)(b) PDA 2000, by reason of Specific Planning Policy Requirement 3 ("SPPR3") of the Height Guidelines. §3.1 of the Height Guidelines records Government policy that building heights must be generally increased in appropriate urban locations. Put broadly, SPPR3 essentially enables material contravention of Development Plans to that end. Compliance with the criteria set by §3.2 of the Height Guidelines is a precondition of application of SPPR3. By s.28(1C) PDA 2000,[12] where those criteria are satisfied, the application by the Board of SPPR3 is mandatory (though the terms of SPPR3 itself are discretionary). §3.2 requires, inter alia, that:

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

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

I will refer to the documents cited above as, respectively, the "BRE Guide" and "BS 8206". The former is expressly based on the latter. They can be read together.[13] Both were exhibited.

8. While it will be necessary to consider them further later, it will help at this point to note that the BRE Guide and BS 8206,

- quantify the daylight reaching a room in terms of an Average Daylight Factor ("ADF").
- describe a "well-daylit" space as having an ADF of at least 5%.
- describe a "predominantly-daylit" space as having either,
  - an ADF of at least 5% or
  - an ADF of at least 2% plus supplementary electric lighting.
- recommend minimum ADFs of 1%, 1.5% and 2% for bedrooms, living rooms and kitchens respectively. For combined rooms, the higher recommended ADF prevails – for example, 2% for a kitchen/living room.

[12] "(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply."
[13] See BRE Guide, Summary.

9. Savona's SHD Planning Application included a "Daylight Report"[14] by Passive Dynamics[15] to the Board, addressing compliance with the BRE Guide and BS 8206 – which is report is exhibited.

Regard to Daylighting Guidelines – Caselaw

10. Ordinarily, the Apartment Guidelines[16] require, as to applications for planning permissions for apartment developments, that the Board "*have regard to*" quantitative performance approaches to daylight provision outlined in guides like the BRE Guide or BS 8206 "*which offer the capability to satisfy minimum standards of daylight provision*". That the "*have regard to*" obligation is usually light is well-established. But, importantly, the issue here is an "SPPR3 issue". So the criteria set by §3.2 of the BRE Guide applied. §3.2 requires not merely that the Board "*have regard to*" guides like the BRE Guide or BS 8206, but that it have "*appropriate and reasonable regard*" to them. This has been held to impose a heightened duty of regard – see **Atlantic Diamond**,[17] which has been followed in **Walsh**,[18] **Killegland**,[19] **Jennings**,[20] and **Fernleigh**.[21] In **Atlantic Diamond**, as to §3.2 of the Height Guidelines, Humphreys J said:

> *"The mandatory s.28 guidelines[22] require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the "not mandatory" simpliciter category."[23]*
>
> *"The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why." [24]*
>
> *"If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.*
> *(i). this must be clearly identified;*
> *(ii). a rationale for any alternative compensatory design solutions must be set out; and*
> *(iii). a discretion and balancing exercise is to be applied."[25]*

These cases hold that that a planning inspector must sequentially,

- clearly identify the applicable standard
- identify and quantify any departure from that standard
- only thereafter, but necessarily, interrogate "*whether a departure from standards was really justifiable having regard to the sort of objective planning features envisaged by the guidelines*".[26]

[14] More fully: "Daylight, Sunlight and Overshadowing Report" 12/08/2021.
[15] Passive Dynamics Sustainability Consultants.
[16] Design Standards for New Apartments – Guidelines for Planning Authorities (March 2018) Updated December 2020 and again, after the impugned decision, in December 2022.
[17] Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322.
[18] Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
[19] Killegland Estates v Meath County Council & Giltinane [2022] IEHC 393.
[20] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14 [2023] IEHC 14, §410.
[21] Fernleigh v ABP & Ironborn [2023] IEHC 525.
[22] This is a reference in substance to SPPR3 and s.28(1C) – hence the word "mandatory".
[23] Atlantic Diamond §33.
[24] Atlantic Diamond §40 – See also §42.
[25] Atlantic Diamond §27.
[26] Walsh §54, Jennings §422.

Pleadings, Evidence and Submissions

The Applicant's Pleadings & Submissions

11. Mr Stapleton pleads[27] that the Impugned Permission is invalid because the Board:

- erred in its interpretation and application of SPPR3 and §3.2 of the Height Guidelines, and s.9(6) of the 2016 Act in failing to have appropriate and reasonable regard to the BRE Guide – in particular its recommended ADF of 5% for a well daylit space,[28] or
- Failed to determine whether any room was required to be a "well daylit space" and whether it met the 5% ADF threshold for such a room.
- Instead applied the BRE Guide's minimum ADF values of 1% for bedrooms, 1.5% for living rooms, and 2% for kitchens.
- In so doing, failed to note that this would require that most rooms to be electrically lit for most of the day.
- Failed to identify a rationale for alternative compensatory design solutions and state reasons why it and they were satisfactory.
- Failed to give adequate reasons for its view that the criteria of §3.2 of the Height Guidelines were satisfied.

12. In addition, and in reliance on an affidavit and report of Dr Paul Littlefair ("the Littlefair report"), Mr Stapleton pleads that Savona overestimated the amount of light passing through the ETFE roof and the amounts entering the rooms.

13. Pleas as to BRE Guide content relating to the vertical sky component for windows, loss of light to rear gardens, and loss of light due to light passing through the proposed ETFE roof were not pursued in submissions. Counsel for Mr Stapleton at hearing also abandoned reliance on the Development Plan requirement[29] that development be "guided" by the principles of the BRE Guide – on the basis that, if his case on §3.2 of the Height Guidelines failed, a fortiori, his argument on the Development Plan requirement would also fail.

14. Mr Stapleton's submissions essentially repeat his pleas and set out verbatim content of the BRE Guide. They record, correctly, that Savona, in its daylight analysis, applied the minimum ADF recommendations of that Guide and that the Clontarf Residents' Association (of which Mr Stapleton is a member), in its submission to the Board, had criticised the application of those minimum ADF recommendations rather than the 5% ADF recommendation for "well-daylit" rooms. He cites content of the Inspector's report, to which I will come in due course.

[27] Ground #2.
[28] Emphasis added.
[29] §16.10.1.

15. It is fair to say that the nub of Mr Stapleton's case as run was essentially that, here, the Inspector and the Board fell at the first hurdle identified in Atlantic Diamond as raised by §3.2 of the Height Guidelines. They misinterpreted the BRE Guide because they failed to identify the requirement that the rooms be "well-daylit" and hence the applicable standard as 5% ADF and so misidentified the minimum values as targets and erroneously measured everything against those minima.

16. Mr Stapleton also submits that 10% of kitchens fell below even the minimum ADF recommended by the BRE Guide and that, even though the Inspector did not accept that there was non-compliance, she purported to apply compensatory measures, which logically she could not have done unless there was a non-compliance. In this respect, Mr Stapleton also submits that the Board's reasoning is incoherent and inadequate.

17. Mr Stapleton's submissions cite **XJS**[30] as to the principles of interpretation of planning documents and, as to §3.2 of the Height Guidelines and the BRE Guide, cites **Atlantic Diamond**, and **Fernleigh**.[31]

The Board's Pleadings & Submissions & Some Initial Observations

18. Beyond traverses, the Board pleads and submits that:

- The Littlefair Report and its criticisms could have been, but were not, submitted to and before the Board and the Applicant is precluded from relying on it in judicial review.
- The Board had appropriate and reasonable regard to the BRE Guide – citing the Inspector's report, in particular §§11.8 & 11.9.
- Mr Stapleton failed to identify rooms in the Proposed Development to which the alleged 5% ADF requirement allegedly applied.
- The BRE Guide – §§2.1.8 - 2.1.10 – merely identifies 5% ADF as a guideline or a recommendation for a well-daylit space. It does not require that rooms be well-daylit or have a 5% ADF. Accordingly, the Board was not obliged to determine whether any room was required to be well-daylit or meet a 5% ADF requirement.
- Alternatively, the only space required by the BRE Guide[32] to be "well daylit" a living room linked to an internal galley kitchen – citing Jennings[33] and Fernleigh.[34] As there is no galley kitchen in this case, no BRE Guide requirement of a well-daylit space applies to any room in the Proposed Development and hence there is no applicable 5% ADF recommendation.
- Absent non-compliance with the BRE Guide, the question of setting out reasons as to the rationale for alternative compensatory design solutions does not arise.

[30] Re XJS Developments, [1986] IR 750, Clonres v Bord Pleanála, [2021] IEHC 303 §49-53. Interpretation as if by an informed intelligent layperson with no special expertise in planning or planning law.
[31] Fernleigh v ABP & Ironborn [2023] IEHC 525.
[32] §2.1.14.
[33] [2023] IEHC 14, §§398-400.
[34] [2023] IEHC 525, §§101-102.

- Alternatively, even the applicable minimum ADF levels can be breached – if the process described in Atlantic Diamond is followed, as it was. The Board relies on §§11.8, 11.9, 11.9.9 - 11.9.21 and 11.9.25 of the Inspector's report as to, inter alia, compensatory design solutions.
- The only reasons plea by Mr Stapleton is as to the alleged 5% ADF requirement: no reasons plea is made as to the minimum ADF levels. But in any event the Inspector's reasons were adequate.

BS 8206 or BS EN 17037 or IS EN 17037?

19. The Board pleads and submits that, by the time of the Impugned Decision, the British Standards Institution had replaced BS 8206 of 2008 by BS EN 17037:2018. Copies of each are exhibited. On perusal of BS EN 17037, I see that it is the UK's implementation of a European standard – EN 17037:2018. I can add that Dr Littlefair identifies an equivalent Irish standard – IS EN 17037:2018, which I have not seen but must be at least very similar to EN 17037 and BS EN 17037. It was originally published in January 2019 – though it has since been updated. Notably, the Inspector's report of October 2022 does not mention IS EN 17037 and excludes consideration of BS EN 17037 – apparently on the basis that it replaced BS 8206, but *"(in the UK)"*.[35] That IS EN 17037 was, at very least, a "*guide like*"[36] BS 8206 was not, as it surely should have been, cited to the Board by Savona. But as to an issue of daylighting which arises routinely as to apartment developments, this hardly explains the absence of reference to IS EN 17037 by a Board afforded curial deference on account of its expertise – a Board whose duty of "*scrupulous rigour*" is identified in **Weston**[37] and whose duty of both "*expert*" and "*detailed scrutiny*" – a duty of the "*utmost importance*" – is identified by O'Donnell J for the Supreme Court in **Balz**.[38] In similar vein, Humphreys J in **Treascon**[39] emphasised "*the need for thoroughly independent and detailed expert scrutiny by the statutory decision-maker*" and in **Jennings** its duty was described as one of "*active and critical interrogation*".[40]

20. However, the Height Guidelines have not been updated to reflect IS EN 17037[41] and the Board also notes in its pleadings that the Inspector considered that BS 8206 remained applicable. Importantly, no-one pleads that the Inspector was wrong in so considering.

21. I emphasise that, absent expert assistance, I am not qualified to make findings as to the significance of the content of BS EN 17037 or the materiality of its differences from BS 8206. However, and while I may be quite wrong, my impression is that BS EN 17037 – and hence, presumably, IS EN 17037:2018 – are in terms appreciably different to those of BS 8206. As best I can see, while minimum, medium and high standards are set BS EN 17037 as reflecting EN 17037, they are not applied to particular room types. However BS EN 17037

[35] Inspector's report §10.8.8.
[36] Height Guidelines §3.2.
[37] Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).
[38] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 I.L.R.M. 367 §454.
[39] Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700 (High Court (Judicial Review), Humphreys J, 16 December 2022).
[40] [2023] IEHC 14, §410.
[41] The Apartment Guidelines were updated in December 2022 after the Impugned Decision and now require, at §6.6, regard to "quantitative performance approaches to daylight provision outlined in guides like A New European Standard for Daylighting in Buildings IS EN17037:2018, UK National Annex BS EN17037:2019 and the associated BRE Guide 209 2022 Edition (June 2022), or any relevant future standards or guidance specific to the Irish context, …"

includes a National Annex which states the opinion of the UK standards committee that the daylight recommendations of EN 17037 may not be achievable for some buildings, particularly dwellings with basement rooms or those with significant external obstructions (for example, dwellings in a dense urban area or with tall trees outside), or for existing buildings being refurbished or converted to dwellings. The UK committee notes the differing Daylight Factor recommendations of EN 17037 specific to identified European capitals. I note that those as to London differ somewhat from those as to Dublin, though I cannot say whether the differences are significant. The UK National Annex, in light of the UK Committee's opinion, appears (though I cannot be certain) to replicate as Table NA.1, albeit quantified in lux,[42] the ADFs for bedrooms, living rooms and kitchens set out in BS 8206 at §5.6. The UK National Annex certainly records that the relevant information was "derived" from BS 8206 §5.6. However, whereas BS 8206 identified those recommendations under the heading "*Minimum average daylight factor*", BS EN 17037 identifies them as recommended "*Values of Target Illuminance*". As it is not exhibited, I do not know if IS EN 17037 includes a National Annex in like terms. It is at least possible that the transition from "minimum" to "target" is significant.

22. As far as I am aware, and there were no submissions on the point, while they are often used in practice, British Standards ("BS") have no legal status in Ireland save as Irish law accords it – such as in §3.2 of the Height Guidelines – or as evidence of conformity to good practice. As it seems to me, that Irish law accords such status to a BS does not, save if it is done expressly, accord similar status to a replacement BS or replace the legal status of the earlier BS. Whether to adopt the replacement standard as suitable to Irish conditions is for the decision of the Irish State, just as it was for the decision of the Irish State to adopt the replaced standard in the first place. Thus if, as to the application of §3.2 of the Height Guidelines, it were a straight choice between BS 8206 and BS EN 17037, the former would prevail. Further, and as best my researches have revealed the Height Guidelines may be out of sync with the 2022 Apartment Guidelines which do cite IS EN 17037. But any issue arising in that regard is for another case.

23. However, it does not seem to me to be likely to be, in another case in which the Height Guidelines are in issue, a straight choice between BS 8206 and BS EN 17037. §3.2 of the Height Guidelines, in citing the BRE Guide and BS 8206, does so non-exhaustively – viz. the words "*in guides like*" in §3.2. Those words seem in principle to allow regard to BS EN 17037 in addition to BS 8206.

24. But given the state of the pleadings and arguments, it seems to me proper to proceed on the footing that the Inspector was correct to limit her consideration to BS 8206. Definitive conclusions on the matters canvassed above must await another case. That said, and as will be seen, the exhibition of BS EN 17037 has assisted in tending to support earlier caselaw as to the significance of the ADF minima identified in BS 8206.

[42] The lux ("lx") is the SI unit of illumination equivalent to 1 lumen evenly distributed over $1m^2$ – Lux | Light Measurement, Photometry & Illumination | Britannica.

Savona's Pleadings, Evidence & Submissions

25. As notable beyond mere traverses and the Board's pleas and submissions, Savona pleads and submits that:

- The Daylight Report was comprehensive and applied the correct ADF recommendation of the BRE Guide to every proposed room.
- The Board properly considered the Daylight Report by reference to the BRE Guide and BS 8206. Savona cites §§11.6, 11.8.5 to §11.8.19, §11.9.12 and §11.9.27 of the Inspector's Report – including as to the explicitly discretionary and flexible character of the BRE Guide and pleads and submits that her conclusions that the units will receive adequate daylight were proper on the materials before the Board.
- The Board was not obliged to give reasons on issues not raised before it.

26. Savona's architect, Mr Joe Kennedy, in his affidavit primarily addresses daylighting as an issue of effect on adjoining properties. Though he asserts the discretionary and flexible character of the BRE Guide, he does not seem to me to add to the debate as to daylighting of the proposed apartments.

<u>The Experts'– Littlefair & McCabe – and their Conflict</u>

27. Dr Paul Littlefair is the author of the BRE Guide. He swore an affidavit on 11 November 2022 for Mr Stapleton exhibiting his report of 11 February 2022, (which, obviously, was not before the Board) criticising the Daylight Report.

28. Dr Littlefair deposes to his interpretation of the BRE Guide. His views in this regard are relevant and admissible – not least as recording the basis on which he approached giving his opinion – but have no special weight. Interpretation of the BRE Guide, specifically as cited by and in the context of §3.2 of the Height Guidelines, is a matter of law for the court and the document must be equally capable of objective interpretation by any informed, lay and inexpert member of the public – **XJS** and **Cicol**.[43] In making that observation, I should record some sympathy for Dr Littlefair. His BRE Guide explicitly states that it is not intended as a planning policy instrument.[44] Yet that is precisely the use to which §3.2 of the Height Guidelines puts it, as a result of which it must be interpreted as text in the context of those Guidelines. The resulting – and considerable – interpretative difficulties are noted in **Fernleigh**.[45]

29. The interpretive task is all the more difficult as the BRE Guide (explicitly flexible and non-mandatory) is identified as part of the criteria for the mandatory application of an SPPR, which enables the mandatory material contravention of a Development Plan. So one expects the criteria to be adequately clear and not excessively elastic. Yet the BRE Guide explicitly emphasises flexibility. In this light, it is notable and

[43] Cicol Ltd v An Bord Pleanála [2008] IEHC 146.
[44] BRE Guide p1.
[45] Fernleigh v ABP & Ironborn [2023] IEHC 525, §55.

unsurprising that Dr Littlefair cites the minimum ADF values for rooms given in the BRE Guide as just that – minima.

30. I should add that, strangely, while Dr Littlefair refers to the invocation of the BRE Guide in the Urban Residential Guidelines[46] and the Apartment Design Guidelines,[47] he does not refer to their relevant invocation – in the Height Guidelines 2018 as part of the §3.2 criteria for the activation of SPPR3. That is the relevant invocation as it is the particular context in which, for present purposes, the BRE Guide must be interpreted. So, the position remains that identified in **Fernleigh**:

> *".. there is no evidence that Dr Littlefair was aware of SPPR3 and the legal context in which it sits – or that his BRE Guide has been transmuted by Irish law into the very "instrument of planning policy" which he intended it not to be."* [48]

31. As relevant to this ground of challenge, Dr Littlefair criticises as too high some of the quantified reflectance[49] assumptions of the Daylight Report. He also criticises the light transmission assumption of 85% made as to the ETFE roof of the Courtyard (relevant not merely as to daylighting the Courtyard but also as limiting the daylight reaching the apartment glazing in the facades facing into the Courtyard) – not least as *"there appears to be no way of cleaning it"* and *"a print pattern (frit)[50] generally causes a significant decrease in daylight transmittance to well below 85%,[51] especially if good control over solar gain and glare is required."* He also criticises what he says is a failure to take into account the blocking of light reaching the Proposed Development by trees surrounding it, because *"They would be expected to cause significant reductions in the light received by the outward facing flats on the lower floors, particular on the south and east sides."* He criticises the Daylight Report's data as to the sitting/living/dining rooms in the 16 studio apartments. Taken together, he says, these factors led to Daylight Report significantly overestimating daylight in the proposed apartments and so the Inspector's overall conclusions as to compliance with BS 8206 "*must be doubtful*". Overall, Dr Littlefair is highly critical of the Daylight Report. But these seem to me to be merits issues, not legality issues, and his report was not before the Board. Correctly, Mr Stapleton did not press these criticisms at trial and the issue as to the studio apartments was not pursued in written or oral submissions.

32. Mr Ciarán McCabe, engineer, of Passive Dynamics, constructed and ran the computer simulation model. The output of which is found in Savona's Daylight Report, which report he wrote. He swore an affidavit on 7 December 2022 exhibiting his report of that date responding to Dr Littlefair's report – deposing that it provides no evidence to undermine the Daylight Report.

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[46] Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages)' 2009 – citing an earlier edition of the BRE Guide.
[47] Sustainable Urban Housing – Design Standards for New Apartments – Guidelines for Planning Authorities 2018. They were updated in 2020 but nothing turns on that.
[48] §62.
[49] Reflectance is the measure of the proportion of light striking a surface which is reflected off it.
[50] Which is intended – to control solar glare.
[51] The transmission claimed in the report.

33. Mr McCabe says that, for technical reasons, he "*diligently tried to avoid higher ADF values*" than the minima given in the BRE Guide – essentially to avoid risk of overheating by solar gain, which might discomfit occupants and require excessive air conditioning. I pause to note that while he says that he does not recommend "*significantly exceeding*" BRE Guide minima, he does not quantify the ADF levels at which such a risk of overheating might be significant. More generally, this rationale as to risk of overheating is not recorded in the Daylight Report. It appears for the first time in these proceedings. Notably in this context, Mr McCabe fails to address the obvious points that the BRE Report:

- Explicitly sets minima. That they are minima inherently suggests that exceeding them is permissible and even likely to be a good thing, at least within bounds. This is confirmed by BS 8206[52] which recommends those minima as "*at least*" figures to be attained "*Even if a predominantly daylit appearance is not achievable*".

- States that "*although BS 8206-2 minimum values can be used as targets for daylight in obstructed situations, achieving 2% in living rooms,[53] for instance, will give improved daylight provision, and 3% or 4% would be better still. The higher values would be particularly appropriate in housing for the elderly, because they require more light and are more likely to be at home during the day*." And I think I can take judicial notice that the elderly are more susceptible to overheating risks than others.

- Explicitly addresses overheating risk: "*… interiors with very high ADFs (over 6%) sometimes have problems with summertime overheating*."[54]

34. As per Collins J in **Duffy**,[55]the "*court must not surrender its judgment to experts, however well-qualified they may appear to be*" and I am not obliged to accept expert evidence merely because it is unchallenged. On the evidence before me, I confess to finding this aspect of Mr McCabe's evidence inherently unconvincing. Though, of course, it is possible that additional evidence in another case could affect a view as to the significance of the risk of overheating and the ADF thresholds at which that risk becomes significant.

35. Mr McCabe, in these averments, essentially sought to meet Mr Stapleton's argument that the correct target should have been 5% ADF. The BRE Guide identifies the overheating risk as starting at over 6%, so it is difficult to see his averments as an answer to that argument. However, I need not resolve that issue as, as will be seen, for other reasons I reject Mr Stapleton's argument that the correct target should have been 5% ADF.

36. Mr McCabe makes the more general point that seeking to achieve higher ADF values than the minima "*would result in much lower density residential schemes which would go against Government policy to deliver much needed housing and overcome the current housing crisis*." I observe that while Mr McCabe

[52] §5.06.
[53] i.e. as opposed to the minimum of 1.5%.
[54] §2.1.10.
[55] Duffy v McGee [2022] IECA 254 Collins J.

correctly identifies the policy, and while that policy is vitally important, the Height Guidelines which pursue that policy also require that "*The form, massing and height of proposed developments should be carefully modulated so as to maximise*[56] *access to natural daylight, ventilation and views and minimise overshadowing and loss of light*."[57] It is clear that simple juxtapositions sacrificing all to quantum of housing are inappropriate. Humphreys J made a similar point in in **Walsh**[58] – that the reasonable and lawful exercise of planning judgement requires that "*enthusiasm for quantity of housing has to be qualified by an integrity as to the quality of housing*". That was echoed in **Jennings**,[59] to the effect that "*Reconciliation of quantity of development with quality of development is a fundamental purpose of the planning system*." Inevitably there will be tensions between different planning policies. But the presumption that policies are coherent and the impetus to coherence require that the first port of analytical call in such circumstances is not the sacrifice of one policy to another, but their reconciliation. And such reconciliations will generally not be "either/or" exercises (as posited by Mr McCabe) but matters of degree. I do not suggest that such sacrificial juxtapositions occurred in this case. I merely observe that Mr McCabe's easy resort to that juxtaposition in his affidavit seems simplistic.

37. Mr McCabe seeks to rebut Dr Littlefair's criticisms of the Daylight Report – inter alia by reference to Table A.1 of BS 8206 which lists reflectance values for various surfaces and by asserting that Dr Littlefair criticised external wall reflectance values which in fact related to the internal surfaces of those external walls. Mr McCabe stands over the light transmission assumption of 85% for the ETFE roof. Though he cites no product specifications[60] he says it will be dirt resistant[61] and that the solar printing is taken into account in estimating daylight transmittance at 85%.[62] He sets out in some detail his reasons for disagreeing with Dr Littlefair as to the effect of trees. In effect, he says the approach he took is standard practice supported by the BRE Guide.

38. As to the studio apartments, he again disagrees with Dr Littlefair - but in unclear terms. He says, *"The studio apartments that were modelled in our software included the bedroom space and kitchen dining room. The results are shown for the bedroom part of the overall space."* Does this mean that only the results for only the bedroom spaces were reported? And if so why? This not least given Dr Littlefair asserts that the bedroom areas are next to the window and balcony and that "*Only data for the bedroom areas appear to have been given*". Mr McCabe says "*If the studio apartment is to be assessed as a whole (bedroom and KLD space combined) our analysis has shown that 14 out of these 16 apartments will achieve an ADF of 2.00%. The two rooms that fail to meet this target achieve 1.98% and 1.99% ADF*." He does not state, and it is not

[56] Emphasis added.
[57] Height Guidelines p14.
[58] Walsh v An Bord Pleanála & St Clare's GP3 Ltd [2022] IEHC 172 §47 et seq.
[59] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14, §§422 & 423.
[60] The Planning Application contained a report entitled "Review Of Proposed ETFE Roof" but it was limited to acoustic issues.
[61] It is said that its high surface tension prevents dirt from sticking and loose dust etc is washed off by rain.
[62] This appears to be echoed by the Architectural Design Statement, which states on p56: "The ETFE system cushions have a partial print pattern applied to their top and bottom surfaces to provide shading to optimise climate control while still retaining transparency. As a result, the overall effect allows the central courtyard space (Communal open space) to be flooded with light (85% light transmittance) while reducing solar gain (temperature) through shading. 95% light transmittance is possible and with detailed specialist design inputs at design development stage, reduced or alternative shading (automatic louvres or screens) may be a consideration which allows for greater light transmittance and enhanced daylight levels."

apparent,[63] that this information was in his report to and before the Board when it made the Impugned Decision.

39. As will have been seen, I have found myself able to take a view on certain aspects of the evidence of Dr Littlefair and Mr McCabe. However in the end, and as between Dr Littlefair's impugning and Mr McCabe's defence of the methodology and assumptions of the Daylight Report, I have, with some reservations, come to the view that I should not choose between them. Neither deponent was cross-examined and the subjects of their disagreement were essentially on matters requiring the application of judgement and expertise. This seems to me a situation in which **RAS Medical**[64] principles as to conflicts on affidavit should apply. As that case points out, this means that the position of the party not bearing the onus of proof prevails. Accordingly, here, I must reject Dr Littlefair's criticisms on those issues.

40. However, Dr Littlefair's criticisms and the Passive Dynamics responses do incidentally draw attention to the principle that curial deference to the Board's decisions does depend on its own possession and deployment of expertise in considering planning applications. Despite the fact that any planning application of consequence involves the deployment of numerous experts, some in arcane fields, the Board's Inspectors do not typically record their specific expertises in their reports and it rarely exercises its power under s.124 PDA 2000 to engage expert consultants and advisors. In some contrast, planning authorities in considering planning applications routinely bespeak reports from their internal specialist disciplines. And, though sometimes they do, objectors are not expected to have to deploy their own expertise to ensure a proper scrutiny of planning applicants' expert reports: see O'Donnell J in **Balz**[65] to the effect that:

> *"The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and <u>at no significant cost to the individual</u>, is an important public function."*[66]

This was described in **NECI**[67] by a unanimous Supreme Court of five judges as an observation which, on the facts of that case, "*strikes home*".

<u>The Importance of Daylight</u>

41. The following views of the importance of daylighting to quality of life were recorded in **Jennings**[68] and **Fernleigh**:[69]

[63] I attempted to find it by searching the reported results for ADFs of 1.98% and 1.99% but the reported results in those figures do not appear to relate to studio apartments.
[64] RAS Medical Ltd v The Royal College of Surgeons in Ireland [2019] IESC 4; [2019] 1 I.R. 63
[65] Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019), §45.
[66] Emphasis added.
[67] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, [2021] IESC 36, [2021] 2 I.L.R.M. 1, §152.
[68] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14, §393 – below quoted.
[69] Fernleigh Residents Association v. An Bord Pleanála [2023] IEHC 525, §47.

"…….. the Apartment Design Guidelines 2020 make the important, general and indisputable observation that

"The amount of sunlight reaching an apartment significantly affects the amenity of the occupants."[70]

So it comes as no surprise that the BRE Guide says

"People expect good natural lighting in their homes .."[71]

The Apartment Design Guidelines 2020 also state:

"The provision of acceptable levels of natural light in new apartment developments is an important planning consideration as it contributes to the liveability and amenity enjoyed by apartment residents." [72]

42. The Introduction to BS EN 17037 echoes those views:

"Daylight is strongly favoured by building occupants as a way to adequately illuminate the indoor surfaces, and to save energy for electrical lighting."

"Daylight can provide significant quantities of light indoors, with high colour rendering and variability, changing through the day and the seasons. Daylight openings provide views and connection to the outside and contribute to the psychological well-being of occupants. A daylight opening can also provide exposure to sunlight indoors, which is important, for example, in dwellings …"

43. As noted in **Jennings**,[73] daylighting must be especially important as to "Build-to-Rent" apartments which are intended, for long-term tenancies: to provide "*the opportunity for renters to be part of a community and seek to remain a tenant in the longer term, rather than a more transient development characterised by shorter duration tenancies that are less compatible with a long term investment model*".[74]

<u>The Daylight Report & the BRE Guide</u>

44. The Summary of the Daylight Report[75] omits to record that the minimum ADF[76] – the quantitative daylighting units described in the BRE Guide and BS 8026 – for kitchens is 2%. But that is recorded elsewhere in the report. The Summary records that "*77.45% of the Living rooms achieve an ADF of ≥ 2.00%*". However, other content of the report confirms that this should have read "*77.45% of the Kitchen/Living rooms achieve*

[70] §3.16.
[71] §1.1.
[72] Apartment Guidelines 2020 §6.5. Though not here applicable, I note repetition of this phrase in the Apartment Guidelines 2022 §6.5.
[73] §96.
[74] Apartment Guidelines 2020 §5.5. Though not here applicable, I note repetition of this phrase in the Apartment Guidelines 2022 §5.5.
[75] More fully: "Daylight, Sunlight and Overshadowing Report" 12/08/2021.
[76] Average daylight factor. 1% ADF means that the average indoor illuminance is 1% of the outdoor unobstructed illuminance.

an ADF of ≥ 2.00%". These omissions are at least unfortunate and temporarily caused confusion. But, reading the report as a whole and in its own terms, they are not misleading. In addition, they could not mislead anyone with any knowledge of the BRE Guide and BS 8026, to whom the significance of the 2% ADF minimum standard for kitchens and kitchen/living rooms could only be well-known. The Summary also cites compensatory factors as to the spaces that do not meet the ADF minima – including balconies and views of an attractive internal courtyard.

45. The Daylight Report accurately cites the BRE Guide to the effect that "*The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design."* I should add in this context that a similar reservation as to its use as a planning policy instrument appears in the Foreword to BS 8206:

> *"The aim of the standard is to give guidance to architects, engineers, builders and others who carry out lighting design. It is recognized that lighting is only one of many matters that influence fenestration. These include other aspects of environmental performance (such as noise, thermal equilibrium and the control of energy use) fire hazards, constructional requirements, the external appearance and the surroundings of the site. The best design for a building does not necessarily incorporate the ideal solution for any individual function. For this reason, careful judgement needs to be exercised when using the criteria given in the standard for other purposes, particularly town planning control."*

Interestingly, I have been unable to find a similar reservation in BS EN 17037.

46. However all this as to flexibility must be viewed in light of the caselaw which explains the effect of the invocation of the BRE Guide and BS 8206 in §3.2 of the Height Guidelines. The difficulties of interpretation caused by the adoption of the BRE Guide by §3.2 as an instrument of planning policy, despite its express disavowal of that role, are considered in **Fernleigh.** I refer also to observations in recent cases – e.g. **Spencer Place**,[77] **Fernleigh**, and a **Ballyboden** case[78] – as to the necessity of particular care in drafting planning guidelines where the obligations imposed exceed those of mere regard and extend, as here, to obligations such as appropriate and reasonable regard and the mandatory force of SPPRs. In **Fernleigh** it is also pointed out that, even in its own terms, the BRE Guide is not carte blanche as to flexibility.

47. Forced, in a sense, to over-interpret the BRE Guide by its being put to a use for which it was not intended or drafted, I turn again to the phrase: "*The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer."* Clearly, the juxtaposition here is between advice to help a designer and planning policy which might be expected to constrain him/her. So, that §3.2 of the Height Guideline requires us to view the BRE Guide as "*an instrument of planning policy"* suggests that it may well, indeed, constrain the designer. And where the BRE Guide is put to unintended use (unintended, that is, by the author) as part of "criteria" requiring satisfaction to permit the

[77] Spencer Place Development Company v Dublin City Council [2020] IECA 268.
[78] Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.

mandatory ouster by an SPPR of provisions of a Development Plan, it is all the less surprising that the BRE Guide should operate, to whatever greater or lesser degree, as a constraint on developers. And, as noted above, Humphreys J said in **Atlantic Diamond**, at least in an SPPR3 context requiring appropriate and reasonable regard, the BRE Guide lies well out of the "not mandatory" simpliciter category and if its standards are not complied with, it must be clear why.

48. While much depends on the particular terms of the plan or standard under consideration, which may be more or less prescriptive or precise, it bears repeating as a general point that easy resort to minima and to flexibility in standards can easily degenerate into the habitual or default non-application of standards or into the adoption of minima as targets. Thereby, guidelines and the standards they contain, and public faith in them and in the planning system, are put at risk of being undermined. The very meaning of minima is that they are the lowest expected outcomes of any necessary compromises – not the starting point down from which compromise proceeds. The point was made in **Jennings**,[79] in **Fernleigh**[80] and, in a slightly different context, in **O'Donnell**.[81] In that case Humphreys J observed that departures from standards must "*be limited in nature and peculiar to their own facts, and not such as can be generalised in a way that would undermine or rewrite the plan.*" Availing of flexibilities must be justified and such justifications must be regarded by the Board with proper scepticism and particularly subjected to the general duty of "*detailed scrutiny*" identified by O'Donnell J in **Balz**[82] and the *"scrupulous rigour"* required by **Weston**.[83]

49. This view of the ADF minima of BS 8206 as the lowest expected outcomes of necessary compromises is supported by the National Annex to BS EN 17037. It makes clear[84] that, at least in the UK, the recommended "*Values of Target Illuminance*" are a response to perceived difficulties in meeting the recommendations of EN 17037. That is, those difficulties are already factored into those values. This necessarily implies that those values are not to be, willy nilly, further diluted by reference to such difficulties. Given Table NA.1 of the National Annex to BS EN 17037 is derived from BS 8206 §5.6, it is safe to assume that the ADF minima identified in the latter are likewise the result of the compromises necessitated by such difficulties – not starting points to be routinely whittled down by reference to such compromises. In other words, they are minima – albeit lesser provision can be made in accordance with Atlantic Diamond criteria. But it follows that, in determining whether lesser provision is "*really justifiable having regard to the sort of objective planning features envisaged by the guidelines",*[85] it must be recognised that in ordinary circumstances the minima represent the compromise of design difficulties such that justification of less than the minima should identify something in the nature of the "*special circumstances*" envisaged by the BRE Guide as justifying "*different target values*".[86]

[79] §137.
[80] Fernleigh Residents Association v. An Bord Pleanála [2023] IEHC 525 §108 – and §181 as to the similar concept of exceptionality.
[81] O'Donnell v An Bord Pleanála [2023] IEHC 381, §85. The relevant passage relates to development plans and, more fully, reads: "A qualifier like "generally" does not confer open-ended flexibility or planning judgement. Any departures from that must themselves be limited in nature and peculiar to their own facts, and not such as can be generalised in a way that would undermine or rewrite the plan. If the basis for an exception was one that could itself be applied generally, then the plan would indeed be materially contravened. To put it another way, the word "generally" does create flexibility, but only in ballpark terms ….".
[82] Balz & Heubach v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd [2019] IESC 90; [2020] 1 I.L.R.M. 367.
[83] Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).
[84] §§NA.1 & NA.2.
[85] Walsh v An Bord Pleanála & St Clare's GP3 Ltd [2022] IEHC 172, §54.
[86] BRE Guide §1.6.

50. In passing, I recall that in **Fernleigh**[87] the argument was also rejected that the BRE Guide does not apply to apartments or applies to them only in an attenuated way**.**

51. The Daylight Report accurately cites the "*have regard to*" obligation imposed by the Apartment Guidelines as to the BRE Guide and BS 8026 but fails to note the criterion of "*appropriate and reasonable regard*" set by §3.2 of the Height Guidelines where, as here, application of SPPR3 of the Height Guidelines is in issue. Indeed, the Daylight Report does not mention the Height Guidelines. This is surprising as Savona's Architectural Design Statement explicitly "*submits a case for increased height on the basis of meeting the criteria set out in 'Building height guidelines for planning authorities 2020', with specific reference to SPPR3(A) Section 3.2*."[88]

52. The Daylight Report cites Appendix C §C4 of the BRE Guide[89] and sets out the assumptions applied by Passive Dynamics in its analysis.[90] It summarises the calculated ADF results as follows:

> *"99.26% of bedrooms achieve an ADF of ≥ 1.00%*
> *90.20% of the Kitchen/Living rooms achieve an ADF of ≥ 1.50%*
> *85.29% of the Kitchen/Living rooms achieve an ADF of ≥ 1.75%*
> *77.45% of the Kitchen/Living rooms achieve an ADF of ≥ 2.00%"*[91]

While the foregoing list was pleaded[92], put negatively, this means that 22.55% of the Kitchen/Living rooms fail to achieve the recommended minimum ADF of ≥ 2.00%. Notably, no case in law was pleaded by reference to that fact.

53. The Daylight Report next tabulates the results for individual rooms and assesses compliance for each by reference to the minima set in the BRE Guide. It describes the results as "*Achieves the BRE Best Practice Guidelines*" – not quite accurately in the sense, as to "*best practice*", that the BRE Guide envisages these minima "*as targets for daylight in obstructed situations*" where "*a predominantly daylit appearance is not achievable*" and states that better results will "*give improved daylight provision*". This falls to be considered in the context of the importance to quality of life of daylighting of dwellings – as to which see above. However it also falls to be considered in light of the description of "good practice" in BS 8206, which I consider below.

[87] Fernleigh v ABP & Ironborn [2023] IEHC 525 §108.
[88] P3 – §1.1 Overview – Background.
[89] See further below. It reads "If a predominantly daylit appearance is required, then the ADF should be 5% or more if there is no supplementary electric lighting, or 2% or more if supplementary electric lighting is provided. There are additional recommendations for dwellings of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms. These additional recommendations are minimum values of ADF which should be attained even if a predominantly daylit appearance is not achievable."
[90] Standard CIE overcast sky, Date & Time: noon, 21 September, Working Plane: 0.85m and surface reflectance of relevant materials.
[91] Daylight Report §8.
[92] Statement of Grounds §164.

54. However, the Daylight Report is straightforward as to compliance/non-compliance of each apartment with the correct minima as set by the BRE Guide. It does deem some rooms "*Marginally below target value*" but the quantitative degree of non-compliance is readily apparent – including as to specific room types.

55. I accept the Board's submission that, as general observations on the Daylight Report:

- Compliance with the BRE Guide minima increases as one gets higher in the buildings.
- Most, and the most significant, non-compliances occur in the separate kitchen/dining rooms of the duplexes[93] on the ground/first floors.
- Those kitchens are connected via sliding doors to living rooms which, if not fully well daylit, come close to 5% ADF.
- Those kitchens have large windows (2.8m wide and 3.8m^2) looking onto the landscaped Courtyard. The front doors give onto that Courtyard.

56. The Daylight Report[94] and Savona's Architectural Design Statement[95] describe compensatory measures off-setting non-compliances as to daylight levels. In addition to the matters I have just described, they record that:

- The duplexes are dual aspect, with first floor balconies and, at ground floor, both high amenity private back gardens set in landscaped areas and private space in the covered Courtyard which is usable year-round.
- The four ground floor apartments facing south towards Seafield Road East have generous south-facing elevated terraces and overlook the natural landscape of a proposed "development exclusion" zone.
- All apartments have shared access to a landscaped, uncovered, fifth floor roof garden.[96]

The Inspector's Report

57. The Inspector paid considerable attention to the daylighting issue.[97] She recited[98] the requirements of §3.2 of the Height Guidelines (2018) as to maximising access to natural daylight, its invocation of the necessity of "*appropriate and reasonable regard*" to guides like the BRE Guide and BS 8026 and that *"Where a proposal may not be able to fully meet all the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and/or an effective urban design and streetscape solution .."*.

[93] Apartment type 2A.
[94] §10.
[95] p9.
[96] See Appendix Figure 5 below.
[97] Inspector's report §11.8.6-9 & §11.9.9 et seq.
[98] §11.9.9.

58. She explicitly had regard also to the BRE Guide and BS 8026. She noted the BRE Guide's flexibility, such that its numerical guidelines are to be interpreted flexibly as, in site layout design, natural lighting is only one of many factors – such as views, privacy, security, access, enclosure, microclimate and solar dazzle.[99] So, she concluded, "*while demonstration of compliance, or not, of a proposed development with the recommended BRE standards can assist my conclusion as to its appropriateness or quality, this does not dictate an assumption of acceptability or unacceptability*". I observe that, as relates to a case in which SPPR3 is applied, this last observation is correct only to the extent the requirements of, not merely regard, but appropriate and reasonable regard, recognised in Atlantic Diamond and elaborated above, are respected.

59. The Inspector considered the Daylight Report to be "*generally … reasonable and robust*". She noted that many third party submissions and the Council had expressed concerns as to the ADFs and concerns that the application had not adequately demonstrated a rationale for alternative compensatory design solutions where ADF minima were not met. In that respect, the Inspector highlighted the compensatory measures addressed in §10 of the Daylight Report – including dual aspect configuration, full access to a covered courtyard and south-facing elevated terraces to some apartments. She also noted the setbacks of the apartment blocks from Site boundaries.

60. She specifically noted that the Daylight Report used the 2% ADF benchmark for both the Kitchen/Dining rooms in the duplexes and the Kitchen/Living/Dining rooms in the other apartments. She noted a few errors in the pass/fail designations but considered them minor and inconsequential to her recommendation. She notes that "*The kitchen spaces have not been excluded from the calculations*" (as has occurred in other cases – see Jennings).

61. As to the duplexes, she noted the non-compliance and the proffered compensatory design solutions – to which she adds that they are above minimum floor area standards. She also noted her recommendation (which the Board accepted) that the floor to ceiling height of all ground floor units be increased by planning condition from 2.5m to the Apartment Guideline minimum standard of 2.7m. More generally, she considers that "*The covering of the communal courtyard will be a significant benefit for future residents, allowing sheltered year round access*" and noted the sizes of window opes. She concludes that "*All would offer a good quality of residential amenity to future occupiers*."[100]

62. The Inspector observed that *"the higher 2% ADF is more appropriate in a traditional house layout, and that in apartment developments such as this, it is a significant challenge to achieve 2% ADF, and even more so when higher density and balconies are included. Often in urban schemes there are challenges in meeting the 2% ADF in all instances, and to do so would unduly compromise the design/streetscape and that an alternate 1.5% ADF target is <u>generally</u>[101] considered to be more appropriate."*[102] I disagree. As was held in **Fernleigh** and for reasons set out therein, "*The BRE Guide and the Daylighting Code*[103] *apply to apartments*

[99] Citing §5 BRE Guide.
[100] Inspector's report §11.9.18 et seq.
[101] Emphasis added.
[102] Inspector's report §11.9.19.
[103] BS 8026.

just as much as to any other form of residential development. I reject any contrary suggestion."[104] Nor do they apply only in an attenuated way. It is frankly difficult to see how such a view of the BRE Guide, is consistent with the Apartment Guidelines' explicit adoption of them as applicable to new apartments and with the Height Guidelines' requirement of appropriate and reasonable regard to the BRE Guide, given high residential buildings, are predominantly, if not invariably, apartment blocks, not houses.

63. As I have said, Dr Littlefair's interpretation of the BRE Guide, which he authored, is no more authoritative than any other. But, given his general credentials and expertise, it is notable that his affidavit and report in these proceedings observes that the BRE Report is widely used by local authorities to help determine planning applications and that the Apartment Guidelines refer to both the BRE Report and BS 8206 Part 2 for assessing daylight provision in new apartments.[105] Nowhere does he suggest that the BRE Report and BS 8206 do not apply, or are impractical to apply, or are practical to apply only in some attenuated way, to apartments. The entire tenor of his report is to the contrary in that he criticises Savona's Daylighting analysis in this case by reference to the BRE Report. However, my view in this regard does not depend on his opinion – as Fernleigh demonstrates.

64. I am not qualified to take a view on the practicality of the application of BRE Guide standards to apartments. But in law they remain applicable unless and until the Minister by new guidelines disapplies them – which, of course, the Minister may do.

What General Daylight ADF Target is set by the BRE Guide & BS 8206?

65. The incongruity of the adoption by the Height Guidelines as planning guidance of a BRE Guide in its own terms explicitly unsuited to that purpose, and resultant difficulties of interpretation, have been noted above.

66. BS 8206 states:

> *"If the average daylight factor in a space is at least 5% then electric lighting is not normally needed during the daytime, ….. If the average daylight factor in a space is between 2% and 5% supplementary electric lighting is usually required".*[106]

67. BS 8206 does not use the term "well-daylit". But it is common case that the phrase "well-daylit" as used in the BRE Guide requires an ADF of 5%. In **Jennings**,[107] it was said that "*Well-daylit means 5% ADF*". That should more accurately have read: "*Well-daylit means at least 5% ADF*". Though it is obvious, I should

[104] §63.
[105] Emphasis added.
[106] BS 8206 §5.5.
[107] §§398, 400, 403.

note that "*well-daylit*" has a different meaning to "well-lit". "Well-lit" is not a phrase consequentially deployed in the BRE Guide and BS 8026 and while I am reluctant to add to the terminology, the phrase is useful. Whereas "*well-daylit*" refers to a space "well-lit" by daylight only, "well-lit" encompasses lighting from any source, including electric lighting.

68. But the BRE Guide and BS 8026 do use the phrase "*predominantly daylit*" – referring to space mostly, but inadequately, daylit and where supplementary artificial lighting may be used to render it well-lit. So, the phrase "*predominantly daylit appearance*" implies something short of "*well-daylit*". Importantly, BS 8206 says:

> *"It is considered good practice to ensure that rooms in dwellings … have a predominantly daylit appearance. In order to achieve this the average daylight factor should be at least 2%."*[108]

This passage is notable for identifying as "*good practice*" that rooms in dwellings have a predominantly daylit appearance. Indeed, the BRE Guide, which invokes BS 8026 such that they are to be read together, is explicitly "A Guide To Good Practice". So, "*good practice*" does not require that rooms in dwellings be well-daylit. The applicable target is to achieve at least "*a predominantly daylit appearance*". Consistently with that observation, this passage of BS 8206 is notable also for stating that to achieve a predominantly daylit appearance an ADF of 2% may suffice.

69. In other words, there are two ways to achieve a "well-lit*"* room. Absent electric lighting, an ADF of 5% is needed. Such a room is entirely daylit – "well-daylit". Alternatively, an ADF of 2% with supplementary lighting can be "well-lit*"* – though it is "*predominantly daylit*" not "*well-daylit*". And, as stated, such a "*predominantly daylit*" satisfies "*good practice*".

70. However BS 8206[109] addresses the situation in which "*a predominantly daylit appearance is not achievable*" in a dwelling. I pause to observe the implications that:

- "*a predominantly daylit appearance"* should be achieved where possible.
- the ADF minima which follow are, as I have already said, the outcome of an inability to attain "*good practice*" and represent the outcome of the compromise thus necessitated. They are not the starting point of further whittling.

So, it is "*recommended*" in BS 8206[110] that the "*minimum*" ADFs "*should be*" as follows:

Room type	**Minimum ADF %**
Bedrooms	1
Living rooms	1.5
Kitchens	2

[108] BS 8206 §5.5.
[109] BS 8206 §5.6.
[110] BS 8206 §5.6.

Multi-purpose rooms	The ADF for the room type with the highest value. For example, in combined living room/kitchen the minimum ADF is 2%.

71. There is an obvious incongruity here. While the premise[111] is that "*a predominantly daylit appearance is not achievable*", the minimum ADF for kitchens is 2%. But at 2% a predominantly daylit appearance is achievable with supplementary lighting.[112] Attempting to reconcile this incongruity, it seems to me that BS 8206 does not in fact contemplate a minimum ADF for kitchens that fails to achieve a predominantly daylit appearance.

72. The BRE Guide says:

> *"2.1.8 .. BS 8206-2 … recommends an ADF of 5% for a well daylit space and 2% for a partly daylit space. Below 2% the room will look dull and electric lighting is likely to be turned on. In housing BS 8206-2 also gives minimum values of ADF of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms.*
>
> *2.1.9 With a higher ADF, indoor daylight will be sufficient for more of the year. So although BS 8206-2 minimum values can be used as targets for daylight in obstructed situations, achieving 2% in living rooms, for instance, will give improved daylight provision, and 3% or 4% would be better still."*

I have considered part of these passages already in doubting Mr McCabe's averments as to the risk of overheating.

73. Reading the BRE Guide §§2.1.8 and 2.1.9 with BS 8206, it seems to me that the BRE Guide is, in saying that BS 8206 recommends an ADF of 5% for a well-daylit space and 2% for a partly daylit space, identifying, though it might have done so more clearly, the two means identified by BS 8206 of achieving a well-lit space. It can be either "*well-daylit*" at 5% ADF or "*predominantly daylit"* at at least 2% ADF, plus supplementary lighting – and the latter does represent "*good practice*".

74. I note that the BRE Guide also states that the minima "*can be used as targets for daylight in obstructed situations*". That said, achieving higher ADFs than the minima – e.g. 2% rather than 1.5% in living rooms – would be better.

75. The BRE Guide[113] later states,

> *"C4 If a predominantly daylit appearance is required, then the ADF should be 5% or more if there is no supplementary electric lighting, or 2% or more if supplementary electric lighting is provided."*

[111] Of §5.6.
[112] BS 8206 §5.5
[113] BRE Guide, Appendix C, Interior Daylighting Recommendations.

Again, there is an incongruity: as has been seen, at 5% ADF a space is "*well-daylit*" – not merely "*predominantly daylit"*. Also, some uncertainty is introduced by the word "if" – the BRE Guide does not tell us when a predominantly daylit appearance is required. But, as I have noted, BS 8206 tells us: *"It is good practice to ensure that rooms in dwellings … have a predominantly daylit appearance."*

The passage continues to the effect that the "*recommendations of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms … are minimum values of ADF which should be attained even if a predominantly daylit appearance is not achievable."*

76. As stated, the concept of a "*well-daylit*" room does not appear in BS 8206. As noted above, it has been held that, as it appears in the BRE Guide, "*well-daylit*" requires a 5% ADF. But there is a difference between describing the concept of "*well-daylit*" and requiring it of particular types of space. The Board points out that in only one instance does the BRE Guide require a "*well-daylit*" room. It states that, if a small, internal, non-daylit, *"galley-type kitchen is inevitable, it should be directly linked to a well daylit living room."*

Daylighting – Decision

77. On the foregoing basis – as "*predominantly daylit*" at 2% ADF represents "*good practice*" and as only one type of room is identified as to be "*well-daylit*" at 5% ADF (a living room linked to a galley kitchen – not, as it happens, at issue in this case), I reject what I have identified as the "nub" of Mr Stapleton's case on daylighting. I reject the proposition that the BRE Guide and BS 8026 set a general target of 5% ADF for dwelling rooms. Accordingly, there was no necessity to have any regard, much less appropriate and reasonable regard, to such a target. It was not necessary for the Board to start its analysis by explicitly articulating a target of 5% ADF, as no such target exists. The primary basis of challenge on daylighting grounds fails.

78. That said, I note Savona's observation that Dr Littlefair, in his report, did not assert that the BRE Guide and BS 8026 set a general target of 5% ADF for dwelling rooms. As stated, though its author, his view of the interpretation of the BRE Guide is no weightier than another. But Savona's observation bears noting at least.

79. Though it is not apparent that an argument for a generally applicable 5% ADF standard was made in that case, and a point not argued is not decided,[114] it is nonetheless notable that **Walsh**[115] is premised on the view that the Inspector "*should have started with the applicable standard, which is 2%".*

[114] The State (Quinn) v. Ryan [1965] I.R. 70 – cited in Enniskerry Alliance and Enniskerry Demesne Management Company CLG v. An Bord Pleanála [2022] IEHC 6.
[115] Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172.

80. As recorded above, Mr Stapleton also submitted that 10% of kitchens fell below the minimum 2% ADF recommended by the BRE Guide and that, even though the Inspector did not accept that there was non-compliance, she purported to apply compensatory measures, which logically she could not have done unless there was a non-compliance. In this respect, the Mr Stapleton also submits that the Board's reasoning is incoherent and inadequate. I reject that submission as insubstantial and merely formalistic. There is no illogicality or incoherence. An Inspector is fully entitled to advise that there is compliance with a standard and also that, if a different view is taken, such non-compliance may be excused for reasons given.

81. Accordingly, the daylighting ground fails.

82. I make two further observations:

a. The Inspector included in her compensatory design features her recommendation (which the Board accepted) that the floor to ceiling height of all ground floor units be increased by planning condition from 2.5m to the minimum standard of 2.7m set by the Apartment Guidelines SPPR5. While no doubt that was a good thing from a planning point of view, it is difficult to see how mere compliance with a minimum standard – indeed a mandatory SPPR standard – could constitute a compensatory design feature. However, the point was not pleaded.

b. Conversely, the Board at trial sought to call in aid the fact, as it said, that most of the kitchens which failed (they face the Courtyard at ground level), had large – 2.8m wide – windows. If so, that makes their failure the more remarkable – though perhaps one might argue that the additional sense of space and view might be compensatory attributes. The Board also argued, presumably by analogy with the "galley kitchen" exception, that these kitchens were in most cases connected via a sliding door to well-daylit living rooms with ADFs in the region of 5%. That might be a legitimate view – though I am unclear that the fact that the door is a sliding door matters – but it is not a view expressed in the Impugned Decision, which cannot be rewritten now.

Neither observation affects the outcome on this ground, but they may be of some future interest.

SUSTAINABILITY – GENERAL

Introduction

83. Mr Stapleton pleads a lack of adequate regard to the concept of sustainability in the Impugned Permission. This plea relates both to the issue of what Mr Stapleton describes as excessive artificial lighting of the Proposed Development and the issue of adequacy of public transport. As there is much overlap between the issues and analysis in these regards, it may assist to attempt first a general survey of the issue of the place of sustainable development in the planning process.

84. In submissions, Mr Stapleton cites, amongst many like instruments,

- Article 2 of the UN Framework Convention on Climate Change, adopting the aim of timely stabilisation of atmospheric GHG concentrations. I observe that, given the dualist approach to international law adopted in Article 29.6 of the Constitution, this Convention justiciable only as an interpretive aid to legal obligations effective at EU and Irish Law. Even at that, as a high-level framework convention its practical influence in the planning process may be diffuse and pale in comparison to the role of EU and domestic legislation, not least that which seeks to give specific content to international law.

- The "Binding Reductions Regulation" aim of a 40% reduction in the EU's GHG emissions by 2030 as compared to 2005 levels and recitals as to such as the intended contribution to the achievement of that aim by the transport sector and in energy performance of buildings. Article 2 and Annex I require Ireland to reduce its GHG emissions by 30%.[116]

- The "European Climate Law and Climate Neutrality Regulation"[117] – specifically its requirement that the State both adopt an integrated national energy and climate plan including objectives, targets and contributions, and set out planned policies and measures.

85. Of the Binding Reductions Regulation and the European Climate Law and Climate Neutrality Regulation, Mr Stapleton submits that "These provisions set out EU obligations which form the basis for government policy in relation to climate change, and compliance with them is a precondition to sustainable development. These are implemented through the National Climate Policy Position and the National Adaptation Framework, and reflected in the NPF which, it is submitted, set out EU obligations which form the basis for government policy in relation to climate change, and compliance with them is a precondition to sustainable development."

Proper Planning and Sustainable Development

86. Mr Stapleton cites **Conway**,[118] correctly, to the effect that sustainable development is not merely an aspirational concept, but a justiciable one identified in the PDA 2000. He argued in effect that the phrase "*proper planning and sustainable development*" had become in the practice of the Board, at least as to the concept of "*sustainable development",* a mere mantra – an empty formula.

87. S.26 of the 1963 Planning Act[119] provided that in deciding a planning application the decision-maker was restricted to considering issues of "*proper planning and development*". While that Act identified particular aspects of proper planning and development (for example, specific matters listed in s.26(1) and

[116] The 2005 level is defined for each State in Decision (EU) 2020/2126.
[117] Regulation 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[118] Conway v Bord Pleanála [2023] IEHC 178.
[119] Local Government (Planning and Development) Act, 1963.

types of planning condition listed in s.26(2)), it did not do so exhaustively. While the 1963 Act did not explicitly require a formal conclusion in each planning permission in explicit terms of "*proper planning and development*" that the practice of expressing such a conclusion became general, if not ubiquitous, doubtless reflected a perception that such a conclusion was at least desirable if, indeed, not an implied requirement of the 1963 Act. So, a grant (or refusal) of permission typically concluded that the proposed development would (or would not) be in accordance with proper planning and development. It seems to me that the phrase "*proper planning and development*" represented a single criterion rather than separate criteria of "*proper planning*" and "*proper development*" respectively.

88. In light, no doubt, of increasing societal, political and legal awareness of the importance of environmental considerations, s.34(2) PDA 2000 interposed the word "sustainable" to yield the phrase "*proper planning and sustainable development*". The long title to the PDA 2000 describes its purpose as, inter alia, to *"provide, in the interests of the common good, for proper planning and sustainable development including the provision of housing".* **Browne**[120] describes the phrase "*proper planning and sustainable development*" as expressing "*the primary consideration in adjudicating on an application for planning permission*". Indeed, he calls the restriction of the Board to considering such issues as "*the overriding consideration*". In my view, Browne records the general and correct view in this regard. In this context, I do not find the Board's submission assists when it says that:

- S.9 of the 2016 Act merely obliges the Board, in deciding an SHD Planning Application, to "*consider*" the materials before it in so far as they relate to the likely consequences for proper planning and sustainable development.
- The Board need not "*decide*" whether proposed SHD development conforms to proper planning and sustainable development.

89. Notably, by s.1(2)(a) of the 2016 Act, it and the PDA 2000 are to be cited together and construed as one. The PDA 2000 imposes many requirements of consideration of "*proper planning and sustainable development*" – for example as to the content of development plans[121] and most notably s.34(2)(a) which restricts decision-makers on planning applications to "*considering the proper planning and sustainable development of the area*". In my view, and considering s.9 of the 2016 Act as part of the general statutory scheme of the Planning Acts, I consider it untenable to suggest – save perhaps on specific statutory authority and none was cited – that the Board is empowered to grant planning permission despite concluding that a proposed SHD does not conform to the requirements of "*proper planning and sustainable development*". Putting it in this negative form, I think, best demonstrates that the Board's proposition is untenable.

90. The corollary is that, to grant permission, the Board must conclude – or "consider"[122] – that the proposed SHD does conform to the requirements of "*proper planning and sustainable development*". Of course that, as will, be obvious, is a conclusion drawn at a very high and general level and, as to grant or refusal of permission, the devil will almost invariably be in the detail. But I see no reason, as to SHD permissions, to disagree with Browne in his view as to planning permissions generally that "*proper planning*

[120] Simons, Planning Law, 3rd Ed'n §4.03.
[121] ss.10, 11, 12, 13 PDA 2000.
[122] In the sense of "decide" or "take the view", as opposed to in the sense of merely directing one's mind to the issue.

and sustainable development" is "*the overriding consideration*". However, it is equally the case that the concept of "*proper planning and sustainable development*" is an extremely broad one, encompassing all aspects of the public interest as they may bear on, or be borne on by, development of lands.

91. In my view, it is emphatically not the case that the introduction by the PDA 2000 of the concept of sustainability made no difference to planning practice or is reduced, either in form or in the practice of planning authorities, to a "mantra" as Mr Stapleton alleges. It made a vast difference and is inescapable in the planning process as reflecting a particular and central perspective and objective in planning matters. So much so, in my view, that the imperative of sustainability is now so enmeshed and pervasive in that of proper planning that attempts to categorise a consideration as one of planning as opposed to sustainability or vice versa would, in at least very many instances, be formalistic in substance, futile in practice and pointless in principle. To pick a simple illustration: the title of the Apartment Guidelines 2020 is "*Sustainable Urban Housing: Design Standards for New Apartments*". Inter alia, they cite the National Planning Framework[123] ("NPF") for a policy shift towards "*securing more compact and sustainable urban development*" and record that "*maximising accessibility of apartment residents to public transport and other sustainable transport modes is a central theme of these guidelines."* Indeed, Mr Stapleton himself, in arguing issues of validity of SPPR3 of the Height Guidelines, expressly characterised those Guidelines as "*a higher buildings policy in service of a sustainable development policy*".

92. In my view, "*proper planning and sustainable development*" consists in a single, if composite, overarching criterion for the grant or refusal of planning permission, which criterion is fleshed out and detailed in many, varied and pervasive ways in planning law and policy. I set out later in this judgment a table, noting and commenting on content of the matters to which the Board recorded its regard in granting the Impugned Permission. It illustrates this point.

93. In 2003, **Butler**[124] observed of the then-recent PDA 2000: "*What sustainable development is, is not defined.[125] There has been no judicial pronouncement thereon. In general it must mean that for a development to be sustainable that it will last in the context of its economic social and environmental context*". The 1987 **Brundtland Commission** had defined sustainable development as *'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'*. That definition achieved general currency in numerous policy documents[126] and was described as "*well-known*" in at least one English case – **Wakil**.[127] **Kingston et al**[128] record the European Council as having endorsed the Brundtland definition in identifying sustainable development as a fundamental objective of the EU Treaties.

[123] Project Ireland 2040 National Planning Framework, February 2018.
[124] Keane, Local Government, 2nd ed'n p201.
[125] Nor is it defined in the Planning and Compulsory Purchase Act 2004 in England & Wales.
[126] e.g. Strategic Planning Guidelines for the Greater Dublin Area 1999, the UK National Planning Policy Framework 2012, Dublin City Development Plan 2016–2022, Dun Laoghaire/Rathdown County Development Plan 2022-2028.
[127] Wakil (t/a Orya Textiles) and others v Hammersmith and Fulham London Borough Council [2013] EWHC 2833.
[128] European Environmental Law p13 – citing the Presidency Conclusions Göteborg European Council 15 and 16 June 2001 ("Sustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties.").

94. Albeit in a different statutory context, the Brundtland definition was cited, and apparently adopted in a Scottish case by the CSIH[129] – **Pairc Crofters**[130] **–** as a broad definition of sustainable development and as including:

- "Protection and enhancement of the natural environment and the cultural heritage.
- Promotion of rural development, regeneration and recreational opportunities; and the development of mixed communities.
- The efficient use of land, buildings and infrastructure."

It will be noted that, while arguably the first two in this list fall within a concept of "proper planning", the third undoubtedly does so and comfortably. The CSIH rejected an objection that the term "*sustainable development*" – used but not defined in the applicable statute – was too vague to have legal force and so was 'not law'. It held that the term *"is in common parlance in matters relating to the use and development of land. It is an expression that would be readily understood by the legislators, the Ministers and the Land Court".*[131]

95. The absence of Irish judicial pronouncement as the meaning of sustainable development appears to have subsisted until as late as **Conway**[132] – in which Humphreys J said the following (to which I have made minor additions consistent with my understanding of his view):

- The concept of proper planning and sustainable development occurs throughout PDA 2000 (149 times in the consolidated version).

- The concept of "*proper planning*" is "*somewhat amorphous*" but cannot be taken in isolation. It must be read in the light of the PDA 2000 generally and in particular of – and be compatible with – the concept of "*sustainable development*".

- The EU has politically adopted the Brundtland definition of sustainable development – adding, importantly, that "*It seeks to reconcile economic development with the protection of social and environmental balance*" and adopting "*a long-term vision for sustainability in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting*".[133]

- Though not defined in legislation, the concept of sustainable development has in law a clear meaning, consistently interpreted. It is adopted in many legislative instruments. Humphreys J cited **Article 3(3) TEU**[134] and **Article 37 EUCFR**[135] and described the concept as "*embedded*" in Irish primary legislation,

[129] Court of Session, Inner House.
[130] Pairc Crofters Ltd v Scottish Ministers [2013] S.C.L.R. 544.
[131] §56.
[132] Conway v An Bord Pleanála [2023] IEHC 178. The decision is under appeal to the Supreme Court – [2023] IESCDET 118.
[133] Humphreys J cited the definition of sustainable development published by the EU Commission in Glossary of summaries – EUR-Lex (europa.eu)- EUR-Lex – sustainable development – EN- EUR-Lex (europa.eu).
[134] Treaty on European Union. Article 3(3): The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
[135] European Union Charter of Fundamental Rights. Article 37 – Environmental protection – A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

particularly the Climate Act 2015.[136] These incorporate in the concept the principles of "*a high level of environmental protection and the improvement of the quality of the environment*"[137] and the transition to a low carbon, climate resilient, biodiversity rich and environmentally sustainable climate neutral economy.[138]

- Sustainable development inherently involves "*ecological sustainability*" and "*the need to preserve natural resources*".

- It requires that environmental impacts be minimised and that they be avoided altogether if they would breach the concept of sustainable development.

96. Humphreys J predictably took the view that the references in the PDA 2000 to proper planning and sustainable development are not merely aspirational but record a "*basic limitation on the exercise of powers under the Act*". No doubt he had in mind the phrase in in s.34(2) PDA 2000 – "*shall be restricted to considering*". He described it as a *"genuine principle and policy constraining what seem to be wide powers under the Act, in which case there is the potential that an individual guideline or even an individual planning decision could be set aside by reason of a legally inadequate consideration of the concept or an irrational application of the concept to a clearly unsustainable development".* He considered that it "*can potentially be applied in practice to the exercise of statutory powers .. "*.

97. That said, and again predictably, Humphreys J observed that *"the application of this test in any particular case is subject to normal judicial review requirements, so that if a decision-maker correctly directs itself as to the legal meaning and effect of proper planning and sustainable development and applies that in a rational way which would be reasonably open to it, and does not infringe any other relevant legal requirement, then the result should be upheld whether the court might be inclined to agree with the outcome or not."* In other words, there may, in a given case, be multiple possible views of what is consistent with proper planning and sustainable development and, ceteris paribus, if the Board's is reasonable it prevails and the Court will not interfere.

98. Also, in this field, I am particularly reminded of Humphrey J's repeated mobilisation of the aphorism "*there are no solutions, only trade-offs*".[139] In the context of the many other considerations affecting national life (for example, the need for housing), of the necessity of public acceptance of the constraints sustainable development may impose, and, indeed, of the difficult need to reconcile countervailing considerations of sustainability (to pick an example topical at a global level, reconciling lithium mining with the reduction of fossil fuel burning and GHG emissions by use of electric vehicle batteries), what specifically constitutes sustainable development seems to me a matter highly suited to political expression in legislation and in

[136] Climate Action and Low Carbon Development Act 2015 as amended by the Climate Action and Low Carbon Development (Amendment) Act 2021.
[137] Article 3(3) TEU.
[138] Climate Act 2015, Long Title & s.3.
[139] North East Pylon Pressure Campaign Ltd v An Bord Pleanála [2016] IEHC 301; An Taisce v An Bord Pleanála [2021] IEHC 254; Duffy v Clare County Council & McDonagh [2023] IEHC 430.; Reid V An Bord Pleanála, Ireland & Intel #7 [2024] IEHC 27.

policies such as in Planning Guidelines, Development Plans and, in a particular case, to the exercise of expert judgment by the Board within the bounds of legality.

99. In that light, Mr Stapleton's positing a standard in argument that all developments must be "*as sustainable as possible*" does not provide, it seems to me, a justiciable legal standard or even a useful yardstick by which the legality of a particular permission can be discerned. Nor could he point to a statutory provision – Irish or European – to that effect. His proposition that a development which is predicted to result in the use of artificial lighting indoors during the day must, ipso facto, not be "*as sustainable as possible*" such that permission for it must be unlawful as inconsistent with "*proper planning and sustainable development"* is possessed of a simplistic logic that is no more than superficial. It ignores the messiness of the imperfect world in which the real and binding obligations of "*sustainable development"* must be effected and reconciled with the many other legitimate concerns of national life. Such concerns of national life include the need for housing – a necessity, not a luxury. And the reality is that all developments inevitably come at some cost in GHG emissions, whether in their manufacture or in their direct operational emissions or in the indirect emissions of the power generation required for their operation.

100. Indeed, I err in describing housing as a concern "other" than one of sustainable development – housing is part of sustainable development. In Brundtland terms, it is, par excellence, a "*need of the present*" and, as to the EU adaptation of the concept of sustainable development cited by Humphreys J[140], housing is necessary to social cohesion and balance. Further, and as noted, the long title to the PDA 2000 adopts a concept of sustainable development which explicitly includes "*the provision of housing*". In short, while to say so is far from giving carte blanche to wasteful forms of housing at any environmental cost, "*provision of housing"* is inherent in, is a very part of, sustainable development.

101. To amplify the point, while EIA is not an issue in this case, it can be forgotten that the EIA Directive repeatedly pairs the required high level of protection of the environment with equal protection of human health and Article 3 identifies "*population and human health*" as a factor requiring consideration in EIA. While a justiciable right to housing/shelter is not guaranteed in the Irish Constitution, it is recognised in international law[141] though that is not justiciable in Irish Law.[142] It is also a prominent focus of legislation and planning policy. It can hardly be doubted that the aim of provision of housing is a consideration legitimately before the Board as a matter, to any extent they are separable, of both "*proper planning*" and "*sustainable development*". The provision of housing is a purpose identified explicitly in the long title to the PDA 2000 and is identified as an urgent concern in s.18 of the 2016 Act.

102. I disavowed carte blanche and used the word "reconciled" above. Other aspects and requirements of sustainable development cannot be abandoned in favour of housing considerations. Far from it. But that reconciliation is pre-eminently a political matter in the first instance and, in light of law and policy politically adopted, a matter for the expert judgment of the Board in the second. Of course, once policy becomes law it

[140] See above.
[141] See e.g. UNHCR Fact Sheet 21 – The Right to Adequate Housing – FS21_rev_1_Housing_en.pdf (ohchr.org).
[142] See Article 29.6 Bunreacht na hÉireann.

is justiciable and the Board must consider consistency with sustainable development both as a general matter and as to the specific elements of it laid down in law and policy.

103. Fundamentally, Mr Stapleton's argument left the court entirely in the dark as to the basis in law upon which the obligation of planning decision-makers, such as the Board, to consider in deciding planning applications the proper planning and sustainable development of the area[143] translates, as Mr Stapleton's argument would have it, into a binding and justiciable requirement that to be permissible, all developments must meet an absolute standard of being "*as sustainable as possible*".

104. Not merely that but, Mr Stapleton's argument picked out, for the application of this supposed legal principle, the discrete issue of Scope 2 GHG emissions of power generation for allegedly excessive artificial lighting. He purported to require that in this respect the requirement of the Proposed Development for artificial lighting be, discretely, "*as sustainable as possible*" without regard to any countervailing considerations. Such countervailing considerations, may themselves be grounded in sustainability – such as the building height and density considered to assist compact urban development but which may make daylighting more difficult and hence increase the need for artificial lighting. As Mr Stapleton's logic must apply equally and discretely to all other elements of sustainability, it reveals his posited standard of "*as sustainable as possible*" to be a practical impossibility and, hence, a legal impossibility. In short, the principles of sustainability require holistic assessments of often countervailing considerations – including countervailing considerations of sustainability – the resolution of which will be an inevitably imperfect trade-off and is a matter for the expert reasonable judgment of the planning decision-maker. With the merits of such resolutions the courts will only very reluctantly interfere on grounds of demonstrated illegality.

The Board's Decision – and Comment Thereon

105. The Board explicitly decided that the Proposed Development would be in accordance with the proper planning and sustainable development of the area. Its decision records that the Board had regard to, inter alia, the following:

Matters to which the Board had regard & Comment thereon	
Matter	The policies set out in the Development Plan;
Comment	• The Core Strategy of the Development Plan is centred on the principles of sustainable communities[144] – to which Chapter 2 is devoted. • Chapter 9 is devoted to sustainable infrastructure. • The word "sustainable" and cognates (including "unsustainable") appear no less than 545 times the Written Statement of the Development Plan. • Figure 1145 entitled "Context for the Development Plan 2016 – 2022", identified: o the Overarching Policy of the Plan as "Sustainable, Resilient Dublin".

[143] S.34(2) PDA 2000; s.9(1) of the 2016 Act.
[144] Development Plan Foreword.
[145] Chapter 1 p11.

Matters to which the Board had regard & Comment thereon	
	○ the Vision as of "Sustainable City Living 2030", including "Creating Sustainable Neighbourhoods & Communities". ○ The Main Themes as including "Climate Change" and Sustainable Communities & Neighbourhoods". ○ Delivery as including "Sustainable Standards" • Chapter 1 says that "Dublin must make the transition to a low-carbon sustainable city".[146] • It identifies principles, for application at all levels, from plan-making to urban projects and development management, which are "essential elements of a sustainable approach to future development of the city" – including developing Dublin as a compact city with an integrated transport network.[147] • It is explicitly a statement of the "core strategy and the aims of the Council for the proper planning and sustainable development of the city."[148] • Policy SC25 is "To promote development which incorporates exemplary standards of high-quality, sustainable and inclusive urban design, urban form and architecture ….." • Policy QH6 is "To encourage and foster the creation of attractive mixed-use sustainable neighbourhoods …." • Policy QH7 is "To promote residential development at sustainable urban densities …" • §16.7 addresses "Building Height in a Sustainable City".
Matter	The Architectural Heritage Protection Guidelines[149]
Comment	Inter alia, its forward describes regeneration of our old buildings and their continued re-use as "the essence of sustainable development" and it invokes the "place of conservation in policies of sustainable development".[150]
Matter	The Design Manual for Urban Roads and Streets (DMURS)[151]
Comment	• It repeatedly invokes sustainability.
Matter	The Guidelines for Sustainable Residential Developments in Urban Areas & the accompanying Urban Design Manual[152]
Comment	• The title to the Guideline needs no elaboration. • The Manual ○ "focuses on creating well-designed sustainable neighbourhoods that will stand the test of time". ○ notes that the PDA 2000 "placed sustainable development at the heart of the statutory planning system for the first time. This means we must now all work hard to

[146] p12.
[147] p13.
[148] p15.
[149] Architectural Heritage Protection, Guidelines for Planning Authorities, issued by the Department of Arts, Heritage and the Gaeltacht in October 2011.
[150] §1.2.3.
[151] issued by the Department of Transport, Tourism and Sport and the Department of the Environment, Community and Local Government in March 2019, as amended.
[152] A Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009.

Matters to which the Board had regard & Comment thereon	
	ensure that the communities we create are truly sustainable."[153]
Matter	The Building Heights Guidelines[154]
Comment	These state • the need to shift from energy intensive ""business as usual"" and "completely unsustainable" development patterns "towards a more compact and sustainable model of urban development" to "create more mixed, more dynamic and more sustainable cities and towns, that carefully employ the delivery of increased building heights to tackle our problems with urban sprawl."[155] • that "Securing compact and sustainable urban growth means focusing on reusing previously developed 'brownfield' land, building up infill sites (which may not have been built on before) and either reusing or redeveloping existing sites and buildings, in well serviced urban locations, particularly those served by good public transport and supporting services, including employment opportunities."[156] Notably, in **NJ**,[157] the CJEU said of the Height Guidelines that they were "adopted with the objective of moving away from high-energy-consumption development models and of creating more mixed-use, dynamic and sustainable cities."
Matter	The Flood Risk Management Guidelines[158]
Comment	• These too repeatedly invokes concepts of sustainability. • The foreword notes that "The planning system plays a major national and local role in ensuring that development is promoted and guided in a manner that is sustainable in economic, social and environmental terms".
Matter	The Chief Executive's Report of Dublin City Council.
Comment	As to the Proposed Development, it repeatedly invokes the concept of proper planning and sustainable development – including the Council's Policy to "*sustainable residential densities, particularly along public transport corridors, which will enhance the urban form and spatial structure of the city*".[159]
Matter	The Report of the Planning Inspector.
Comment	• This report repeatedly invokes concepts of sustainability[160] – inter alia, recording objections alleging the unsustainability of the Proposed Development. • It opines that "*the proposal will contribute to this attractive mixed-use sustainable neighbourhood by providing a development that is well-designed, safe and adaptable, in an area which is well served with local facilities and public transport.*"

[153] Introduction.
[154] Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018.
[155] Introduction.
[156] §1.7.
[157] Case C-9/22, NJ & OZ v An Bord Pleanála, Ireland, The Attorney General & DBTR-SCR1 Fund.
[158] The Planning System and Flood Risk Management Guidelines for Planning Authorities (including the associated Technical Appendices), issued by the Department of the Environment, Heritage and Local Government in 2009.
[159] See also Development plan Policy SC1 and Inspector's report §11.4.10.
[160] The word "sustainable" and its cognates appear over 60 times.

Matters to which the Board had regard & Comment thereon	
	• It repeatedly invokes the guidelines identified above as incorporating the concept of sustainability. • It recommends that the Board conclude that the Proposed Development would be in accordance with the proper planning and sustainable development of the area.

106. The foregoing were also more generally canvassed in the Inspector's report.[161] The foregoing commentary far from suffices to fully convey the extent to which concepts of sustainability are woven into the fabric of permeate planning policy to which the Board expressly had regard. But it suffices for present purposes.

107. The Impugned Permission includes both an EIA Screening[162] and an AA.[163] EIA and AA are procedures deeply characterised by sustainability concerns. In addition, the reason given for no less than 6 of the planning conditions of the Impugned Permission was that they would be "*in the interests of proper planning and sustainable development*." Two conditions invoked "*the interest of public health*" and the reasons for others in substance invoked concepts of sustainability – for example, "*sustainable waste management*" and waste management "*in the interest of protecting the environment*".

108. The Board also explicitly had regard to the NPF – in particular National Policy Objectives 13[164] and 35.[165]

a. I observe that the Board expresses regard to the NPF generally – its regard to NPOs 13 and 35 is "in particular". The NPF generally is explicitly characterised by the need "*to manage our future growth in a planned, productive and sustainable way*".[166] It seeks, to *"enable a national transition to a competitive low carbon, climate resilient and environmentally sustainable economy by 2050*". [167] The NPF asserts[168] that "*Sustainability is at the heart of long term planning"* and it "*seeks to ensure that the decisions we take today, meet our own needs without compromising the ability of future generations to meet their needs*". It notes significant alignment between the UN Sustainable Development Goals and the NPF's National Strategic Outcomes (NSOs) in areas such as climate action, clean energy, sustainable cities and communities, economic growth, reduced inequalities and innovation and infrastructure, education and health. The Strategic Investment Priorities of the NPF include "*Housing and Sustainable Urban Development*".[169] Its National Strategic Outcomes include, as

[161] For example, at §6 – Planning Policy.
[162] Environmental Impact Assessment Screening within the meaning of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
[163] Appropriate Assessment Within the meaning of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[164] In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high-quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.
[165] Increase residential density in settlements through a range of measures including reduction in vacancy, re-use of existing buildings, infill development schemes, area or site-based regeneration and increased building heights.
[166] p5.
[167] p12.
[168] §1.5 p19.
[169] p13.

to "Compact Growth" (NSO 1), "*carefully managing the sustainable growth of compact cities*" and "*achieving effective density and consolidation, rather than more sprawl of urban development, is a top priority.*"[170] NSO 1 cites the "*need to deliver a greater proportion of residential development within existing built-up areas of our cities*"[171] and states that a compact growth policy will secure a more sustainable future when combined with a focus on infill development and integrated transport. It seeks to ensure, in urban contexts, transition to more sustainable modes of travel including public transport.

b. In the context of NPO 13, to which the Board had particular regard, the NPF states[172] that "A *more dynamic performance-based approach appropriate to urban location type will also enable the level of public transport service to improve as more development occurs and vice-versa*." This clearly recognises, and necessarily implies the Board's regard to, the interrelationship – indeed, the interdependence – of urban housing development and public transport.

c. In the context of NPO 35, to which the Board also had particular regard, the NPF states[173] that "*To avoid urban sprawl and the pressure that it puts on both the environment and infrastructure demands, increased residential densities are required in our urban areas".* It envisages *"a significant and sustained increase in urban housing output and apartment type development in particular, if we are to avoid a continuation of the outward expansion of cities .."* and *"To more effectively address the challenge of meeting the housing needs of a growing population in our key urban areas, it is clear that we need to build inwards and upwards, rather than outwards. This means that apartments will need to become a more prevalent form of housing, particularly in Ireland's cities."*

In short, it is clear that regard to the NPF cannot avoid regard to sustainability and even if, which I do not, one inferred regard only to NPO 13 and 35, such regard would clearly include compact development to avoid urban sprawl, increased apartment building and the interdependence of urban housing development and public transport – all notable elements of a sustainability agenda.

109. The Board also specifically applied SPPR 1 and SPPR3 of the Building Heights Guidelines. In Chapter 2, SPPR1 invokes "*Government policy to support increased building height and density in locations with good public transport accessibility, particularly town/city cores*" – which policy must be "*actively pursued*" in statutory plans, such as Development Plans. Chapter 2, inter alia, cites increased building height as *"a significant component in making optimal use of the capacity of sites in urban locations where transport, employment, services or retail development can achieve a requisite level of intensity for sustainability"*[174] and espouses compact urban growth via increased density and building height along sustainable mobility corridors and networks. SPPR3 applies only where the development proposal complies with the criteria set out in §3.2 of the Height Guidelines "*taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines*". As I have already observed, those Guidelines and the NPF are explicitly grounded in concepts of sustainable development. In addition, Chapter 3 of the Height Guidelines, which prefaces SPPR3, at §3.1 states "Development Management

[170] §1.3 p14.
[171] p139.
[172] p67.
[173] p93.
[174] §2.3.

Principles" which, as to the assessment of individual planning applications and appeals, invoke concepts of sustainable development as follows:

- "*It is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility.*"

- *"Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres?"* (This is a clear reference to NSO 1 of the NPF as to "Compact Growth")

- "*Is the proposal in line with development plan requirements which have taken clear account of the requirements of Chapter 2*?"

- "*Does the development plan align with and support the objectives and policies of the NPF?*" (Which, as I have said, is grounded in sustainability)

110. Of course, anyone may disagree with the priorities and view of the requirements of sustainable development reflected in the foregoing policy documents. One may also disagree with the chosen reconciliation of conflicting requirements of sustainability and of requirements of sustainability with other considerations of proper planning. For example, one may discern in §3.2 of the Height Guidelines, by its invocation of the BRE Guide, a willingness to trade a certain degree of sustainability in the form of daylighting for sustainability in the form of compact urban development. Such trade-offs are inevitable and commonplace. It is for the legislature and the executive to make their choices in these regards and those choices identify to the Board, indeed to all, the requirements of sustainable development to which it must have regard. It is patent from its decision that the Board did so.

111. Remembering the view of Hardiman J in **GK**[175] that "*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*", and applying that logic to express statements that regard has been had to matters listed in an impugned permission, it is clear that it cannot be stateably argued in this case that the Board failed in a general sense to have regard to the necessity of sustainable development. It is clear that, having had such regard, it found the Proposed Development consistent with the principles of sustainable development. That the same logic does apply is confirmed in a **Cork County Council** case[176] in which Humphreys J noted that in GK,

> *"a fairly formulaic statement of reasons to the effect that the interests of public policy and the common good outweigh such features of the case as might tend to support leave to remain was held sufficient*

[175] GK et al v The Minister for Justice et al [2002] 2 IR 418.
[176] Cork County Council v. Minister for Local Government [2021] IEHC 683, §42 & 43.

by the Supreme Court. Indeed, insofar as the applicant alleged that factors under s.3(6) of the 1999 Act in particular representations "were not considered", Hardiman J.…[177] *said "[t]here is simply no evidence whatever for this proposition. … The approach taken by the Supreme Court in G.K. was essentially that where the decision-maker says that it has had regard to certain matters there is an evidential onus to be overcome to displace that."*

112. Given the sprawling, pervasive and encompassing nature and extent of the principle of sustainable development which by now imbues all planning policy, the Board is not obliged to list, in its decision or in its Inspector's report which it adopts, for the purpose of recording its express regard, an encyclopaedic description of the elements of sustainable development – many of which will be more or less irrelevant to the decision at hand. Such a requirement would be a recipe for pointless administrative sclerosis. In this regard, it is to be remembered that the Board's obligation is only to give its main reasons on the main issues.[178]

113. It follows that:

- Mr Stapleton's case in this regard must depend on positive evidence of disregard for specific elements of the principle of sustainable development and that
- such evidence must demonstrate that the element disregarded was significantly material to the particular decision to be made by the Board.

I have seen no such evidence or demonstration.

The Effort Sharing Regulation and the European Climate Law/ Climate Neutrality Regulation

114. As noted earlier, Mr Stapleton pleads[179] that the State is bound to achieve the emissions targets set out in the "*Binding Reductions Regulation*"[180] and "*the Climate Neutrality Regulation and the European Climate Law.*" These pleas require some explanation. First, the term "Binding Reductions Regulation" is not conventional usage – it is more conventionally known as the "Effort Sharing Regulation" ("ESR") – which term I will use from this point of this judgment.

115. As noted in **Coyne**,[181] the EU splits GHG emissions into two categories: emissions from large industries, including electricity generation, covered by the Emissions Trading System ("ETS"[182]) managed at

[177] Denham and Geoghegan JJ. concurring.
[178] There are many authorities over many years for this proposition. See recently, Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála, [2020] IEHC 586, Atlantic Diamond Ltd. v. An Bord Pleanála [2021] IEHC 322, Killegland Estates Limited v. Meath County Council [2022] IEHC 393, O'Donnell v An Bord Pleanála [2023] IEHC 381.
[179] Ground 4 – Scope 2 GHG emissions of artificial lighting.
[180] Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.
[181] Coyne v An Bord Pleanála [2023] IEHC 412.
[182] As set out, in the first place, in the ETS Directive 2003/87/EC and transposed by the European Communities (Greenhouse Gas Emissions Trading) Regulations 2004 as amended, most recently by the European Union (Greenhouse Gas Emissions Trading) (Amendment) Regulations 2020.

EU level and the rest – the "non-ETS" (or "Effort Sharing"/"ESR") emissions dealt with by Member States through binding targets set in the Effort Sharing Regulation for emission reduction in each Member State and monitoring by the Commission.[183] The first two recitals of the Effort Sharing Regulation note that the European Council[184] endorsed a binding target of at least a 40% reduction in EU-wide GHG emissions by 2030 compared to 1990 emissions – to be delivered collectively in the most cost-effective manner possible by,

- ETS reductions of 43% by 2030 compared to 2005 emissions.
- non-ETS reductions of 30% by 2030 compared to 2005 emissions. (Recently increased to 40%.[185])

The ESR addresses the non-ETS GHG emissions.

116. **Peeters & Athanasiadou** give a helpful account of the ESR.[186] They observe that it covers the majority of the EU's GHG emissions, including transport. I observe that the phrase "Effort Sharing" appears to reflect the method of the Regulation in setting individual targets for each member state as its contribution to achieving the EU-wide GHG emission reduction target. Ireland's gross national target for 2030 is a 30% reduction compared to 2005 emissions[187] (recently increased to 40%[188]).

117. Mr Stapleton's plea also reads as if the Climate Neutrality Regulation and the European Climate Law are different instruments. In fact the European Climate Law is the Climate Neutrality Regulation[189] – entitled "*Regulation (EU) 2021/1119 …… establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 ('European Climate Law').*" Article 2 sets a legally binding "*Climate Neutrality Objective*" for the EU of net zero GHG emissions by 2050. Article 4 sets a legally binding "*Climate Target*" for 2030 of a 55% reduction in EU-wide GHG emissions compared to 1990 levels.

118. As to both the Effort Sharing Regulation, and the European Climate Law/Climate Neutrality Regulation, Mr Stapleton relies significantly on recitals. Notably, he describes Recital 12 of the Effort Sharing Regulation (as to GHG emissions of the transport sector), as "*the key provision*". To so describe it betokens a misunderstanding of the legal effect of recitals. Recitals are very far from insignificant but ultimately are justiciable only as interpretive aids to legal obligations effective at EU and Irish Law. They do not create legal obligations. As the CJEU said in **Inspecteur van de Belastingdienst**[190] *"whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule."*

[183] e.g. Article 8 permits the Commission to find that a Member State is not making sufficient progress towards meeting its obligations.
[184] In October 2014 and March 2016.
[185] Regulation (EU) 2023/857. Irrelevant to the present case.
[186] Peeters & Athanasiadou, The continued effort sharing approach in EU climate law: Binding targets, challenging enforcement? Review of European, Comparative & International Environmental Law RECIEL. 2020;29:201–211. wileyonlinelibrary.com/journal/reel. Marjan Peeters: Professor of Environmental Policy and Law (International and European Law), Maastricht University.
A brief account was also given in FIE v Ireland [2019] IEHC 747 and in the appeal in that case the Supreme Court briefly mentioned its predecessor, the Effort Sharing Decision; [2020] IESC 49 ([2020] 2 I.L.R.M. 233).
[187] ESR Article 4(1) and Annex 1.
[188] Regulation (EU) 2023/857. Irrelevant to the present case.
[189] See to this effect, European Climate Law- European Commission (europa.eu) and EUR-Lex- 4536626- EN- EUR-Lex (europa.eu).
[190] Case C-429/07 Inspecteur van de Belastingdienst v X BV, 11 June 2009. §31 – citing Case 215/88 Casa Fleischhandels [1989] ECR 2789, §31, and Case C-136/04 Deutsches Milch-Kontor [2005] ECR I-10095, §32.

119. As noted earlier, of the Effort Sharing Regulation, and the European Climate Law/Climate Neutrality Regulation, Mr Stapleton essentially submits that "*These provisions set out EU obligations which form the basis for government policy in relation to climate change, and compliance with them is a precondition to sustainable development.*" While perhaps not quite a non-sequitur, this submission falls far short of a reasoned assertion of legal obligations justiciable as to individual planning decisions or as to the Impugned Permission. Indeed, it is notable for its lack of legal analysis of specific content of these regulations and their application to the specifics of this case. It treats EU law obligations imposed on States in terms of national targets – in themselves justiciable as they are imposed by regulation – as to the formulation and adoption of "*government policy*" and, presumably, in turn the adoption of domestic laws implementing those policies, as if those EU Law obligations directly confer on the Board a roving commission to impose in discrete planning decisions its own – and indeed a simplistic and absolute view – of what the highly complex and multifactorial tasks of addressing climate change via sustainable development and of meeting national GHG emission reduction targets require. The submission seems to me to display considerable naivete in seeking to proceed directly from national targets applicable at a macro level to apply them at the micro level of individual planning decisions. It skips the necessary detailed working out of national targets via justiciable legal instruments and guidelines capable of sensible application to individual decisions. Indeed, it seeks to leap over and ignore those instruments and the working out they represent – for example the compromise of §3.2 of the Height Guidelines between compact development and daylighting. While it has very considerable scope for expert judgment, the Board is not to sustainable development what the chancellor's foot was once considered to be to equity.

120. I am encouraged in this view by Peeters & Athanasiadou – who observe that, even though Article 288 TFEU renders regulations directly applicable in member states and even though the Effort Sharing Regulation targets are explicitly binding on member states, they doubt that the Regulation has direct effect. That is because national policies and other measures, including possibly decisions on the use of the flexibility instruments,[191] are usually needed to achieve the applicable emission reduction target.

121. The following text of Article 4(2) and (3) of the Effort Sharing Regulation illustrates the point that a crude application of national headline targets to individual planning applications or, meaningfully, to the interpretation of the likes of §3.2 and SPPR3 of the Height Guidelines is impossible:

> *"2. Subject to the flexibilities provided for in Articles 5, 6 and 7 of this Regulation, to the adjustment pursuant to Article 10(2) of this Regulation and taking into account any deduction resulting from the application of Article 7 of Decision No 406/2009/EC, each Member State shall ensure that its greenhouse gas emissions in each year between 2021 and 2029 do not exceed the limit defined by a linear trajectory, starting on the average of its greenhouse gas emissions during 2016, 2017 and 2018 determined pursuant to paragraph 3 of this Article and ending in 2030 on the limit set for that Member State in Annex I to this Regulation. The linear trajectory of a Member State shall start either at five-twelfths of the distance from 2019 to 2020 or in 2020, whichever results in a lower allocation for that Member State.*

[191] For which the Effort Sharing Regulation provides. Article 5 allows for "Flexibilities by means of borrowing, banking and transfer". Article 6 allows for "Flexibility for certain Member States following reduction of EU ETS allowances" – Ireland is included. Article 7 allows for flexibilities related to GHG Emission removals from Land use, land-use change and forestry (LULUCF) activities.

3. The Commission shall adopt implementing acts setting out the annual emission allocations for the years from 2021 to 2030 in terms of tonnes of CO 2 equivalent as specified in paragraphs 1 and 2 of this Article. For the purposes of those implementing acts, the Commission shall carry out a comprehensive review of the most recent national inventory data for the years 2005 and 2016 to 2018 submitted by Member States ……"

122. Peeters & Athanasiadou record the Commission's view,[192] which I find unsurprising, that the Effort Sharing Regulation addresses only Member States, without creating any rights and obligations for individuals. Whatever about the possibility of infringement/enforcement actions by the Commission against member states or, even, the possibility of actions by individuals against States seeking to enforce the binding targets at a national level, (similar to **Urgenda**[193]) as to which possibilities I express no view here, it does not seem to me that Mr Stapleton has come anywhere close to demonstrating direct effect of the of the Effort Sharing Regulation such as to apply the national targets to individual planning applications or projects and render them justiciable, to that end, at the instance of citizens. For like reasons, neither does it avail Mr Stapleton to cite Article 4(3) TEU – the obligation to "*refrain from any measure which could jeopardise the attainment of the Union's objectives*" and **Smith**,[194] and the line of cases back to **Von Colson**[195] as to the duty of all State authorities to take all appropriate measures to achieve the result envisaged by a Directive as an obligation of the State. They are not authority that each and every state authority is bound to invent its own recipe in individual cases, for effecting obligations framed in terms affording considerable discretion to member states and requiring implementation measures and where, as here, it is far from apparent of what precisely – and in individual cases – compliance would consist. Nor do I see that such national targets, to be met over time, can, as he suggests, inform in any useful way the interpretation of SPPR3 and §3.2 of the Height Guidelines, and s.9(6) of the 2016 Act. On these issues, Mr Stapleton's argument is painted with only the broadest of brushes and is entirely undeveloped. Indeed, he does not even plead or argue for any particular interpretation of SPPR3 and §3.2 of the Height Guidelines and s.9(6) of the 2016 Act, as deriving from the Effort Sharing Regulation and/or the European Climate Law/Climate Neutrality Regulation, much less particular interpretations which would differ by reason of those instruments from those which would otherwise be made.

123. Similar observations may be made as to Mr Stapleton's allegation that the Board "*failed to comply*" with Articles 1 and 2 of the European Climate Law/Climate Neutrality Regulation.[196] The Board had no such

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[192] The Proposal for the Effort Sharing Regulation (n 7).

[193] Urgenda Foundation and 886 citizens v The State of The Netherlands, Supreme Court of The Netherlands (20 December 2019), ECLI:NL:HR:2019:2007.

[194] Case C-122/2017 Smith v Meade.

[195] Case 14/83 von Colson v Land Nordrhein-Westfalen.

[196] Article 1 Subject matter and scope

This Regulation establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law.

This Regulation sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030.

Article 2 Climate-neutrality objective

1. Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.

2. The relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.

obligation of compliance. While those articles set out a binding objective of climate neutrality in EU by 2050 and require the relevant EU institutions and the Member States to take the necessary measures at EU and national level to achieve it, they fall far short of any tenable view of satisfaction of the **Van Gend en Loos**[197] and **Becker**[198] criteria for direct effect (acknowledged by the Supreme Court in **Dellway**[199]) such as to render them justiciable by Mr Stapleton in respect of a specific planning application. Those criteria are that the invoked legislative instrument impose a clear precise and unconditional obligation unqualified by requirements of implementation by positive measures of national law. **Moules**[200] notes that unconditionality requires that the relevant provision "*must be in a self-contained norm, the requirements of which may be derived from its terms alone without being dependent on further measures being taken at either EU or national leve*l". Noting the requirement to consider "*the nature and wording of the provision and the scheme of which it forms part*",[201] a conclusion of absence of direct effect is entirely unsurprising as to a regulation explicitly described in Article 1 as establishing a "framework" for GHG emission reduction. The position as relevant is clear and I do not need to explore the nuances of the caselaw on this issue.[202]

124. Indeed, as an observation general to Mr Stapleton's reliance on EU law in this case, I agree with the Board's submission that he cites "*a variety of instruments or provisions of EU law; however, it has not directly pleaded how any of these EU law provisions are breached by the Board's decision, less still tendered evidence that the grant of planning permission for the proposed development will result in a breach of any of these requirements. He has not, for example, put before the Court any evidence that this proposed development "will jeopardise the attainment of the Union's objectives". There is no 'route map' from the EU law provisions cited to the reliefs sought* (citing a Ballyboden case[203]), *and no evidence to underpin such 'route map' even if had been provided."*

SUSTAINABLITY – ARTIFICIAL LIGHTING – Ground 4

125. This ground essentially proceeds from the ground alleging inadequate daylighting of the apartments. It argues that, as supplemental artificial lighting will be required during the day, it follows from the GHG[204] emissions of the generation of the electricity required to provide that supplemental artificial lighting that the Proposed Development will not be, as counsel for Mr Stapleton put it in argument "*as sustainable as possible*".

[197] NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, ECLI:EU:C:1963:1.
[198] Case 8/81 Becker v. Finanzamt Minster-Innenstadt [1982] E.C.R. 53.
[199] Dellway Investments Limited, et al v The National Asset Management Agency et al [2011] 4 I.R. 1, §39.
[200] Environmental Judicial Review, Hard 2011, p300.
[201] Dellway §36.
[202] Peeters at fn11 observes that "CJEU case law on direct effect … is evolving and not uniform."
[203] Ballyboden Tidy Towns Group v An Bord Pleanála [2021] IEHC 648, §20.
[204] Such indirect emissions of a development are conventionally known as "Scope 2" emissions; Scope 1 emissions being the direct emissions of a development.

Pleadings & Submissions

126. Mr Stapleton pleads[205] that "*if and insofar as their ordinary meaning may not be as set out in Ground 2"* (i.e. the ground as to daylighting of apartments) the Impugned Permission is invalid because the Board erred in its interpretation and application of SPPR3 and §3.2 of the Height Guidelines, and s.9(6) of the 2016 Act, having regard to their proper interpretation in the context of the NPF, the Effort Sharing Regulation[206], the European Climate Law/Climate Neutrality Regulation, failed to consider the need to deliver sustainable development under s.9 of the 2016 Act, s.34 PDA 2000, Article 3(3) TEU,[207] and Article 11 TFEU,[208] and thereby breached its obligation pursuant to Article 4(3) TEU[209] (principle of sincere cooperation) not to adopt a decision that would undermine the State's obligations under those Regulations.

127. I should at this point observe that the introductory phrase of the plea set out above and the precise intended relationship between this ground and the ground as to daylighting is not entirely clear to me. Indeed, Mr Stapleton's pleadings on both grounds had much in common. However, the general thrust of this plea seems adequately clear.

128. Mr Stapleton submits that the Board failed to consider whether, and explain how, the Proposed Development, conforms to sustainable development under s.9(1) of the 2016 Act[210] as to climate change as many rooms would not meet the 5% ADF for a well daylit space, and would have to have electric lights on for much of the day. Clontarf Residents' Association, had submitted to the Board that, "*it is not appropriate to build buildings that require electric lighting even in daylight having regard to government objectives in relation to climate change*."

129. The Board's and Savona's statements of opposition and submissions essentially plead and submit as follows. They,

- traverse Ground 4 and plead that it is mere and vague assertion without basis in law or evidence. They repeat their pleas as to Ground 2.

- plead that, in the determination of every planning application, consideration of 'sustainable development' is an aspect of the Board's consideration of the overriding principle of proper planning and sustainable development.

[205] Ground 4.
[206] Pleaded sub nom "Binding Reductions Regulation".
[207] Supra.
[208] Treaty on the Functioning of the European Union. Article 11. Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.
[209] Article 4(3). Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.
[210] S.9(1) requires the Board to consider various identified materials "in so far as they relate to—
(A) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development,
(B) the likely effects on the environment or the likely effects on a European site, as the case may be,
of the proposed development, if carried out,

- plead that Mr Stapleton misunderstands the manner in which the EU law provisions invoked are effected via Irish policy and law. They deny that the Board has distinct relevant obligations as to sustainable development or its delivery – including under the Effort Sharing Regulation and the European Climate Law/Climate Neutrality Regulation – other than those apparent from the PDA 2000, the 2016 Act and policies and guidelines such as, as here relevant, §3.2 and SPPR3 of the Height Guidelines, as to, inter alia, compact urban development.

- assert that while Mr Stapleton invokes certain EU laws as to climate change, he leaves it entirely unclear how, and on what legal basis, EU Law allegedly changes the meaning of the Height Guidelines or requires the Board to apply them in a particular manner or renders the Inspector's conclusions unlawful or requires an outcome different than the Impugned Permission. They note that Mr Stapleton himself pleads that the Height Guidelines require a compromise, or balancing exercise, between the climate adaptation requirement of more compact and denser cities and maintaining residential amenity. This compromise requires the exercise of planning judgment on a case-by-case basis, and is reflected in the Inspector's assessment of the Proposed Development.

- make similar points as to higher-level Irish policies such as the National Climate Policy Position and the National Adaptation Framework.

- assert that in granting permission, the Board properly had regard to climate change policy, including GHG emission reduction – especially the policy favouring compact (and denser) infill development in Dublin to minimise urban sprawl and so reduce commuter trips and contribute to development sustainable as to climate change.

- They assert that the Board's exercise of planning judgment as to the criterion of proper planning and sustainable development was rational and lawful.

Discussion

130. As observed earlier, Mr Stapleton argues that one instance of which it can be said that the Proposed Development is not "*as sustainable as possible*" lies in its need for artificial lighting during the day by reason of inadequate daylighting of the apartments. As a result, he says, the Scope 2 GHG emissions of the electricity generation required to power the apartments will be greater than they need to be and hence the principle of sustainable development is breached.

131. The Height Guidelines, explicitly and repeatedly invoking the concept of sustainability, require as a precondition to invocation of SPPR3 of those Guidelines adequate and reasonable regard to identified daylighting guides.[211] Those daylighting guides themselves explicitly

- envisage minimum daylighting standards in rooms of dwellings.

[211] The BRE Guide and BS 8206.

- envisage the use of supplementary artificial lighting during the day in predominantly daylit rooms as in accordance with "good practice".
- recognise that it is better to exceed those minima but also that "*natural lighting is only one of many factors in site layout design*"[212] and,
- allow that in certain conditions development may be acceptable even which does not meet these minima.

So, as a broad observation, it is clear that the Height Guidelines, while explicitly and repeatedly invoking the concept of sustainability, by the invocation of those daylighting guides accept at least some degree of likelihood of the use of supplementary artificial lighting during the day. This does not undermine the Height Guidelines' invocation of the concept of sustainability: rather it represents the working out of countervailing elements of sustainability – in the cause of efficient land use in the provision of needed housing with a view to sustainably compact urban development.

132. When taxed with the observation that the incremental Scope 2 GHG emissions of the daytime artificial lighting of dwellings could only constitute a small fraction of the emissions of developments at present nationally awaiting construction and an even more infinitesimal fraction of national total GHG emissions of the electricity generation required to power development already in being, the reply by counsel for Mr Stapleton was illuminating. He replied that it was the Board's duty to maintain some form of inventory of GHG emissions with a view to monitoring pending planning applications and the avoidance of the "thousand cuts" problem of the incremental effect on national GHG emissions of GHG emissions of individual developments to the extent each was not "*as sustainable as possible*". No legal source or basis for this far-reaching proposition was proffered. And no evidence whatever was adduced for the proposition that, as was suggested, this Proposed Development would contribute in any appreciable way to the jeopardising of national attainment of GHG goals as mandated by relevant EU and domestic legislation.

133. It is important to get some perspective here. For example, as to the NPF, Mr Stapleton criticises the Inspector and the Board for,

- referring only "*to Objectives 4*[213]*, 13*[214]*, 27*[215] *and 35,*[216] *none of which relates to sustainability*."
- failing to look at Strategic Outcomes 1[217] and 4.[218]

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[212] BRE Guide §1.6.

[213] Ensure the creation of attractive, liveable, well designed, high quality urban places that are home to diverse and integrated communities that enjoy a high quality of life and well-being.

[214] In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.

[215] Ensure the integration of safe and convenient alternatives to the car into the design of our communities, by prioritising walking and cycling accessibility to both existing and proposed developments, and integrating physical activity facilities for all ages.

[216] Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights.

[217] Compact Growth: "From an urban development perspective, we will need to deliver a greater proportion of residential development within existing built-up areas of our cities, towns and villages ……" It refers to a "focus on infill development" and to achieving "greater densities" and "transition to more sustainable modes of travel".

[218] NSO 4 Sustainable Mobility – inter alia to expand attractive public transport alternatives to car transport to reduce congestion and emissions and enable the transport sector to cater for the demands associated with longer term population and employment growth in a sustainable manner – inter alia through the Bus Connects investment programme.
Mr Stapleton's papers clearly relied on the NSO relating to Sustainable Mobility. However, they were confused as to whether that NSO is NSO 4 or NSO 5 and pleaded NSO 5. For the avoidance of doubt, the NSO relating to Sustainable Mobility is NSO 4 (NPF p142). NSO 5 is entitled "A Strong Economy Supported by Enterprise, Innovation and Skills". (NPF p143). I have taken the reference as being to NSO 4.

- not recording consideration of "*climate change, energy use (by building a development where the lights have to be left on during the day)*"

134. It is not correct that "*Objectives 4, 13, 27 and 35 do not relate to sustainability*." First, they must all be understood as text in context – the most important part of which context is the restriction of the Board to considering what I consider to be the unified concept of "*proper planning and sustainable development*". So, that is the context in which, for example, Objective 4 espouses "*well designed, high quality urban places*" producing "*a high quality of life and well-being*". In context, is difficult to see how a space can be "*well designed, high quality*" unless consistent with "*proper planning and sustainable development*". Similar points can be made as to Objectives 13 & 27 and, even more so as to Objective 35 which espouses increased residential density via, inter alia, reuse of existing buildings, infill development schemes, and increased building heights. In any event, in my general consideration of sustainability I hope I have demonstrated that the NPF, including NPOs 13 and 35, is indeed characterised by concern for sustainability.

135. That the Inspector and the Board did not expressly mention NSOs 1 and 4 does not mean they "*failed to look at them*" – see Hardiman J in **GK**.[219] As I have said, I do not accept that in recording reference to NPOs 13 and 35 "*in particular*", the Board detracted from its recording regard to the NPF in general. More importantly, it does not mean they failed to consider the issues NSOs 1 and 4 address. In any event, as to NSO 1 – "Compact Growth" – the submission is simply wrong. The Inspector cites[220] §3.1 of the Height Guidelines in asking:

> *"1. Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres?*

The Inspector's answer is:

> *"Yes - as noted and explained throughout this report by focussing development in key urban centres and supporting national strategic objectives to deliver compact growth in urban centres. The planning authority is also of the opinion that the site is suitable for a higher density of development in accordance with the principles established in the National Planning Framework."*[221]

136. The Inspector had already cited Development Plan policies which "*underpin the creation of a compact city with mixed-use environments, sustainable neighbourhoods and green infrastructure*" and considered in principle a that a 131-unit development "*in this established area of the city*" "*underpins the principles of a compact city*".[222] She opined that,

[219] Supra.
[220] Inspector's report §11.6.7.
[221] Emphases added.
[222] Inspector's report §11.2.7.

"…. delivery of a residential development on this prime, underutilised site, in a compact form comprising well-designed, higher density units would be consistent with the zoning objective for the site and with the policies and intended outcomes of current Government policy, including the National Planning Framework, which seeks to increase densities in suitable locations."

137. Specifically, the allegation of failure to record consideration of *"climate change, energy use (by building a development where the lights have to be left on during the day)"* completely ignores the fact that the Inspector, in some detail, considered the Proposed Development by reference to the requirements of §3.2 of the Height Guidelines. Those Guidelines inherently reflect part of the working out of the State's view of countervailing considerations of sustainable development. In effect, the State therein acknowledges that development sustainable by reason of increased height, and so density, in the cause of a compact city may come at a price of rooms merely "*predominantly daylit*" as opposed to "well-daylit" and hence requiring increased supplementary lighting – as envisaged to be "*good practice*", in BS 8026.

138. I have no hesitation in rejecting Mr Stapleton's arguments – not least as utterly impractical but in any event as legally flawed. It is for the EU, the Executive and the Oireachtas to determine, as they have, that the best way to address Scope 2 GHG emissions, at least generally, is by way of programmatic measures to move to renewable sources of electric energy. Similar issues arose in the **Kilkenny Cheese**[223] case and in **Coyne**.[224] Whatever the extent of the limited obligation in EIA identified in those cases to consider Scope 2 GHG emissions, there is no challenge here to the screening out of EIA. It follows that the Scope 2 GHG emissions of the Proposed Development are deemed non-significant.

139. The Board's obligation is to apply the principles of sustainable development as given specific expression in relevant legislation and policy. As was observed in Coyne, the Board has no roving commission to apply a very high-level concept of sustainable development directly in planning applications for developments which, as to supposedly excess power usage (which is all that is here relevant) can only contribute in an extremely minor way to national Scope 2 GHG emissions. The Board has no roving commission to cut across the inevitable and necessary "trade-offs" given specific expression in relevant legislation and policy. Not least, the Board has no commission to invent and apply in planning applications a requirement that proposed developments be "*as sustainable as possible*". That is certainly a general aspiration which should inform policy-making but, when posited as an absolute standard applicable in multifactorial planning decisions, it is incapable of practical application save perhaps in rare, discrete and obvious cases. To resort to both cliché and mixed metaphor: the general concept of sustainable development, as a trump card, would be an unruly horse.

140. Also, it seems to me that the remarks of Hogan J in **Kilkenny Cheese** case mutatis mutandis resonate strongly here. He said that the proper scope of the EIA Directive should not be artificially expanded beyond its remit – it *"should not, so to speak, be conscripted into the general fight against climate change by being*

[223] An Taisce v ABP & Kilkenny Cheese [2021] IEHC 254; [2022] IESC 8; [2022] 1 I.L.R.M. 281.
[224] Coyne v ABP, Ireland & EngineNode [2023] IEHC 412.

made to do the work of other legislative measures" such as the Climate Action and Low Carbon Development Act. In this respect, I repeat the views expressed in **Coyne** to the effect that the EU's decision is to primarily address national Scope 2 GHG emission targets by power generation via the programmatic ETS[225] rather than by piecemeal application of those targets to individual planning applications. That is not to ignore that many policies and rules bear, in greater and lesser detail, on the sustainability of individual developments. It is merely to say that gross national targets do not trump those policies and rules, and the necessary nuances and compromises they represent.

Decision

141. As I hope the foregoing analysis of this issue makes apparent, Ground 4 as to the sustainability of the Proposed Development in respect of its Scope 2 GHG emissions by generation of power for daytime electric lighting must be rejected.

PUBLIC TRANSPORT – Ground 3

142. There are overlapping pleas as to the adequacy of public transport. Ground 3 relates to what I might call more classic grounds of judicial review as to the adequacy of the Board's consideration of the adequacy of public transport to serve the Proposed Development whereas Ground 5 relates to the issue of sustainability of the Proposed Development as to adequacy of public transport.

143. It is common case that the adequacy of public transport to serve the Proposed Development depends on Dublin Bus's #130 bus route. In the context of redesignations in the implementation of the NTA's[226] 'BusConnects' proposals, it is variously referred to also as the #64 and the #10. I will refer to it as the #130.

Pleadings & Submissions

The Applicant's Pleadings & Submissions

144. Mr Stapleton pleads that:

- Whereas Savona states that the #130 bus, does not "*operate at maximum capacity*", Clontarf Residents Association[227] says "*this would not be the experience of users of the route*" and that it is "*often oversubscribed*". Other objectors submitted that the #130 bus *"is over-subscribed at peak times and that passengers may have to wait for several buses to pass before they can get on."*

[225] Emissions Trading System.
[226] National Transport Authority.
[227] Mistyped as "Clonres" but the error and its correction are obvious.

- Whereas the Inspector said that she had "*noticed a number of buses on Clontarf Road whilst conducting my site visit on the morning of December 06th, 2021",*[228] she did not note the time of her observation, whether the buses were full, or whether they were in service. (After the morning rush, many buses in the area are returning to Clontarf bus garage empty.)

- The 'Bus Connects' proposal amounts to a general 40% reduction in service frequency of the #130 bus.

145. Mr Stapleton pleads that the Impugned Permission is invalid because the Board erred in its interpretation and application of s.9(1)(a)(iii),[229] s.9(2)[230] and s.18 of the 2016 Act,[231] s.143 PDA 2000,[232] and various NSOs[233] of the NPF, as to public transport capacity to serve the Proposed Development. He pleads that the Board,

- failed to have regard to the Dublin Area RSES 2016,[234] Chapter 5 of which identifies the NTA Greater Dublin Area Transport Strategy 2016. They require, inter alia,
  - effective coordination and integration of transport planning with spatial planning policies – as "key".
  - increased sustainability by greater alignment of land use and transport.
  - facilitation of sustainable travel, including public transport.
  - management, maintenance and improvement of existing transport infrastructure.
  - delivery of investment in bus infrastructure and services through BusConnects.
  - addition of bus capacity to meet demand "as passenger demand increases".

- failed to resolve a key issue of fact the resolution of which was necessary to determine whether the Proposed Development would be sustainable – whether the #130 bus would have capacity to serve the Proposed Development.

- erred in mis-framing the issue as one whether public transport was "*regular and reliable*" – thereby excluding the issue of adequacy of capacity.

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[228] This is the precise phrase used by the Inspector at §11.10.10 of her report. Mr Stapleton's Statement of Grounds paraphrases it – but not inadequately.
[229] S.9(1)(a) provides in effect hat before the Board decides an SHD Planning application, it shall consider various matters, including "(iii) any other relevant information" "in so far as they relate to —
(A) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development,
(B) the likely effects on the environment or the likely effects on a European site, as the case may be, of the proposed development, if carried out, …
[230] As relevant, 9. (2)provides that "In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to —
(a) the provisions of the development plan, including any local area plan if relevant, for the area,
(b) any guidelines issued by the Minister under section 28 of the Act of 2000,
(c) the provisions of any special amenity area order relating to the area, ……..
(f) the matters referred to in section 143 of the Act of 2000, and
(g) the provisions of the Planning and Development Acts 2000 to 2016 and regulations made under those Acts where relevant."
[231] s.18 of the 2016 Act relates to oral hearings.
[232] 143.— (1) The Board shall, in the performance of its functions …. have regard to —
(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,
(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and
(c) the National Planning Framework and any regional spatial and economic strategy for the time being in force. ……
[233] National Strategic Outcomes.
[234] Regional Spatial and Economic Strategy – for which Part II, Chapter III PDA 2000 provides.

- misdirected itself in law as to the proper test of capacity: to avoid displacement of passengers elsewhere on the route, it should have looked at overall capacity rather than the capacity at one stop early on the bus's journey.

- was obliged to have regard to the views of Dublin Bus and the NTA as to transport capacity. While they are not prescribed consultees, s.9(1)(a)(iii) of the 2016 Act obliged the Board to have regard to "*any other relevant information*".

- had no evidence from Dublin Bus or from the NTA as to its 'Bus Connects' proposals. No correspondence from Dublin Bus or copy of the NTA 'Bus Connects' proposal was provided in the planning application to confirm the assertions of its Traffic and Transport Assessment ("TTA").

- "failed to obtain" relevant material – the views of Dublin Bus and the NTA[235] – in concluding that there would be adequate transport capacity. As counsel put it orally: the Board did not equip itself to resolve the issue as s.9(1) required it to consider relevant information.

- erred in law in failing to hold an oral hearing to resolve the transport capacity issue.

- alternatively, failed to avail of the option of writing to either Savona or Dublin Bus for the correspondence in question – as it could have done under Article 302(6) of the 2017 Regulations. (This submission was made orally only).

- Failed to have regard to other relevant material, in particular the views of the NTA and Dublin Bus, and then to set out its consideration of that material in the Impugned Decision.

146. Mr Stapleton submits that:

- Savona submitted to the Board a TTA to the effect that,
  - Dublin Bus had confirmed in writing that #130 bus services to and from the city at morning and evening peak times generally do not operate at maximum capacity,[236]
  - and so there was adequate public transport capacity to serve the Proposed Development.

- the correspondence with Dublin Bus, not enclosed with the planning application but later revealed by exhibition in these proceedings, undermined this assertion – such that the TTA amounted to a misrepresentation in this regard. (I consider the detail of this allegation below and so will not set it out here).

- Savona submitted to the Board that its transport survey[237] at the nearest bus stop showed that all waiting were able to board the first bus to arrive. Mr Stapleton submits that many objectors, including

[235] National Transport Authority.
[236] TTA §2.4.5.
[237] To which the TTA referred.

the Applicant, disputed this assertion of capacity[238] and so did Dublin City Council.

- the Board failed to take any steps to resolve, and did not resolve, the conflict of fact as to capacity. The Inspector[239] simply noted the public submissions, repeated what Savona had said, and found that, "*while there may be scope to improve the service … it remains that the area is served with a regular, reliable public transport service*." Having also addressed cycling and walking, she concluded that, "*having regard to all of the information, I am satisfied in this regard*."

- The Board must set out the main reasons and considerations on which it based its decision.[240] One is "*left to ponder*" what in fact the Board considered in reaching this conclusion. **Sweetman (Ennis Bypass)**[241] is cited as to the Board's duty to consider all matters which should properly have been considered. As counsel put it orally, the Board "simply plumped" for Savona's position without explaining why – in breach of the requirement of **Sliabh Luachra**[242] to engage with submissions. It is also said to be in breach of the same obligation as identified in **Balz**[243] to the effect that *"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."*

- Whether the service is regular and reliable says nothing of its capacity. A minibus running every 10 minutes would be as regular and reliable as a double decker running that frequently. The crucial considerations leading from the conflict of fact to its resolution are missing. There is nothing to indicate that the Inspector even considered how she could get from those transport contradictory assertions about capacity to a conclusion. The Board failed to consider how to resolve the dispute whether there was capacity or not and so erred in law.

- The Board failed to consider how to resolve the dispute as to capacity or not. Should it
  - request further submissions?
  - hold an oral hearing?
  - request further submissions?

- The Board also failed to consider how much the Developer's evidence proved, if correct. Even if there was capacity for the existing number of prospective passengers, would there be capacity for additional passengers from the Proposed Development? If there was capacity at this stop, would it simply displace other passengers further down the road?

- The Board failed to consider Dublin Bus's timetable for route 130 – there is a bus potentially every 8 minutes throughout the day – or the 'Bus Connects' proposal for route 64, which proposes a service every 6 minutes between 6am and 7am, and every 10 minutes between 3pm and 4pm, but at other times reduced to every 15 minutes.

[238] The Stapleton submission to the court inexhaustively lists 7 named objectors, including Clontarf Residents' Association, of which Mr Stapleton is a member.
[239] Inspector's report §11.10.9.
[240] s.10 of the 2016 Act.
[241] Sweetman v Bord Pleanála [2007] IEHC 153.
[242] Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888.
[243] Balz & Heubach v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd [2019] IESC 90; [2020] 1 I.L.R.M. 367.

- A **Ballyboden** case,[244] and **Jennings**[245] are authority that, though transport frequency and capacity are related, they are distinct issues requiring discrete consideration by the Board.

The Board's & Savona's Pleadings & Submissions

147. Beyond traverses, the Board pleads that,

- Mr Stapleton may not rely on evidence, material and/or facts that were not before the Board and/or were not pleaded.

- The public transport ground is mere assertion absent evidence.

- s.9(1)(a)(iii) of the 2016 Act requires the Board to "*consider… any other relevant information".* before making a decision on an application for planning permission under the 2016 Act. s.9(2) and s.143 PDA 2000 require regard to certain matters. None require compliance with those matters.

- The Board had regard to the RSES and Mr Stapleton pleaded no legal basis for an obligation of regard to the NTA Greater Dublin Area Transport Strategy 2016.

- The Board considered public transport capacity and it pleads §§11.10.9-11.10.10 of the Inspector's Report.

- As to BusConnects, Mr Stapleton pleaded no legal basis for an obligation to consider or further investigate the matters alleged in that regard.

- Alternatively, Mr Stapleton's pleas as to BusConnects are an attempt to reopen the merits of the Board's conclusions on public transport capacity. As he has not pleaded irrationality of these conclusions, these pleas are not open to him.

- Mr Stapleton pleaded no legal basis for the contention that the Board was obliged to consider or further investigate the matters alleged and it is denied that any such obligation applied.

- As to the views of the NTA and Dublin Bus as to whether there was adequate public transport capacity, Mr Stapleton was permitted[246] to amend his Statement of Grounds on terms that he must re-phrase the ground "*in terms of failure to obtain information (which is what the issue is), not failure to have regard to information*".

- The Board was not obliged to have evidence before it from specific sources, and/or to seek out such evidence and/or undertake an investigatory role, or to obtain the views of the NTA and/or Dublin Bus

[244] Ballyboden Tidy Towns Group v Bord Pleanála [2022] IEHC 7 §83-102.
[245] Jennings v Bord Pleanála [2023] IEHC 14.
[246] Stapleton v An Bord Pleanála [2023] IEHC 344. See Table in judgment – Ref #10.

on the issue of public transport capacity and the Applicant has failed to identify the legal basis of any such obligation.

- The views of Dublin Bus on this issue were provided by way of summary by the Developer.

- The Board's obligation was to have regard to the issue of public transport capacity and it did. The Inspector considered it in detail. Mr Stapleton's disagreement is with the merits of that consideration but it is reviewable as to merit only for irrationality and Mr Stapleton has not pleaded irrationality.

148. I will consider Savona's affidavits on this issue below.

Not an SPPR3 Issue

149. In other cases[247] issues have arisen as to a question whether the criteria set by §3.2 of the Height Guidelines as to transport capacity, to be satisfied as a precondition of application of SPPR3 of the Height Guidelines, had been satisfied. As will have been noted, the issue as to transport capacity in this case was not pleaded in that context. It is pleaded and argued on the more general basis that was a main issue in the planning application.

The Policy Context, The Inspector's Report & some Comment thereon

150. Planning policy is replete with assertions of the interdependence of the aims of sustainable compact cities, higher density housing (both as desirable as sustainable and with a view to ameliorating the housing crisis) and the provision of high quality public transport. For example and as noted earlier, the "*Sustainable Urban Housing: Design Standards for New Apartments*" of 2020 cite the NPF for a policy shift towards "*securing more compact and sustainable urban development*" and record that "*maximising accessibility of apartment residents to public transport and other sustainable transport modes is a central theme of these guidelines".* The foreword to the Height Guidelines articulates the objections to "*constant expansion of low-density suburban development around our cities and towns*" as including "*the energy intensive transport systems needed to feed it*". Those Guidelines reflect policy favouring increased building height and density in locations with good public transport. One need not be a planner or an expert to find that entirely unsurprising. It would be a wonder were it otherwise. Every city dweller, all the more so suburbanites, at some level understands the importance of public transport to quality of life and to high density development in particular.

[247] For example, O'Neill v. An Bord Pleanála & Ruirside Developments [2020] IEHC 356, Ballyboden Tidy Towns Group v. An Bord Pleanála & Shannon Homes [2022] IEHC 7, Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 & Fernleigh Residents Association v. An Bord Pleanála [2023] IEHC 525.

151. The Inspector's report on the issue of "Capacity of Public Transport"[248] noted that,

- many third party submissions raised concerns that the Site was unsuitable for a development of the nature and scale proposed, for want of quality and capacity of public transport in the vicinity.

- the Council stated that there is some concern that the Site is not optimal in terms of proximity to high capacity public transport.

- Savona's TTA states that Dublin Bus has confirmed that:
  - route 130 is one of its most frequent – running every 8-10 minutes from both termini.
  - the services travelling to/from the city centre at peak times in the morning generally do not operate at maximum capacity and the same is true returning in the evening.

- correspondence in this regard from Dublin Bus does not appear to have been submitted with the application.

- Savona states that its February 2020 traffic survey records (before Covid-19 restrictions[249]) show about 30 patrons per hour waiting at bus stop 1726[250] in the morning between 07:00 - 09:00 hrs – reducing to 12 per hour through the day. All patrons observed were accommodated by the first bus to stop after their arrival at the bus stop

- BusConnects proposes little change for this area.

- on her Site visit, on the morning of 6 December, 2021, she "*noticed a number of buses on Clontarf Road*".

152. The Inspector's opinion is that,

- *"While there may be scope to improve the service within the area, it remains that the area is served with a regular, reliable public transport service.*

- *Pedestrian and cycle connectivity is good within the wider area.*

- *There are many services and facilities within walking distance of the site including retail, educational, recreational and ecclesiastical.*

- *Having regard to all of the information before me, I am satisfied in this regard."*[251]

[248] Inspector's report §11.10.9 & 10.
[249] This is the Inspector's comment.
[250] The closest bus stop to the Proposed Development serving city-bound bus users.
[251] Layout changed – the bullet points are mine.

153. While I have no reason to doubt their accuracy or their relevance to sustainability of travel modes generally and holistically, I am unclear of the import and relevance of the Inspector's observations, as part specifically of an analysis of "Capacity of Public Transport", to local pedestrian and cycle connectivity and to services and facilities within walking distance of the Site. Conceivably, they could be understood as suggesting the adequacy of a lesser quality and capacity of public transport than would otherwise be required. However, I have found no such suggestion or argument in the application documents and the premise of all other analysis is that the only problem, if there is one, is at peak hours – in other words, primarily morning commuter traffic to, or towards the city. And if such a problem subsists, it subsists despite the currency of these two observations by the Inspector. Nor have I seen policy favouring provision of lesser public transport services to suburbs well-served with local facilities or to large scale residential developments similarly served. Rather, policy emphasises the compact city as facilitating, and facilitated by, good public transport. However, as no issue was pleaded in this regard, I need take it no further.

154. As recorded above, Mr Stapleton is, but I am not, critical of the Inspector's recording her personal observation of buses on Clontarf Road. But it was clearly and merely an observation incidental to the narrative of her discussion of the issue of adequacy of transport. It was not methodical, analytical or quantified. I cannot see that she intended it, or that the Board could have understood it, as a weighty contribution to the specific issue at hand. Indeed, unless her observations were made at rush hour, they cannot weigh in the balance at all as to the time as to which adequacy of public transport is disputed. And had her observations been made at rush hour, she would have said so. While I claim no great familiarity with the locus, I think I can take judicial notice that, at any time of day, it would be very surprising if "*a number of buses on Clontarf Road"* were not to be seen, at least over any appreciable duration of observation. The Inspector's observation cannot be read as purporting to verify or discount either the transport survey recorded in the TTA or the daily experience of local residents or as purporting to contribute to, much less lay, a basis for choosing between them. As, I say, I am in no way critical of the Inspector: I think it is just a matter of not reading into her observation any more then she intended and the Board must have understood.

155. I will consider presently the Inspector's noting of Savona's omission from its planning application of the correspondence with Dublin Bus.

"Regular & Reliable" Encompasses Capacity

156. I reject Mr Stapleton's plea and argument[252] that the Inspector (and so the Board), in enquiring whether public transport was "*regular and reliable*" and finding that it was, thereby failed to consider and draw a conclusion as to adequacy of capacity. To my mind, capacity adequacy is an element of reliability. To apply an example posited by Mr Stapleton, a minibus running every 10 minutes would be as regular as a double-decker running that frequently but, depending on the level of passenger demand, it might not be as reliable. Reliability of a service must be viewed from the perspective of the person seeking to rely on it.

[252] Including at §10 et seq of an affidavit of Danny Ryan sworn 21 November 2021.

Intending passengers cannot rely on a public transport which appreciably lacks capacity. I reject the challenge, insofar as based on this linguistic issue alone.

157. However the matter goes further. The phrase "*regular and reliable*" must also be construed in context. The Inspector clearly expressed her view that the service was "*regular and reliable*" in the context of her consideration (whether adequate or not – an issue to which I will come) of the dispute as to transport capacity. Indeed, that view is expressed in a section of her report headed "*Capacity of Public Transport*".[253] It commences with the express recognition that "*many*" third party submissions had disputed the adequacy of transport capacity and that the Council had noted concerns in that regard. On the other hand, she noted the allegation of correspondence with Dublin Bus confirming capacity and the findings of the survey of February 2020 as to the ability of those waiting for a bus to get on it. These elements of the materials before her, and to which she refers, specifically addressed capacity as opposed merely to frequency. This case is to be distinguished in that respect from the **Ballyboden** case[254] cited by Mr Stapleton. In my view, the context in which the Inspector deemed public transport "*regular and reliable*" makes it clear that her concept of reliability included capacity.

158. So, she and the Board did purport to resolve the issue of capacity – whether adequately may be a different matter.

The #130 Bus and the Residents' Objections

159. It is common case that the adequacy of transport capacity serving the Site depends on the #130 bus operated by Dublin Bus. The only sense in which its adequacy is impugned is that it is said that at peak hours the buses lack capacity and that those waiting at bus stops must watch buses pass full and await one with space.

160. On the evidence, I am satisfied that large numbers of objectors – typically local residents, some via residents' associations, others individually – asserted that the #130 lacked capacity. Some did so briefly and in identical terms – clearly using a template, as is not uncommon in such circumstances. Others did so in terms clearly composed personally. Counsel for Mr Stapleton opened over 20 such objections to me. They said that:[255]

- The #130 is the only bus route.
- It is already inadequate and profoundly over-subscribed. Many users during peak periods must wait for several buses to pass before one with space is available. Any additional commuters would worsen an already dire situation.

[253] Inspector's report §11.10.9 & 10.
[254] Ballyboden Tidy Towns Group v Bord Pleanála, [2022] IEHC 7 §83-102.
[255] I have edited and amalgamated the terms of the objections to reduce repetition somewhat while preserving meaning.

- Inter alia, Clontarf Residents Association (of which Mr Stapleton is a member) said that although Savona's Mobility Management Plan ("MMP") states that Dublin Bus stated that the #130 was not operating at capacity, "*this would not be the experience of users of the route*" and it is often oversubscribed.
- It is widely known locally that at rush hour, the bus would often be at capacity as early as Doyle's Lane, is full once it hits the coast road and is full when it reaches the Wooden Bridge.[256]
- The #130 Bus is frequent but is already inadequate to serve the demand of morning commuters. By the time it reaches Mount Prospect Avenue it is generally full so commuters along the Clontarf Road (adjacent to the junction with Seafield Road) find the service is full before it arrives.
- We only have one bus line #130 passing which is typically over-crowded and may times you can't get on the bus in the morning for work.
- This service was already incredibly overstretched pre-pandemic with huge queues and few buses at core commuting times.
- The reality is that at peak times, the buses are full going to and from Clontarf. I know this from experience as I commute to work in Dublin city centre. My son also travels to town for secondary school. Between the hours of 7.20am and 8.20am, the buses are regularly full and on many occasions, we can be left standing for 20-30 minutes due to the demand for services, compounded when drivers do not show for work.

The Council's CEO expressed "*some concern that this suburban location is not optimal in terms of proximity to high capacity public transportation. The application indicates that the proposed development would be five minutes' walk from bus route no. 130 which is a local bus route rather than a Quality Bus Corridor / Bus Connects route*".

I have no view as to the accuracy of these assertions. But it is undeniable that transport capacity adequacy was a main issue in dispute in the planning process.

BusConnects

161. There was much evidence and discussion at trial of the detail of the NTA's 2019 BusConnects proposal[257] for bus services in Dublin – inter alia in the vicinity of and potentially serving the Proposed Development. The exhibited 2019 BusConnects Proposal discloses, inter alia, a very considerable public consultation exercise which informed it and which it records as reflecting a "*wide variety of concerns*" including that "*Proposed peak routes and frequencies may not provide sufficient passenger capacity, causing overcrowding*." (These were general concerns as opposed to specific to the #130). The proposal and those public concerns are obviously potentially relevant to the planning merits of the Impugned Decision. Mr Stapleton pleads and verifies that the Board had no evidence before it in relation to the 'BusConnects' project.

[256] The bus stop nearest the site – bus stop 1726 – is at the Wooden Bridge.
[257] Amongst the exhibits was the National Transport Authority's BusConnects "Dublin Area Bus Network Redesign Revised Proposal, October 2019".

162. The position appears to be as follows:

- The TTA[258] gives a reasonably detailed account of what it says is the relevant content of the "*BusConnects Dublin Area Bus Network Redesign Public Consultation Report*". The TTA does not give a date for that document but given the TTA is dated 2021, I assume that the reference is a misnomer and should have been to the "Dublin Area Bus Network Redesign Revised Proposal October 2019". That is the BusConnects document exhibited in the proceedings. It is not apparent that it was before the Board.

- The TTA account of the 2019 BusConnects Proposal concludes that "*Insofar as it relates to Clontarf it is doubtful that the revised network will give rise to significant change in public transport service since the route and frequency of service is essentially unchanged from the existing scenario*."[259] The MMP[260] gives an all but identical account.

- The Inspector recorded her view that *"In terms of BusConnects, there appears to be little change proposed for this area."*[261] As far as I can discern, it seems to be based on the relevant content of the TTA rather than on any independent perusal of the 2019 BusConnects Proposal.

- The exhibited 2019 BusConnects Proposal states that the route between Clontarf and the city centre would be an all-day service, every 15 minutes (every 6 minutes at peak). "*This route would essentially be the same as existing Route 130, with frequency adjustments matching demand (higher frequency at peak, slightly lower off-peak).*" It seems that, if anything, the TTA and hence the Inspector somewhat understated the prospect of improvement – at least as to the peak hours at which the problem of which the residents complained allegedly arises.

163. I do not see that all this avails Mr Stapleton. He does not dispute the conclusion that no improvement is proposed. Indeed, in a sense, it suited his purpose before the Board that Savona was not holding out a prospect of improvement of the Bus Service. He might say, correctly, that the TTA did not tell the Board of the record in the 2019 BusConnects Proposal of the public consultation exercise which informed it and which it records as reflecting a "*wide variety of concerns*" including that "*Proposed peak routes and frequencies may not provide sufficient passenger capacity, causing overcrowding*." But I do not see that he was in any degree disadvantaged, or that the Board was left in any degree uninformed, in these regards. First, the record in the 2019 BusConnects Proposal of such concerns is entirely general and city-wide. It sheds no particular light on the position specific to the #130 bus or to the Proposed Development. Second, the Board had, and the Inspector recorded, the multiple expressions of such concerns specific to the Proposed Development and the present #130 bus route. And, though Savona disagreed with those concerns as to present capacity, it held out no prospect of improvement. In short, the Impugned Permission was not premised on any prospect of improvement of public transport capacity by the implementation of BusConnects.

[258] TTA §2.4.6 et seq.
[259] §2.4.9.
[260] §2.3.6 et seq.
[261] Inspector's report 11.10.10.

164. Mr Stapleton suggests that implementation of BusConnects will decrease relevant capacity but I am not satisfied that that is so or that it was suggested to the Board by anyone that it was so. Accordingly, I cannot see that the Board was required to take that issue further. In any event as put, Mr Stapleton's argument seemed to depend on taking a particular and contestable view of whether there would in fact be a reduction – as to which the Board's view is impugnable only for irrationality which was not pleaded. Indeed, Savona argued that the implementation of BusConnects will decrease relevant capacity only at off peak times and increase it at peak times. Neither Mr Stapleton nor Savona can reopen the merits of the Board's decision – as to Savona, not least as the Board's view that there would be no appreciable change derived from Savona's own TTR to the effect that BusConnects would effectively leave the service "essentially unchanged". And if the residents foresaw in BusConnects a net reduction in service, they should have said so to the Board.

165. I should add that the BusConnects proposals are recited in the TTA but were not in the materials placed before the Board by Savona. The Board's decision did not recite the BusConnects proposals as matters to which it had regard – understandably given that they had been identified as proposing no significant change to relevant bus services. Elements of the BusConnects proposals' content were put and explored before me. On the view I take, I do not need to address that content.

166. However, had the BusConnects proposals been consequential, it seems to me that an element in the consideration of any resultant legal issues would be whether, the Board's attention having been drawn to relevant BusConnects proposals, those proposals, while not formally public documents yet being in the public domain, could have been considered to be within the Board's corporate knowledge given its expertise. I am inclined to think so – see by analogy **Dublin Cycling**[262] – but need not decide the issue and would not absent argument.

167. In the end, as the dispute was as to the adequacy of the current service and as the Impugned Decision assumed no improvement in the service, BusConnects seems to me a side issue.

<u>Savona's Transport Survey</u>

168. As already noted, Savona in its TTA submitted to the Board that its transport survey at the nearest bus stop – #1726 is recorded as 360m from the Site[263] – showed that all waiting were able to board the first bus to arrive. That survey was done on one day only – Thursday 13 February 2020 – it seems between 07:00 and 19:00.[264] Savona's MMP recorded that:

[262] Dublin Cycling Campaign CLG v. An Bord Pleanála [2020] IEHC 587 §125.
[263] TTA §2.4.2.
[264] See TTA §1.5.2.

> *"Records from the February 2020 traffic surveys show approximately 30 patrons per hour waiting at bus stop 1726 in the morning between 07:00 - 09:00hrs with demand reducing to 12 per hour through the day. All patrons were accommodated by the first bus after their arrival to the bus stop."*[265]

169. The TTA[266] account is the same as to the first sentence of the foregoing excerpt. The second sentence is subtly different. It reads: "*All patrons observed in the surveys were accommodated by the first bus to stop after their arrival at the bus stop*."[267] The difference may be entirely insignificant but one may observe that a full bus would not stop and a bus would stop only if it had capacity for additional passengers. That is a point which might not much trouble me but for the position as to the Dublin Bus correspondence addressed below and, as applicable to reliability, the approach of Hardiman J in **Shelly-Morris**.[268] Savona's traffic expert's second affidavit seeks to clarify that "*each passenger waiting was able to board the first bus arriving*". It also records, as the TTA had done, that the survey was not conducted by his firm but by another firm specialist in such surveys. There is, of course, nothing wrong with this. But it would at least have been preferable if that firm's survey report had been exhibited such that its methodology would have been clear to all. It, presumably, would have clarified exactly what was done and whether buses due to stop at the bus stop had not done so as they were full and so were excluded from the analysis. Ultimately, however, there is no reason to believe that the survey was not done properly and in a genuine attempt to discern adequacy of bus capacity. Certainly nothing adverse to the propriety of the survey could be inferred absent evidence supporting such a conclusion and there is none. I cannot hold against Savona what is most likely to have been merely a poor choice of words in the TTA. That said, it would clearly have been good practice to include the report of the firm which did the survey as confirming its methodology. And the TTA should have made clear whether any buses passed by full.

170. Mr Stapleton in oral submissions criticises the fact that the transport adequacy survey was done on one day only. He is more critical again that a one-day survey appears to have outweighed in the Board's mind the submitted, contrary, long, first-hand and practical experience of multiple local residents. It is hard not to have sympathy with his submissions on both counts – though, in making that observation, I do not suggest that the residents' submissions should not be assessed with a proper scepticism and scrutiny. They are no more to be taken at face value than are Savona's submissions.

171. That said, I do not think Mr Stapleton's criticism in this regard decisive here as:

- The respective adequacies and weights of conflicting materials in resolving such conflicts is a matter for the Board – though the extent of the reasons they must give in explaining that resolution is a distinct isssue from their entitlement to decide on weight and resolution.

- This seems to me to be a respect in which, ignoring the issue of the information available from Dublin Bus (as to which see below) and viewing the matter as a straight choice between the survey and the

[265] §2.3.5.
[266] §2.4.5.
[267] Emphasis connotes difference to the MMP.
[268] See below.

resident's objections, the Board's decision as to a finding of adeequacy of transport services would survive challenge even if I thought it "clearly wrong" on the merits, given the survey constitutes "*material to support*" that decision – **Holohan**.[269]

- As to the exceptions allowed by **Holohan** to that proposition, there is here no plea in this regard of irrationality or want of reasons nor is there any plea or question of disproportionate interference with rights. Nor is the case one of illogicality.

- There were here not merely two relevant and countervailing elements (transport survey and residents' submissions). The third element was what the Board was given by Savona to understand was the written opinion of Dublin Bus that the #130 bus service was adequate. This albeit the written opinion of Dublin Bus was not supplied to the Board and, as it transpires and is demonstrated below, did not and does not not live up to its billing by Savona.

Information from Dublin Bus as to Adequacy of Public Transport

A Pleading Issue

172. I accept the Board's plea that, as to the views of Dublin Bus on whether there was adequate public transport capacity, Mr Stapleton was permitted[270] to amend his Statement of Grounds on terms that he must re-phrase the ground "*in terms of failure to obtain information (which is what the issue is), not failure to have regard to information*" rather than in terms of failure to have regard to the view of Dublin Bus. I propose to analyse the issue from that point of view.

The Evidence & Comment thereon.

173. The relevant content of Savona's planning application was in terms markedly in contrast with the objectors' assertions of inadequacy of public transport. Its TTA and MMP said:

> *"Dublin Bus has confirmed in correspondence[271] … that Route 130 is one of the most frequent operating routes in the Dublin Bus fleet running every 8-10 minutes from both termini. Dublin Bus also confirm that the services travelling to and from the City Centre at peak times in the morning generally do not operate at maximum capacity and that the route returning to and from the city centre in the evening similarly does not typically operate at maximum capacity."*[272]
>
> *"Dublin Bus has confirmed that Route 130 is one of the most frequent routes in the Dublin Bus fleet running every 8-10 minutes from both termini. Dublin Bus confirms that the services travelling to/from*

[269] Holohan v An Bord Pleanála [2017] IEHC 268.
[270] Stapleton v An Bord Pleanála [2023] IEHC 344. See Table in judgment – Ref #10.
[271] Emphases added.
[272] TTA §9.6.4. §2.4.5. says the same but does not mention correspondence. The MMP at §2.3.5 repeats TTA §9.6.4 almost verbatim.

the City Centre at peak times in the morning generally do not operate at maximum capacity and the same is true returning in the evening."[273]

174. For reasons which will become apparent, Savona urged on me that each of the foregoing passages could be read on the footing that the word "*also*" should be read as indicating that the information cited as to the capacity of the service derived from Dublin Bus but not from the correspondence with Dublin Bus cited in the previous sentence. While such a reading may be a technical possibility, I have no hesitation in saying that, putting the matter at its lowest, Savona by that passage allowed the reader to infer from the second sentence, in the context of that immediately preceding it, that the information cited in the second sentence as to capacity had been in the correspondence from Dublin Bus. I am, indeed, happy that such is the inference naturally to be drawn from the juxtaposition of these two sentences and that such inference represents their natural and ordinary meaning. To put it more simply, I am satisfied that the ordinary reader would understand from these passages that Dublin Bus had in correspondence stated that the #130 service was not operating at capacity both to and from the City in both the morning and the evening peaks. That was the state of the information as to the view of Dublin Bus in this regard which Savona, via its traffic expert, had placed before the Board by the time the Board made its decision.

175. As noted above, Mr Stapleton pleaded, inter alia, that the Board had no evidence before it from Dublin Bus and had failed to properly resolve the bus capacity issue. In response, Savona's traffic expert swore an affidavit on 30 November 2022. Inter alia, he averred that his past experience included providing expert witness testimony in the High Court – from which I infer that he sought to impress on the court his appreciation of the particular duties of such witnesses. Indeed, he explicitly averred to that appreciation. Those duties of those swearing affidavits include duties to the Court of independence and impartiality, of precision of language (**McKillen**[274]) and to state not merely the truth but the whole truth (**Ikarian Reefer**[275]). For the avoidance of doubt, independence incudes, perhaps primarily, independence of the client's interest.

176. Savona's traffic expert explicitly noted his understanding that Mr Stapleton was "*questioning the veracity of aspects of the TTA due to the absence of a letter from Dublin Bus setting out the latter's position*" amd explicitly set out to disagree with Mr. Stapleton's assertion that the *"TTA was in some respect deficient or inadequate as regards the information provided in relation to public transport capacity."* So he appreciated that the veracity of his company's report was impugned – a serious matter calling for a serious, precise and complete response. In that light, he should have appreciated all the more that the information he needed to provide in his affidavit should not be deficient – either as to accuracy or completeness.

177. Savona's traffic expert recited §2.4.5 and §12.2.4.2 of the TIA (see above) and later cited his "*professional opinion*" that Savona's traffic surveys *"confirm <u>the Dublin Bus statement</u> showing that the bus service had the capacity to accommodate all those waiting at the bus stops without exception."*[276] He

[273] §2.4.5. Repeated at §12.2.4.2.
[274] McKillen v Tynan [2020] IEHC 189.
[275] National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd (The Ikarian Reefer) [1993] 2 Lloyds Rep. 68 at 81-82 – principle #4. That case has been cited in many cases including, recently, Duffy v McGee [2022] IECA 254.
[276] Emphasis added.

confirmed that his company had contacted Dublin Bus and that the TTA and MMP "*reference the engagement with Dublin Bus and the following is the statement received from Dublin Bus*."

> *"Our 130 service is one of the most frequent operating routes in our fleet, running an 8-10 minute service from both Termini. Our services travelling from the city centre at peak times in the morning generally do not operate at maximum capacity, similarly, the route returning to the City Centre at evening peak times generally does not operate at maximum capacity also."*[277]

178. The traffic expert, "*for completeness*", exhibited the Dublin Bus "*statement*". It is a brief e-mail from Dublin Bus dated 28 February 2020 and addressed to another member of the expert's company. It is in the terms set out just above. Savona at trial confirmed that this is the only relevant written communication from Dublin Bus – there is no other. It commences: "*I refer to your email regarding our service on our 130 route.*" That e-mail, presumably asking the question under reply, was not exhibited.

179. A number of things are immediately striking about this – "*the statement*" – of Dublin Bus.

- It addresses capacity only on buses going in the opposite direction to rush hour traffic generally and specifically that rush hour traffic likely to emanate from the Proposed Development – certainly in the opposite direction to that expected to be travelled by residents of the Proposed Development.

- It manifestly does not live up to its billing by the expert that it verified the TTA and MMP assertions that Dublin Bus had confirmed capacity in both directions in both rush hours. It addresses only two of the four permutations.

- It is puzzling in that it seems to answer an odd question – why would Dublin Bus give a reassurance about an issue which was, at best, marginally relevant to the Proposed Development and which certainly did not address the real and obvious issue as to capacity going into the city in the morning rush hour and returning in the evening? This oddity prompts inquiry – exactly what question was Dublin Bus asked – in the e-mail under reply or otherwise? That became apparent only at the trial.

180. The expert next deposed, inaccurately, for the reasons I have just identified, that "*this is the information that was relayed in the TTA and MMP that were before the Board.*" As has been seen, in fact, very different information had been relayed to the Board. He also deposes: *"I say and believe that it was not considered necessary to append this statement from Dublin Bus to the TTA or the MMP submitted to the Board, same having been accurately reflected in both the TTA …. and the MMP".* In truth, the Dublin Bus statement had not been accurately reflected in the TTA and MMP and, had it been, the discrepancy between that statement and the account of it given in the TTA and MMP would have been apparent to the Board.

[277] Emphases added.

181. At trial[278] I expressed to the Board my appreciable concern that,

- it may have acted, in making the Impugned Permission, on an understanding as to the position of Dublin Bus as to the adequacy of public transport which was factually incorrect.

- Savona's affidavit on the issue had purported to address it but in fact had not.

- Had the Board sought and got information from Dublin Bus it might have required a materially different understanding of the position of Dublin Bus as to the adequacy of public transport.

182. I add now that information from Dublin Bus might also have given the Board a different understanding of the general reliability of the TTA and MMP. Of course, often, correction of the specific error will suffice – for example, see **CHASE**[279] as to correction of data relevant to the potential impact on humans of dioxins produced from incinerator operation. But, while credibility in the sense of falsehood is not in issue, on the logic of Hardiman J in **Shelly-Morris**[280] and insofar as error may have proceeded from carelessness, the possibility at least arises for consideration by the Board whether carelessness in a report on such a significant issue may require it to consider whether a difficulty of reliability may be general to the expert report in any greater or lesser degree. That is a function of the Board's duties of the "*utmost importance*"[281] of "*expert*" and "*detailed scrutiny*"[282] of "*active and critical interrogation*"[283] and, not least, of "*scrupulous rigour*".[284]

183. I later pressed Savona's advocate as to whether his client now stood over that averment that *"this statement from Dublin Bus"* had in fact been *"accurately reflected in both the TTA .. and the MMP".* He stood mute and I did not press him. I did not criticise his silence, which, to me at least, was eloquent. But I indicated to him that I would draw any appropriate inferences. The inference clearly to be drawn, and which I do draw, is that Savona could no longer stand over that averment as accurate in fact. Nor was it accurate in fact.

184. The expert continued, in a quite misconceived averment: *"The implication of the Applicant's complaint is that the TTA and the MMP are in some sense not to be believed insofar as they recite the position of Dublin Bus in relation to its Route 130 bus service. I respectfully fully reject, as entirely unfounded, any such contention whether implied or expressed."* He later referred to Mr Stapleton's "*unsubstantiated assertions*" in this regard. Given the obviousness of the discrepancy I have identified, I must, somewhat paradoxically, infer that the expert at this point had not adverted to it when swearing his first affidavit – though he clearly should have. However, it is also important to note that this passage in his affidavit reflects the expert's awareness of both the attack on his report and his opportunity to respond to it.

[278] Day 3, 23/11/23, 11:43.
[279] Cork Harbour Alliance for A Safe Environment v An Bord Pleanála [2021] IEHC 203.
[280] Shelly-Morris v Bus Atha Cliath [2003] 1 I.R. 232, p. 258 – recently cited in Nolan v Dildar [2024] IEHC 4 §237.
[281] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 I.L.R.M. 367 §454.
[282] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 I.L.R.M. 367 §454.
[283] Jennings v An Bord Pleanála [2023] IEHC 14, §410. See also Humphreys J in Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700 as to "the need for thoroughly independent and detailed expert scrutiny.
[284] Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).

185. Notably, given his obligation to furnish comprehensive information – an obligation highlighted by the discrepancy disclosed – the traffic expert refers in this affidavit to no contact with, or source of information from, or oral communication by, Dublin Bus as to these matters, other than "the statement" described above.

186. There followed a further affidavit from Mr Stapleton – sworn 25 April 2023. He pointed out

- as to the Dublin Bus statement that "*the letter requesting this comment is not appended, so we do not know what question was asked*".

- the discrepancy noted above – the Dublin Bus statement addressed only capacity going out of the city in the morning rush hour and returning in the evening. He deposes:

  "As a resident of Clontarf, I can confirm that more people live in Clontarf and commute to work in the city in the morning and come home again in the evening, than commute from the city to Clontarf to work. It would have been highly significant had this letter been put before the Board because then I and all the other members of the public who made submissions could have addressed the fact that the evidence produced did absolutely nothing to support the Developer's case."

  "It would also have been significant if the request for comment had been included in the application to the Board, because we could have ascertained whether the error was that of the Developer or of Dublin Bus. It should also have been exhibited to (the traffic expert's) Affidavit, because I could then have considered the email in light of the request"

  Unfortunately the clear implication from the Dublin Bus letter is that the TTA is incorrect, in that it draws a conclusion from the letter that it cannot bear. While I would hesitate to say that (the traffic expert) is not to be believed, it is clear from the letter that he is not correct. The fact that some part of Dublin Bus said precisely the opposite of what the Developer asserted in the application demonstrates precisely why the Board should have insisted on obtaining the correct and relevant opinion of Dublin Bus - and, likewise, of the National Transport Authority in relation to the Bus Connects project request."

187. This affidavit by Mr Stapleton can only have confirmed to the traffic expert what he must already have known: that important and damaging criticisms had been levied at both

- his report to the Board and
- his failure to exhibit the question asked of Dublin Bus.

The discrepancy between the Dublin Bus statement and the TTA can, by now at very least, only have been vividly apparent to him.

188. The traffic expert swore a further affidavit on 23 June 2023. He deposed inter alia, as follows:

"I exhibited an email in my affidavit in an effort to demonstrate that as part of my engagement with Dublin Bus there had been written correspondence from Dublin Bus and this was provided in response to a complaint made by the applicant in his Statement of Grounds in that regard. However, to clarify, that email does not and was not intended to represent either the extent of my firm's engagements, which included telephone enquiries with both NTA and Dublin Bus, or the full extent to which I was engaged on the matter of establishing the capacity of the relevant bus service."

He then referred to Savona's traffic surveys and continued:

"This email provided useful information regarding the capacity of transport services at two specific time frames and in certain directions of travel which merely corroborated my own broader enquiries and findings. Those enquiries and findings were not limited to the capacity of bus services at these two specific time frames and directions of travel, nor was the Inspector's own personal assessment of the route.

I say that the information provided in the TTA and MMP properly reflects those findings and enquiries. As I stated at paragraph 2.3.5 in the MMP and at paragraphs 2.4.5, 9.6.4 & 12.2.4.2 in the TTA, Dublin Bus confirmed that the services travelling to and from the City Centre at peak times do not operate at maximum capacity and this was corroborated by independently collected passenger survey data.

I note that Mr Stapleton alleges in his affidavit at paragraphs 15 - 21 that if the Dublin bus email was the extent of the information reflected in the MMP & TTA then they are deficient and/or are fundamentally flawed and/or contains errors. However and as I have explained above this is not the case, and both the TTA and MMP are correct.

I understand how the email if read in isolation may have caused unintended confusion, but Mr Stapleton at paragraph 21 of his affidavit has drawn a conclusion which is incorrect and requires the response in this affidavit. If I did not sufficiently explain the position in my first affidavit I trust this affidavit now clarifies the position for the Court and the parties to the proceedings."

189. This affidavit is notable in a number of respects:

- For the first time and belatedly he says of the exhibited Dublin Bus e-mail which he had described as "the statement", "*that email does not and was not intended to represent either the extent of my firm's engagements, which included telephone enquiries with both NTA*[285] *and Dublin Bus.*" What had been the sole focus of his first affidavit as to the source of his information from Dublin Bus, is now downgraded to "*part of my engagement with Dublin Bus*" and to merely having "*provided useful information*" which "*merely corroborated my own broader enquiries and findings*". That is not the tenor of the account in the TTA. Nor is it his account of the matter in his first affidavit. Nor does it recognise that, of all potential sources of information as to the capacity of its bus system, Dublin Bus must be perhaps pre-eminent but at very least highly significant.

[285] National Transport Authority.

- Though it is not quite said explicitly, the implication is that in conversation between someone unidentified in Dublin Bus and someone unidentified in his firm on one or more unidentified and unrecorded occasions (I presume any record would have been exhibited, but none was), Dublin Bus had orally "*confirmed that the services travelling to and from the City Centre at peak times do not operate at maximum capacity.*" – i.e. that bus capacity was adequate going into the city in the morning and returning in the evening.

- The focus of criticism of the expert's first affidavit was not, for this purpose, on his other "*enquiries and findings*" or whether in the TTA and MMP "*properly reflects those findings and enquiries*". The issue at hand was his assertion in the TTA and MMP specifically that Dublin Bus had confirmed in correspondence something quite specifically identified in the TTA and MMP – capacity in both directions in both rush hours. It is clear that Dublin Bus, in correspondence, had not done so and that would have been clear to the Board had the Dublin Bus "*statement*" been appended to the TTA and/or MMP.

- Significantly, the traffic expert completely ignored the criticism that he had failed to identify the question asked of Dublin Bus and failed to state the terms of the question or to exhibit any e-mail asking it.

190. Given the heightened state of controversy on affidavit by this time, this bald and bare assertion of other contact with Dublin Bus was an entirely inadequate response. It would have been at least reassuring if a confirmatory note had been obtained from that informant in Dublin Bus or had either interlocutor sworn an affidavit as to the conversation in question. If, as I accept, that may not have been possible, one would have expected at very least that the identity of the informant in Dublin Bus and of its interlocutor, would have been identified, some account given of the date and circumstances of the conversation and that any contemporaneous note of the conversation would have been exhibited. The objection that the deponent was not cross-examined is beside the point: it is not a matter of putting these averments in the balance against contradictory averments. The averments were in themselves inadequate in substance. Also, as it seems that the averment was that information from Dublin Bus relayed orally to someone else in the expert's firm, it was hearsay – admissible, if at all,[286] only on identification of its source. The traffic expert ought to have named his informants of the views of Dublin Bus – see for example **Pepper**[287] and **Trafalgar**.[288]

191. At an early stage in the trial, I expressed concern at the discrepancy between the TTA and MMP on the one hand and the Dublin Bus statement on the other. I allowed ample time to inquire but little came of those inquiries – save one piece of striking information. While the e-mail from the traffic expert's firm to Dublin Bus was not produced, I was informed of the question Dublin Bus had been asked. In his first affidavit, the traffic expert had asserted that Dublin Bus had been contacted *"in preparing the subject planning application".* From that, one would inevitably infer that the inquiry made of Dublin Bus had been specific, or at least specifically applicable, to the Proposed Development.

[286] Ignoring for this purpose the distinction between final and interlocutory applications.
[287] Pepper Finance Corporation (Ireland) Ltd v. Macken [2021] IECA 15 §15.
[288] Trafalgar Developments Ltd v Mazepin [2017] IEHC 721 §14.

192. However, at trial I was informed by Savona that the question asked of Dublin Bus, to which its "statement" was a response, had in fact related to an office building in Dollymount. Of course, in that light, Dublin Bus's response made perfect sense as relating to the direction of likely traffic to and from that office block in the morning and in the evening. But it is difficult to see what place such a question had *"in preparing the subject planning application".* I enquired of the advocate for Savona but he was unable to assist. No doubt that was not his fault. But as Savona's position it is unsatisfactory.

193. As will have been seen, I have anonymised the traffic expert in the foregoing. I have done so in part because Mr Stapleton on affidavit stopped short of any allegation beyond that the traffic expert was substantively incorrect. Of course, leaving aside the precise terms of Mr Stapleton's complaint, the expert had duties directly to the Court and a full explanation of matters should have been given in his first affidavit – a fortiori in his second. Certainly, we should not have had to wait until trial to be told that the question asked of Dublin Bus was of little, if any, apparent relevance, and no explained relevance, to the Proposed Development. I must also find that the assertion in the TTA, which I find was made – that Dublin Bus had in correspondence confirmed adequacy of public transport capacity in both directions in both rush hours – was incorrect. I find that the expert, in his first affidavit, failed properly to recognise and address the obvious discrepancy between the TTA and MMP on the one hand and the Dublin Bus "*statement*" on the other – though it must be said that the affidavit at least revealed that discrepancy if only, it seems and puzzlingly, inadvertently. It also failed to give, whatever the extent the second affidavit reveals it, a full account of other alleged communications with Dublin Bus. Given what the circumstances in which it was sworn called for, his second affidavit as to oral contact with Dublin Bus fell considerably short of a full and detailed account of the alleged confirmation by Dublin Bus of adequacy of capacity in both directions in both rush hours. That affidavit did so at a time when the need for such a full and detailed account can only have been borne in on the traffic expert by the replying affidavit of Mr Stapleton. And neither affidavit of the traffic expert revealed that the inquiry made of Dublin Bus, allegedly made *"in preparing the subject planning application",* had in fact and for reasons not explained despite my inquiry, related to an office block in Dollymount in respect of which the direction of rush hour traffic might be expected to be the opposite to that likely to be generated by the Proposed Development. When that was revealed at trial it did at least explain the puzzling terms of the Dublin Bus statement. Nor should the issue of exhibition of that question to Dublin Bus have been ignored in the second affidavit. Indeed thought the terms of the question are now known at least generally, the e-mail asking it remains missing from the exhibits before the Court.

194. I confess to finding all this quite unsatisfactory and disquieting in terms of the erroneous information given both to the Board and to the court. All this is the less understandable from an expert who called in aid his 30-odd years in that capacity and appreciation of his duties to the Court. However on the evidence before me and on the arguments made to me, I do not need to come to a precise view as to how the error occurred and with what form and measure of fault. That said, Savona's attempt to deny the error, its failure to exhibit the question posed to Dublin Bus and its last-minute revelation of the general content of that inquiry only when pressed at trial, are all distinctly unimpressive. I am prepared, with some hesitation, to refrain from any more serious finding. Accordingly, and notwithstanding that he

- was clearly on notice of the respects in which his report and evidence were impugned and

- availed of the opportunity of reply in his second affidavit,

I consider on balance that the interests of justice do not require identification of the expert in this judgment.

195. However it is necessary to repeat and emphasise for future reference that comprehensive candour in affidavits is required – they are no place for "spin" or coyness[289] – including by omission. *"Witness evidence must not obscure areas of central relevance, whether deliberately or unintentionally, nor contain any ambiguity nor be economical with the truth, nor contain spin."* – **Jet2.com**.[290] While that observation was made in the context of the duty of candour of public authorities in judicial review, that it applies to all parties in all litigation had been made clear by the Supreme Court (O'Donnell J) in **Renehan**:[291]

> *"The affidavits of all parties should be drafted in clear unambiguous language. The language must not deliberately or unintentionally[292] obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modern parlance is called 'spin'."*
>
> *"….. affidavits should deal fairly with all available facts ……"*

196. While the duty is general and solemn, it applies all the more to expert deponents – whose primary duty is not to their client but to the court. It is of the "*utmost importance*" that legal advisors, of their duty to both their clients and to the Court, must always make this duty clear to deponents – **Fay**.[293] They must also make clear that responsibility to the Court for the accuracy of content is the deponent's not the drafter's or legal advisor's – **Kelly Dunne**[294] and **Madigan**.[295] In the latter, Heslin J said recently – though expressing long-established orthodoxy – that *"The responsibility to put accurate information before the court, via affidavit, is a responsibility which the party who swears the affidavit cannot dilute, avoid, or 'stand back' from, regardless of whether an affidavit was drafted by them or by a 3rd party, on their instructions."* Swearing an affidavit is not a form filling exercise, and solicitors must explain as much to the deponent – **Naghten**.[296] Donnelly J said in **Egan**[297] *"It is of great concern to this Court that a party could swear any affidavit …….. without being aware of the contents of that affidavit. The swearing of an affidavit is a solemn event and the deponent takes responsibility for the contents of the affidavit."* For the avoidance of doubt, that responsibility includes responsibility for the content of exhibits. That O.40, r.14 RSC requires that an affidavit sworn by a blind or illiterate person must be read over to and "*perfectly understood*" by the deponent (see, for example, **Saleem**[298]) merely reflects a general duty that no deponent may swear any affidavit unless he or she has not merely read it but has perfectly understood it. I would add that the deponent must not merely perfectly understand what he or she is saying: he or she must believe it to be true and must satisfy himself or herself

[289] Re Brennan (A Bankrupt) [2022] IECA 212 §80.
[290] R (Jet2.com Ltd) v Civil Aviation Authority [2018] EWHC 3364 (Admin), citing R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin).
[291] Renehan v T&S Taverns Ltd t/a The Red Cow Inn [2015] IESC 8 approving Re Downes [2006] N.I.Q.B. 77.
[292] Emphasis added.
[293] Re Fay (A Debtor) [2020] IEHC 163, §84 et seq.
[294] Kelly Dunne v Guessford Ltd T/A Oxigen Environmental (Costs) [2022] IEHC 427, §47.
[295] Madigan v Promontoria (Oyster) DAC [2023] IEHC 736, §176.
[296] Naghten v Cool Running Events [2021] IECA 17.
[297] Egan and Tubber Water Limited v Byrne [2014] IEHC 538.
[298] Saleem v The Minister for Justice, Equality and Law Reform [2011] IEHC 223, [2011] 2 IR 386.

to that end by relevant investigation and/or checking of the relevant facts and documents to ensure that they justify any averments made in the body of the affidavit as to their content. It bears repeating that the swearing of an affidavit is as solemn an event as taking the stand to give sworn oral evidence. **Fay**[299] sets out a very helpful account of the proper process of swearing an affidavit – which account is not merely a checklist but impresses on the reader the solemnity of the event and the care it demands of all of the drafter/legal advisor, deponent and the person before whom the affidavit is sworn.

197. A deponent cannot, in interacting with the Court, blame his or her legal advisors for inaccuracy. Nor, indeed, may the advisor volunteer to take such blame. It is important to say however that, properly, neither course was attempted in this case.

198. Of course, errors and omissions will escape even great care on occasion and proper judgements as to what should be included in or omitted from an affidavit may not always seem wise in the 20:20 vision of hindsight. Such situations should not be judged too harshly. Murray J recognised as much in **Pepper.**[300] But this does not seem to me a case in which such leeway is appropriate – not least as the corrective opportunity of the second affidavit was not availed of.

199. The primary finding from the foregoing is that the Board was given to believe that Dublin Bus had confirmed in writing that there was spare capacity on the #130 bus to the city in the morning rush hour and from the city in the evening rush hour to serve the Proposed Development when, in fact, Dublin Bus had given no such written confirmation.

200. The Board's plea that *"the views of Dublin Bus on this issue were provided by way of summary by the Developer"* is, as it turns out, misplaced as to fact – though the Board was unaware of that when making its Impugned Decision. I would have to add that by the time of its last amendment of its Statement of Opposition, on 6 October 2023, that this plea was misplaced should have been apparent to the Board on the affidavits by then to hand – or at least apparent in part, (it knew the terms of the Dublin Bus "statement" but did not yet know that it had been prompted by an inquiry as to an office block in Dollymount).

Would it have Made a Difference?

201. On the evidence, we do not know, even now, what the true opinion of Dublin Bus was on the material issue of bus capacity. Its "statement" does not tell us and Savona's averments on affidavit are insufficient to the demands of the occasion. But, given the potential authority of Dublin Bus on the issue of bus capacity, it is far from inconceivable that Savona's invocation of that authority materially affected the Board's view of bus capacity and its consideration of the conflicting views of Savona's traffic expert and the

[299] Re Fay (A Debtor) [2020] IEHC 163 §79 et seq.
[300] Pepper Finance Corporation (Ireland) Ltd v Macken [2021] IECA 15 §12.

local residents. Admittedly in quashing a decision for material error of fact – not pleaded here – but nonetheless in reasoning which seems relevant here, Noonan J held in the **West Cork Bar** case[301] that *"The mistake, had it been realised, might conceivably have led to a different outcome. It seems to me that this is all that is required. It is not necessary to show that a different result would have ensued if the mistake had been discovered, merely that it might have. However, there is no way of knowing."* In this regard, see also **Talbot**[302] to the effect that "*a judge is not entitled to presume in advance what the outcome of an application will be*".

202. Similarly, there is now no way of knowing if correct information as to the view of Dublin Bus would have affected the Board's decision. But it might have and that suffices for Mr Stapleton's purposes. It is not for the court to speculate what the Board might have done had it known,

- that the planning application's account of the view of Dublin Bus was inaccurate.
- the true view of Dublin Bus – whatever it might be.

Taking Planning Applicants' Materials "at face value".

203. I asked counsel for the Board what effect all this might have on the case, given that the Board had no idea of the discrepancy when making its decision. Though he drew back somewhat from his initial response, it was revealing and, I have to say, echoed similar observations I have heard over the years from the Board. He initially said the Board was entitled to take the traffic expert's report "*at face value*". "*Face value*" is not a term of art. Generally, and in its ordinary meaning, it refers to the apparent value of a proposition or assertion before that value has been tested in any way.

204. This case illustrates, if only in hindsight rather than by reference to the materials before the Board, that such a proposition, while not entirely wrong, must be viewed with very considerable circumspection. Certainly, as applied to an objective, independent and impartial decision-maker such as the Board, it applies, if at all and ceteris paribus, no more to planning applicants' experts than to the content of other submissions, including those made by objectors. The Board is obliged to be not merely an independent decision-maker but an impartial one. As Cooke J said in **Cairde Chill An Disirt**,

> *"…… in Irish law it is undoubtedly the case that the Board is "an independent and impartial body established by law" having regard to the basis on which it is constituted and to the terms and conditions on which its members are appointed and by which they and the employees of the Board are bound under parts VI and VII of the 2000 Act."* [303]

And in **CHASE**,[304] the impugned decision was quashed on foot of objectively reasonable apprehension that the Board might not be capable of considering and determining Indaver's 2016 planning application in not merely an unbiased but (to the extent there is any difference) an impartial manner. Yet if a planning

[301] West Cork Bar Association v. Courts Service [2016] IEHC 388, [2017] 2 I.L.R.M. 281.
[302] Talbot v An Bord Pleanála, Kildare County Council, Ireland and The Attorney General [2009] 1 IR 375.
[303] Cairde Chill An Disirt Teoranta v An Bord Pleanála [2009] IEHC 76.
[304] Cork Harbour Alliance for A Safe Environment v An Bord Pleanála [2021] IEHC 203.

applicant's materials are to be taken at face value by an impartial Board, then ceteris paribus, why not the objectors' materials? And if both are taken at face value and are in conflict in a respect relevant to the Board's decision, the Board must explain the view it takes as between them.

205. A proposition that it may take materials at face value may not become a basis for the Board's not performing its duties of inquiry into the information put before it by a planning applicant – at least where that information is stateably put in issue by objectors whose personal experience lends at least appreciable apparent weight to their objections. Obviously, the converse also applies. As was said in **Weston**,[305] **Fernleigh**[306] and **Jennings**,[307] the Board's deployment of its expertise in objective scrutiny and critical interrogation of planning applications and its processing of them with scrupulous rigour is a pre-condition of curial deference to its decisions. In a somewhat different context, the dangers of the Board's taking materials placed before it at face value where those materials are disputed was adverted to in **ETI**.[308]

206. In one sense, the caselaw tends to be mobilised by the Board to put objectors in a Catch-22. The Board says it can take at face value materials put before it by planning applicants. That proposition has some degree of general validity when those materials are not stateably disputed. But, when they are disputed, the Board cites **O'Brien**[309] to the effect that *"… the Board is engaged in an administrative decision making process and not primarily in deciding disputes between parties."*

207. In **CHASE**,[310] Barniville J cited O'Brien to that effect in holding that the obligation in EIA to identify, describe, assess, investigate and analyse the environmental effects of a project did not, on the facts of that case, require the Board to specifically resolve disputes as to the credibility of the expert who had tendered erroneous data to it. Barniville J took the view that a dispute as to the credibility of that expert opinion did not require resolution by the Board. Crucially, it seems to me, by the time of its decision in CHASE, the Board had the corrected data from the challenged expert and could make its own decision on it. It must also be acknowledged that Barniville J rejected an argument that a different conclusion was required given certain remarks of O'Donnell J in **Balz** – to which I will come. Barniville J cited **Sliabh Luachra**[311] – which is authority that, while the Board need not always explicitly identify by name of objector, and address individually, every submission made to it, it is "*crucial*" that *"the points made in submissions should be addressed."* In other words, what matters is that the substance of submissions taken together be addressed rather than that they be each and discretely addressed by name of objector. However, it seems to me that, while O'Brien and CHASE are authority that the Board need not resolve disputes merely for the sake of their resolution and that it need not resolve disputes the resolution of which is unnecessary to its decision, neither is authority for a general proposition that the Board need never resolve disputes between protagonists in a planning process. As Costello J said in O'Brien, the Board is not engaged "*primarily in deciding disputes between parties.*" The word "primarily" is important. Where, as **Sliabh Luachra** holds, it is *"crucial"* that submissions be *"addressed"*

[305] Weston Ltd. v An Bord Pleanála [2010] IEHC 255.
[306] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525.
[307] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.
[308] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540, §261.
[309] O'Brien v An Bord Pleanála & Draper [2017] IEHC 773.
[310] Cork Harbour Alliance For A Safe Environment v An Bord Pleanála [2021] IEHC 203, §451 et seq.
[311] Sliabh Luachra v An Bord Pleanála [2019] IEHC 888, §38.

and where those submissions are contradictory, it may, depending on circumstance, be difficult or impossible to meaningfully "*address*" the substance of a submission, or "*truly engage*"[312] with it, without resolving that contradiction where its resolution is necessary to a proper planning decision.

Disputes as to Fact & Addressing Submissions

208. The planning process is more inquisitorial than adversarial and is directed more at the application of planning policy to particular planning applications and to making broad and multi-factorial judgements balancing disparate considerations,[313] than at making findings of fact or resolving disputes – see for example Barrett J in **Owens**[314] citing Clarke CJ in **Connolly**.[315] Clarke J made a similar point in **Slattery Pre-Cast**,[316] though as to assessing materiality of change of use, that the issue was *"not a matter subject to detailed calculation but rather involves a broad judgment taking into account a range of factors*." However, it does not seem to me that these observations necessarily rule out a necessity in particular circumstances that the Board be clear as to the factual basis of its decision and so, if needs be, as to resolution of disputes as to that factual basis.

209. Mr Stapleton cites **Dennehy**[317] as an example of the Board's duty to resolve a dispute the resolution of which is necessary to its decision. The background was a right of way dispute. Mr Dennehy sought to quash the Board's decision, pursuant to s.5 PDA 2000, that his erection of a gate on the disputed right of way was not an exempted development. That decision had been based on a finding by the Board that the way was habitually open to or used by the public, in the ten years preceding the erection of the gate, as a means of access to a lakeshore of natural beauty and recreational utility, such that Article 9(1)(a)(x) PDR 2001[318] disapplied the exemption which would otherwise have applied. Materials asserting and disputing such public user were before the Board. Meenan J held that, as far as those materials went and as to that public user, there was "*a clear conflict of evidence which the Board may have been entitled to resolve against the applicants*". However, the Board also had in its possession when considering the matter the detailed judgment of the Circuit Court following a trial on oral evidence in an earlier iteration of the dispute. Though addressing a different legal issue, the circuit judge had made findings as to the user of the way over the years. Essentially, he found that some user was permissive rather than as of right, such that there was no right of way. Other user was by trespassers.

210. Those findings, Meenan J held, had required the Board to conclude that the laneway was not *"habitually open to or used by the pubic ..... as a means of access to any ..... lakeshore ....."* such that *"the Board could only make its findings as to the user of the laneway by the public by ignoring the facts, as found by the Circuit Court"* that such users were trespassers. Meenan J considered that the Board erred in taking

[312] Balz v An Bord Pleanála [2020] 1 I.L.R.M. 367; Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, [2021] IESC 36, [2021] 2 I.L.R.M. 1.
[313] i.e. considerations not directly comparable – comparing "apples and oranges".
[314] Owens v An Bord Pleanála [2021] IEHC 532. §19[14].
[315] Connelly v An Bord Pleanála [2018] 2 I.L.R.M. 453.
[316] Cork County Council v Slattery Pre-Cast Concrete Ltd[2008] IEHC 291.
[317] Dennehy v An Bord Pleanála [2020] IEHC 239.
[318] Planning and Development Regulations, 2001.

the view that, "*whereas the Circuit Court was concerned with the issue of a right of way, the Board was not*". He could not *"see … that the Board is permitted to take a decision to the effect that the gate was not an exempted development on the basis of a public user which was unlawful*." The s.5 declaration was quashed – not for failure to consider a relevant consideration, but as irrational. I confess to respectfully wondering, as to the specific issue in that case, whether another view might not be taken – that habitual user need not necessarily be lawful user. The word "habitual" seems to relate more easily to the fact of, than to the legal quality of, user. And, after all, trespass (user as of right but without such a right and without consent) is the classic method of prescription of a right of way. And a s.5 declaration does not determine the legality or illegality of alleged trespass. It at least often determines, merely and in practice, whether the development in question requires planning permission (see, e.g. **Cleary**[319]) and it is well-established that exemptions are strictly construed against the developer – see **Doorly**[320] and **Dillon**.[321] In any event, I need not take that question any further. For present purposes, Dennehy seems to bear out Mr Stapleton's view that there are at least some disputes which the Board, in the performance of its functions, must resolve in order to decide a planning application. That proposition is perhaps weakened as to the Board's decision in a planning application or planning appeal, but is not necessarily undermined, by the fact that in Dennehy the Board was engaged in a s.5 declaration as opposed to in a planning application or planning appeal. In short Dennehy does assist Mr Stapleton but as part of an argument rather than as decisive in itself.

211. In a planning decision, the application of planning policy to a planning application does not occur in a factual vacuum. In my view, circumstances may arise in which the ascertainment of the truth of a disputed element of the factual matrix in which the planning decision must be made may require the Board to decide which version of those facts it should take as correct for the purposes of the application of planning policy to those facts. Where facts relevant to its decision are disputed, the Board may, depending on circumstances, have to resolve such disputes. Certainly, as O'Brien and CHASE demonstrate, the Board need not do so merely for the purpose of resolving the dispute as such or as an end in itself. But, depending on circumstances, it may need to do so for the purpose of ascertaining the facts upon which its decision must be based. Nor can it be ruled out, given the view of Hardiman J in **Shelly-Morris**, that the Board may in particular circumstances have to take a view of the general reliability of information provided by a person where that information has been shown to be unreliable in a particular respect. Indeed, the necessity to resolve a dispute is one reason why an oral hearing may be needed – though it is not necessarily the only means of such resolution, nor is it the only reason for holding an oral hearing. I would not rule out that disputed opinions may also need resolution. But in the present case the issue was essentially factual – whether the rush hour capacity of the #130 bus was already exhausted and inadequate to serve the Proposed Development. And as Charleton J said in **Weston**:

> *"Planning applications seek to change the character of a neighbourhood and landscape. The granting of permission can be the fulfilment of a modest domestic ambition or the opening up of what is perceived to be the path to riches. Human nature, with its inescapable tendency to exaggeration, evasion and deception, is an integral part of this process. The role of an inspector under the planning code is to bring objectivity to bear in circumstances where assertions may be made that are unsupported; where what appears on the ground may be different to the maps and plans supplied;*

[319] Cleary Compost and Shredding Ltd. v An Bord Pleanála [2017] IEHC 458 §102 et seq.
[320] Doorly v Corrigan [2022] IECA 6 §83.
[321] Dillon v Irish Cement Ltd. [1986] 11 JIC 2602, 2004 WJSC-SC 2866 (Unreported, Supreme Court, 26th November 1986).

> *and where wishful thinking may be seen in the cold light of reality. An inspector is entitled to make his own observations not only in the context of the arguments advanced in favour of a planning permission, but as to how facts may be assessed. It may be fair to observe, in the context of planning applications especially, that those who seek permission rarely make errors against their own interest."*

212. As I said, Barniville J, in **CHASE**, considered that the observation of O'Donnell J in **Balz**,[322] which I set out below, did not amplify the duties of the Board as they related – more accurately, did not relate – to the particular issue of expert credibility alleged to have arisen in that case, any necessity of the resolution of which had abated in light of the Board's receipt of the corrected data. However, Barniville J clearly was not expressing a view that the considerations identified by O'Donnell J are generally, much less invariably, irrelevant to the scope of the Board's duties as they may, depending on circumstance, necessitate the ascertainment of the veracity of facts to which planning policy falls to be applied in deciding a planning application, or the ascertainment of the reliability of expert opinions, where such ascertainment may, incidentally rather than for its own sake, require the resolution of a dispute between protagonists. O'Donnell J said:

> *"… It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live…"*[323]

213. A unanimous Supreme Court in **NECI**[324] (post-dating CHASE[325]) affirmed the importance ("*The judgment emphasises …*") of that passage in **Balz**. Remembering that we are concerned only with "*main reasons on main issues*", this passage has a number of implications:

- It is necessary, but insufficient, to "*address*" submissions – in the mere sense of the Board's directing its mind to them and recording that it had done so.

- To "*address*" a significant submission requires more than merely acknowledging that it was made and recording its content – it requires engagement. As MacMenamin says in NECI, *"Balz makes clear that a decision-maker must engage with significant submissions."* [326]

- It is necessary, as a distinct matter, that the Board's reasons must show that it had "*truly engaged*"[327] and explain *"why they are not accepted". "This is fundamental …."*[328]

[322] Balz v An Bord Pleanála [2019] IESC 90 §57.
[323] §57.
[324] Náisiúnta Leictreach Contraitheoir Éireann v Labour Court, [2021] 2 I.L.R.M. 1. ("NECI") §152 et seq.
[325] Though I do not consider the decisions incompatible, given that by the time of the Board's decision impugned in CHASE the Board had received the corrected data.
[326] NECI §155.
[327] NECI §157.
[328] NECI §155.

- **Sliabh Luachra** deems this obligation "*crucial*". It is also to be understood in terms of the substantive issue the submissions raise – rather than by reference to the identity of each person, and his or her discrete submission, who has made a submission on that issue. There is no need for slavish repetition of response to each by name of numerous objectors who made the same point – as long as, crucially, the substance of the point is dealt with.

- It seems to me to follow that where the explanation of *"why they are not accepted"* in substance consists in the acceptance of one or other of disputed and contradictory allegations of fact or expert opinion, such that the decision is in substance explicable by the acceptance of one and the rejection of the other, nothing in Balz suggests that the true explanation need not be given. If the acceptance of one and the rejection of the other is unreasoned it is unacceptable. If it is reasoned, all that is required is that the reasons be briefly stated – which, given the reasoning which has, ex hypothesi, occurred, should not ordinarily be too burdensome. Indeed, Balz says the contrary. If, in the circumstances of a particular case, the Balz requirement of explanation of *"why they are not accepted"* requires of the Board resolution of a factual dispute or a dispute between experts, so be it.

The Inspector noted the Absence of the Dublin Bus Correspondence & General Practice as to Enclosure of Documents

214. The Inspector records *"I note that correspondence in this regard from Dublin Bus does not appear to have been submitted with the application documentation."*[329]

215. She does not expressly follow this observation through to any specific conclusion that something ought to be done or inquiry made in this regard or that nothing need be done or that the omission required one or another inference as to transport capacity. However, given her conclusion that she was "*satisfied*" on the transport capacity issue, her position and that of the Board is apparent.

216. Nonetheless, and quite apart from the context of information which came to light in these proceedings, it is notable that she regarded the absence of the correspondence as worthy of note. It appears to follow that she had expected to see the correspondence to and from Dublin Bus – that its inclusion would have been normal in the ordinary way as a matter of good and proper practice. One may add, of course, that as a practical matter of good practice, nothing could have been easier for Savona than to include the correspondence to and from Dublin Bus. But as Charleton J noted in **Weston**, "*those who seek permission rarely make errors against their own interest.*"

217. That is not to say that the Inspector ought to have anticipated the information which came to light in these proceedings. But, if only in hindsight, that information, belatedly to hand, does vividly illustrate the

[329] Inspector's report §11.10.9.

necessity of such good and proper practice and the need for active scrutiny of applications by the Board. It is well-established that, short of irrationality, the Board is the final judge of the adequacy for its purposes of the information before it – the Board cites the consideration of the relevant authorities in CHASE[330] as to the application of that general principle to the adequacy of the content of an EIAR. I accept that as a principle not confined to EIA – it applies generally in planning applications and so applies here. And the rules of evidence, not least the rule against hearsay, do not apply in processes before the Board. That said and as ample authority cited in this judgement records, a proper scepticism and investigative scrutiny is expected of the Board.

218. To any extent that the Board's plea that it was not "*obliged to have evidence before it from specific sources, and/or to seek out such evidence and/or undertake an investigatory role*" proceeds from a general view of its role in planning matters generally – as opposed to a view specific to the circumstances of this case – I respectfully disagree. My comments above as to taking materials at face value apply here. Also, and ordinarily – in non-SHD matters – the Board has ample statutory powers of proactive investigation. For example, it can summon any person and documents to an oral hearing.[331] The reason is obvious. As the Board itself observes on occasion, a planning application is not an adversarial lis inter partes between developers and objectors in pursuit of their respective private interests. At base, and leaving aside the private interests of objectors, consideration of a planning application is an inquiry into the question whether the private interests of the planning applicant are at least reconcilable with the public interest in proper planning and sustainable development. That being so, the Board cannot be limited to consideration of the positions taken by developers and objectors in pursuit of their respective private interests.[332] For example, unopposed planning applications can be refused. The Board in determining an appeal may take into account matters other than those raised by the parties or by any person who has made submissions or observations if they are matters to which, by virtue of the PDA 2000, the Board may have regard.[333] While in many, perhaps most cases, investigation beyond the contributions of protagonists and statutory consultees will be unnecessary, that does not imply that the Board has no investigatory role.

219. It seems to me that where a party in the process calls in aid the alleged opinions of or facts confirmed by non-parties, the Board must at least ask itself whether that information is reliable and, as did the Inspector in this case, whether it is reasonable to expect that the party citing the non-party would enclose a letter or other document emanating from the non-party confirming the opinion or facts in question. Here, of course, Savona had asserted that Dublin Bus had expressed in writing an opinion which, as we now know, it had not in fact expressed in writing and Dublin Bus's e-mail – and the question which prompted it – were in Savona's possession.

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[330] Cork Harbour Alliance for A Safe Environment v An Bord Pleanála [2021] IEHC 203 §378 et seq. They also cite Clarke J in Sweetman v An Bord Pleanála, Ireland & Clare County Council [2007] IEHC 153, [2008] 1 IR 277 to the effect that "The limitations inherent in the O'Keeffe v An Bord Pleanála irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors."

[331] s.135 PDA 2000.

[332] That general observation does not preclude, of course, that the private interests of developers and objectors may coincide with or indeed be primarily motivated by the public interest.

[333] s.137 PDA 2000.

220. I am reminded also of the assertion by the developer in **Fernleigh**[334] in a daylighting issue that the BRE Guide does not apply or is applied in some generally attenuated way by "*the majority of councils in Ireland and the UK*", to apartment developments as opposed to "*traditional house layout and room usage*" and that "*This has been confirmed as acceptable and standard practice by the author Dr Paul Littlefair".* Counsel for the Board, in that case, correctly placed little or no reliance on the Developer's reliance on the alleged view of Dr Littlefair. The judgment observed that *"a sweeping, unsubstantiated and likely unverifiable assertion as to what the "majority of councils in Ireland and the UK" habitually do or do not do, by way of the disapplication of a standard, inevitably invites healthy scepticism"* and that *"the citation of the views of Dr Littlefair is entirely unattributed as to precise source or content or context, as to when or to whom they were expressed, in answer to what question or whether in public. While the rule against hearsay does not, of course, apply and weight is a matter for the Board, nonetheless some statements are just clearly and self-evidently weightless."* For those and other reasons the developer's submission in Fernleigh was rejected. I emphasise that I make no retrospective finding of fact as to the position in Fernleigh and cast no aspersion on anyone involved in that case. But it bears noting that, in this case, Dr Littlefair himself has sworn an affidavit and exhibited his report, the entire premise of which is the application of the BRE Guide to apartment developments and he cites the Apartment Guidelines[335] to that effect.

221. As this case and Fernleigh illustrate, all this is not merely a matter of bureaucratic or legalistic fussiness or of i-dotting and t-crossing. The Board is entitled to say that, as a matter of fact, it had no particular reason to suspect, in either case, error in the citation of the views of Dublin Bus and Dr Littlefair respectively. But the absence of such reason will often, perhaps generally, be the case – and especially will be so if the Board seeks to insist on an entitlement to take planning applicants' submissions at face value. And, of course, there is Charleton J's observation in Weston as to the general tendency of errors. The very fact that particular reason for suspicion of error will often be absent implies that guarding against error should be approached via the general practice of the Board as to its expectation of the content of planning applications and, for that matter, submissions thereon, as opposed to approaching the issue via ad hoc reactions in particular cases. While, no doubt, there will be room for exception, and questions of degree and flexibility of practice may arise, I respectfully suggest to the Board that undiscovered errors, and judicial reviews in consequence, may be reduced by a general practice that where planning applicants invoke the opinions and authority of or facts confirmed by third parties, the record generated by such third party of such opinion or facts should be enclosed or, at least, the Board should be referred to where it may be found and verified.[336] Certainly, and though I do not suggest it occurred in this case, there is no room for a tactical decision by a planning applicant or objector to not enclose or point to such a record on the basis that such a course will better advance the position of the protagonist addressing the Board. Indeed, it seems to me that de facto, that enclosure of such relevant documents is already the practice in most planning applications. No doubt that is why the Inspector considered the omission notable in the present case – a matter to which I will return below.

[334] §58.
[335] He cites the 2018 edition rather than the 2020 edition, but nothing turns on that.
[336] In this respect I have in mind public documents and, arguably, reliable documents readily available to the public.

Was the Board Obliged to Address Transport Capacity, What Does it Mean to Do So & Did it Do So?

222. There is no real dispute but that transport capacity was a main issue in the planning application – an issue which the Board was obliged to address. What is disputed is what it means to address the issue, the nature of the steps the Board was obliged to take to address it and whether it failed in that regard.

223. While one might say that the adequacy of public transport serving a particular location can be a matter of opinion as adequacy is a disputable concept and questions of degree arise, as observed in a **Ballyboden TTG** case,[337] it is an essentially factual and very practical issue. In this case, and in one sense, it boils down to the question, are there enough buses at peak hours?

224. As to the necessity of resolving transport capacity issues where they arise in the context of SPPR3, see that Ballyboden TTG case, including its citation of **O'Neill**.[338] As is said in Ballyboden TTG: "*as to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical – issue*" and "capacity" and "frequency" are identified as linked but distinct concepts. The significance was also noted in that case that, as here, there were multiple expressions of local concern about capacity inadequacy and buses passing bus stops full in peak hours and "*The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the buses in question and by the expected populations of developments already permitted in reliance on existing public transport*".

225. As has been noted, on the pleadings in this case, the issue of adequacy of public transport does not arise in the context of SPPR3 of the Height Guidelines. Nonetheless, the adequacy of public transport was a main issue for consideration by the Board in granting the Impugned Permission. The short way of explaining why this is so, is to observe that:

- The signal interdependence of compact development of cities, large scale housing development and adequacy of public transport is pervasive in planning policy – as noted above.
- Its importance was recognised in the planning application documents – not least in the TTR and the MMP.
- It was the subject matter of considerable public submission disputing the content of those documents as they relate to present transport capacity
- Its importance was recognised in the Inspector's report.

226. However, it remains to be examined what considering and addressing the issue means in terms of the conclusion required of the Board. Noting this is not an SPPR3 issue, it seems to me that,

[337] Ballyboden Tidy Towns Group v. An Bord Pleanála [2022] IEHC 7 §90 et seq.
[338] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356.

- Where pleaded as an SPPR3 issue, the present adequacy of public transport is a criterion set by §3.2 of the Height Guidelines, satisfaction of which must be demonstrated as a precondition to the mandatory application of SPPR3.

- In contrast, where not pleaded as an SPPR3 issue, the adequacy of public transport,

    - while a "main issue", is not a precondition to permission. It is, rather, a factor in the multifactorial broad judgment which informs a planning decision. Inadequacy of public transport does not formally preclude permission though, given the weight of planning policy on the issue, it might be surprising were the Board to grant permission despite significant inadequacy.

    - is not confined to an issue of the present adequacy of transport capacity.[339] The Board is entitled to give weight, as it considers appropriate, to any prospects of improved capacity. However, as has been seen, in this case the Board saw no such prospects.

227. My view that it was not necessary to granting permission that the Board find that the public transport provision – including as to capacity – was adequate or would in future be adequate to serve the Proposed Development bears some elaboration. It does seem to me that, as to public transport, given both its prominence in planning policy and the vehement controversy particular to the present case, a decision on the issue was required. But in a multifactorial planning decision made on a broad judgment in an imperfect world, it might be that the Board would properly consider a degree of inadequacy of public transport capacity tolerable in the context of other and countervailing virtues of the Proposed Development. Inadequacy of public transport capacity comes in varying degrees – some perhaps tolerable to the planning decision-maker, others perhaps not. What was required for purposes of a decision on the grant or refusal of permission for the Proposed Development was a decision whether, considered in the context of all other relevant planning considerations, public transport was adequate, tolerably inadequate or intolerably inadequate to serve the Proposed Development. Adequacy and what, if any, degree of inadequacy is or is not tolerable is for the Board to judge and the Board is reviewable as to merit in this regard only for irrationality. The same may generally be said for its view of the adequacy of the information before it to inform a decision in that regard.

228. Here, the Inspector considered that the area is served with a regular, reliable, public transport service. As I have said earlier, that conclusion as to reliability encompassed a view as to capacity. She considered that "*there may be scope to improve the service*" but was nonetheless "*satisfied*". This necessarily implies that any inadequacy of capacity is tolerable. Accordingly, I do not think it can be said that the Board did not resolve the issue of transport capacity to the extent necessary to inform its decision.

229. It could be suggested that the Inspector's reasoning leading to that resolution was unsatisfactory as she did not articulate whether she

- accepted the residents' account but found it represented tolerable inadequacy or

[339] As to which see O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356.

- rejected the residents' account and upheld the TTA and, if so did not give reasons for doing so.

It might well be said that her reasons should have explicitly recorded and explained her preference as between the TTA and the residents and whether capacity was or was not adequate before deciding that any inadequacy was tolerable. But no reasons challenge is pleaded and so I cannot quash the decision on that basis.

Inference of the Board's Reasoning

230. However, adequacy of reasons apart, a question arises as to what, as a matter of fact, was the Board's reasoning as to public transport capacity. The TTA argued that the capacity was adequate – but was based on only a single day's data. The objecting local residents argued the opposite, based, one must infer, on long personal experience over months and years. Their argument might or might not stand up to close examination: perhaps such objectors have the luxury of expecting a perfect service and their evidence may not have been specific to the locale of the Proposed Development, as was the TTA.

231. Still, it is difficult to avoid the factual inference, as a matter of probability, that in choosing between these poles, the Board relied, at least appreciably, on the assertion that Dublin Bus had confirmed in writing that public transport capacity serving the nearest bus stop was adequate at rush hour. Dublin Bus as an independent disinterested party (at least as to the Proposed Development) and as the service provider presumptively highly knowledgeable on the capacity of its service and its adequacy, is an obvious and primary source of relevant information as to the capacity of its own bus routes. I therefore infer as a probability, and so find as a matter of fact, that the Board, in choosing between the irreconcilable accounts of public transport capacity provided to it by Savona's transport survey and the objecting residents relied at least appreciably on the assertion that Dublin Bus had confirmed in writing that public transport capacity serving the nearest bus stop was adequate in both peaks in both directions. And that assertion, as we have seen, was incorrect.

232. For reasons I have set out above, I also find on the evidence before me that, though the Board could not have known it on the evidence before it, that reliance was mistaken. Dublin Bus had not confirmed in writing that public transport capacity serving the nearest bus stop was adequate at peaks – at least in the directions that mattered. And the evidence tendered to the court by Savona, which was not before the Board, is in any event entirely inadequate to establish oral confirmation to that effect.

Could the Board, procedurally, have taken further the issue of the view of Dublin Bus?

233. As to the Board's options of further inquiry, we come up against the rigidity of the 2016 Act in severely limiting the ascertainment and circulation of additional information during the SHD planning process. That rigidity is both binding in law and understandable in substance in view of the policy of expedition (often not, as matters transpired and as seen in hindsight, achieved) proceeding from the urgency

of the housing crisis, which informed not merely the detail of the 2016 Act but its entire scheme of planning application direct to the Board.

Oral Hearing?

234. Mr Stapleton argues that the Board should have held an oral hearing. The Board, in ordinary planning appeals has an "*absolute discretio*n" whether to hold oral hearings. It is clear however that even an absolute discretion cannot be exercised arbitrarily. It does not confer a Louis XIV-style freedom of action on An Bord Pleanála[340] and must be exercised within the legal limits of the applicable statutory framework, fundamental reason and common sense, rationality, fairness, consideration of the relevant and exclusion from consideration of the irrelevant. The cases in this regard were reviewed in an **FoIE** case[341] to a conclusion that "absolute discretion", as opposed to mere "discretion", does not restrict the Court's power to review a decision made in the exercise of that discretion. In **Egan**,[342] as to an absolute discretion to hold an oral hearing on a compulsory purchase issue, Hedigan J said that *"The Board's discretion as to whether to hold an oral hearing must be exercised in accordance with constitutional justice. The question of whether an oral hearing is required will depend on the individual circumstances of each case. In cases where there is a factual dispute to be resolved, an oral hearing will often be the only fair and adequate means of resolving same."*[343]

235. The Board's discretion whether to hold an oral hearing is, at least on a literal reading, considerably restricted in the SHD process by **s.18 of the 2016 Act** which provides that that, in deciding whether to hold an oral hearing, the Board:

> *"(i) shall have regard to the exceptional circumstances requiring the urgent delivery of housing as set out in the Action Plan for Housing and Homelessness, and*
> *(ii) shall only hold an oral hearing if it decides, having regard to the particular circumstances of the application, that there is a compelling case for such a hearing."*

236. I confess to doubting that this provision as to a "compelling case" makes any great difference beyond mere emphasis, save in cases where the Board might otherwise have exercised its discretion in favour of an oral hearing even though not obliged by fair procedures requirements to do so. Interestingly, **Browne**[344] suggests that, even under the "*absolute discretion*" rubric, successful judicial review of refusal of an oral hearing would require "*a compelling reason as a matter of law why one should be held*". More importantly, it seems to me that **Waterville Fisheries**,[345] which Browne cites, identifies a constitutional bedrock requiring a constitutional, and not a literal, interpretation of the phrase "*absolute discretion*" as meaning a "*wide and flexible power*" to decide whether to hold an oral hearing. Logically, the same constitutional bedrock requires

[340] Morris v An Bord Pleanála [2017] IEHC 354.
[341] Friends of the Irish Environment Ltd v An Bord Pleanála & P. Plunkett Limited [2018] IEHC 136.
[342] Egan v An Bord Pleanála & Athlone Town Council [2011] IEHC 1.
[343] Citing Galvin v Minister for Social Welfare [1997] 3 I.R. 340 in which Costello J concluded "that without an oral hearing it would be extremely difficult if not impossible to arrive as a true judgment on the issues which arose in this case." It is a little unclear whether Hedigan J was expressing his opinion or merely reciting submissions but the principles recited are sound.
[344] Simons, Planning Law, 3rd Ed'n § 6–350.
[345] Waterville Fisheries Development Ltd v Aquaculture Licence Appeals Board (No. 2) [2014] IEHC 381.

the same interpretation of the "*compelling case*" requirement of s.18 of the 2016 Act. In that light, the requirement suggested obiter in **Morris**[346] (in which Waterville was not cited) of "*quite remarkable circumstances*" may pitch the requirement too high. However, the discretion is wide and flexible and it is clear that in practice, on the planning side at least and arguably more generally, its exercise in a given case is difficult to upset, as Browne suggests.

237. Counsel for Mr Stapleton cited various cases[347] – none planning cases – for what he submitted was the necessity of an oral hearing to resolve the dispute in this matter as to the adequacy of transport capacity. Save as indicated below, I do not find that they assist as to detail. They relate to a quite different statutory scheme relating to the Financial Services and Pensions Ombudsman, and to a different, adversarial, form and subject-matter of investigation and dispute resolution.

238. There is no single, universal or absolute standard of fairness of procedure. The requirement responds to circumstance and to the nature of the investigation at hand. It is fact-sensitive and flexible. In **Baskaran**, to which Mr Stapleton properly drew my attention, Binchy J, in holding that an oral hearing had not been necessary to resolve a dispute of medical opinion as to the appellant's psychological fitness for work, cited Costello J in **Galvin**[348] to the effect that:

> *"There are no hard and fast rules …. as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

In **Greenstar**[349] McKechnie J agreed with Costello J as to this passage.

239. In **Davy**[350] it was said that "*The requirements of natural justice will vary with the nature of the case"* and *"may vary with the particular facts and circumstances of the case*". In similar vein, the UK Supreme Court said in **Stirling**,[351] *"Fairness is a protean concept, not susceptible of much generalised enlargement."* In **Shadowmill**[352] it was acknowledged that the question whether an oral hearing is required is intensely fact-specific and required the application of broad principles of commonsense and fair play to those facts. The question is whether the process was so unfair as to be unlawful – was the unfairness significant?

[346] Morris v An Bord Pleanála [2017] IEHC 354.
[347] O'Neill v Financial Services Ombudsman [2014] IEHC 282; O'Driscoll v. Financial Services Ombudsman [2014] IEHC 462, Baskaran v Financial Services and Pensions Ombudsman [2019] IEHC 167.
[348] Galvin v Chief Appeals Officer [1997] 3 I.R. 240.
[349] Greenstar v Dublin City Council [2013] 3 IR 510.
[350] J&E v Financial Services Ombudsman, Respondent [2010] 3 IR 324.
[351] R (Stirling) v Haringey London Borough Council [2014] PTSR 1317, paras 23–25
[352] Shadowmill v ABP & Lilacstone [2023] IEHC 157 §268. Cherwell District Council v Oxfordshire CCG [2017] EWHC 3349 (Admin) §12; R(Holborn Studios Ltd) v Council of the London Borough of Hackney; [2017] All ER (D) 121 (Nov) [2017] EWHC 2823 (Admin); R(Suliman) v Bournemouth, Christchurch and Poole Council [2022] EWHC 1196 (Admin), Wexele v An Bord Pleanála [2010] IEHC 21, §20. State (Haverty) v. An Bord Pleanála, [1987] I.R. 485.

240. Mr Stapleton, in his objection to the Board, did not request an oral hearing. Nor did the Clontarf Residents Association, of which he is a member. As to "*the rules under which the decision-maker is acting*", the statutory scheme of the 2016 Act, was founded in the urgency of addressing the exceptional circumstances of the national housing crisis and imposing truncated procedures on strict and short time limits (though in hindsight illusory). The 2016 Act introduced a "*fast track*", *"streamlined procedure for dealing with applications for permission for SHDs"* – **Crekav**.[353] S.18 of the 2016 Act, in restricting the Board to holding oral hearings only where there is a compelling case for such a hearing, obliges the Board to not hold oral hearings in at least some circumstances in which otherwise they might have chosen, even though not obliged, to do so. Clearly, the 2016 Act aimed at reducing delay in the SHD planning process as compared to other planning processes – see for example s.9(9) and s.9(10) and s.18 of the 2016 Act and Article 303 of the SHD Regulations 2017.[354] It is equally clear that the scheme of the 2016 Act is that oral hearings will be held in SHD planning applications only where legally necessary. While a decision not to hold an oral hearing cannot be at the expense of significant unfairness, the 2016 Act does require a discerning approach to significance of unfairness in light of the urgency identified.

241. The question whether an oral hearing was required in this case must be considered here by reference to,

- the information before the Board at the relevant time – unaffected by the hindsight we now have of the true position as to the information provided by Dublin Bus regarding public transport capacity.
- any possibility, as apparent at that time, of less disruptive means of resolving the issue.

In my view, while it is useful to distinctly identify these matters for consideration, the decision falls to be made holistically.

242. The information before the Board, included irreconcilable opinions of Savona and many residents as to adequacy of public transport. It also included, taken at face value, the assertion that Dublin Bus had in writing confirmed the adequacy of public transport at rush hours in all directions. The Board at the time did not know that such was not the case. However, the information before the Board also included the fact that, as the Inspector had explicitly noted, Savona had not enclosed that written confirmation by Dublin Bus. Absent controversy, it is easy to see that this omission could be overlooked without unfairness or legal detriment to the planning decision. But there was controversy. And it is readily apparent that the view of Dublin Bus was likely to be significant in resolving that controversy to whatever degree resolution was required to inform the Impugned Decision. So, as to whether an oral hearing was required, the question arises: did the Board have open to it the means, short of an oral hearing, of at least advancing the position as to the reliability of the assertion that Dublin Bus had in writing confirmed the adequacy of public transport at rush hours in all directions? It does seem to me that, in the quite particular circumstances of this case, such a means was at hand – at least as a first resort.

[353] Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 §§257 & 258.
[354] Planning and Development (Strategic Housing Development) Regulations 2017.

Article 302(6) SHDR 2017

243. In oral argument, counsel for Mr Stapleton[355] disavowed arguing that an oral hearing was the only means of resolving the dispute as to adequacy of public transport. He cited **Article 302(6) SHDR 2017**.[356] It provides that:

> *"The Board may, at any time before making its decision, request any person, authority or body to make a submission or observations or elaborate upon a submission or observations in relation to an application."*

244. The Board in reply[357] raised no point that **Article 302(6)** had not been pleaded – in my view wisely. Mr Stapleton pleaded that the Board had no evidence from Dublin Bus and "*failed to obtain*" its view. In this regard see **Eco Advocacy**[358] to the effect that what is required is merely *"that applicants plead their case … in terms which make it acceptably clear to the other side and the court as to what the point is. That does not require that "the provisions at issue be enumerated" or any other specific rule, as long as the point is acceptably clear. The demand for enumeration is a fictitious standard …".* In any event, the Board did not raise a pleading point. Rather it cited **Crekav**[359] and **Crofton**[360] to the effect that even had the Board, via Article 302(6), sought additional information as to the position of Dublin Bus, it could not have circulated it for further comment. From this proposition it argued that an Article 302(6). The Board's premise is correct: its conclusion is misconceived.

245. Remembering that the word "evidence", as used in relation to planning procedures, does not have the technical meaning which it has in court proceedings, and approximates more to an idea of reliable materials, it is notable in this case that the view of Dublin Bus and materials confirming that view could have been obtained – no doubt readily – by Article 302(6) requests either to Dublin Bus or to Savona for a copy of the written confirmation to which the TTA had referred. In my view, Mr Stapleton's pleadings, on a fair, reasonable, and relatively permissive rather than overly strict reading, (**Four Districts**,[361] **People Over Wind**,[362] **O'Donnell***[363]*) suffice to cover both possibilities.[364]

246. I need not rehearse here the detailed consideration by Barniville J in **Crekav**[365] of the question of the Board seeking further information in SHD planning applications. Having noted that the position under the PDA 2000 and the 2016 Act did not avail the applicant for permission and for judicial review in that case (the Board had refused permission), Barniville J did not find it necessary to decide the question whether further

[355] Day 2, 14:20 et seq.
[356] Planning and Development (Strategic Housing Development) Regulations, 2017 (SI 271 of 2017)).
[357] Day 3, 12:24.
[358] Eco Advocacy CLG v. An Bord Pleanála [2023] IEHC 713.
[359] §214 et seq.
[360] Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704 §167.
[361] Four Districts Woodland Habitat Group v. An Bord Pleanála [2023] IEHC 335.
[362] People Over Wind & Anor v. An Bord Pleanála & Ors (No. 1) [2015] IEHC 271.
[363] O'Donnell v. An Bord Pleanála & Drumakilla [2023] IEHC 381.
[364] Note: this approach is not intended to dilute the insistence on pleading in judicial review. Once, on a fair and reasonable reading, the meaning of the pleading is discerned, the party pleading is held strictly to it.
[365] §214 et seq.

information should have been sought from the applicant for planning permission via Article 302(6)(b). Nonetheless, Barniville J, apparently taking it that Article 302(6)(b) allowed a request of an applicant for SHD planning permission, said obiter:

> *"I tend to agree with the Board that in so far as Regulation 302(6)(b) confers a discretionary power on the Board to request a submission or observation or an elaboration on them, it ought to be construed as applying only to requests dealing with minor, non-material clarifications, which would not require to be circulated to others or to the public to ensure effective public participation. The Board is probably correct in that regard."*

247. I respectfully confess to being unsure why the Board, in a fast-track process, would bother to seek minor, non-material clarifications and, in passing, I express curiosity as to whether Article 302(6)(b) has in practice proved a dead letter? While interpolation is a legitimate technique of statutory interpretation and assists purposive interpretation in accordance with the scheme of an act, implying the addition to Article 302(6)(b) of the words "*save that the exercise of such power shall be confined to submissions or observations as to matters not material to the decision of the application for planning permission*", or similar words, counterintuitively suggests the conferral by the article of a more-or-less pointless power. And if material information is missing from the Board's file – what then? Is the decision on the particular issue to which it relates (as opposed to necessarily – but nonetheless possibly – the entire decision on the planning application) to go against whomever failed to tender it? That would seem to be the logic of a statutory scheme in which all parties are expected to "front-load" their contributions to the SHD planning process and the pre-application process specifically aids the planning applicant in doing so. But, in truth, it is not at all inevitable that even a material clarification would require further circulation. As is said in **Haverty**[366] and **Southwood**,[367] someone must have the last word. In such a case, penalising whomever failed to front load their application or submission could prove excessive and even counterproductive – for example, it might stymie development desirable in the housing crisis.

248. The Board, in making an Article 302(6)(b) request, may well not know in advance of receipt of the information whether fair procedures would require its further circulation. If, on receipt of the information, it is apparent that fair procedures would not require its further circulation, no difficulty arises and the Board has the benefit of material material to its decision. If, on the other hand, it is apparent that fair procedures would require further circulation but such circulation is prevented by the 2016 Act, the Board will have to consider how best to proceed. I need not here decide what the Board's course should be. It may vary with circumstance. For example, in a front-loaded process, it might perhaps consider that material received from a protagonist should be ignored if fairness required, but the 2016 Act prevented, its circulation. Perhaps a different view might be taken if the information had been received from a non-protagonist and might depend on the content and likely influence of the information. Or the Board might consider that the material received rendered the case for an oral hearing compelling within the meaning of s.18 of the 2016 Act.[368] No doubt, statutes which seek to inhibit fair procedures, even though for good reason, tend to throw up such difficult issues. However, I have difficulty seeing that a statutory authority can decline to exercise a power to

[366] State (Haverty) v An Bord Pleanála [1987] I.R. 485.
[367] Southwood Park Residents Association v An Bord Pleanála & ors [2019] IEHC 504.
[368] Properly, s.134(1) PDA 2000 as temporarily substituted by s.18 of the 2016 Act.

seek information material to its decision merely because of a risk, which may or may not eventuate, that a difficulty as to fair procedures may ensue and require resolution in accordance with law.

249. However, as was the view of Barniville J on Article 302(6)(b), mine is obiter. I need not decide the issue as it seems to me that, in the quite unusual circumstances of this case, either view produces the same result as one considers the Board's position as it was prior to making the Impugned Decision.

The Board's Position Prior to Making the Impugned Decision

250. As I have said, and though she didn't suggest any resulting course of action, the Inspector specifically noted that Savona had not provided the correspondence to and from Dublin Bus. It seems unlikely that she did so for no reason. She clearly considered the omission notable and I infer that she would have considered the enclosure of the correspondence preferable. In light of her placing the observation very much in the context of the live dispute as to transport capacity adequacy, I think it proper on balance to infer that she thought its exclusion unusual and at least in some degree undesirable, if only as a matter of ordinary good practice and transparency. Indeed, as Barniville J observed in **Crekav**,[369] the 2016 Act "*fast track"* is premised on the expectation *"that an applicant will ensure that its documentation is as complete as possible at an early stage in the process."*[370] That is part of the price paid by developers for the fast-track direct application to the Board which the SHD process affords. Indeed, in Crekav it was noted that the restriction on oral hearings in SHD matters was, at least in part, *"To maximise the efficiency of the … quality of preparations for applications made by housing providers".*

251. It is difficult to see that Savona should have had the slightest legitimate difficulty in enclosing with its SHD planning permission application its correspondence to and from Dublin Bus on the public transport adequacy issue.

252. Nonetheless, despite the controversy as to adequacy of public transport and my view that it was a main issue in the planning decision, and despite what we can now see in hindsight, the Inspector was entitled to anticipate, at that time[371] and as a matter of considerable probability, that

- written confirmation by Dublin Bus would be readily available from Savona and would justify its description by Savona, and
- accordingly, that its provision would prove to be a minor matter as contemplated in the view Barniville J took of Article 302(6)(b).

No doubt such an anticipation would have proved justified in the vast majority of similar cases.

[369] Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 §§87, 257, 258. See also Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704 §46.
[370] Emphases added.
[371] i.e. when considering the SHD planning application.

253. I cannot see why such a clarification (per Barniville J) or elaboration (per Article 302(6)(b)) should not consist of the enclosure to the Board of correspondence of which an account has already been given in the SHD planning application on an issue on which the objectors had already been heard. Nor would provision of the written confirmation by Dublin Bus delay the operation of the "*fast track*". Not least, the party primarily interested in speed, Savona, was a party of whom the information could be required and the information in question was known to be in its possession. Savona would surely have provided the correspondence with Dublin Bus in short order on request – if not, indeed, by return. In all probability, and from the Inspector's perspective at the time, all that was required was a letter by way of Article 302(6)(b) requirement to Savona and a delay of no more than a day or two. And, if its content was as anticipated, as warranted by the TTA already in the objectors' possession, on an issue on which the objectors had already made their views known, it is difficult to see that a fear of being unable to circulate the reply to the objectors should have restrained the Inspector from seeking the correspondence with Dublin Bus.

254. No doubt had she sought and got the correspondence, the Inspector would have been surprised by its content. But that we now know that her anticipation of the content of the reply would not have been realised does not alter the position as it should have been apparent to the Inspector when considering the file. Accordingly, and from her perspective at that time, she had every reason to consider that bespeaking that correspondence would be within the scope of Article 302(6)(b) as understood by Barniville J – a matter of, as it were, keeping the file right.

255. The Board is correct that **Crekav**[372] and **Crofton**[373] establish that the Board could not have circulated for further comment, either to Savona or to other participants, any additional information as to the position of Dublin Bus which might have come to hand on foot of an Article 302(6)(b) request. As explained above, I do not think this argument disposes of the issue of recourse to Article 302(6)(b) as:

- As I have observed, the Board might have directed its Article 302(6)(b) request not merely to Dublin Bus but instead or also to Savona who clearly had, and could be anticipated by the Board to have had, its correspondence with Dublin Bus in its possession.

- The information would in any event have confirmed the position of Dublin Bus, whatever it was.

- It is not for me, or anyone at this point, to decide what would have been the Board's reaction to the position of Dublin Bus one reliably ascertained. However, some possibilities can be sketched. It might have determined that:

    - It had adequate information on which to proceed without further inquiry and that, even had it the power to circulate further, it would not have done so and consderations of fair procedures would not have required it to do so.

    - It had adequate information to proceed without further inquiry in light of a failure of Savona to

[372] §214 et seq.
[373] Crofton Buildings Management CLG v An Bord Pleanála [2022] IEHC 704 §167.

realise the expectation, of both the 2016 Act and the Board, that an applicant for SHD planning permision, having had the benefit of the pre-application consultation process, will "front load" its preparation to ensure that the planning application and enclosed documents are as complete as possible when the application is made.

- The circumstances were compelling such that an oral hearing was required.

256. Beyond observing that the first option described above might have required very careful consideration, I do not suggest any view of which of the foregoing steps the Board would or should have taken on receipt from Savona of its correspondence with Dublin Bus. And there may be other possibilities I have not thought of. My point is that I do not think the Board is correct in its suggestion, in effect, that an Article 302(6)(b) request would have been pointless or legally unsound because the information thereby coming to hand could not have been circulated. In any event, and taking the view of Barniville J, at the time at which it might have made an Article 302(6)(b) request, the Board had no reason to anticipate that the information to come to hand would require circulation.

257. Of course, the discretion to make or not to make an Article 302(6)(b) request must be a wide one. There will be many cases in which there will be no need for the Board even to consider whether to exercise that discretion. Nonetheless, the SHDR confers the discretion and circumstances may require consideration of its exercise. As Sumption LJ said in **Sandiford**,[374] "*A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope."* Albeit formulated slightly differently, **Hogan et al**[375] address essentially the same issue of failure to exercise a discretion in circumstances calling for its exercise. Though in practice a request to exercise a discretion (as in the cases cited by Hogan et al) may more obviously suffice, it does not seem to me to matter in principle whether those circumstances consist in such a request or in other circumstances calling for its exercise. In **Sherwin**, the Minister's error was that he *"disabled himself from considering whether or not he should exercise his discretionary powers".* At issue in those cases was not a failure to exercise a discretion in a particular manner: it was failure to exercise it at all. Whether the failure to exercise a discretion when circumstances call for its consideration is unlawful does not seem to me to turn on whether the failure proceeded from a deliberate decision to ignore, or from inadvertence to, that call.

258. This was a very particular case in which there was a vehement factual dispute on an issue of current adequacy of public transport – to the demand for which the Proposed Development would add and all with the prospect, as apparent from BusConnects, of no significant improvement in capacity in the foreseen future. In this context, the Inspector,

[374] R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] 1 WLR 2697. Cited in R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1 WLR 3923 and R(Stephenson) v Secretary of State for Housing and Communities and Local Government [2019] EWHC 519 (Admin).
[375] Hogan, Morgan, Daly; Administrative Law in Ireland 5th Ed. 2019 §17-249 – Failing to acknowledge that there is any discretion to exercise. Citing Sherwin v Minister for the Environment [2004] 4 I.R. 279 & Whelan v Kirby [2005] 2 I.R. 30.

- had taken the trouble to note to the Board the absence of what, one must infer, was correspondence with Dublin Bus which she had expected to find in Savona's application as of the ordinary course of good practice.

- had left the observation hanging: despite the inference which I draw that she had expected to find it, she did not express any view as to whether anything should be done, and if so what, in light of the absence of the correspondence with Dublin Bus.

- had every reason to expect that the correspondence with Dublin Bus would confirm
  - the highly relevant position of Dublin Bus as to the subject-matter of that dispute
  - the position of Dublin Bus as to that subject matter as already depicted in the TTA by Savona – and accordingly would not require further circulation.

- perhaps paradoxically given the vehemence of the dispute, but nonetheless informed by the expectation that Savona had accurately depicted the views of Dublin Bus, had every reason to consider that an Article 302(6)(b) request would amount to no more than a "*minor, non-material clarification*" as envisaged by Barniville J. That she would later have been disappointed in that expectation is irrelevant to that characterisation.

259. In the particular circumstances in which adequacy of public transport capacity was a main issue in vehement dispute and in which there is appreciable reason to believe that the written confirmation of Dublin Bus operated, as it were, as a tie-breaker between the opposing views, it seems to me that the obligation identified in Sandiford arose. That is, the Board was obliged to consider whether to exercise its discretion to seek a copy of the written confirmation of Dublin Bus to which the TTA had referred.

260. The question whether the Board considered whether anything should be done, and if so what, in light of the absence of the correspondence with Dublin Bus is a question of fact to be decided on the evidence. There is little evidence to go on and I have found it difficult to make a finding. It is unattractive to decide the matter against Mr Stapleton on a presumption of validity as to an issue of fact exclusively within the Board's knowledge, which knowledge it has not shared. On one view, the Board's adoption of the Inspector's satisfaction with the position as to adequacy of public transport capacity could be extrapolated to an inference that the Board considered and rejected the prospect of pursuit of the correspondence with Dublin Bus. On another view, the proper inference is that the Inspector just never followed to any conclusion her observation that the correspondence had not been enclosed with the planning application and so the prospect of pursuit of the correspondence with Dublin Bus was never considered. Yet, in the circumstances in – outlined above – in which adequacy of public transport capacity was a main issue in vehement dispute and in which there is appreciable reason to believe that the written confirmation of Dublin Bus operated, as it were, as a tie-breaker between the opposing views, it seems to me likely that, had the Inspector considered bespeaking the correspondence and rejected that course as unnecessary, she would have said so. With this in mind, I infer on balance that the prospect of exercising the Board's statutory discretion under Article 302(6)(b) was never considered by the Inspector or the Board.

The Pleadings & Submissions Revisited

261. Clearly, Mr Stapleton did not learn of the true state of affairs as to Savona's knowledge of the opinion of Dublin Bus regarding the transport capacity issue until during the proceedings and as revealed by the traffic expert's affidavits. Mr Stapleton could not have consciously pleaded it initially. It might have been wise of him to seek to amend his pleadings on learning the true position. Be that as it may, while he will be held strictly to his pleadings once properly interpreted (**Casey**[376]) if, on a fair, reasonable and relatively permissive reading, the issue can be reasonably identified in his pleadings such that it is acceptably clear that they cover the point, he is entitled to their benefit. Justice is the key criterion, and Humphreys J has asked whether the party taking the pleading point would be "caused an injustice" or inhibited from endeavouring to counter the point, by allowing the point to be argued. See in this regard and for example, **People Over Wind**,[377] **Sweetman**,[378] **Four Districts**,[379] **O'Donnell**[380] and **Eco Advocacy**.[381]

262. Mr Stapleton pleaded that the Board had *"failed to obtain relevant material in reaching its conclusion that there would be adequate capacity"* and that material included *"the view of … Dublin Bus as to whether there was such capacity."* Logically, an obligation to obtain material presupposes an obligation to consider whether it should be obtained. Mr Stapleton's written submissions put the matter explicitly: the Board "*failed to consider how they should resolve the issue of dispute between the parties – whether there was capacity or not. Should they Board request further submissions? Should it hold an oral hearing, so that the strength of the different submissions could be evaluated? Should it invite a submission from Dublin Bus or Transport for Ireland? ….. They failed to consider what material would enable them to resolve the matter, and they failed to obtain that material*, …" Of course, submissions cannot amend pleadings – that is not why I mention them. I do so because the Board did not raise a pleading objection to these explicit submissions – indeed it replied that Mr Stapleton's claim was "*based on*" inter alia, an allegation of *"failure to embark on an investigatory role".*

Public Transport – Decision

263. The Board and Mr Stapleton could not have known, when the Board was making the Impugned Decision, that the correspondence with Dublin Bus did not, in fact, live up to its billing by Savona. I also bear in mind that the Inspector and the Board concluded that they were "satisfied" on the issue of public transport capacity. But the Board did know that the correspondence with Dublin Bus was missing from the file – the Inspector had told it so. There was no obligation on it to hold an oral hearing. But in my view, not least given how little was involved in terms of delay or burden on anyone, it could very easily, and with no delay of any consequence, have bespoken that correspondence and, at very least as a matter of good practice, it should have done so. However, I do not quash the decision on that specific account. In the end,

[376] Casey v Minister for Housing [2021] IESC 42.
[377] People Over Wind & Anor v An Bord Pleanála & Ors (No. 1) [2015] IEHC 271.
[378] Sweetman v APB & Bord na Mona [2021] IEHC 390.
[379] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.
[380] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[381] Eco Advocacy CLG v An Bord Pleanála [2023] IEHC 644.

the Board is the judge of the adequacy of the information before it to enable a decision and there is no plea of irrationality on this issue.

264. I bear in mind also that it may yet prove that Dublin Bus disagrees with the objecting residents and considers that #130 bus capacity is adequate to serve the relevant area at present at all rush hours and that the current level of service (no improvement is envisaged) will be adequate to serve the Proposed Development in the future. But I cannot assume any of that. As far as is known at present, Dublin Bus has not said so. Nor can I assume what the outcome of any remitted decision would be as to the issue of adequacy of transport.

265. I do quash the decision on a narrower ground. While it is entitled to decide the adequacy of the information before it to enable a decision, it must properly consider that adequacy in order to decide it. The Inspector had, in the context of a live controversy on a main issue, explicitly adverted to the absence of a relevant document which she clearly had expected to find on the file. As a matter of probability, the alleged content of that document underlay, in appreciable degree the view taken by the Board of that controversy. It seems to me that while it was entitled to anticipate that the correspondence would live up to Savona's account of it, the Board was obliged in the particular circumstances of this case, but failed, to at least consider and decide whether to bespeak the Dublin Bus correspondence if only on a basis, as a former president of the United States might have put it, of "trust but verify".

266. As to certiorari on at least this ground, and while I will hear argument on the issue if needs be, I am provisionally though clearly of the view, both on general principle and in light of s.50A(9A) PDA 2000,[382] that I should accede to any application to remit the matter to the Board.

SUSTAINABLITY – PUBLIC TRANSPORT – Ground 5

267. This ground largely echoes as to transport the sustainability plea as to artificial lighting. Indeed, the parties' submissions tended to treat of both Grounds 4 and 5 together. Accordingly, the generality of my consideration of the sustainability plea as to artificial lighting applies here also.

Mr Stapleton's Pleadings & Submissions

268. Mr Stapleton pleads[383] that:

[382] "If, on an application for judicial review under the Order, the Court decides to quash a decision or other act to which *section 50(2)* applies, made or done on an application for permission or approval, the Court shall, if requested by the applicant for permission or approval, remit the matter to the planning authority, the local authority or the Board, as may be appropriate, for reconsideration, subject to such directions as the Court considers appropriate, unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so."
[383] Ground 5.

- A finding that there was or would be adequate public transport capacity was essential to establish whether the Proposed Development would be a sustainable development.

- The Board did not address whether the Proposed Development would be sustainable in light of its impact on public transport capacity.

- "*if and insofar as their ordinary meaning may not be as set out in Ground 3"* (i.e. the ground as to public transport) the Impugned Permission is invalid because the Board erred in its interpretation and application of s.9(1)(a)(iii), s.9(2) and s.18 of the 2016 Act, and s.143 PDA 2000, having regard to their proper interpretation in the context of the NPF, the Effort Sharing Regulation,[384] European Climate Law and Climate Neutrality Regulation,[385] failed to consider the need to deliver sustainable development under s.9 of the 2016 Act, s.34 PDA 2000, Article 3(3) TEU, and Article 11 TFEU, and thereby breached its obligation pursuant to Article 4(3) TEU not to adopt a decision that would undermine the State's obligations under those Regulations.

- The Effort Sharing Regulation[386] at Recital 12 says that transport represents almost a quarter of the EU's GHG emissions, so it is important to reduce them and reduce risks related to transport fossil fuel dependency by comprehensive promotion of GHG emission reductions and energy efficiency. This is "*the key provision*". Articles 2 and 4 are "*also relied upon*".

- In failing to properly apply the link between compact development and high capacity public transport, the Board failed to have regard to relevant factual material and thereby failed to give proper effect to the NPF, The National Climate Policy Position, The National Climate Change Adaptation Framework 2012 as replaced by the National Adaptation Framework 2018, The European Climate Law, The Effort Sharing Regulation,[387] or The Climate Neutrality Regulation.

- Accordingly, the Board misdirected itself in law as to the scope of the concept of "sustainable development" which it was required to apply for the purposes of s.9 of the 2016 Act, s.34 PDA 2000 or s.143 PDA 2000 and failed to have regard to the policies and objectives of the Government, a State authority, or the Minister, as required by s.143.

- The Board failed to comply with Articles 1 and 2 of the Climate Neutrality Regulation, and failed to take all steps within its power, as required by Article 4(3) TEU, to ensure that it did not prejudice the achievement by the State of its obligations under that Regulation, under Article 4(2) of the Effort Sharing Regulation, and under the European Climate Law.

- Also, resolution of the transport capacity issue was necessary to determine whether the Proposed Development would be sustainable development, and its effects on the environment[388] – for the purposes of s.9(1)(a) of the 2016 Act.

[384] Pleaded sub nom "Binding Reductions Regulation".
[385] See above analysis of Mr Stapleton's erroneous separation of 'Climate Law' and 'Climate Regulation'.
[386] Pleaded sub nom "Binding Reductions Regulation".
[387] Pleaded sub nom "Binding Reductions Regulation".
[388] Mr Stapleton's grounds explicitly disavow any EIA argument in this regard.

- The Board, obliged by s.9(2) of the 2016 Act and s.143 PDA 2000 to have regard to the NPF, and though citing NPOs 13[389] and 35[390] of the NPF, failed to determine whether NSOs 1[391] and 4[392] would be served or impeded by the Proposed Development, or to give any reasons in relation to them.

- By failing to determine whether NSOs 1 and 4 would be served or impeded by the Proposed Development, the Board failed to ensure that its Decision complied with the objectives of the National Climate Policy Position, or the National Adaptation Framework as to climate change, and their aim for a transition to a low carbon, climate resilient, sustainable society, including as to the built environment and transport.

269. Mr Stapleton's submissions assert that,

- The Board also failed to indicate how, in the context of an unresolved factual dispute as to capacity, or one resolved by reference only to the fact that the service was frequent and reliable, it could legitimately conclude that the Proposed Development would be sustainable development.

- Government policy as to, and the sustainability context for, public transport are set out in the NPF, to which the Board must have regard. NSO 1, Compact Growth, says proper planning should ensure transition to more sustainable modes of travel including public transport. NSO 4 states that Dublin is too heavily dependent on cars and its roads are becoming more and more congested. It espouses, investment in "*the provision of a well-functioning, integrated public transport system, … enabling sustainable mobility choices for citizens*" to *"reduce congestion and emissions"* and to cater for "*population and employment growth in a sustainable manner*" by delivery, inter alia, of BusConnects.

- The Board failed to consider what sustainability means and whether the Proposed Development would be sustainable – would encourage transition to more sustainable modes of travel.

270. Because the NPF is government policy, and NSO's 1 and 4 relate to sustainable transport, the Board was required by law to have regard to them. They are not listed as items which the Board considered, and the Board has denied in its Opposition that it was required to have regard to them. In those circumstances it erred in law by failing to have regard to relevant material and failed to have regard to government policy. It failed to consider whether the Proposed Development would, or could, facilitate the achievement of that outcome if, as alleged, the capacity of the public transport network was already, at the least, stretched.

[389] In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.
[390] Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights.
[391] NSO 1 Compact Growth – inter alia to ensure transition to more sustainable modes of travel including public transport.
[392] NSO 4 Sustainable Mobility – inter alia to expand attractive public transport alternatives to car transport to reduce congestion and emissions and enable the transport sector to cater for the demands associated with longer term population and employment growth in a sustainable manner – inter alia through the Bus Connects investment programme. Mr Stapleton's papers clearly relied on the NSO relating to Sustainable Mobility. However, they were confused as to whether that NSO is NSO 4 or NSO 5. For the avoidance of doubt, the NSO relating to Sustainable Mobility is NSO 4 (NPF p142). NSO 5 is entitled "A Strong Economy Supported by Enterprise, Innovation and Skills". (NPF p143).

Discussion

Introduction

271. Given my decision on Ground 3, it is arguably unnecessary to decide Ground 5. However, it seems to me useful to consider this issue ignoring the error I have identified as requiring certiorari on Ground 3.

272. As stated, much of the discussion above of the issue of sustainable development both generally and as it relates to the artificial lighting issue applies here. It remains to address some issues specific to transport.

273. It does bear observing as a general, if obvious, point that the aim of compact urban development, pursued inter alia by higher height and higher density of residential development on urban sites, promotes the reduction of GHG emissions of transport, and hence promotes sustainable development, by tending to,

- shorten commuting distances,
- provide local population densities supportive of efficiency of public transport, and hence transition to it and the sustainability of it.

274. On one view, there is a difficult "chicken and egg" issue – whether to proceed by building to create demand to which public transport is expected to respond or whether to provide public transport to prompt development. No doubt that is a simplistic contradistinction. In reality there is an interactive dynamic – inter alia a timing issue – propelled by policy choices made by Government as expressed, inter alia, in s.28 guidelines issued to planning authorities and the Board as applicable to planning decisions. One can easily see that those policy choices might differ as between modes of public transport. For example, the choices made might be informed by a view that rail provides greater capacity but on fixed routes and requires long-term planning whereas, arguably, bus provision may allow more flexible response. Equally, whereas in the specific instance of the overriding of a Development Plan by SPPR3 of the Height Guidelines §3.2 requires that consideration of the adequacy of transport capacity must be limited to present transport capacity (**O'Neill**[393]), there is no reason in principle and absent such limitation why, in considering sustainability more generally, prospects of increased capacity should not be taken into account.

The Effort Sharing Regulation, the European Climate Law/Climate Neutrality Regulation & The NPF

275. I have already remarked on Mr Stapleton's misconceived reliance on Recital 12 of the Effort Sharing Regulation (as to GHG emissions of the transport sector), as "*the key provision*". The "*also relied upon*" Articles 2 and 4 of the Effort Sharing Regulation identify the scope of that Regulation and, with Annex I, set the national GHG emission reduction target for Ireland of 30% as compared to 2005 emissions. As I have already explained, in my view, calling these gross national targets in aid as to the interpretation of such as the

[393] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356.

s.9(1)(a)(iii), s.9(2) and s.18 of the 2016 Act, and s.143 PDA 2000 in their application to individual planning applications is a futile exercise.

276. I have already discounted above, Mr Stapleton's reliance on Articles 1 and 2 of the European Climate Law/Climate Neutrality Regulation.

277. The essential allegation as to the NPF is of failure to have regard to NSO1 as to "Compact Growth" – inter alia to ensure transition to more sustainable modes of travel including public transport – and to NSO4 as to "Sustainable Mobility". NSO4 seeks to expand attractive public transport alternatives to car transport to reduce congestion and emissions and enable the transport sector to cater for the demands associated with longer term population and employment growth in a sustainable manner – through, inter alia, the Bus Connects investment programme.

278. The starting point is that the Board expressly recorded its regard to the NPF and the view of Hardiman J in **GK**[394] and of Humphreys J in a **Cork County Council** case[395] (cited above) that "*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*."

279. Mr Stapleton provides no evidential basis for this challenge – relying merely on a formalistic and threadbare inference that because the Inspector explicitly mentioned some other content of the NFP she must have ignored NSOs 1 and 4. As to the substance of the concerns addressed by NSOs 1 and 4, the evidence clearly favours the Board. While Mr Stapleton is free to disagree with the Inspector's view, it is perfectly clear that she considered the issue of public transport in appreciable detail. She, inter alia,[396]

- noted the Development Plan Core Strategy as promoting intensification and consolidation of a compact city, inter alia by development at higher densities, especially in public transport catchments.[397]

- noted Development Plan Policy SN1 to promote "*good urban neighbourhoods .. well served by … public transport ….*"[398] with which policy she considers the development consistent "*in an area which is well served with … public transport*".[399]

- noted Development Plan §16.7.2 Assessment Criteria for Higher Buildings as including "*Relationship to transport infrastructure, particularly public transport provision*".[400]

[394] GK et al v The Minister for Justice et al [2002] 2 IR 418.
[395] Cork County Council v. Minister for Local Government [2021] IEHC 683, §§42 & 43.
[396] The following is not a complete list.
[397] Inspector's Report §8.2.
[398] Inspector's Report pp 26
[399] Inspector's Report §11.3.11.
[400] Inspector's Report pp 27.

- noted objectors' concerns as to inadequacy of public transport[401] – including as to its capacity and the Council's assessment that the proposed building height had not been adequately justified against the criteria set out in the Heights Guidelines – particularly with regard to high-capacity public transport accessibility.[402]

- cited the location of the Site "*in a central and accessible location*" – close to the city centre, within an established area beside good public transport facilities – in an urban area close to adequate public transport accessibility.[403]

- though not citing objectives 1 and 4 specifically, cited the NPF as supporting urban infill residential development such as that proposed on sites in close proximity to quality public transport routes and within existing urban areas.[404]

- was satisfied that the Proposed Development accords with §5.8 of the Sustainable Urban Residential Guidelines[405] as public transport corridors. Noting her view that the "*Site is relatively well served by public transport with the nearest bus stops being within 500m (360m and 390m as measured from the main pedestrian access to the development at the SE corner of the site).*"[406] §5.8 bears quoting in part:

  > *"…. it is important that land use planning underpins the efficiency of public transport services by sustainable settlement patterns – including higher densities – on lands within existing or planned transport corridors. …. increased densities should be promoted within 500 metres walking distance of a bus stop"*

- concluded that the principle of a development of 131 units, underpins the principles of a compact city, with good public transport options[407] and that the Proposed Development would be consistent *"with the policies and intended outcomes of current Government policy, including the National Planning Framework, which seeks to increase densities in suitable locations. The site is considered to be located in a central and accessible location, proximate to good public transport, within an established area of the city"*.[408]

280. Significantly, §11.10 of the Inspector's report devoted appreciable attention to Traffic and Transportation. It includes consideration of the TTA content and also records that many third party submissions raised concerns as to the quality and capacity of public transport in the vicinity of the Site. §11.10.9 and §11.10.10 address these issues to the conclusion that "*the area is served with a regular, reliable public transport service*."

[401] Inspector's Report §7 generally.
[402] Inspector's Report §11.2.7.
[403] Inspector's Report §11.3.10, §11.4.11, §11.5.11, §11.6.5, §11.6.20, §11.8.4.
[404] Inspector's Report §11.6.22
[405] Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages), May 2009.
[406] Inspector' Report §11.6.8.
[407] Inspector' Report §11.2.7.
[408] Inspector' Report §11.4.14.

Decision

281. Remembering that the allegation here is not one of substantive disagreement with the analysis, but of a failure even to have regard to the public transport aspects of NSO 1 and NSO 4 of the NPF as to "Compact Growth" and "Sustainable Mobility" respectively, it will be apparent from the foregoing that, far from there being evidence of absence of such regard, there is ample evidence of such regard in substance.

282. In my view, leaving aside the error identified as to Ground 3, there is no basis for the allegation in Ground 5 of failure to have regard to the sustainability of public transport. Given my decision on Ground 3, it is unnecessary and would be inappropriate to quash the decision on the basis of Ground 5.

283. Whether and to what extent any remittal of the Impugned Decision to the Board on the basis of Ground 3 may result in information coming to the Board's attention which would prompt a reconsideration of the sustainability of the Proposed Development as to the issue of public transport remains to be seen and is a matter for the Board.

MATERIAL CONTRAVENTION – COMMUNAL OPEN SPACE – Ground 1

Introduction

284. Mr Stapleton asserts that the Board erred in law in failing to identify a material contravention of the Development Plan as to its quantified requirement of communal open space in apartment developments. It is common case that:

- against a Development Plan requirement of 817m^2, the proposed communal open space of 1,293m^2 comprises the Courtyard at 965m^2 and the fifth floor roof garden at 328m^2.[409]
- satisfaction of that requirement depends on the Courtyard being correctly categorised as communal open space. As will be apparent, if one includes the Courtyard, the communal open space easily exceeds the quantity required by the Development Plan and if one excludes it the provision is clearly deficient and the contravention is material.

285. The Board's suggestion in oral argument that the other planning merits of the Courtyard could be such as to render the contravention immaterial as in accordance with the "spirit" of the concept of open space is entirely unconvincing: if adopted, it would eviscerate the primary feature of the criterion – that the space be open.

[409] Inspector's Report §11.4.26. Architectural Design Statement p15.

286. In truth, the issue nets to a question whether the space is open. It seems to be accepted that in all other respects the space is communal and is possessed of attributes characteristic of a communal open space. That net question of openness derives from the fact that the Courtyard will be covered by a roof. Put that baldly, one may wonder how the controversy arises at all. The issue is best understood by reference to figures which I have appended to this judgment and to which, at this point, the reader should refer.

287. As has been noted, and as will have been seen from those figures, the four rectangular apartment blocks are arranged in two connected L-shaped pairs such that the entire layout, seen in plan, forms a rectangle around the Courtyard. The 2 L-shapes do not quite touch. Two 2.77m wide opes lie between them, running to the full height of the buildings and connecting the outdoor areas to the Courtyard. At or near ground level there are two other opes. One is a rectangular ope in the northern apartment block. It somewhat oddly gives onto a sort of tunnel, under apartments and above the basement car park ramp, through to the outside beyond. The other is a smaller ope over the amenity area seen on the right on Figure 1. These opes will allow the elements access, to a greater or lesser degree, into the Courtyard. But they clearly will not contribute appreciably to any visual sense of open space.

288. In addition, Savona say that 85% of available ambient light will reach the Courtyard via the translucent ETFE roof. (It is of some interest to note in contrast that the Daylight Report gives a figure of 70% for glass light transmittance – though no doubt that varies with type of glass). But for this roof no issue would arise as to the openness of the Space – the Courtyard would qualify as communal open space within the meaning of the Development Plan. However, as will also have been seen from the figures, the roof sits a little proud of the top of the buildings. Some of the drawings convey a gap of 0.82 metres (2.7 feet) over the long edges of the rectangle[410] and larger gaps at the short edges. As a result it is suggested, as illustrated in the figures appended to this judgment,[411] that air may percolate freely from the elements outside, under the roof and into the Courtyard. While it may be possible for precipitation also to intrude to some degree in certain weather conditions, given the overlap of the roof over the buildings, precipitation seems unlikely to be a prominent feature of the Courtyard environment and, generally, the purpose of the roof is its prevention.

289. However, it seems to me important to draw attention to Figures 7 and 8 in the Appendix. These illustrate, first, that the apparently large gap shown in the schematic drawings where the roof meets the 5th floor roof garden will be very considerably filled by a combination of aluminium panelling and perforated screens. These features are also discernible “in the distance” as it were, in Figure 2. Also, the 0.82m gap over the long edges of the rectangle are shown as filled by “Large Profile Perimeter Louvres” – presumably intended to open or close that gap as required, in a manner analogous to the operation of windows or louvre shutters. The Architectural Design Statement[412] could be read as equivocal as to the installation of these louvres, but as they are shown on the drawings, it seems to me proper to assume their intended installation. Certainly their installation is permitted. I hasten to say that I appreciate that some of the drawings[413] are

[410] See Appendix Figure 6.
[411] In particular, figures 4 and 5.
[412] p56 – “with detailed specialist design inputs at design development stage, reduced or alternative shading (automatic louvres or screens) may be a consideration which allows for greater light transmittance and enhanced daylight levels”.
[413] See Appendix Figures 4 and 5.

schematic rather than precise and that there is no intention to mislead. They were produced for the hearing and placed before me by agreement. They were not before the Board. But it seems to me that these features, identified in Figures 7 and 8, considerably diminish the degree of openness conveyed in those schematic drawings.[414] It also seems to me notable that the roof completely covers the Courtyard in the horizontal plane.

Pleadings, Evidence & Submissions

The Applicant's Pleadings & Submissions

290. Mr Stapleton pleads[415] that the Impugned Permission is invalid because:

- The Proposed Development materially contravenes §16.10.1 of the Development Plan in that it fails to provide the required amount of communal open space.
- The Board erred in its interpretation of the word 'structure' for the purposes of s.2 PDA 2000[416] by failing to recognise that the roof would be part of the structure of the Proposed Development. It would be itself a structure supported on four sides by other structures, such that the space beneath it would not constitute open space or communal open space for the purposes of §16.10 of the Development Plan, resulting in an unidentified material contravention of the Development Plan contrary to S.9(6) of the 2016 Act and S.37(2)(b) of the 2000 Act.
- The proposed internal communal open space, being roofed, is not open space. The Board erred in considering it to be open space.
- In considering the requirement for communal open space, the Board had regard to irrelevant material being the proposed roofed structure, which is not "open" space.
- Objectors made submissions to the Board on this issue.[417]

291. Mr Stapleton submits that:

- The roof is a structure. The area beneath the roof is a part of the structure. It is not open space. Open space is space outside, around or on top of a structure. The Courtyard is not open space but is part of the structure.

- The Development Plan defines open space as follows:

  "3 Open space is any land (active or passive use), including water, whether enclosed or not, on which there are no buildings (or not more than 5% is covered with buildings), and the remainder of which is laid out as a garden/ community garden or for the purposes of recreation, or lies vacant, waste

[414] See Appendix Figures 4 and 5.
[415] Ground #1.
[416] s.2 PDA 2000, as relevant, defines a "structure" as "any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and — (a) where the context so admits, includes the land on, in or under which the structure is situate, ……."
[417] Listed in the Statement of Grounds. I consider some below.

or unoccupied. It also includes school playing fields, playgrounds, urban farms, forests, allotments, and outdoor civic spaces." [418]

- §16.10.1 of the Development Plan[419] describes communal open space in apartment developments as a "*critical environmental resource*", a "*breathing space*". "*It may be in the form of accessible sheltered roof gardens, communal landscaped areas at ground level or at podium level where commercial or retail uses occupy the ground floor*." It should "*include green spaces that support communal free play, sports and biodiversity*." Reference is made to soft and hard landscaping, plant species, garden maintenance and water and drainage connections. The succeeding paragraph refers to "communal facilities" accessible to residents only, which include meeting rooms, laundry, gyms and childcare.

- While it may include a "sheltered" roof garden, the Development Plan does not suggest that the entire communal open space may be enclosed by an overall roof and surrounded by walls on four sides, with only relatively narrow openings.

- Interpretation of the Development Plan and of s.2 PDA 2000 is a matter of law for determination by the Court: the former on **XJS** principles; the latter on the rules and principles of statutory interpretation.

- On such interpretation open space is a space which is not enclosed by the structure but which is open to the air, the elements, biodiversity and its surroundings. A roofed and walled structure is not open space.

- The Courtyard is not land "*on which there are no buildings*".

- By the Board's misinterpretation of the Development Plan as to the meaning of open space, it failed to direct itself correctly in law and it authorised a development which failed to provide appropriate communal open space, in material contravention of §16.10.1 of the Development Plan. In respect of that material contravention the Board did not invoke its powers under s.9(6) of the 2016 Act and s.37(2)(b) PDA 2000. The Impugned Permission is therefore ultra vires and void in accordance with general principles of judicial review.

The Board's Pleadings & Submissions

292. The Board pleads that

- It is denied that the space beneath the roof is not open space or communal open space.

- Mr Stapleton has pleaded "no basis" for the contention that that space is not open space or communal open space other than reliance on the definition of "structure" in s.2 PDA 2000.

[418] p246, fn3.
[419] Residential Quality Standards – Apartments – at p327.

- Nothing in that definition of "structure" supports the contention.

- Mr Stapleton has not pleaded any respect in which the Board has erred in its interpretation of "structure" and/or how it is relevant to the issue of communal open space.

- The Board did not, in its Impugned Decision purport to interpret of the word term 'structure', nor was it required to do so in order to assess the merits of the Proposed Development.

- The space under the proposed ETFE roof comes within the Development Plan's definition of open space.[420] It creates a covered (though not fully enclosed[421] – as the roof allows free movement of air) and landscaped area for year-round amenity and recreation of the residents, which aligns fully with the purpose of open space under the Development Plan.

- Correctly interpreted, the Development Plan allows that space covered by an ETFE roof can constitute communal open space.

- As to the "structure" of the Proposed Development, the Inspector's description of the ETFE roof and assessment of its planning merits.[422]

- Further, where neither Mr Stapleton nor anyone else (including those whose submissions to the Board Mr Stapleton pleads) submitted to the Board that the Proposed Development would materially contravene the Development Plan as to open space due to the ETFE roof, Mr Stapleton may not now advance this ground.

293. The Board's submissions elaborate on its plea that that space covered by the ETFE roof can constitute communal open space within the meaning of the Development Plan correctly interpreted on XJS principles. That is so as its definition of open space,

- allows that it can be 'enclosed'

- allows that it can include a sheltered roof garden. Such gardens, the Board says, are covered by a roof. It says that it is "*hard to identify any coherent basis on which it could be contended that the Development Plan intended to characterise a sheltered roof garden as open space but a sheltered courtyard as not constituting open space*."

- crucially distinguishes open space from land on which there are "buildings". There is no applicable definition of a "building" but the lay person would understand it as connoting a degree of permanence and ordinarily meaning a structure with walls and a roof.

[420] Development Plan p246, §14.8.9 fn3.
[421] As noted at §11.4.28 of the Inspector's Report.
[422] At inter alia §3.0, §11.4.6 and §§11.4.28-11.4.35 of her report.

294. The Board's submissions generally rely on the Inspector's analysis and also observe that:

- Mr Stapleton's submission is primarily based on a definition of "*structure*" in s.2 PDA 2000, which definition has no bearing on whether the space underneath the ETFE roof is open space.

- A courtyard largely covered by an ETFE roof, but with gaps between walls and roof through which air may freely circulate and the elements can penetrate, would not be understood by the lay person as a building.

- The Inspector describes the space as "*not fully enclosed as the roof allows for free movement of air*" and as "*usable outdoor space*".

- The space "*is a covered and landscaped area for year-round amenity and recreation*".

Savona's Pleadings, Evidence & Submissions

295. I will cite Savona's pleas and submissions only as they go beyond the Board's. Savona pleads that this Ground is based on a misinterpretation of the Development Plan, a mischaracterisation of the Impugned Decision, and a mischaracterisation/misunderstanding of the nature of the ETFE roof – of which it sets out a technical description essentially describing it as not "*a roof in the conventional sense*". Rather it is a translucent "*umbrella suspended over the courtyard*", above parapet level, which allows fresh air to naturally circulate into the space beneath. Its primary purpose is to partially shelter the Courtyard from the rain but it does not seal or fully weather it (Savona do not mention the louvres). The Development Plan does not require that open space has to be uncovered or unsheltered. Savona alleges want of particularity in Mr Stapleton's pleadings. Savona's submissions elaborate on and illustrate its pleaded technical description of the EFTE roof.

296. Savona's architect, Mr Joe Kennedy, deposes that:

- He disagrees that the Courtyard is not open space and characterises it as external space.
- The roof of inflated ETFE cushions suspended on a steel frame over the Courtyard acts effectively as an umbrella. It does not create a sealed and fully weathered enclosure such as in a typical atrium. It is not a roof in the conventional sense.
- The purpose of the ETFE roof is primarily to partially shelter the Courtyard from precipitation.
- It is transparent – allowing natural daylight into the Courtyard.
- Its suspension above parapet level allows fresh air to naturally circulate into the Courtyard.
- If the Courtyard was not sheltered, its communal use and enjoyment would be restricted in inclement weather.

The Development Plan

297. The interpretation of the Development Plan, on **XJS** principles as if by the intelligent informed layperson, is agreed by all to be a matter for the Court. Chapter 14 identifies zoning objectives, one of which, Z9, is for "*To preserve, provide and improve recreational amenity and open space and green networks*". It does not apply to the Site but is of interest in that the text provides the definition of open space which I have set out above.[423] For present purposes what is notable is that,

- an open space may or may not be "enclosed".
- no more that 5% of it may be "covered with buildings".

298. Neither the Development Plan nor the Planning Acts define "building". As an exercise in XJS interpretation, Mr Stapleton's submission that "*four walls and a roof is a building*" is attractive. Albeit in a very different legal context, in **Prime GP2**[424] Hyland J attempted, citing **Cement Ltd**,[425] to construe the word "building" *"in its popular sense as including what an ordinary lay person would understand by the word".* That approach doesn't seem far from XJS principles. She cited **Mason**:[426] "*A building which is the subject of a tenancy usually consists of walls and a roof*". It seems to me that, as long as one pays due attention to the word "usually" and remembers that some structures with walls and roofs are not buildings – e.g. a caravan – that is probably about as close to a definition as can be managed.

299. The Development Plan, under the heading "*Residential Quality Standards – Apartments",*[427] includes the following as to communal open space in apartment schemes:

- *"…. apartment schemes must … provide for communal open space. Communal open space is a critical environmental resource as a 'breathing space' and for meeting the amenity needs of residents*".[428]
- "*It may be in the form of accessible sheltered roof gardens (or) communal landscaped areas at ground level …. "*
- "*Where appropriate, communal open space should include green spaces that support communal free play, sports and biodiversity*."
- It "*will be soft and/or hard landscaped with appropriate plant species and landscaping materials*".
- It "*is secure for residents and benefits from passive surveillance considers the needs of children in particular in terms of safety and supervision*." Play spaces/areas are required.
- "is wheelchair accessible".
- "achieves good sunlight penetration".
- "has appropriate arrangements for maintenance and management".

300. Separately, the Development Plan states that "*communal facilities may be provided in apartment schemes, … such as community or meeting rooms, laundry rooms etc. which are accessible to residents only.*

[423] Development Plan p246, §14.8.9 fn3.
[424] Prime GP2 Ltd v Technological University Dublin [2021] IEHC 88.
[425] Cement Ltd v Commission of Valuation [1960] I.R. 283.
[426] Mason v Leavy [1952] I.R. 40.
[427] §16.10.1.
[428] p327.

Other communal facilities such as childcare or gym use could be open to non-residents …." So it is apparent that not all communal spaces are communal open spaces.

The Council's View

301. Following consultations between the Council and Savona before the planning application was made, the Council issued an opinion in which it said that it "*would query whether the enclosure and confinement of the communal space allows such space to be regarded as truly 'open'".*

302. Savona's Architectural Design Statement responded to the Council's opinion on this question in the following terms which, it seems to me, addressed various planning merits of the proposal but not the question whether the space would be "truly open":

> *"Refer to Sections 3.7 Rationale for Covered Court yard, 3.12 Daylight-Sunlight and Overshadowing and Section 3.13 Microclimate. The proposed courtyard not only satisfies the various criteria with respect to daylight, Sun Light and fresh air but offers a sheltered space which is more usable throughout the year."*

303. Before further considering Savona's Architectural Design Statement, it is useful to note both the Council's response and the relevant content of the Development Plan. The Council's chief executive's report to the Board stated: *"… the proposed courtyard to the scheme would provide 1,293 sq. metres of communal open space, which would comfortably meet the required standards for communal open space."*[429] The Council could have so responded only if it considered that the Courtyard constituted communal open space. However, as the Inspector recorded[430] and as Mr Stapleton observes, the Council also opined that "*The roofing of the four blocks would result in what was a four building perimeter block to*[431] *becoming one structure".*

Savona's Architectural Design Statement

304. Savona's Architectural Design Statement describes the Proposed Development as including "*an enclosed landscaped communal open space between the blocks*"[432] It says of the Courtyard that "*The ground floor Communal Open space is covered while the roof garden is not*"[433] and also says:

> *"The courtyard space is an 'open' space in every sense other than the fact that there is an ETFE … air inflated membrane cushion system suspended on a light weight steel structure above the roof parapet*

[429] In fact, it is the combination of the Courtyard and the roof garden which amounts to 1,293m^2.
[430] Inspector's Report §11.4.29.
[431] Sic.
[432] §1.3 – §3.
[433] §1.4 Key changes in Design.

line for the purpose of preventing the ingress of precipitation only (Effectively an umbrella suspended over the courtyard). If the key parameters for determining the quality of external amenity space relate to sunlight, fresh air and thermal comfort, then the proposed court yard development provides very high quality space for residents scoring high on all counts. The rationale for the covering is to allow for usable outdoor space (including deck access on all levels) to be available to all residents throughout the year."[434]

305. The Design Statement refers to *"a partially covered internal courtyard*". That is not accurate: the figures make clear that the courtyard is entirely covered. That there may (ignoring the louvres, which otherwise I do not) be empty, essentially vertical, spaces beneath the edges of the roof does not mean the space is not fully covered – coverage is essentially a horizontal issue.

306. Savona's Design Statement goes on to state that "*Gaps at E3 and E7 also create vistas into and out of the courtyard space ……. The first floor plan is enclosed on all 4 sides save for gaps at E3 and E7 which exist through all floors*."[435] E3 and E7 are in substance the locations circled red in Figure 2 in the Appendix to this judgment. They are identified in other drawings as entry points to the Courtyard. If there are "vistas" to be seen, they can be seen only from limited viewpoints, certainly not from far the greater part of the Courtyard.

307. ETFE is described[436] as a lightweight transparent material increasingly used in buildings mainly because of its lightweight properties, its high daylight transmittance and potential for energy savings. It is the "*encapsulating membrane*" in the well-known Eden Project in Cornwall because of its "*ability to reliably regulate environmental conditions within the building*". The proposed air-filled pillow-like cushions will "*provide thermal insulation and structural stability against wind or snow loads*". Perhaps unusually for a plastic, the Design Statement describes it as more environmentally friendly than glass and also more economical. The following is stated:

"The basic parameters for the design of the ETFE canopy for this development were:
1. The membrane should provide shelter from precipitation in the courtyard – with a simple 'umbrella' approach while allowing free movement of air. Not enclosing space.
2. The membrane should allow maximum daylight transmittance into the courtyard space.
3. The membrane should mitigate the effects of solar gain and glare.
4. The supporting structure should be light weight and integrate into the overall design
5. The system should be easy and economical to maintain
6. The Cushion membrane system should be environmentally friendly in terms of manufacturing processes and material recycling."

308. Under the heading "Micro-climate"[437] Savona's Architectural Design Statement says that:

[434] §1.4 Key changes in Design.
[435] Design Statement §3.3 – Plans and Layouts.
[436] 3.0 Proposed Design.
[437] §3.13.

"On the basis that the courtyard is an 'outside' space covered only with an 'umbrella' type canopy for the purpose of providing shelter from rainfall, ambient air temperatures inside the courtyard will generally only be slightly higher than those outside the courtyard. Solar gain generated by the ETFE cushions will be controlled through the use of fritting the fabric while ensuring light transmittance levels are maintained at 85%. Any warmed air below the canopy will quickly dissipate on all 4 sides. The 'umbrella' configuration creates a stack effect over the courtyard which produces warm air movements upwards with cooler air being drawn in at lower levels. Therefore, there will be no adverse effects on comfort levels within the courtyard with respect to solar gain or overheating as a result of the ETFE canopy. Heated air created by the buildings facing into the courtyard is drawn into the convection cycle and dissipated also through the opening around the ETFE canopy."

And later, in similar vein,

"Summer time warming air within the courtyard rises and is drawn out below the suspended ETFE canopy on all four sides as cool air is drawn in through various openings at ground and lower levels. Air moving over the roof creates differential pressure zones which further draws air out from within the courtyard. In winter time, the issue of solar glare does not exist and cooler ambient air temperatures are more likely to carry into the courtyard where the stack effect is less active.

The courtyard is a sheltered space where marginal increases in ambient air temperature within the space may occur from time to time (Summer time) but because of natural air movements through the space (convection) the temperature within the courtyard space is naturally regulated. In Summer time, because of the stack effect, the temperature inside the courtyard will be a little cooler than air outside the courtyard."

309. The "Rationale for Covered Courtyard – ETFE"[438] in the Architectural Design Statement states that *"The ground floor internal courtyard provides the main Communal Open space*". It says that *"The ETFE canopy is suspended over the courtyard with a light weight steel structure*." I observe that it is not suspended, it is supported[439] – and, as the drawings reveal, by the buildings themselves. The Design Statement asserts that "*With a 85% light transmittance, the court yard will be well lit with direct sunlight for extended periods*." It claims that "*The ETFE canopy does not create a sealed and fully weathered enclosure as you would expect for a typical atrium space but simply offers partial protection from general precipitation and shade from strong sunlight*." The word "partial" seems designed to amplify the assertion of non-enclosure but seems an understatement given the full coverage shown on the drawings. Incidentally, Figure 3 below did not appear in the planning application. The Design Statement continues:

"On a practical level, this allows activities in the courtyard all year round under cover which has many obvious advantages. On an experiential level, the inflated ETFE cushions create a quality to the courtyard space which is ethereal and calming and with more residents likely to use the space more of the time, there is greater opportunity for social interactions fostering a greater sense of community. …

[438] §3.7
[439] To suspend something is to hang it.

the general rationale for employing the ETFE system is to provide residents with an external communal space experience which offers enhanced physical comfort and sense of wellbeing …"

Save as to its use of the word "external", I am not competent to comment on this claim but have no reason to doubt it and it is not impugned.

310. The Architectural Design Statement states that "*The proposed courtyard development with the ETFE canopy will be unique in Ireland. It will be an apartment development which residents will immediately identify with and quickly form an emotional attachment to. Because of greater and more comfortable accessibility to the internal courtyard for all age groups a better sense of community will be fostered. ……. The ETFE canopy over the court yard creates unique Communal Open space for residents and visitors*."[440] Again, that description is not, in any real way, disputed – other than the use of the word "open".

The Inspector's Report

311. The Inspector states that,

- "*Many of the third party submissions .. raised concerns in relation to this aspect of the proposal, in particular the roofing of the communal open space* .." [441] They related in particular to visual impacts, its perceived experimental nature, noise and quality of space for future residents and environmental concerns.[442]

- the Apartment Guidelines require quantified minimum standards of communal open space provision.[443] Those guidelines refer to "communal amenity space" rather than "communal open space" – the latter is a phrase used only once in the guidelines.[444] But it is clear from their terms that "communal amenity space", within the meaning of the guidelines at least includes outdoor spaces and courtyards.[445]

- "*A feature of the proposed scheme is an enclosed landscape communal open space between the blocks, which would involve the roofing of the area between the four building blocks with an ETFE … roof*."[446] She refers to it as a "*covered courtyard area …. to be covered with an ETFE roof*."[447]

- *"The rationale for covering the space is to allow for usable outdoor space … to be available to all residents throughout the year*."

[440] §3.0 Proposed Design, §6. Distinctiveness.
[441] §11.4.18.
[442] §11.4.29.
[443] §11.4.25.
[444] §4.14 "The perimeter block with a central communal open space is particularly appropriate for children's play ……."
[445] For example, as to communal amenity space, §4.10 says that "accessible, secure and usable outdoor space is a high priority for families with young children and for less mobile older people." and §4.10 says that "Communal amenity space may be provided as a garden within the courtyard of a perimeter block …"
[446] §11.4.6.
[447] §11.4.27.

- The Council state that the proposal would comfortably meet the required standards as to quantity of communal open space.

312. Of the ETFE roof, the Inspector states that:[448]

- It will "*substantially cover the area of communal open space between the proposed blocks*" but "*will not fully enclose the space*".

- The Council state that it "*would result in what was a four building perimeter block becoming one structure."*

- it is "*for the purpose of preventing the ingress of precipitation only*". She refers to its description "*as effectively an umbrella suspended over the courtyard*". I have already expressed my view that this description is not accurate. It is neither suspended nor an umbrella. It is also described as performing other functions characteristic of a roof – thermal effects and structural stability against wind or snow loads.

- The ETFE system cushions have a partial print pattern applied to their surfaces to provide shading. This will optimise climate control while still retaining transparency. This allows 85% light transmittance to the central courtyard space while reducing solar gain (temperature) through shading. Thus it will result in some loss of natural sunlight to the communal open space.

- The proposal states that in summer warming air in the courtyard rises and is drawn out below the ETFE canopy on all four sides as cool air is drawn in through various openings at ground and lower levels. In winter, cooler ambient air temperatures are more likely to carry into the courtyard. The space is well ventilated – all gaseous odours will quickly dissipate.

313. The Inspector opines that:

"The covering of the communal courtyard will be a significant benefit for future residents, allowing sheltered year round access …"

"The proposed development exceeds the quantum of communal open space required under the operative City Development Plan. Overall, I am satisfied with the quantum and quality of communal open space provided and am of the opinion that the public and communal open space is such that it will be an attractive place for future residents to reside."[449]

"The applicants state that the covered courtyard will be a unique type of communal open space in Ireland, will be an attractive space to be in and possibly an attraction in itself. I would not disagree with this assertion. This roofing type has been used successfully in many projects throughout the world and I

[448] §11.4.28 – 33.
[449] §11.4.27.

am of the opinion that it is an innovative solution to the use of outdoor open space within the Irish climate. …… any impacts on daylight from the covering of the communal courtyard would be far outweighed by the benefits it would offer. …….. this roofing system would be a quality offering ……."[450]

"I am satisfied with the design approach proposed and consider that the proposal will provide for a quality scheme at this location, … a high quality proposal has been put forward in terms of .. communal open space … I am generally satisfied that the proposed development, if permitted would be an attractive place in which to reside …"[451]

Discussion & Decision

The Issue is not General Planning Merit

314. It is important to state that what is at issue here is not whether the Courtyard, including its roof, is a good thing from a planning point of view. Leaving aside the question of openness, one can understand the Inspector's point of view that the Courtyard would be a quality offering – unique and innovative and that any impacts on daylight would be far outweighed by its benefits.[452] In contrast, I note, by way of example, the observation to the Board submitted by "HMcI" which provides illustrations of the examples of ETFE roofs cited by Savona and asserts that they clearly demonstrate that such an "industrial-style" roof would be inappropriate for the Site in terms of its visual effect when seen from off-Site.[453] This is the type of subjective issue as to which beauty is in the eye of the beholder. Without taking a position, I can acknowledge that many might consider, and the Board was fully entitled to consider, the Courtyard a very attractive, innovative, desirable and useful space and, if not open space, a very acceptable substitute for – even an improvement on – open space given the Irish climate. Also, one can readily imagine that Savona could make an appreciable saving by simply omitting the roof, thereby also avoiding any controversy as to whether the space is open. Equally, no doubt the roof was included in the proposal for good commercial reasons.

315. Mr Kennedy makes the point that if the Courtyard was not sheltered, its communal use and enjoyment would be restricted in inclement weather. No doubt that is so and it is a consideration which may well weigh in favour of the general merits of the roof. But use restricted in inclement weather is characteristic of open space and ease of use despite inclement weather is characteristic of a building. That is perhaps one of the essential distinctions between them. Protection from the weather (whatever it may bring) is perhaps the primary purpose of a "roof over one's head".

[450] §11.4.35.
[451] This passage relates to other issues as well as to that of communal open space.
[452] Supra.
[453] Exhibit MS1 Book 3 p1469.

316. What is at issue here is whether the space beneath that ETFE roof is open space. If so, as the Board must be taken to have concluded, there is no contravention of the Development Plan as to quantum of provision of communal open space. If not, there is such a contravention.

317. As I have said, I reject the Board's invocation of the "spirit" of open space. It seems to me an attempt to fudge an essentially simple and ordinary requirement – that the space be open. Indeed, it is a concept which the intelligent layman interpreting the phrase "open space" would expect to be essentially simple. The Board invoke that "spirit" by reference to the other features of the Courtyard – such as the garden and its amenity value. But these seem to me to be features just as capable of being found in a space which is not open – for example a closed atrium.

318. Mr Kennedy expresses the "*professional opinion*" that the Courtyard is open space. However, while he is entitled to that opinion and to have it considered and I mean no disrespect to that opinion, this does not seem to me an issue of expertise on which professional opinion is weightier than any other. Whether the Courtyard is open space is a matter of ordinary meaning on which a layperson's opinion is, ceteris paribus, as weighty as an experts'. Though this is not a matter of admissibility of evidence, it is nonetheless notable that, as to some matters of opinion, a layperson can give evidence – as was observed by the Supreme Court in **Ruddy**[454] as to the admissibility of a non-expert opinion whether a person was drunk or sober. Lavery J considered that the late 1950's was *"the age of experts qualified to give opinions in every field of human knowledge"* but he also considered that *"a sense of proportion should not be lost. There are innumerable incidents of everyday life upon which an ordinary person can express a useful opinion and one which ought to be admitted."* One may add that the question, from the point of view of planning, is one of a particular form of amenity. It is not a technical question or one whether architects or other experts will experience this Courtyard as open space but is whether the ordinary residents of the Proposed Development will do so. Lavery J observed that "*Unfortunately, drunkenness is a condition which comes under the notice of most people with any experience of life."* Fortunately, the same can be said for open space.

Openness of the Space – Standard Of Review

319. There is no plea by Mr Stapleton that the Board's decision, necessarily implicit in its Impugned Decision, that the Courtyard would be open space was irrational. Neither are there pleas by the Board or Savona that the Board's decision that the Courtyard would be open space,

- is reviewable only for irrationality,
- bears on a type of material contravention a decision on which requires the exercise of planning judgment and so is reviewable only for irrationality – as to which see **Jennings**[455] and **Four Districts**,[456]

[454] AG (Ruddy) v Kenny [1960] 94 I.L.T.R. 185.
[455] Jennings and O'Connor v An Bord Pleanála [2023] IEHC 14.
[456] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335 §85 et seq.

- consists in the application of a legal criterion (the concept of open space) to particular facts and so is a mixed question of fact and law, in relation to which some degree of deference to the Board's view is appropriate – as to which see **SWRCPA**,[457] **NE Pylon**[458] and **Four Districts**.[459]

320. All parties' pleadings and written submissions proceeded on the basis that it is for me to decide whether the Board was substantively correct in deeming the Courtyard to be open space. I imagine that may be because the issue of material contravention of the Development Plan is, at least usually, an issue of law on which the Court may substitute its decision for that of the Board. As far as the written case goes, it proceeded on the basis that I am to decide the issue whether the Courtyard is open space within the meaning of the Development Plan.

321. Orally, the Board introduced, for the first time in reply to Mr Stapleton's oral submissions, an argument that whether the space was open was a matter of planning judgement reviewable only for irrationality – citing the recent review of the law of material contravention in **Jennings**.[460] It essentially posited a distinction between contraventions as to development plan content requiring the exercise of discretion and planning judgement, reviewable by the Court, as to merit, only for irrationality, and contraventions as to development plan content not requiring such exercise, as to which the court could substitute its own view – see also **Four Districts**.[461]

322. While a decision as to the quality or planning merit of the open space would be reviewable only for irrationality, I do not think the question whether it is open space is. While the discernment involved may be difficult and questions of degree may be involved, it does not seem to me that whether a space is "open", in the sense in which the intelligent layperson would understand that word, is a matter of discretion (which would imply a right to deem a space open as opposed to making a finding of fact) or planning judgment (in the sense that the issue is not the planning virtue of the space but is one of its physical nature). It is a binary question. Either the space is open or it is not. In my view, I must decide whether the Courtyard space is "open" or not.

General Significance of the Issue, Interpretive Principle and the Development Plan Definition

323. I think it fair to add that the decision of the Board, and perhaps mine, as to whether this Courtyard is open space is likely to be consequential. The particular definition in the Development Plan apart, open space is a concept found in every development plan and in important planning policy documents such as planning guidelines. Its provision is required as a matter of course in certain forms of development. For example, the Urban Residential Guidelines[462] identify "*Fundamental questions to be addressed at the outset of the*

[457] South-West Regional Shopping Centre Promotion Association Limited v An Bord Pleanála [2016] IEHC 84, [2016] 2 IR 481 §91.
[458] North East Pylon Pressure Campaign Ltd v An Bord Pleanála [2016] IEHC 301 §140.
[459] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335 §41.
[460] §62 et seq.
[461] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335 §76.
[462] Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages), May 2009.

planning process" as including "*The scale, location and type of public open space*"[463] and states that *"It is one of the key elements in defining the quality of the residential environment. … Well-designed open space is even more important in higher density residential developments."*

324. Not least in a planning system designed for the participation of a wide variety of lay and expert stakeholders and participants and characterised by public participation, important and widely applicable concepts such as "open space" should be, insofar as possible and even if not susceptible to precise definition, clear, objective, generally understood, and grounded in common-sense and ordinary meaning – as opposed to technical/legalistic meaning. The application of such concepts to particular facts should generally produce predictable results. That the necessary complexity of planning law and practice is such that the intention cannot always be fully realised and outcomes are not always as predictable as one would wish is an argument for intensifying the effort towards clarity rather than abandoning it.

325. Clearly, the approach to interpreting such concepts must be the same as that to interpreting the documents in which they appear. Simons J in **Ardagh**[464] espoused common sense in interpretation of planning documents and in **Dublin Cycling**[465] the XJS principle was reiterated that "*planning documents should be construed not as complex legal documents drafted by lawyers but in a way in which members of the public, without legal training, might understand them*" and on a "*careful but not legalistic*" basis.

326. It is a commonplace of statutory interpretation that the ordinary meaning of a word or phrase may be altered for the purposes of a particular statute by a definition stated in the statute. But interpretation of a Development Plan is not the same exercise as statutory interpretation. I have referred above to text from the Development Plan as a definition of open space. However, and while I will continue to refer to it as a definition, and I have found it of assistance in this case, it might perhaps be better viewed as an explanation or description, or perhaps even an elaboration, of the phrase. I do not see it as attempting to give to the phrase "open space" a meaning substantially other than its ordinary meaning. Of course, that is not to say that the adoption by development plans of particular definitions of words and phrases for particular purposes is to be ignored. But in this case the approach I describe seems to me to accord with the application of XJS principles.

Estoppel from raising Material Contravention Issue as to Open Space

327. The Board pleads that Mr Stapleton may not raise the material contravention issue as it was not raised before the Board. The law in this regard was surveyed in **Kelly**.[466]

[463] §2.2.
[464] Ardagh Wind Farm Ltd v An Bord Pleanála [2019] IEHC 795.
[465] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587.
[466] Kelly v An Bord Pleanála & Atlas GP [2022] IEHC 238.

328. In fact, objectors did in substance raise the issue:[467]

- "AK" baldly asserted that there was "*No open space in the development*".[468] Whether correct or not, that assertion is consistent only with her expression of a view that the Courtyard is not open space. While she does not frame the issue as one of material contravention, that her assertion raises such an issue can only have been obvious to the Board.

- "HMcI", to whose observation in this regard I have already referred, refers to the space below the ETFE roof as "communal open space"[469] and is critical of the ETFE roof in various respects other than an assertion that it encloses it such that it is not open space. However, under the heading "*No Open Space In The Development – No Rationale Provided*", he also asserts that in the SHD consultation Savona was asked to provide "*a rationale for the covering and clarify if the communal area is to be completely enclosed*" but in the planning application did not answer this question. Again, while he does not frame the issue as one of material contravention, his assertion of "*No Open Space In The Development*" and his relating it to the Courtyard can only have made the implication of material contravention apparent to the Board given open space provision is an invariable and important aspect of any apartment development.

329. As noted above, the Council did raise the issue, if tentatively, in its post-consultation/pre-application opinion, in which it said that it "*would query whether the enclosure and confinement of the communal space allows such space to be regarded as truly 'open'".* Its report to the Board on the planning application accepted the Courtyard as open space – albeit also opining that "*The roofing of the four blocks would result in what was a four building perimeter block to becoming one structure"*

330. There is therefore no sense in which the Board is being "gaslit" in the proceedings by a point not made to it in the planning process. The point was made to it and, to the extent it was not made in explicit terms of material contravention, it was made in terms which made the question of material contravention obvious.

331. Material contravention of a development plan is a question which the Board has an autonomous duty to consider, whether or not it is raised by objectors, as long as there is material before it which may reasonably be said to raise the issue – **Four Districts**.[470] What material may reasonably be said to raise the issue must be considered in the light that the Board is a planning expert. I do not think it is impermissible hindsight to observe that, whatever the substantive planning merits or demerits of the proposal to roof the

[467] Others did criticise the roof but not in terms of the status of the Courtyard as open space or material contravention of the Development Plan's requirements of Communal Open Space on the basis that it will not be open space. Clontarf Residents Association, in criticising the ETFE roof, stated that "The covered internal courtyard represents the largest portion of Communal Open Space in this development." Marston Planning Consultancy, for Seafield Road East Residents Group, Seacourt Residents Group, and Dollymount Park and Rise Residents Group addressed the ETFE roof under the heading "Poor quality of the proposed covered internal Courtyard Amenity Area" but did not assert that it was not open space or a material contravention. The "H" Family objected to the absence of rationale for roofing the Communal Open Space but did not dispute that it is open space.
[468] Exhibit MS1 Book 3 p1541.
[469] Exhibit MS1 Book 3 p1479.
[470] Four Districts Woodland Habitat Group v. An Bord Pleanála [2023] IEHC 335, §147. See also Clane Community Council v An Bord Pleanála [2023] IEHC 467 §107(x): "The fact that the applicant didn't raise the issue is irrelevant – compliance with the plan or in the alternative valid consideration of the material contravention power is an autonomous duty on the board."

Courtyard, it should be obvious to a planner that the question must at least be asked, whatever the answer, whether this resultant space is "open" such as to contribute to the quantified provision of open space required by the Development Plan. A planner could not ask that question without immediately realising that it raises a question of material contravention. In any event, the Council had explicitly, in its statutory opinion in the consultation process, doubted whether the space was "open". While it resolved that question in Savona's favour, that could not absolve the Board from making its own judgment on the issue. And "AK" and "HMcI" baldly asserted that there was "*No open space in the development*". With or without their objections, there was ample material before the Board, an expert, to alert it to the need to consider the issue. Further, Four Districts is authority that once the Board's duty to consider the specific material contravention issue was activated, whether autonomously or by other objectors, that fact that Mr Stapleton did not himself raise it does not estop him from doing so in judicial review. The relevant part of Four Districts is as follows:

> *"147. I don't think the applicants are precluded from succeeding on this point merely due to the limited emphasis on it in their submissions, although that isn't fatal anyway because Marsden Planning Consultancy on behalf of Rathcoole Park did make a reference to density. There is an autonomous duty on the decision-maker to comply with the law regarding material contravention. That implies an obligation to consider whether the application materially contravenes the development plan. The board is required to do that whether or not anybody raises the issue."*

332. As it is based on authority preceding the trial of the present case. I consider that I may here repeat the view expressed in a recent **Ballyboden** case[471] that **NGGSPS**[472] is not inconsistent with the view that the Board has an autonomous duty to identify material contraventions which duty,

> *"… subsists where the alleged material contravention is not drawn to its attention by others, unless the Board was not on notice – actual or constructive – of the relevant facts. In identifying facts of which it is on constructive notice one must have regard to the inquiries it ought to have made having regard to its autonomous duty of inquiry. That a process is inquisitorial not adversarial is a burden on a decisionmaker – not an absolution. That inquisitorial obligation is born of the primarily public nature of the interests protected by planning and environmental law (though it protects private interests also) and is evident, for example, in that planning applications may be (and often are) refused in the absence of any objection – including on material contravention grounds."*

I would add only that the foregoing must be considered in the context that the Board is an expert and its duties bear on it accordingly.

333. I therefore hold that the issue whether the Courtyard is open space, and whether there was a material contravention as to the provision of communal open space was before the Board and Mr Stapleton is not estopped from raising it in these proceedings.

[471] Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722, §25.
[472] North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241.

Openness of the Space – Discussion

334. While I would not overstress the point, and while Savona's advocacy of the high quality of the Courtyard is what one would expect, it does bear observing that, as to a phenomenon as commonplace as open space, it is perhaps somewhat self-defeating for Savona and the Board to have stressed that the space is "unique".[473] As a general proposition, open space is not unique – at least as to its quality of openness. But, as I say, it is not a determinative point.

335. S.2 PDA 2000 defines a "*structure*" as "*any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and— (a) where the context so admits, includes the land on, in or under which the structure is situate, ……*". Though it shares the word "building" (of which there is no relevant definition) with the definition of open space in the Development Plan, I agree with the Board and Savona that the definition of "structure" in s.2 does not assist Mr Stapleton – or indeed the Board – as to this ground. Likewise, Mr Stapleton's plea of regard to irrelevant material does not seem to me a useful lens through which to view the open space issue.

336. But Mr Stapleton's emphasis on the definition of "structure" does not require or allow me to ignore his more general and simpler plea: that the Board erred in law in considering the Courtyard to be open space. Leaving aside his emphasis on the definition, it seems to me correct to say, as Mr Stapleton does and as did the Council, that the roof and the apartment blocks together form a single structure. Indeed, it is the roof that renders the entire a single structure as it joins the two "L"s formed, in each case, by two of the four apartment blocks.[474] And the entire is not merely a structure, it is a building – a building which is "on", inter alia, the Courtyard.

337. Savona says that the roof is not a "conventional" roof and emphasises an asserted analogy between this particular roof and an umbrella and, thereby, a contradistinction of this roof from an ordinary roof. It seems this analogy is drawn on the basis that the roof sits proud of the apartment blocks allowing the elements to intrude in the Courtyard via the gap between them.[475] I see the point, but find it of very limited assistance – at least as distinguishing this roof from an ordinary roof. If this structure is an umbrella, any roof is an umbrella. That they keep off rain is an essential common purpose of both an umbrella and an ordinary roof. They typically differ appreciably in that an umbrella can generally be put up in the rain and taken down and put away when it stops – whereas roofs generally are permanent. This roof is permanent and in that significant respect is unlike an umbrella. It is not said to be demountable, or even retractable, and will stay up all year round and in all weathers. One might add portability as a distinction but some umbrellas can be fixed and large. This roof does have in common with an umbrella that fresh air can enter under both but, in that respect, the space and person under an umbrella is typically far more exposed to the elements than the Courtyard and residents under this roof will be. And Savona's point ignores the relationship between the roof

[473] The Board cited the Architectural Design Statement p16 – "The proposed courtyard development with the ETFE canopy will be unique in Ireland." – "The ETFE canopy over the court yard creates unique Communal Open space for residents and visitors."
[474] See Appendix Figure 3.
[475] See Figures 4 – 6 in the Appendix to this judgment.

and the remainder of the structure/building of which it is part. That is so not least as to the louvres – though I appreciate that shut louvres would not fully shut off the ingress of fresh air. We are concerned here with roof, not an umbrella. It is not even a demountable or retractable roof. The analogy adds little, if anything, to the analysis.

338. While gardens and other facilities such as those to be provided in the Courtyard are characteristic of outdoor locations, they seem to me to be, as with many amenities, generally capable of provision both indoors and outdoors. Likewise, that the roof is to be translucent – or even transparent – does not seem to me determinative. Glazed roofs over indoor spaces such as atria are not unusual and conservatories are not typically considered open spaces. Savona's emphasis on the environmental, economic and other benefits of the roof system seem to me very relevant to its planning merits but irrelevant to the question whether the space below it is open space.

339. Whether a space is "open" is not a technical or scientific issue. It is an issue of ordinary meaning. It seems to me important to ask the question what, as to the openness of the space, would the intelligent layperson make of this? Does the space conform to the proper expectations of such a person and the community with whom the Council Development Plan has made an environmental contract – a promise, a representation in solemn form, binding on all affected or touched by it – that it will regulate private development in a manner consistent with the objectives stated in the plan – **McGarry** and **Byrne**.[476] It is for the Court to *"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"* – **Jennings**.[477] Ordinary concepts through which the solemn promise is expressed are not infinitely elastic and the Court is entitled to discern when the elastic has snapped. I must ask if the ordinary intelligent informed layperson would consider that, in the Proposed Development, the solemn promise of the Development Plan that apartment developments would include a particular minimum quantity of space which is "open" has been fulfilled.

340. It seems to me that the layperson, asking if the Courtyard will be open space, will ask: open to what? A space can be open, for example, to the public or to a differently constituted cohort such as residents – but that is clearly not the issue here. What is at issue here is openness to the elements. While the search for synonyms as often complicates as simplifies a question, it seems to me helpful to ask whether the space is indoors or outdoors, inside or outside? The phrase "open air" is also helpful. And while fine linguistic distinctions as to prosaic concepts may be as unconvincing as synonyms may complicate them, I nonetheless think that "open space" tends to be "in the open air" rather than merely "open to the air". The Courtyard is, to appreciable degree open to the air but not, it seems to me, in the open air.

[476] AG (McGarry) v Sligo County Council [1991] 1 IR 99 at p 113, Byrne v Fingal County Council [2001] 4 IR 565.
[477] §105.

341. Openness can be a matter of degree. Shelter is possible indoors and outdoors and in varying degrees. But "a shelter" tends to convey an outdoor location in which an incomplete protection from the elements is found: for example a bus shelter or a gazebo or a roofed platform at a smaller railway station. Even a windbreak provides shelter on a beach. Such locations are considered to be outdoors – as is a person sheltering under an umbrella, unless prepared to risk bad luck by opening it indoors. A sheltered roof garden is likely to be a similar space. As the Development Plan definition acknowledges, an open space can be enclosed. Indeed, balconies to apartments are often partly enclosed but are generally considered outdoor spaces – in this Development Plan they are considered to be private open space. But, whatever the definition, clearly a space completely enclosed by walls and a roof is not open space on any sensible view, so the definition must allow only of partial enclosure. And the more enclosed, the less likely to be open space. For example, a walled kitchen garden in a "big house" is clearly an enclosed outdoor space – as is the often walled back yard of an artisan cottage. On the other hand, a room in which the windows are wide open – even in which large skylights or patio doors spanning an entire wall are open – will still be considered to be indoors. Despite the very large oculus in the centre of its dome, no-one would suggest that the Pantheon is an open or an outdoor space.

342. Broadly and without attempting a definition, it seems to me that in general,

- four walls and no roof is open space.
- a roof with no walls is open space.
- a roof with less than four walls may be open space.
- four walls and a roof is not open space.

343. Dictionaries yield varying definitions of open space – though the Cambridge Dictionary echoes the Development Plan in defining "open space" as *"land, especially in a town, that has no buildings on it".*[478] In submitting that the Courtyard is not land "*on which there are no buildings*", Mr Stapleton asserted that it is proper to view the combination of the four inner facades of the apartment blocks as walls to the Courtyard, surmounted by the ETFE roof – four walls and a roof being the prime characteristics of a building. And, contrary to the text of the application documents, the drawings reveal that the roof is not suspended over the courtyard – it is supported, and by the apartment buildings themselves.[479] It seems to me that, while the primary function of those facades is undoubtedly as walls of the apartment blocks, viewed as to their role in defining the space constituted by the Courtyard there is merit in Mr Stapleton's submission that they function as the walls surrounding the Courtyard. Though the roof edges do not meet the facades, they overlap them – no doubt with the intention of minimising precipitation on the Courtyard. And, of course, there are the louvres apparent on the drawings which occupy the gap between the roof edges and the facades below, along the long edges of the rectangle. As the Inspector says, the roof *"will not fully enclose the space*" – it will "*substantially cover"* it.

[478] OPEN SPACE | English meaning – Cambridge Dictionary.
[479] See Appendix Figure 6.

Open Space – Conclusion

344. I must decide if the Courtyard will be open space. My choice is binary. The space is either open or it is not. While the possibility of a third or intermediate category of space was discussed at trial, in the end that is irrelevant: there is a positive requirement of open space and space in any third or intermediate category is, ex hypothesi, not open space.

345. In my view, the search for a watertight definition of "open space" is futile. It follows that the Board's appeal to logic – that *"it is hard to identify any coherent basis on which it could be contended that the Development Plan intended to characterise a sheltered roof garden as open space but a sheltered courtyard as not constituting open space"* – is unconvincing. To slightly misapply Holmes' aphorism that the life of the law has not been logic but experience: one may not be able to logically distinguish two spaces, one as open, one as not, but the experience of being in them will usually suffice to do so. I think it useful to "stand back" from the detail and ask whether, as a matter of impression and on the materials opened to me, the Courtyard is open space. Impression is important – but informed by an appreciation of the characteristics typical of the phenomenon in question. I think the "elephant test" applies – see a **Ballyboden TTG** case[480] and cases cited therein. In **Malins**[481] Mostyn J referred to *"the well-known elephant test. It is difficult to describe, but you know it when you see it, which is a common enough technique used by lawyers and judges where they cannot define something with precision."*

346. The only issue is whether the Courtyard will be open. I do not ignore the high, open, entrance routes where the "L" structures do not meet – nor the somewhat unusual gap between the apartments and the car park ramp. It does seem to me that while the Courtyard is open to the air – and in appreciable degree – it is not in the open air in the sense in which open space is usually understood. It is not merely walled on all four sides, it is substantially covered by a roof – entirely so in the horizontal plane. Those walls and roof are joined – indeed, joined by the roof – in a single structure or building. I agree with the Council on that issue. It necessarily follows from that conclusion that the building thus described is on the space in question – the Courtyard below. The visual effect is of a covered, indoor, atrium-like space and that will strongly influence the experience of those using it. It may not be the Parthenon, but in this respect the effect seems similar – maybe even less open as the openness of the Parthenon is central and unmissable whereas that will not be the case as to the peripheral gaps below the ETFE Roof. Further, and I do not say this pointedly, the impression of openness conveyed by some of the schematic drawings is excessive. The space under the roof between the roof garden and the Courtyard is in fact considerably blocked off. The space between the long edges of the roof and the buildings below is to be occupied by louvres – and, as a general observation, just as an open window does not turn indoor space into outdoor space, neither do open louvres. For these reasons and for the reasons set out in the discussion above, I have concluded that the Courtyard is not open space.

347. It follows that the Proposed Development is in material contravention of the Development Plan as to the quantum of its provision of communal open space. The Board has not invoked the procedures of s.9(6) of

[480] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §184.
[481] Malins v Solicitors Regulation Authority [2017] All ER (D) 82 (Apr), [2017] EWHC 835 (Admin).

the 2016 Act and s.37(2)(b) PDA 2000, so the Impugned Permission must be quashed as unlawful as in breach of the conditions of s.9(6) for the grant of permission in material contravention of the Development Plan. I will hear the parties as to remittal of the decision to the Board having regard to this finding.

VALIDITY OF HEIGHT GUIDELINES & CONSTITUTIONALITY OF s.28(1C) PDA 2000

Introduction

348. Mr Stapleton pleads both that:

- The Height Guidelines were adopted ultra vires the Minster's powers under s.28 PDA 2000 – this is the validity issue.
- In any event, s.28 PDA 2000 contravenes Art 15.2.1° of the Constitution – this is the constitutionality issue.

349. As recorded above, the Impugned Permission records that permission "could" materially contravene §16.7.2 of the Development Plan as to building height and that permission would nonetheless be justified in accordance with s.9(6) of the 2016 Act and s.37(2)(b)(i) & (iii) PDA 2000, having regard, inter alia, to SPPR3 of the Height Guidelines. If the criteria for its application are satisfied, SPPR3 authorises the Board to permit a proposed development "*even where specific objectives of the relevant development plan … may indicate otherwise*".

350. As to SHD permissions, and as recorded above, s.9(6) of the 2016 Act authorises the grant of planning permissions "*even if the proposed development contravenes materially the development plan*" other than as to zoning – but only "*where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development*". S.37(2)(b) PDA 2000 authorises the grant of planning permissions "*even if the proposed development contravenes materially the development plan*" but only if the proposed development,

- (i) is "of strategic or national importance", or
- (iii) should be permitted having regard to, inter alia, s.28 guidelines.[482]

351. S.28 PDA 2000 authorises the Minister to issue planning guidelines to which the Board shall "*have regard*". It is well-established that such burden of regard is light. However, s.28(1C) PDA 2000 authorises ministerial inclusion in such planning guidelines of SPPRs "*with which … the Board shall, in the performance of their functions, comply".*

352. Article 15.2 of the Constitution provides that:

[482] I have omitted irrelevant possibilities.

"1° The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the state.
2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."[483]

353. Article 28A of the Constitution provides for directly elected local authorities and, in part, as follows:

"1 The state recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities."

Pleadings & Submissions – Stapleton

354. As to the validity issue, Mr Stapleton pleads that SPPR3 of the Height Guidelines is invalid as ultra vires the Minister's powers under s.28 PDA 2000 as:

- The Minister may create policy but is not empowered by the Constitution to create binding policy: binding policy can only be created by legislation or pursuant to principles and policies laid down by law or as required by EU law.

- The Height Guidelines in general, and SPPR3 in particular, purport to effect as binding a policy in favour of permitting higher buildings, which policy,
  - is not found in legislation.
  - purports to override development plans adopted pursuant to ss.9 to 12 PDA 2000.

- In purporting thereby to make such a binding policy, the Minister acted in excess of the power delegated to him by the Oireachtas.

355. Mr Stapleton pleads the constitutionality issue in similar terms. He pleads that the Impugned Permission is invalid as reliant on SPPR3 as s.28(1C) PDA 2000 contravenes Article 15.2.1 of the Constitution in that:

- By Article 15.2.1, the legislative power of the Oireachtas can only be delegated to a Minister by legislation laying down the principles and policies on which (s)he is to exercise that delegated power.

- SPPR3 purports to

[483] The origins, motives for, drafting and effect of Article 15.2.1 are described by Hogan in The Origins Of The Irish Constitution, Chapter 9. Motivated by a desire to emphasise the legislative independence of the Oireachtas and to guard against any suggestion that the Westminster Parliament might enjoy any residual legislative authority it also "in modern times, … has assumed enormous importance since it is the very mechanism whereby the courts ensure that the Oireachtas has not abdicated its law-making powers to the executive …" and was described by Keane CJ in Laurentiu v Minister for Justice [1999] 4 IR 26 as "also an essential component in the tripartite separation of powers which is also the most important feature of our constitutional architecture".

- effect and make binding in law a policy in favour of permission to develop higher buildings, which policy is not found in legislation.
- make that policy override statutory development plans adopted pursuant to ss.9 to 12 PDA 2000.

- In so authorising the Minister to formulate binding policy, s.28(1C) delegated greater power to the Minister than the Oireachtas is entitled to delegate given Article 15.2.1 of the Constitution.

- S.28(1C) also purports to empower the Minister to adopt binding rules that override decisions taken by a local democratic body to which the Oireachtas has delegated decision-making power pursuant to ss.9 to 12 of the 2000 Act. That power, having been delegated to a subordinate democratic body, cannot be conferred on any other person without setting out the policies and principles under which it may be exercised.

- No such policies and principles are found in s.28 of the 2000 Act or elsewhere.

356. As to both issues, Mr Stapleton stood on his written submissions.[484] He characterised the Height Guidelines as "*a higher buildings policy in service of a sustainable development policy*". He canvassed the decision of Humphreys J in **Conway**[485] which, he very properly conceded, recently decided both the validity and constitutionality points against him. Conway is under appeal.[486] Nonetheless, Mr Stapleton accepts the decision in Conway and that it binds me – with one caveat.

357. One principle identified in Conway as a factor in deciding the validity of delegated legislation (or, as Conway categorises it, secondary legislation) is "*the extent to which subordinate bodies have historically been conferred with functions of the sort under consideration*". Mr Stapleton asserts that Humphreys J erred in considering it relevant to the application of that that principle that, if delegation to the Minister were unlawful, delegation of plan-making power to local authorities would also be unlawful.

358. Mr Stapleton submits that "*a deeper understanding*"

- reveals that the view that, if delegation to the Minister were unlawful, delegation of plan-making power to local authorities would also be unlawful, is wrong
- leads to the conclusion that the delegation of power to the Minister by s.28(1C) is unconstitutional.

Essentially, he submits that the scheme adopted by the Oireachtas in Part II, Chapter I, PDA 2000 – ss.9-12[487] – as to the making of Development Plans, is to devolve policy-making to the elected members of local

[484] Having exhausted his time for argument agreed prior to trial.
[485] Conway v An Bord Pleanála et al [2023] IEHC 178.
[486] [2023] IESCDET 118.
[487] It may assist to list the description of those sections set out in the Arrangement of Sections in the consolidated version of the PDA 2000:

- 9. Obligation to make development plan.
- 9A. Modification to operation of section 9 of Act of 2000 having regard to Covid-19.
- 10. Content of development plans.
- 11. Preparation of draft development plan.
- 11B. Extension of certain development plans and restriction of section 11.
- 11C. Development plans and dissolution of certain planning authorities.
- 11D. Modification to operation of sections 11 and 11B of Act of 2000 having regard to Covid-19.
- 12. Making of development plan.

planning authorities as, he says, "*the people entrusted under A15.2.2 and A28A of the Constitution with deciding local policy*".

359. The Constitutional status of local planning authorities by virtue of Article 28A was not pleaded and its argument introduced an entirely new and unpleaded element to the case. Nor had Mr Stapleton pleaded Article 15.2.2 as to "subordinate legislatures".

360. Mr Stapleton submits that it is constitutionally objectionable that the Minister – who he describes as a "*less democratic body*" – is by s.28(1C) empowered to override the Development Plan and the decision of the democratically-elected Council that adopted it, and to impose requirements that determine decisions on planning applications. He says that as the Oireachtas has given local authorities a democratic power it cannot then authorise another person to give directions to them, without scrutiny or control, as to how they must exercise that power: "guidance, yes; direction, no." Mr Stapleton contrasts s.29 PDA 2000 which allows the Minister to issue policy directives with which planning authorities must comply – but only after the directive has been approved by resolution of each house of the Oireachtas. S.28(1C) creates a directive by another name, and exempts it from the necessary controls seen in s.29. In essence, he says, s.28(1C) is s.29 without the safeguard.

361. Mr Stapleton describes as "*more nonsense than paradox*" the State's argument that SPPR3 is, given its terms and in effect, not a "requirement" at all, but is merely "permissive". He suggests that the State's argument indicates that SPPR3 is void for uncertainty rather than unconstitutional. But no case in uncertainty was pleaded and so the case cannot be made.

362. Mr Stapleton submits as to this ground that

- the Board has treated "sustainable development" as a mantra – as a "*a purely aspirational phrase which does not in reality amount to any form of principle, policy, constraint or limitation on the exercise of such powers, whereas it is in law a genuine principle and policy constraining what seem to be wide powers under the Act*,"
- "*The application of a binding high building policy shorn of any true consideration of its sustainability origins is not acceptable. If that is what the Height Guidelines require, they are ultra vires the Minister and void".*[488]

Discussion

363. Mr Stapleton accepts that, unless I depart from it, Conway is decisive against him on both the constitutionality issue and the validity issue. In that light, I confess to sharing the State's surprise that Mr

[488]Stapleton Written Submissions §84.

Stapleton argues that I should do so merely on the basis of an allegedly "*deeper understanding*" of one issue only – an issue canvassed in that decision. He makes that argument on the basis of no authoritative caselaw.

Worldport

364. Specifically, Mr Stapleton omits to mention, much less engage with or demonstrate satisfaction of, the criteria for departing from a recent judgment of the High Court as such criteria were laid down in **Worldport,**[489] **Kadri**,[490] and **A v Minister for Justice**.[491] I need not repeat here the reasons for those decisions. It suffices to say that I am bound by them and that they limit the scope for the High Court's departure from an earlier High Court decision to circumstances in which there are "strong reasons" to do so. That requires that it can be said of the earlier High Court decision that it was,

- clearly wrong,
- clearly not based upon a review of significant relevant authority, or
- delivered so long ago that the relevant jurisprudence has advanced since.

That is so even (perhaps especially) as to authority recently decided on evenly balanced argument.

365. For the avoidance of doubt, the bar of "strong reasons" for departure from an earlier judgment is high. Mere disagreement with the earlier judgment will not suffice. Indeed, ex hypothesi, absent disagreement the issue of departure does not even arise. Judicial inclination, at least, to disagree is a premise of the application of Worldport principles. The State posited a test in which the judge considering to departure from earlier judgment would have to be able to say, with a high degree of confidence, that if the issue returned to the judge who decided the earlier case (s)he would say "Ah, I see" – perhaps, for example, on drawing his or her attention to authorities overlooked in submissions made earlier. However one describes the test, **Brady**,[492] (in which Worldport was considered), **GE Capital**,[493] **Irish Trust Bank**[494] are authority that departures from earlier decisions of the same court are "*extremely rare*".

366. As I say, Mr Stapleton advanced none of these Worldport propositions and cited no relevant authorities. So, I agree with the State that I must follow Conway.

367. As I say also, Mr Stapleton accepts that, unless I depart from it, Conway is decisive against him on both the constitutionality issue and the validity issue. As I have been given no sufficient reason to depart from it that is, in essence, the end of the matter.

[489] Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189.
[490] Kadri v Governor of Wheatfield Prison [2012] IESC 27.
[491] A v Minister for Justice [2020] IESC 70.
[492] Brady v Director of Public Prosecutions [2010] IEHC 231
[493] GE Capital Woodchester Homeloans Ltd v Maureen Faulkner Madden & Ors [2013] IEHC 540
[494] Irish Trust Bank Ltd v Central Bank of Ireland [1976 – 1977] I.L.R.M. 50

Conway

368. However, it may be as well to briefly record what Conway seems to me to have decided. Mr Conway challenged the constitutional validity of s.28(1C) PDA 2000 and the validity of two guidelines made under s.28(1C) – one of which was the Height Guidelines by reason of SPPR 3.

Conway – the Constitutionality Issue

369. The pleaded constitutionality challenges invoked Article 15.2.1º of the Constitution (pleaded here) and Articles 15.2.2º and 28A.1 and 2 of the Constitution, (not pleaded here). It was argued that (as pleaded and argued here) the alleged absence of principles and policies in the PDA 2000 Act to limit or sufficiently limit the Minister's power under s.28(1C) to formulate policies rendered s.28(1C) was contrary to the constitutional rule of law. This was argued on the basis that s.28(1C) purports to grant overly broad administrative powers, a vague and untrammelled discretion and/or a disproportionate power on the Minister to make binding policies which restrict the powers of local authorities. It will be seen that the case pleaded in Conway covered the case pleaded here and additionally pleaded Articles 15.2.2º and 28A.1 and 2 of the Constitution.

370. Humphreys J stated that:

- By s.34(2)(d) PDA 2000 and s.9(3)(c) of the 2016 Act the function of SPPRs is explicitly "*to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development*".[495]

- By s.34(2)(aa) & (ba) as to ordinary planning applications, and by s.9(3) of the 2016 Act as to SHD planning applications, planning authorities and the Board must apply relevant SPPRs – even where they differ from the development plan.

- S.28(1C) does not confer merely a merely administrative power – that is to say a power of execution, not primarily of rulemaking or of the enactment of measures of general application. The power it creates, to issue binding general requirements (misleadingly called guidelines) that do not decide individual cases but apply in an overall way to categories of situations, is quasi-legislative. However Humphreys J considered that the distinction between administrative powers – and quasi-legislative powers is not very helpful as to the validity of those powers as conferred on a minister.

- The traditional **Cityview Press** test[496] of unauthorised delegation of parliamentary power, in the context of Article 15 of the Constitution, was whether the power delegated was more than that of giving effect to principles and policies contained in the statute itself – by way of the delegate filling in detail. Recent Supreme Court caselaw[497] has rendered that 'principles and policies' test no longer determinative.

[495] s.9(3)(c) of the 2016 Act.
[496] Cityview Press v. An Chomhairle Oiliúna [1980] I.R. 381.
[497] Humphreys J cites Bederev v. Ireland [2016] IESC 34, [2016] 3 I.R. 1, O'Sullivan v. Sea Fisheries Protection Authority [2017] IESC 75, [2017] 3 IR 751, Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court [2021] IESC 36, [2021] 2 I.L.R.M. 1.

- The modern test, set in **NECI,**[498] is holistic and derives from the words of Art.15.2.1 itself. It prohibits delegated law-making. So the "primary" question is whether, having regard to all the circumstances, "*the Oireachtas has abdicated its function*" as "*sole legislator*". Though no longer a free-standing test, the 'principles and policies' analysis remains an important factor – an "*indispensable foundation-stone*" – to assist courts in applying that test.[499] (I add that NECI bears careful and detailed reading).

- The circumstances relevant to the abdication test include:
  - (i) any principles and policies governing the delegated function,
  - (ii) the nature of the functions delegated and the issues to which they relate,
  - (iii) the system of which the delegated function concerned forms part, and
  - (iv) the safeguards restricting or regulating the exercise of the delegated function.

- As to (ii), the nature of the functions delegated and the issues to which they relate, Humphreys J rejected "*as impracticable the applicant's suggestion that policy-making cannot be delegated at all, although the extent to which the formulation of policy is delegated is certainly a factor*". So too is the extent to which the matter delegated is technical or complex.

- In general terms, guidelines in any context are highly desirable to promote the rule of law and to enhance equality and consistency of approach. Where general discretions are created, even binding guidelines serve an important purpose by ensuring consistency. This the PDA 2000 recognises in defining the function of SPPRs as "*to support the consistent application of government or national policy and principles by planning authorities, including the board, in securing overall proper planning and sustainable development*". Far from being unconstitutional, this procedure strongly promotes the constitutional values of lawful decision-making and equality as between similar persons and situations.

371. Humphreys J went on to hold that

- The concept of "*proper planning and sustainable development*" constrains the exercise of all functions under s.28(1C) PDA 2000. So do other provisions of the PDA 2000.[500] The concept requires that environmental impacts be minimised, but also that they be avoided altogether where this would breach the concept of sustainable development.

- The subject matters covered by the Height Guidelines and SPPR3 are detailed, technical and complex in nature, inherently requiring expert input and flexibility of response to changing circumstances such that their determination by primary legislation would be impractical.

[498] Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court [2021] IESC 36, [2021] 2 I.L.R.M. 1.
[499] In this paragraph I have added some wording from Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court [2021] IESC 36, [2021] 2 I.L.R.M. 1 to that used by Humphreys J – but without altering meaning.
[500] Humphreys J instanced provision for the NPF (pt. II, ch. III), strong protections for architectural heritage and protected structures (pt. IV), the requirement for environmental impact assessment (EIA) (pt. X) and appropriate assessment (AA) (pt. XAB), and provision for protection of amenities including landscapes and trees (pt. XIII).

- The blend of soft and hard law in planning policy documents and the use of practical examples and photographs and graphics, as appears from perusal of the sort of guidelines that have been issued to date under s.28, renders them inappropriate for incorporation in primary law.

- The function of the Height Guidelines and SPPR3 primarily relates to the regulation of administrative decision-making, rather than direct interference in civil or criminal law such as the imposition of penal requirements or the nullification of contracts.

- The bodies primarily impacted by the delegated power are organs of local and regional government, and the Board, albeit that there is a downstream impact on participants in the planning process (such as this applicant).

- By the applicant's logic, the power of local authorities to make development plans must also be unconstitutional, given the vast discretion given to such authorities to develop policies and objectives, including land use objectives, which are then applied to every single piece of real property within the functional area of the local authority concerned. The vast powers given to local authorities under the PDA 2000 render it implausible that a more limited power given to the Minister must be unconstitutional. (This is where Mr Stapleton invites me, on foot of his alleged "deeper understanding", to depart from Conway).

- The delegation does not allow anything that would otherwise contravene primary law.

- The power to make planning documents setting out policies[501] has existed since at least the Town and Regional Planning Act 1934. It empowered the Minister to veto entire land-use plans.

- The level of parliamentary scrutiny of the guidelines provided for in the legislation is virtually non-existent. That is a factor to be considered but is not in itself determinative of or fatal to the constitutional validity of s.28(1C).

- S.28(1C) cannot be used by the Minister to affect individual cases – it can only operate at the general level.

- There is a limited impact on fundamental human rights.

- Notably, by Article 28A, the powers and functions of local government are not inherent to local government or conferred on it by Article 28A – they are to be those conferred by law.

372. Humphreys J concluded that despite some indicia to the contrary – s.28 is light on principles and policies, and the lack of meaningful parliamentary scrutiny – a "*cascade*" of factors favoured the conclusion that s.28(1C) is a permissible delegation of power. There followed a recapitulation by Humphreys J of many points made above (and some others) as informing the "*overwhelming conclusion*" that while s.28(1C)

[501] Whether the adoption of plans by local authorities, or the furnishing of guidance by national government.

> *" … appears wide on its face, there are in fact sufficient principles, policies and constraints to limit it significantly, that it is a reasonable and non-abdicatory conferral of a power to make secondary law in circumstances where there is an objective need for flexibility in relation to the subject matter, and where the system of which the power forms part is one that relies very considerably on the delegated exercise of functions, including policy-making functions, by local authorities. Section 28(1C) of the 2000 Act is not an unconstitutional delegation of legislative power".*[502]

373. The foregoing, though lengthy, is a brief, edited and incomplete account of the judgment of Humphreys J on the constitutionality issue. However, it suffices to show, with reference to the **Worldport** principles, that Conway certainly cannot be said to have been anything other than a recent highly-considered judgment, adverting to the salient authorities (and Mr Stapleton has cited no other authorities), on exactly the same constitutionality issue raised before me. I must follow Conway on that issue.

374. All that said, because it is easily dealt with, I will briefly say something of the constitutional law argument that,

- s.28(1C) purports to empower the Minister to adopt binding rules that override decisions of a local democratic bodies to which the Oireachtas has delegated decision-making power pursuant to ss.9 - 12 PDA 2000.
- That power, having been delegated to a subordinate democratic body, cannot be conferred on any other person without setting out the policies and principles under which it may be exercised.

375. The fundamental and simple problem with that argument is that, as Humphreys J points out in Conway,[503] by Article 28A of the Constitution, local governmental bodies are to have such powers as are to be conferred by law – that is, conferred by the Oireachtas and by laws such as the PDA 2000. It follows that those powers can, by the Oireachtas, be defined, limited, circumscribed, amended and, indeed, withdrawn. Mr Stapleton makes the error of failing to read ss.9 - 12 PDA 2000 completely in themselves and as part of the whole Act, many provisions of which limit or similarly affect the powers of planning authorities as to the terms in which they may adopt development plans. In citing s.9 Mr Stapleton implicitly cites s.9(6). It requires that a *"development plan shall in so far as is practicable be consistent with such national plans, policies or strategies as the Minister determines relate to proper planning and sustainable development."* Notable also is s.31 PDA 2000, empowering the Minister to compel compelling Planning Authorities to take specified measures as to Development Plan content considered objectionable. And, of course, the whole Act includes s.28(1C). Ss.9 - 12 PDA 2000 on the one hand and s.28(1C) on the other, are not things apart. The powers conferred by the scheme of the PDA 2000 are inherently circumscribed by s.28(1C). And as Humphreys J points out in Conway,[504] by statute[505], SPPRs are "*policy requirements identified in guidelines issued by the Minister to support the consistent application of government or national policy and principles by planning authorities, including the board, in securing overall proper planning and sustainable development*". That

[502] §91.
[503] §84.
[504] §70.
[505] S.34(2)(d) PDA 2000 and s.9(6)(3) of the 2016 Act.

statutory scheme is in accordance with the Article 28A of the Constitution, to the effect that local governmental bodies are to have such powers as are conferred by law.

376. Likewise, I am content to record my agreement with the State that Mr Stapleton's argument is a non-sequitur when he says that the fact that, by s.29 PDA 2000, ministerial policy directives must be laid before both Houses of the Oireachtas for approval implies that s.28 is unconstitutional. In any event, Humphreys J expressly considered the issue of parliamentary oversight of the operation of s.28 and held that it did not outweigh the factors weighing in favour of the constitutionality of s.28(1C).

Conway – the Vires Issue

377. Humphreys J described the vires issue in Conway as elusive. He said it essentially repackaged the constitutionality argument in the considerably weaker form of an argument that even if it was valid, the lack of principles and policies in s.28(1C) meant that the impugned SPPRs derived from it were invalid. The argument failed as he had found that adequate principles and policies were discernible. And it hadn't been shown that the SPPRs exceeded the contours, terms and safeguards he had found as applying to s.28(1C). Mr Conway hadn't pointed to anything in the SPPRs that breached the principles of proper planning and sustainable development, for example by mandating approval of projects that were impermissibly unsustainable. Nor has Mr Stapleton and I am as bound by Conway on this issue as on the constitutional issue.

Other issues

378. The assertion that SPPR3 is void for uncertainty (as expressed in discretionary terms) was made without recourse to either pleadings or authority. I reject it on both accounts. As to the latter, in **Kerins**,[506] despite elements of its wording suggesting that SPPR3 merely permits the Board to grant permission if the criteria of §3.2 of the Height Guidelines are satisfied, Humphreys J demonstrates that SPPR3 is mandatory in the sense that, if those criteria are satisfied, SPPR3 prohibits refusal of permission merely for contravention of the development plan.

379. As I have noted, Mr Stapleton submits, that "*The application of a binding high building policy shorn of any true consideration of its sustainability origins is not acceptable*. *If that is what the Height Guidelines require, they are ultra vires the Minister and void*".[507] As I have said, Mr Stapleton makes these submissions in somewhat Delphic terms unrelated to any evidence or analysis of the terms of the Height Guidelines and of the allegation that they are "*shorn of any true consideration of its sustainability origins*". The State, I think correctly, identifies this as an attempt to mobilise an observation by Humphreys J in **Conway**,[508] that,

[506] Kerins v An Bord Pleanála [2021] IEHC 733, §15 et seq.
[507] Stapleton Written Submissions §84.
[508] §§ 93 & 94.

hypothetically, whether the Height Guidelines were adopted ultra vires could be open to debate by reference to a proposition that they go beyond the contours, terms and safeguards he identified as applying to the making of SPPRs under s.28(1C). Humphreys J considered that had not been done in Conway as *"The applicant didn't particularly point to anything in these guidelines that breached the principles of proper planning and sustainable development, for example by mandating the approval of projects that were impermissibly unsustainable."*

380. I reject the argument for the following reasons:

- I accept the State's argument that no basis was laid for this assertion. Not least, it is not pleaded.

- As I have held, the Height Guidelines (including SPPR3 – which invokes the *"wider strategic and national policy parameters set out in the"* NPF[509] and the Height Guidelines) do not merely express – they are characterised by – sustainability concerns: not least that of compact urban development. Indeed, Mr Stapleton's own submissions, a sentence earlier, undermine the proposition: he asserts that the Height Guidelines are *"a higher buildings policy in service of a sustainable development policy".* Mr Stapleton's invocation of "*true consideration"* is no more than an invitation to the Court to impermissibly second-guess the merits of the views of sustainability and the many judgments and compromises it requires (even as between sustainability concerns) as expressed in those Guidelines.

- In my view Mr Stapleton's attempts to point "*to anything in these guidelines that breached the principles of proper planning and sustainable development* have failed.

- It is difficult to see how the Board's allegedly deficient application of the Height Guidelines and/or SPPR3 could, even if established, be a factor in their invalidity or in the unconstitutionality of s.28(1C).

Decision

381. For the foregoing reasons I reject the challenge to the validity of the Height Guidelines and the constitutionality of s.28(1C) PDA 2000.

CONCLUSIONS

382. It follows from this judgment that the Impugned Decision will be quashed on two grounds only. They are that:

a. The Proposed Development is in material contravention of the Development Plan as to the quantum of its provision of communal open space. The Board has not invoked the procedures of s.9(6) of the

[509] I have noted above that the NPF is imbued with sustainability.

2016 Act and s.37(2)(b) PDA 2000 so the Impugned Permission must be quashed as unlawful as in breach of the conditions of s.9(6) for the grant of permission in material contravention of the Development Plan.

b. The Board erred in law in failing to considerwhether, in the particular circumstances of the case, it should exercise its discretion to bespeak from Dublin Bus or Savona the written confirmation of Dublin Bus as to the adequacy of public transport to serve the propsed development at peak hours.

383. I am provisionally of the view that the matter should be remitted for re-decision by the Board and that Mr Stapleton should have his costs. I will list the matter for mention on 26 February 2024.

DAVID HOLLAND
13/2/24

APPENDIX – COMMUNAL OPEN SPACE FIGURES

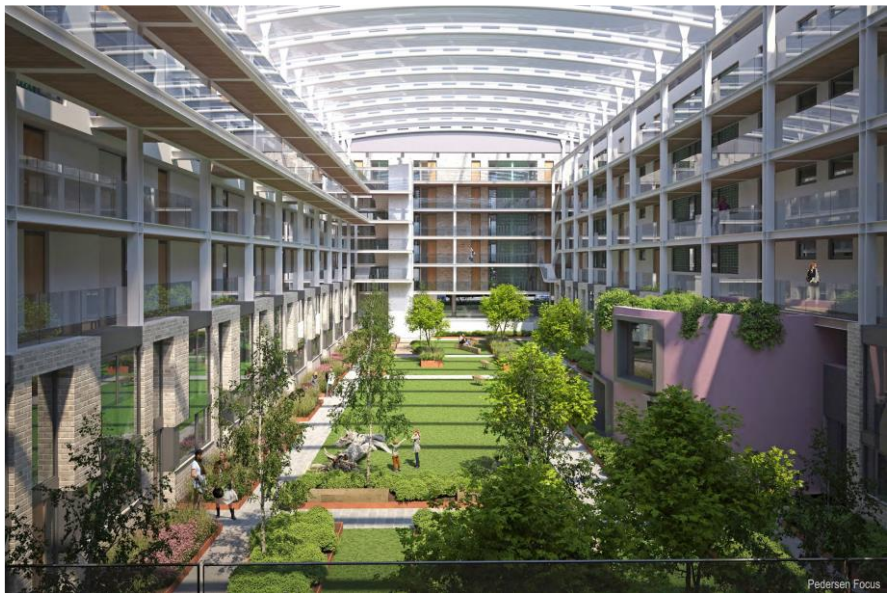


Figure 1 – Internal Courtyard – general view facing Northeast.

- The mauve protrusion to the right houses an amenity area at the outer side of which is the main entrance to the apartment complex.

Figure 2 – Internal Courtyard – general view facing Southeast.

- Note: see arrangement immediately under roof on far wall.

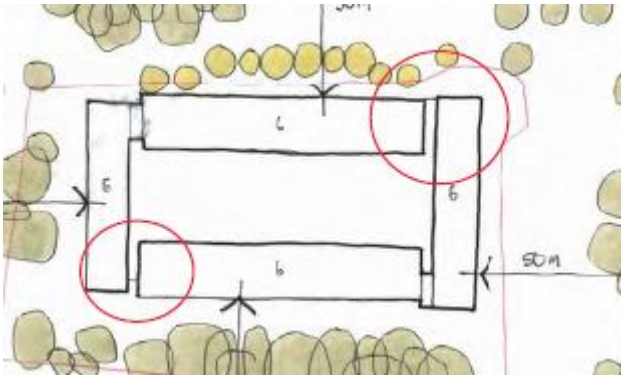


Figure 3 – Schematic Plan.[510]

- Areas circled red open to exterior at all levels.

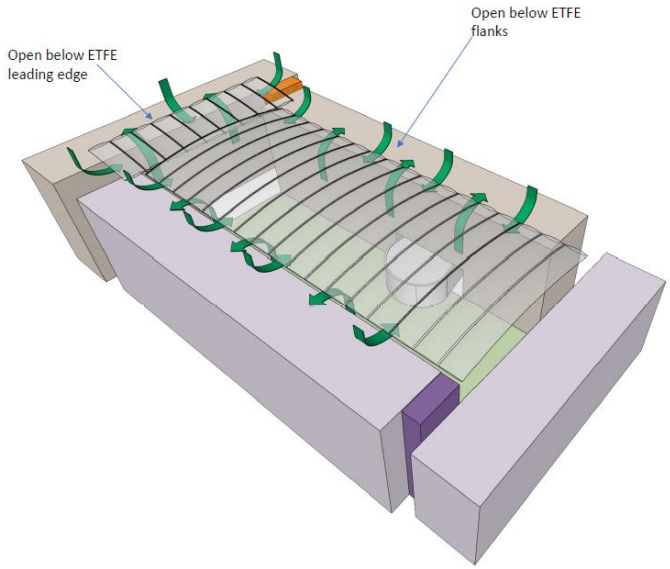


Figure 4 – Schematic – Free Air movement around roof.

- There is a landscaped uncovered 5th floor roof garden on the roof of the south-eastern (bottom right) block.

[510] Extract from drawing at Architectural Design Statement – Page 13.

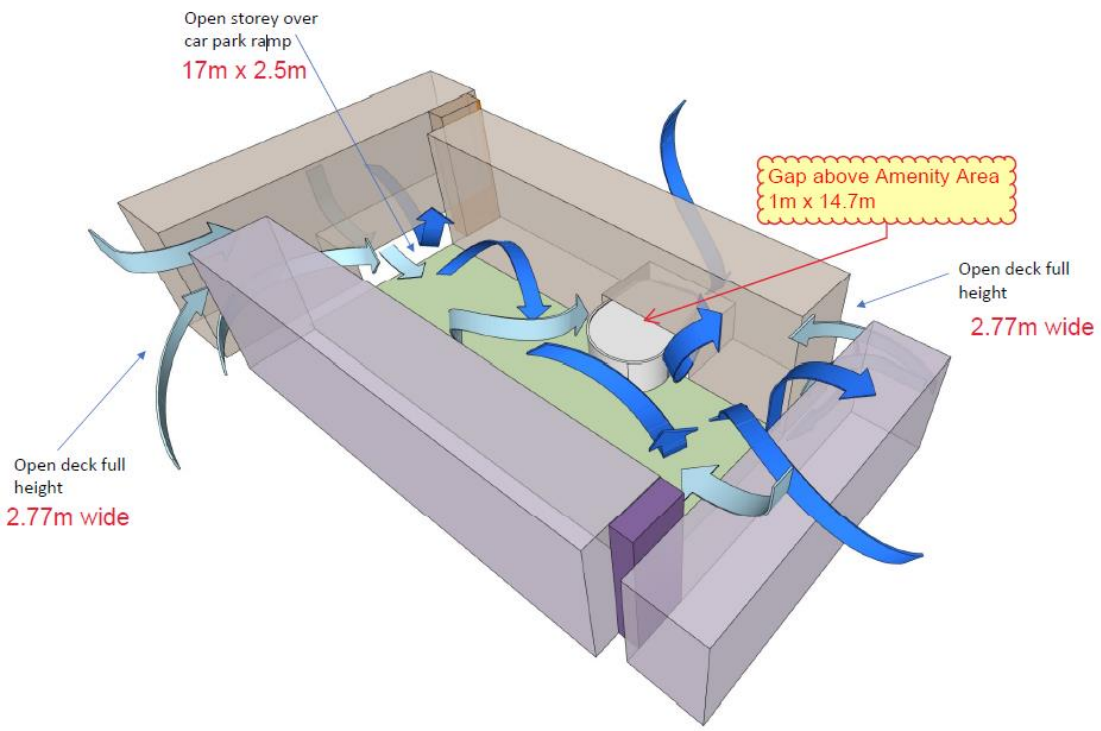


Figure 5 – Schematic – Free Air movement through courtyard high and low level.

- I have added the measurements and text in red on foot of information provided at trial.

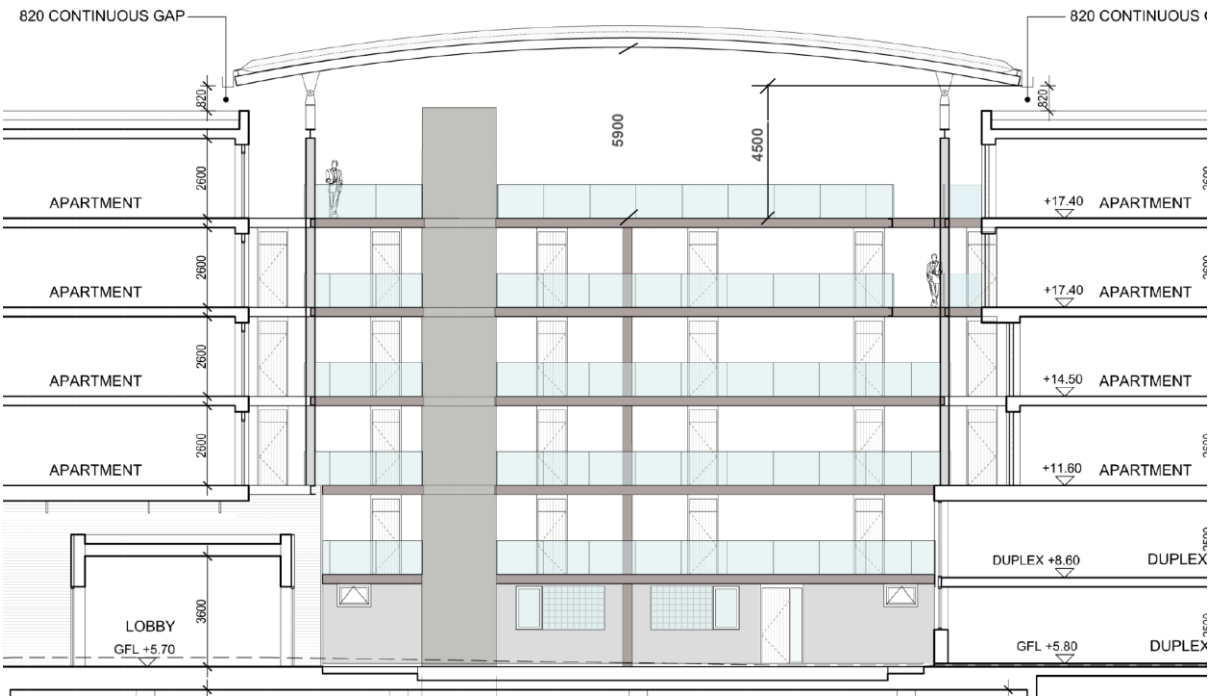
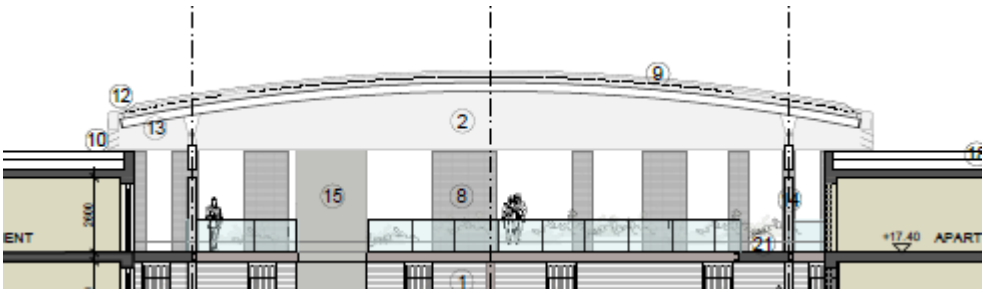


Figure 6 – Section of roof mounting to building.

- The indicated vertical height of the gap at the roof edges is 820mm – or 0.82m or 2.7 feet.
- The louvres shown in Figures 7 & 8 below do not appear in this drawing.



KEY:

- 2. 3mm Polyester Powder Coated Aluminium
- 10. Large Profile Perimeter Louvres In Polyester Powder Coated Aluminium Matching Window Systems
- 8. Perforated And Profiled Metal Facing Panels – Screens Between Roof Garden And Upper Deck
- 15. External Lift Shafts.

Figure 7 – Extract from Sections Drawing – Proposed Section C-C.[511]

- This shows the 5th Floor Roof Garden on the south-eastern Block. This is also visible from the inside in Figure 2.
- Note: the Perimeter Louvres also appear on the same drawing – Proposed Section C-C – and also on East/West Sections A-A and D-D[512] and on East and West elevations[513]

Figure 8 – Extract from Elevations Drawing.[514]

- This omits the ETFE roof but shows:
    - 2. – 3mm Polyester Powder Coated Aluminium
    - 8. – Perforated and Profiled Metal Facing Panels – Screens between Roof Garden and Upper Deck

[511] Drg # A1516-03-311.
[512] Drg # A1516-03-310.
[513] Drg # A1516-03-210.
[514] Drg # A1516-03-211.