THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

Record No: 2022/1101JR

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

Between:

MICHAEL DUFFY

Applicant

and

AN BORD PLEANÁLA

Respondent

and

PAT McDONAGH
and
CLARE COUNTY COUNCIL

Notice Parties

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 27 SEPTEMBER 2024

Contents

INTRODUCTION & BACKGROUND

1. The Applicant ("Mr Duffy") seeks certiorari quashing the decision[1] (the "Impugned Decision") of the Respondent ("the Board") dated 21 October 2022 granting the First Notice Party ("Mr McDonagh") planning permission for the construction of a Motorway Service Area ("the Proposed Development") adjacent Junction 12 of the M18 motorway on a site at Kilbreckan, Doora, Ennis, County Clare ("the Site"). The Site is about 3km south east of Ennis.

2. The Impugned Decision was made by the Board on appeal from decision 20/781 of the Second Notice Party ("Clare County Council") made on 17 December 2020 to grant permission for the Proposed Development. The Board's Inspector recommended that permission be granted.[2]

3. The Proposed Development incudes an On-Site Wastewater Treatment Plant (WwTP) which will provide primary and secondary treatment of foul water only[3] prior to discharge to the public sewer for transmission to Uisce Éireann's ("UÉ") Clareabbey WwTP, which serves part of Ennis. There it will add a p.e.

[1] ABP-309207-21.
[2] Inspector's Report dated 4 August 2022.
[3] The foul and surface water systems on-Site will be separate. We are not concerned with the on-Site surface water system.

of 24[4] to the Clareabbey WwTP BOD_5 load and 25 m^3/day to its hydraulic load.[6] UÉ has confirmed that Clareabbey WwTP has capacity to cater for the treated effluent from the on-site WwTP.

4. However, Mr Duffy says that the fundamental core of this "net enough" case is that the Board did not assess the hydraulic capacity of Clareabbey WwTP.[7] He complains in particular that the Board did not engage with his submissions on that issue.[8]

5. While there is dispute as to the relevant influent load on Clareabbey WwTP, the 2019 Annual Environmental Report[9] ("AER") by UÉ for the Clareabbey agglomeration,[10] as to loading on the Clareabbey WwTP, put existing

- peak organic load at 4,829 p.e. as against a capacity of 6,000 p.e., leaving an unused margin of 1,171 p.e..
- hydraulic load at an average of 1,862 m^3/day and a maximum of 3,995 m^3/day as against a peak hydraulic capacity of 4,050 m^3/day.

While WwTP load and capacity issues are disputed and need some further teasing out, these figures indicate that the load placed by the Proposed Development on the Clareabbey WwTP will not overload it.

6. The Planning Application and Impugned Decision included in the Proposed Development a connection from the On-Site WwTP to the public sewer by way of an On-Site pumping station and a new rising main sewer of about 3km running west to the southern outskirts of Ennis. It will pass under the M18 motorway, thereafter underground via existing road margins/public road and then under the River Fergus and a railway line, to a new header discharge manhole. From that manhole, the effluent will discharge by a short new gravity sewer to a nearby existing manhole on a public gravity sewer to the UÉ Westfields Pumping Station which pumps to Clareabbey WwTP which is operated by UÉ. All influent to Clareabbey WwTP is pumped there from that Westfields PS. UÉ has undertaken to construct the header manhole and the sewer therefrom to the nearby existing manhole on the gravity feed public sewer ("the UÉ works").[11]

7. Clareabbey WwTP discharges to the River Fergus pursuant to an EPA[12] Waste Water Discharge Licence ("WwDL") which issued in 2012. Discharge flow/volume is automatically measured.[13] At the

[4] PE, Population Equivalent, is a means of measuring wastewater load on a WwTP. It should be emphasised that 24 is the PE of the effluent leaving the on-site WwTP after treatment.
[5] Biological Oxygen Demand – see below.
[6] Ecology Response to Appeal Malachy Walsh and Partners February 2001 p4.
[7] Transcript Day 1 p44 & 45.
[8] See for example Transcript Day 2 p63 and Day 3 68.
[9] The obligation on a WWDL Licensee to make an AER appears to derive only from standard clause 6.8 of all WWDLs which provides "The licensee shall submit to the Agency, by the 28th of February of each year, an AER covering the previous calendar year. This report, which shall be to the satisfaction of the Agency, shall include as a minimum the information specified in Schedule D: Annual Environmental Report of this licence and shall be prepared in accordance with any relevant guidelines issued by the Agency." Schedule D specifies AER content but allows that it may be revised with EPA agreement.
[10] "agglomeration" means an area where the population or economic activities or both are sufficiently concentrated for a waste water works to have been put in place" – Art 3, Waste Water Discharge (Authorisation) Regulations 2007, S.I. No. 684 of 2007.
[11] Issues in this regard fell away at trial. I mention these works now merely as background.
[12] Environmental Protection Agency – the regulatory authority competent to issue and enforce WwDLs.
[13] See Clare County Council, Application for wastewater discharge licence for Clareabbey treatment plant, Non-technical Summary 2008, p8. "This outflow discharges from the plant via a venturi flume, fitted with a flow meter, recorded on an Akron System 10 pressure transducer and recorder."

discharge location, the Fergus forms part of the Lower River Shannon SAC ("the SAC").[14] The Fergus also forms part of the River Shannon and River Fergus Estuaries SPA ("the SPA").[15] I am unclear if, at that discharge, the Fergus forms part of the SPA but nothing seems to turn on that.

8. Mr Duffy, a civil engineer and planning consultant,[16] had objected to the Proposed Development on his own behalf – though not raising the specific issues he raises in these proceedings. He had also objected, separately, on behalf of a client, a Mr Bx.[17] Third party appeals were made to the Board – including by Mr Duffy for Mr Bx. He did not appeal on his own behalf, nor did he personally participate in the Appeal. Instead, believing it infirm, he sought to judicially review the Council's decision.[18] He was refused leave to do so on the basis that he had failed to exhaust his remedies by way of appeal to the Board.[19]

9. The Impugned Decision records that the Board did an AA[20] - adopting the Inspector's report in that regard. The AA included consideration of the possibility of adverse impact on various European Sites, including the SAC and the SPA. However, there is dispute whether the Inspector considered, or adequately considered, any question of in-combination impact of the Proposed Development on the SAC and SPA by reason specifically of any effect on the quality of the Clareabbey WwTP discharge effluent.

10. In these proceedings Mr Duffy also sought leave to judicially review the Board's Impugned Decision, which leave was not opposed and was partially granted,[21] on terms:

11. striking out the Council as a respondent and making it a notice party. (The Council has not participated in these proceedings.[22])

- requiring amendment of the Statement of Grounds to reflect leave granted in some respects and refused in others.
- that leave was granted without prejudice to any point the Board or Mr McDonagh could have made at leave stage.

12. Mr Duffy represented himself in these proceedings – assisted by a McKenzie friend. He presented his case with courtesy and ability. It must be said that he did so initially without much appreciation of the constraints imposed on him by his pleadings. It is to his considerable credit that, as the trial progressed and as he began to appreciate those constraints, he helpfully narrowed his case considerably – inviting me to

[14] Special Area of Conservation within the meaning of the Habitats Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. See Clare County Council, Application for wastewater discharge licence for Clareabbey treatment plant, Non-technical Summary 2008, p12.
[14] Appropriate Assessment within the meaning of the Habitats Directive.
[15] Special Protection Area within the meaning of the Birds Directive 79/409/EEC on the conservation of wild birds.
[16] Whether he practices generally as a planning consultant I am unsure but he at least represented a Mr Bx in that capacity in the planning process.
[17] I have anonymised Mr Duffy's client as he played no part in these proceedings and it does not appear to me that his personal identity is relevant, even contextually, to the issues I must decide
[18] In intended proceedings 2021 No. 85 JR.
[19] see **Duffy v An Bord Pleanála** [2023] IEHC 430.
[20] Appropriate Assessment within the meaning of the Habitats Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[21] in the same judgment: Duffy v An Bord Pleanála [2023] IEHC 430. i.e. this judgment encompassed both Mr Duffy's challenge to the Council's decision and this challenge to the Board's decision.
[22] though it maintained a watching brief at trial.

ignore considerable parts of his evidence and his written submissions. That said, pleadings disputes remain – though the Board and Mr McDonagh did not seek their decision as preliminary issues.

13. Mr Duffy also and fairly accepts that, as a party to the case, he cannot be considered an expert witness – **ETI**[23] and **Murphy**.[24] However, his submissions in considerable part consisted of commentary on the exhibits and facts and opinion disclosed therein - as to which the dividing line was often difficult to discern between lay commentary and deployment of legal argument on the one hand and, on the other hand, deployment of his expertise as a civil engineer and planning consultant and the tendering of inadmissible evidential material. It is in the end difficult to avoid the impression that such impermissible matter and, notably, arguments impugning the merits of the Impugned Decision, made up a significant element of his submissions – to which the Board and Mr McDonagh objected with reason.

14. I do not suggest that Mr Duffy was attempting deliberately to exceed the proper bounds of his submissions. It was more that he had understandable difficulty in discerning in particular instances where those bounds lay. In that light, it became all the more important to focus on the case made in Mr Duffy's pleadings. And, as I say, he took a progressively more helpful approach in that regard. I will return to the pleadings and associated issues in due course.

15. All parties made written and oral submissions, which I have considered.

16. It bears noting that UÉ and the EPA were not parties to these proceedings and none of their respective statutory decisions, acts and omissions can be quashed in these proceedings.

PRELIMINARY ISSUE - SLAPP

17. Mr Duffy prior to trial asserted, without giving details, a "SLAPP[25] element" to this case and intimated that he would address the Court in that regard at the outset of the case. SLAPPs are a form of abuse of process.[26] As Mr McDonagh had inferred, this allegation transpired to be a reference to proceedings[27] issued by Mr McDonagh against Mr Duffy on 21st May 2024, alleging defamation by statements allegedly made by Mr Duffy on social media. No evidence of these proceedings was before me. Mr Duffy made certain other allegations of attempted intimidation which I need not describe here. His precise purpose in bringing these issues to my attention was unclear and he did not seek relief in consequence. Mr McDonagh generally rejects the allegations and notes that Mr Duffy is protected as to the costs of these proceedings by s.50B PDA 2000.[28] He also says that any allegation that the defamation

[23] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540 at §93, §96
[24] Murphy v An Bord Pleanála [2024] IEHC 59 at §13, §14
[25] Strategic Lawsuits Against Public Participation.
[26] For a discussion of the concept see Glenveagh Homes Ltd v Lynch [2024] IEHC 157.
[27] Pat McDonagh and Supermac's Ireland Limited v Michael Duffy (Galway Circuit Court).
[28] Planning & Development Act 2000.

proceedings are an abuse of process – a SLAPP - falls to be made and decided in those proceedings. Broadly, I agree. In any event, it became apparent that Mr Duffy required no ruling of me on this issue and so I made, and now make, none.

SCOPE OF JUDICIAL REVIEW

18. Given my perception that Mr Duffy sought to argue the substantive planning and environmental merits, as opposed to the legality, of the Impugned Decision, it may assist to note the attempt in **MRRA**,[29] to record the limits of judicial review. I set out a somewhat edited version below:

- Judicial review does not correct errors in or review decisions so as to render the High Court a court of appeal from those decisions. Judicial review is radically different from appeal. In an appeal, the Court may well be concerned with the merits of the decision appealed. In judicial review, the Court is concerned with its legality. In an appeal, the question is 'right or wrong?' On review, the question is 'lawful or unlawful?'" Mr McDonagh correctly cites **Coyne**[30] to the effect that in judicial review the Court is:

  > *"…concerned only with the legality of the Impugned Decisions: not whether they were right or wrong on their merits. Judicial review is not an appeal on the merits. As MacGrath J said in Harrington, "it is not open to the Court to review such a decision on the basis that others or indeed the Court might have made a different decision". As Humphreys J strikingly put it in Holohan, "if there is material to support it", I cannot strike down a decision as to its merits even if, on those merits, I consider it "clearly wrong"."*

- In judicial review the burden of proof of error of law, or fundamental error of fact leading to an excess of jurisdiction, or of such unreasonableness as flies in the face of fundamental reason and common sense (i.e. irrationality), rests on the applicant.

- By the Planning Acts, the legislature unequivocally and firmly placed planning and environmental questions, questions of the balance between development and the environment and the proper convenience and amenities of an area, in the jurisdiction of planning authorities and the Board. They are expected, as experts, to have special skill, competence and experience in such matters. The Court is not vested with that jurisdiction, nor it is expected to, nor can it, exercise discretion with regard to planning matters.

- Bodies charged with roles in the planning process are required to exercise judgment as to what may be the proper planning and development of an area. In coming to such a view, such bodies must have regard to the matters which the law specifies (such as a development plan). Disputed questions of expert opinion (such as the likely effect of a proposed development) may be resolved in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary,

[29] Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318.
[30] Coyne v An Bord Pleanála [2023] IEHC 412 §8.

testing competing expert evidence. However, such expert bodies may bring to bear in their decision-making a great deal of their own expertise as to matters which involve the exercise of expert judgment and as to what is the proper planning and development of an area. I would add that accordingly they have considerable discretion as to whether the resolution of disputes requires oral hearing.

- In consequence flows "*the deference that a court should give to the decisions of different administrative bodies, depending on their nature and the extent of their expertise"* and *"a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown". "One must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner."*

- The Court should be slow to interfere with the decisions of expert administrative tribunals. Conclusions based upon an identifiable error of law or an unsustainable finding of fact by tribunals must be corrected. Otherwise it should be recognised, as to tribunals which have been given statutory tasks and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements[31] on the evidence and arguments heard by them, that it should not be necessary for the courts to review their decisions by way of appeal or judicial review.

- The circumstances under which the Court in judicial review can interfere with a decision on the basis of irrationality[32] are limited and rare. The Court cannot interfere for irrationality merely on the grounds that it is satisfied that (a) on the facts as found it would have raised different inferences and conclusions or (b) the case against the decision made by the authority was much stronger than the case for it.[33] Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere. To establish that a decision-maker has acted irrationally so that the Court can quash its decision, an applicant in judicial review must establish that the decision-maker had before it no relevant material to support its decision. This is the "**O'Keeffe**" standard.[34]

19. The "**O'Keeffe**" standard is not without its critics.[35] However, rather than try to resolve such criticisms here (in any event, a task more appropriate to a higher court), I observe that it generally suffices in practice to observe that where there is before the decision-maker relevant material capable of supporting its decision it is unlikely that the decision will be found irrational by reference to the more general **Keegan**[36] test. That test, of "*fundamental variance from reason and common sense*", represents a very high bar to certiorari which is not surmounted even by a judicial view that an impugned decision was "*clearly wrong*" on its merits.[37]

[31] This is not to be interpreted as requiring discursive narrative judgments.
[32] Irrationality and unreasonableness are synonyms.
[33] See also People Over Wind v An Bord Pleanála [2015] IEHC 271 §98.
[34] O'Keeffe v An Bord Pleanála [1993] 1 IR 39.
[35] See for example the review of the caselaw in Jennings v An Bord Pleanála & Colbeam [2023] IEHC 14 §15 et seq.
[36] The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642.
[37] Holohan v An Bord Pleanála [2017] IEHC 268 §101 & 102; Jennings v An Bord Pleanála & Colbeam [2023] IEHC 14 §61.

20. As it happens, there is in a **BbTTG** case,[38] on facts not dissimilar to those of the present case, a useful illustration of the court's refusal to decide the merits of a planning application. BbTTG unsuccessfully challenged UÉ's confirmation of capacity and feasibility in a WWTP to serve the proposed development. It pleaded that *"In fact, there is no spare capacity in the waste water network as pointed out by IFI and a group of observers and as evidenced by the most recent Ringsend WWTP AER which indicates that the capacity of the WWTP is 1.6 million PE whereas it was then processing 2.3 million PE".* Humphreys J said:

> *"That is a misunderstanding of the judicial review process. Postulating a different position to a finding of the decision-maker is not automatically a valid ground of challenge. Rather one would normally look at the issue through the prism of unreasonableness, error of fact or law, or the like – but no such plea is formulated here. No valid challenge to the merits of UÉ's statements have been made out."*
>
> *"I agree that there is much evidence that the UÉ Dublin networks, reliant as they are on Ringsend Waste Water treatment plant, are at or beyond capacity depending on one's point of view, UÉ's first letter must be construed as meaning it takes a different view (or at least did as of the date of the letter). The fact that this is contested doesn't help the applicant in the absence of a plea that acceptance of UÉ's position was irrational and unreasonable."*

PLEADINGS, AFFIDAVITS & EXHIBITS IN JUDICIAL REVIEW & THE ISSUES IN THIS CASE

21. Given the pleadings disputes in the case, it is as well to set the legal scene for consideration of the pleadings. As to the pleading of any issue, two basic questions may be asked:

- has the issue been pleaded at all?
- if so, have adequate particulars of the issue been pleaded?

22. Those questions are addressed in the Rules of the Superior Courts ("RSC"). **Order 84, rule 23(1)** RSC provides that no grounds shall be relied upon or any relief sought at the hearing of a judicial review except the grounds and relief set out in the statement of grounds.[39] **Order 84, rule 20(3)** RSC provides that:

> *"It shall not be sufficient for an applicant to give as any of his grounds …… an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground".*

The word "should" here is applied in its imperative sense.

[38] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66.
[39] Save where amendment is permitted.

23. O.84, r.20(3) was inserted in the RSC following the Supreme Court's judgment in **AP v DPP**.[40] In that case, Murray CJ said that: "*In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought*." Denham J said that the order granting leave to seek judicial review "*determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the court is established*." Hardiman J referred to the "*absolute necessity for a precise defining of the grounds on which relief is sought*".

24. Murray CJ also observed that if at trial a new argument emerges, *"The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued ...".* In this case there was no application to amend the Statement of Grounds.

25. Denham J in **AP** held that the High Court judge had "*addressed issues outside the grounds granted for the judicial review, in the absence of any order, or consent, to amend the statement of grounds. In this he fell into error. A court, including this Court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended*."

26. Baker J in the Supreme Court in **Casey**[41] held that, in judicial review, the pleadings;

- set the parameters, define and fix the issues in dispute between the parties and those to be determined by the court.
- define and limit the jurisdiction of the court to decide the issues pleaded.
- confine the evidence at trial to the matters relevant to those issues.
- operate to avoid a party being taken at a disadvantage at trial by the introduction of matters not fairly to be ascertained from the pleadings. Each party should know what matters are in issue so as to marshal their evidence on it and so that the court may limit evidence to matters relevant to those issues.

27. **Reid**[42] pithily summarises the rules:

> *"The basic rule as regards pleadings can be summarised as follows:*
> *(i). a party can only pursue grounds set out in his or her pleadings;*
> *(ii). a party cannot introduce new grounds of claim or opposition by affidavit; and*
> *(iii). any new grounds or reliefs have to be sought by amendment of the statement of grounds; and*

[40] [2011] 1 IR 729.
[41] Casey v Minister for Housing [2021] IESC 42 citing, inter alia, Mahon v Celbridge Spinning Company Limited [1967] IR 1 and Keegan v Garda Síochána Ombudsman Commission [2015] IESC 68, as to the functions and importance of pleadings.
[42] Reid v An Bord Pleanála [2021] IEHC 230 §12.

(iv). likewise for any new points of opposition."

28. These rules have been considered in many cases since. In a **BbTTG** case[43] the Supreme Court cited **Cooney v Browne**[44] as asking whether "*the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial*". In **ETI**[45] an account was given of the caselaw as to the strictness of the pleading rules in judicial review. Humphreys J returned to the issue in **O'Donnell**.[46] General pleas will not ground a specific and detailed complaint. And in another **BbTTG** case,[47] it was said that "*if on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it*." If, on such an interpretation of the pleadings, a matter is found not to have been pleaded, the rule is strict – it is excluded from consideration at trial. New grounds can be introduced only by amendment of the statement of grounds – they cannot be introduced merely by affidavit. A fortiori, they cannot be introduced for the first time in submissions, written or oral. These rules apply equally to opposition papers.

29. All that said, and as to pleadings[48] in judicial review, there is a counterpoise between an applicant being inadequately precise and a respondent being unduly precious. Both phenomena are common. Without diminishing the stringency of the requirement, the touchstone remains fairness and the "*key criterion is, needless to say, justice, which includes the concept of giving acceptable notice of the point being made*." – **Sweetman**.[49] What is required is clarity, precision and particularity on a *"fair and reasonable*" – not overly strict or narrow – reading, such that the plea is "*acceptably clear*"[50] - even if "*imperfectly framed*" – **Roache**.[51]

30. In that context, it is convenient at this point to reject the Board's posited distinction[52] between a plea of failure to consider submissions and a plea of failure to engage with submissions. Consideration of and engagement with submissions are not distinct burdens on decisionmakers. They are a single burden – even if in particular cases it may be convenient to analyse it as a composite burden. True, it may be that on given facts a decision-maker will be found to have considered but not engaged with submissions but, absent unfairness, the cases will be few in which such a pleading point will prevail and this case is not one of them.

[43] Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IESC 47 (Supreme Court, Woulfe J, 15 November 2022).
[44] Cooney v Browne [1984] IR 185, Henchy J.
[45] Environmental Trust Ireland v An Bord Pleanála & Cloncaragh Investments [2022] IEHC 540 §211 et seq.
[46] O'Donnell v An Bord Pleanála & Drumakilla [2023] IEHC 381.
[47] Ballyboden Tidy Towns Group v An Bord Pleanála, & Shannon Homes [2022] IEHC 7, [2022] 1 JIC 1001 §308.
[48] Absent a better collective noun and at least as concerns colloquial usage, the day may have passed in which there was purpose in the technically correct observation that statements of grounds and of opposition are not "pleadings" - as long as it is remembered that special considerations apply to them.
[49] Sweetman v APB [2021] IEHC 390.
[50] E.g. St. Audoen's National School v An Bord Pleanála [2021] IEHC 453, Sweetman v APB & Bord na Mona [2021] IEHC 390, Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322, Sherwin v An Bord Pleanála & CWTC [2023] IEHC 26, Dunne & Ors v Kildare County Council & Ors [2023] IEHC 73.
[51] Roache v An Bord Pleanála & Abo Wind [2024] IEHC 311 §97.
[52] Transcript Day 3 p146.

31. Of relevance in this case it must be said that in judicial review, affidavits are no substitute for pleadings - **Reid**.[53] And, on affidavit, exhibition is no substitute for averment. In **Murphy v Greene,**[54] Finlay CJ said: *"the facts relied upon must be actually and clearly deposed to in an affidavit and not by reference to any other written document*." **Delany & McGrath**[55] cite Murphy to the effect that *"a deponent is required to set out in the body of the affidavit the evidence which it is sought to put before the court and it does not suffice to simply incorporate by reference the contents of exhibits."* That position is nuanced in judicial review in that one may swear a brief affidavit verifying one's pleading and exhibiting the relevant documents. But that nuance emphasises the necessity of particularity and detail in the pleadings so the other side knows, in substance and in reasonable detail, what to expect at trial. Similarly, that an applicant for judicial review has raised an issue before the Board does not absolve him from pleading it in judicial review – see for example **ETI**.[56]

32. I mention the position as to affidavits and exhibits as, in this case, Mr Duffy took the unusual course of referring to his exhibits MD1 to MD13 (with internal tabs within exhibits resulting in the "exhibition" of 38 distinct documents) in his Statement of Grounds. He did not formally exhibit them on affidavit – though he did complete signed exhibition sheets. His primary verifying affidavit was limited merely to a formal verification of his grounds. Sensibly, the other parties did not object, those exhibits are before me and I will consider them as evidence. But their unorthodox introduction into the case does not render them pleadings and they are not a substitute for particularity in the Statement of Grounds.

33. Mr Duffy swore a supplemental affidavit on 16 February 2024. It canvassed many issues to the litigation of which the Board and Mr McDonagh objected as unpleaded or inadequately pleaded. There was much in these objections. Similar objections were made as to much of the content of Mr Duffy's submissions.

34. In response and, in my view, wisely and helpfully, Mr Duffy abandoned much of the content of that affidavit and his submissions. Specifically, he abandoned what he termed a "project splitting" allegation. This related to his view that regulatory authorisation was lacking for the UÉ works. In fact, the UÉ works were included in the scope of the development for which the Impugned Decision granted planning permission. For purposes of planning law, it does not matter who does those works as long as they are done in accordance with the permission. I was a little unclear if Mr Duffy abandoned every aspect of his case as it related to these works, but I am satisfied there is nothing in it.

35. As, to no objection, I advised the parties at trial that I would, rather than rule on each pleading dispute individually, I will instead focus on the pleas Mr Duffy did make and pursue and I will give judgment accordingly.[57] However it bears observing that no issues were pleaded as to the Water Framework

[53] Reid v An Bord Pleanála [2021] IEHC 230 (High Court (Judicial Review), Humphreys J, 12 April 2021) §11.
[54] Murphy v Greene [1990] 2 IR 566.
[55] Delany and McGrath on Civil Procedure, 5th ed'n. §21-66.
[56] Environmental Trust Ireland v An Bord Pleanála & Cloncaragh Investments [2022] IEHC 540 §§208, 209 & 216.
[57] Transcript Day 3 p19 & p22.

Directive[58] or the Urban Waste Waters Treatment Directive[59] ("UWWTD") and the Irish law transpositions thereof. Nor was a case pleaded that the WwTP discharge was monitored at incorrect locations. I will make other observations as to pleadings as convenient.

36. Essentially, Mr Duffy's remaining case centres on issues of AA as they relate to potential adverse effect on the SAC and/or SPA due, as he alleges, to deterioration, by reason of the Proposed Development, in the quality of Clareabbey WwTP effluent discharged to the River Fergus. More essentially still, he complains that the Board, in AA, did not properly consider materials before it and his submissions as to AA.

GROUNDS & OBSERVATIONS THEREON

37. Mr Duffy's Amended Statement of Grounds, dated 30 August 2023, is not in the form usual in this Court – no doubt as Mr Duffy is a lay litigant. It is in many respects repetitive. I therefore attempt, as best I can, to rationalise, summarise, and to some degree "translate" to legal form, its substantive content as follows and I make certain observations thereon. In doing so, I bear in mind the principles set out above including that,

- Mr Duffy is strictly bound by his pleaded grounds. But first they must be properly construed.

- in construing them, I must not ameliorate any pleading failures by Mr Duffy or give him the benefit of any genuine doubt, ambiguity or confusion in his pleadings.

- nonetheless, the fact that he may use language not usually used in pleadings should not disadvantage him if his meaning is clear and synonymous with language usually used and well-understood. So, for example, a plea that there is "no basis" or "no evidence" for a conclusion may, depending on context, suffice as a plea of irrationality even if the words "irrational" or "unreasonable" are not used. It is the substance of a plea that matters, not its form - even if departure from form may be unwise of the pleader as at risk of creating doubt, ambiguity or confusion.

- the requirement of clarity, precision and particularity is assessed on a *"fair and reasonable*" – not overly strict or narrow – reading, with a view to ascertaining whether the plea is "*acceptably clear*".

§	**Amended Statement of Grounds**
1.	Plea • I did not participate in the appeal as I consider the Council's decision invalid for procedural reasons which were not matters the Board had jurisdiction to address and to appeal would have been in conflict with that position. • I did however appeal to the Board as an agent for a client. §3 of the Inspector's Report refers to that submission and the basis for it.
	Observation

[58] Directive 2000/60/EC establishing a framework for Community action in the field of water policy.
[59] Directive 91/271/EEC concerning urban waste water treatment.

§	**Amended Statement of Grounds**
	• The Board and Mr McDonagh did not impugn Mr Duffy's general standing in these proceedings. • Nor did they press with appreciable force any point that his submissions in the appeal had been made as agent not principal. • Counsel for Mr McDonagh did briefly intimate an intention to dispute his issue-specific standing on matters not raised before the Board but the point was not pursued – I imagine of a preference to rely on the many pleading points raised.
2.	<u>Plea</u> • s.177V(3) PDA 2000 requires AA prior to any development consent decision and the Board shall consent to proposed development only having determined that it will not adversely affect the integrity of a European site.
	<u>Observation</u> • This is an uncontroversial statement of law.
3.	<u>Plea</u> • The Board's decision is ambiguous and irrational as to whether it carried out AA, simply adopted the Inspector's AA, or adopted some of the Inspector's AA and completed the process itself. • There is no evidence that the Board carried out any assessment and/or scientific enquiry to complete the AA as it states.
	<u>Observation</u> • This plea, as advanced at trial was based on Mr Duffy's misapprehension that the Board, being obliged to do its own AA, was not entitled to adopt its Inspector's report as to AA. • The Board must do its own AA but may in so doing adopt its Inspector's report as to AA. As was said in the context of EIA Screening in **South West Regional Shopping Centre**:[60] *"The Board adopted the Inspector's Report. It is well-established that a court may impute the reasons set out in an inspector's report to the Board where the Board accepts the recommendations of the Inspector and does not differ from the inspector's report in reaching its decision. In those circumstances, I am satisfied that the Board carried out a proper screening …"* • I therefore reject this plea.
	<u>Plea</u> • Article 6(3) of the Habitats Directive[61] requires that AA contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on European sites.
	<u>Observation</u> • This is an uncontroversial statement of law.

[60] South West Regional Shopping Centre v An Bord Pleanála [2016] IEHC 84; [2016] 2 IR 481. See also Ardragh Windfarm Limited v An Bord Pleanála[2019] IEHC 795.
[61] Directive 92/43/EEC as transposed to Irish law.

§	**Amended Statement of Grounds**
4.	<u>Plea</u> • The Board states that: o it was satisfied that the information before it was adequate to allow the carrying out of an AA. o it carried out an AA. o in doing so it ▪ considered the NIS[62] and all other relevant submissions on the file including the Inspector's assessment. ▪ accepted and adopted the Inspector's AA. o "*In overall conclusion, the Board was satisfied that the proposed development, by itself or in combination with other plans or projects would not adversely affect the integrity of European sites."* o *"this conclusion is based on a complete assessment of all aspects of the proposed project and there is no reasonable doubt as to the absence of adverse effects".*
	<u>Observation</u> • This plea consists in accurate factual recitation from the Board's Impugned Decision, none of which content is legally objectionable in itself. • It indelibly reflects the Board's appreciation of the standard of proof in AA of the absence of significant effect on the integrity of European sites.
	<u>Plea</u> • The Board lists items which it considered "*in particular*". • That list did not include submissions as to impacts on adjacent European Sites from an increase in wastewater loadings or the capacity of the Clareabbey WwTP. • The Board ignored submissions, o questioning the capacity of the Clareabbey WwTP. o as to unmonitored stormwater overflows[63] ("SWO"). o as to likely significant impacts it has on European Sites.
	<u>Observation</u> • Of itself, this first plea is not a valid criticism in law of the Impugned Decision. The Board recited its regard to all other relevant submissions on the file. The Inspector explicitly summarised the Duffy/Bx submissions and explicitly discounted them.[64] • **GK**[65] is authority that an applicant in judicial review disputing that such regard was had must adduce evidence to displace the Board's assertion of regard. I do not see that Mr Duffy has done so. • Having said that it had considered all relevant materials, the Board was entitled to identify those to which it gave particular weight.

[62] Natura Impact Statement – a formal statutory document prepared by the planning applicant to inform AA. See Art. 42(12)(a) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011).
[63] "storm water overflow" means a structure or device on a sewerage system designed and constructed for the purpose of relieving the system of excess flows that arise as a result of rain water or melting snow in the sewered catchment, the excess flow being discharged to receiving waters": Art.3, Waste Water Discharge (Authorisation) Regulations 2007, S.I. No. 684 of 2007.
[64] Inspector's report §6.1.3 and §7.5.4. See below.
[65] G.K. & Ors v Minister for Justice, Equality and Law Reform [2001] IESC 205, [2002] 2 IR 418, [2001] 12 JIC 1704; Cork County Council v Minister for Housing, Local Government and Heritage (No. 1) [2021] IEHC 683 , [2021] 11 JIC 0501 §43

§	**Amended Statement of Grounds**
	• Taken together as to a legal ground of challenge, these pleas allege failure to consider submissions as to o the capacity and spare capacity of Clareabbey WwTP. o increase in wastewater loadings on Clareabbey WwTP. o unmonitored SWOs. o resultant impacts on European Sites. • I should say that "SWO" can refer to either o the discharge point at which overflows of untreated waste water occur or o the occurrence of such overflows. But in practice the meaning is generally clear from the context.
	<u>Plea</u> • The Council's planner's report on the subject file 20/781 refers to a 2007 planning refusal on file 07/798 as to adjacent lands - inter alia as the Council was not satisfied that capacity was available at Clareabbey WwTP.
	<u>Observation - Planning Refusal 07/798 as to adjacent lands</u> • As elaborated by Mr Duffy, this became a complaint that whereas the Council's planner had listed this refusal in the relevant planning history, the Inspector had not.[66] • The Inspector records his regard to the Council's planner's report.[67] That implies his regard to the Council's planner's reference to the 2007 planning refusal on file 07/798 as to adjacent lands • The Inspector's report is necessarily a summary of the information he considers. Indeed, if it were not a summary it would be considerably less useful. He is entitled to exercise judgment as to what to include in and exclude from his report and his exercise of that judgment does not absolve the Board from considering the entire file when making its decision. The Board does not – may not - consider merely the Inspector's report. • While the Inspector does not explicitly mention the Council's planner's reference to the 2007 refusal, the Council's planner's report runs to 40 pages. Clearly it would have been wasteful and pointless to repeat it in all respects in the Inspector's report. • There is no reason to consider that the Inspector and the Board failed to have regard to the Council's planner's report and, in doing so, to the planner's reference to the 2007 refusal. • More substantively and in fact, the refused application 07/798 was for permission to lay a foul water collection system for 5.5ha of development land nearby. The applicant in that application bore the onus of satisfying the Council that Clareabbey WwTP had capacity for the load likely to result from the development of that 5.5ha. That it failed to discharge that onus in 2007 may legitimately be considered of little weight in considering in 2020 an application for a very different development, producing a very different and treated waste water load amounting to a p.e. of 24 by way of BOD load and 25 m^3/day hydraulic load and in respect of which different supportive evidence was placed before the Board as compared to that adduced in 2007.

[66] Transcript Day 1 p47
[67] Inspector's report §3.2.

§	**Amended Statement of Grounds**
	• It is entirely unremarkable that a WwTP in respect of which capacity for the development proposed in 2007 had not been shown could be found to have capacity for the very different Proposed Development. • In my view this plea does not contribute to any legal basis for certiorari.
	Plea • That capacity[68] has not increased since. • Mr Duffy cites the Council's planner's report of February 2019 in Permission 18/1004 granted to Irish Water in March 2019 for an upgrade to Clareabbey WwTP, which stated that the upgrade would not increase the PE or treatment capacity of the WwTP.
	Observation • The 2019 planner's report was more nuanced than the plea suggests. • It is common case that the Clareabbey WwTP treatment capacity of 6,000 p.e. (in BOD_5 terms) has never changed. But, stated baldly, that observation is apt to mislead. • The 2019 planner's report also noted that the upgrade would *"increase the efficiency of the existing treatment capacity of the wastewater treatment plant, as opposed to increasing the overall treatment capacity".* • I consider further below this issue of capacity of the WwTP.
5.	Plea • The Board's AA did not consider that all Clarecastle[69] agglomeration wastewater is being diverted to the Clareabbey WwTP. • Mr Duffy cites an Irish Water press release of 2021 as to these works.
	Observation • As a matter of fact, it is intended to divert all Clarecastle agglomeration wastewater to the Clareabbey WwTP. At the relevant time no WwTP served Clarecastle and all its wastewater discharged untreated to the River Fergus. • Mr McDonagh's "Ecology Response",[70] submitted in response to the Appeals, o cited the 2019 Clareabbey AER. o noted that "*The target date for completion of transfer of flows from Clarecastle to Clareabbey WWTP was the end of 2020*." (In fact, Clarecastle remained unconnected at the end of 2021.[71]) o asserted, on the authority of the 2019 "*Clarecastle Sewerage Scheme EIA Screening Report*"[72], that the resultant total load[73] on the Clareabbey WwTP would be 5,857 p.e. • On that basis, adding the treated effluent of the Proposed Development would increase the load by 24 p.e. to 5,881 p.e. - within the Clareabbey WwTP capacity of 6,000 p.e.. • I see no basis to conclude that the Board was ignorant of or failed to consider this information.

[68] i.e. of Clareabbey WWTP.
[69] Not to be confused with Clareabbey.
[70] Ecology Response to Appeal of Motorway Services and Rest Area, adjacent to Junction 12, off the M18, February 2021, Malachy Walsh and Partners.
[71] Clarecastle AER 2021 certified 19/05/2022.
[72] by RPS Group.
[73] i.e. the existing load plus the Clarecastle load.

§	**Amended Statement of Grounds**
	Plea • This is only one example of in-combination impacts on the unmonitored pump-station SWO and additional loading on an already overloaded plant with consequential impacts on the Clareabbey WwTP discharge directly to the SAC.
	Observation • Pleading examples does not allow reliance on examples not pleaded.
	Plea • The Planning Authority recognised in 2006 that Clareabbey WwTP was overloaded.
	Observation • The pleas do assert that; o the WwTP is already overloaded. o the additional loading by the Proposed Development will impact the WwTP discharge to the SAC.
	Plea • Other planning permissions granted since 2006 are likely to be causing in-combination impacts on the SAC also.
	Observation • This plea is vague and so is ineffective.
	Plea • While some ancillary works are on-going in the Clareabbey WwTP, no additional capacity is authorised.
	Observation • As indicated above, it is strictly correct but apt to mislead to say that no additional capacity is authorised at Clareabbey WwTP. The recent addition of a storm water holding tank before the WwTP inlet has increased its effective hydraulic capacity. I return to the issue of WwTP capacity below.
6.	Plea • There is no evidence that the Board carried out an AA, applied itself to readily available scientific data, or had all the available information before it to enable it "*in completing the Appropriate Assessment*". • In listing what it considered, it did not list submissions questioning the Clareabbey WwTP capacity or the unmonitored discharges from the associated pump-station. • Copious readily available information and data on the EPA licensing portal as to Clareabbey WwTP was not considered by the Inspector or the Board. • This calls into question the Impugned Decision and, in particular, its statement that its "*conclusion is based on a complete assessment of all aspects of the proposed project*".
	Observation – Adequacy of Information for AA • Mr Duffy's case is confusing in an important aspect. As noted above, he pleads absence of evidence that the Board applied itself to readily available scientific data or had all the available information before it to enable AA. He complains of what he alleges was the Board's failure to properly investigate the issues having been put on inquiry to seek out information not before it.

§	**Amended Statement of Grounds**
	• Yet he avers[74] that: o "*The Board had all the material, including my submission, before it in the appeal in order to come to the correct decision*." o "*Clearly the information before it allowed it to carry out an Appropriate Assessment*." o The Board's "*statutory duty extends beyond materials that were before it. Notwithstanding that, there was ample information before the Respondent to make a proper determination. The submissions available raised legitimate significant environmental issues and the Respondent had a duty to seek the best scientific knowledge available*." • I think the proper interpretation of these averments is that, in referring to the "correct decision" Mr Duffy is referring not to the correct decision in a general or neutral sense but to the specific decision which he considers was correct as required by a proper AA – refusal of permission. I do not consider that he is to be understood as accepting that the Board had before it information adequate to an AA concluding that the project would not risk adverse impact to European Sites. • That said, as to the adequacy of information to enable AA, the Board is expert – **Dublin Cycling**.[75] While its decision is subject to judicial review and perhaps particularly so in AA, one may nonetheless cite **Ui Mhuirnin, O'Sullivan** and **People over Wind** as having *"emphasised that it was entirely within the scope of the remit of the Bord in those cases to determine that it had before it sufficient information to carry out … an AA."*[76] In similar vein, **Heather Hill #2**[77] is authority that "*The adequacy of information provided in a planning application must be assessed in context and, for planning, EIA and AA purposes, is primarily a matter for the Board*". • Specifically as to the adequacy of information before the Board for purposes of AA Screening, Phelan J. in **St. Margaret's Recycling**[78] accepted the view, expressed in **Coyne**[79] as to EIA, that "*The Board is entitled to curial deference to its view of the adequacy of the information before it and, as to such adequacy, is reviewable only for irrationality"* such that *"a high threshold applies in the case of a challenge to a decision by the Respondent that insufficient information has been provided".* • In my view, the Boards' recorded decision that it had before it information adequate to enable AA was not irrational. I consider below the content of that information.
	<u>Observation – Engagement with Submissions</u> • The caselaw (for example **Balscadden Road**[80] and a **BbTTG** case[81]) clearly establishes that the Board need not engage by name with each submission individually, as long as it substantively considers their content – for example, it may thematically address multiple overlapping submissions.

[74] Affidavit 16 February 2024.
[75] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §104.
[76] Ui Mhuirnin v Minister for Housing Planning and local Government [2019] IEHC 824 §168, citing O'Sullivan v An Bord Pleanála [2017] IEHC 716, and People Over Wind v An Bord Pleanála [2015] IEHC 271.
[77] Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §232.
[78] St. Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 §70.
[79] Coyne v An Bord Pleanála [2023] IEHC 412, §414.
[80] Balscadden Road SAA Residents Association Limited v An Bord Pleanála [2020] IEHC 586 §39; cited in Graymount House Action Group v An Bord Pleanála & Ors [2024] IEHC 327 §29.
[81] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §274

§	Amended Statement of Grounds
	• It is clear that the materials before the Board and to which it had regard, including materials supplied by all participants in the process, addressed the issues of Clareabbey WwTP capacity and unmonitored SWOs at Westfield PS. • The plea as to copious information and data about Clareabbey WwTP on the EPA licensing portal is, of itself, vague and inadequate. • That said, it clear from the evidence that the Inspector was apprised by Mr Duffy and Mr McDonagh of much specific information from the EPA portal – including the Clareabbey and Clarecastle AERs from 2012 to 2019 and a 2018 EPA Site Visit Report. As will be seen, the AERs consistently recorded that the WwTP was operating within its capacity – both organic and hydraulic.[82] Regard to them can only have tended to a grant of permission not a refusal, whether or not on AA Grounds. • The Inspector was also apprised by the NIS that an 2018 EPA site visit to Clareabbey WwTP had identified issues to be addressed and the NIS provided a weblink to the EPA site visit report. That report envisaged a new Storm Water Holding Tank as the solution. • I will return to the question of engagement with submissions below.
	<u>Plea</u> • The Board, in carrying out AA without lacunae, must fully inform itself of the best scientific information available. • It may not simply depend on information in the Applicant's NIS. • The Board's attention was drawn to this issue but it did not have regard to the submissions and failed to inform itself of the readily available information.
	<u>Observation</u> • The first plea is correct. • The second plea is too swingeing a proposition of law. Whether and how much the Board may rely on an NIS will vary with circumstance – in particular the quality and comprehensiveness of the NIS. • As to the third plea - of non-regard to the submissions and failure to inform itself, as I have stated as to the evidential burden on an applicant asserting failure to have regard to matter to which the Board records its regard, **GK**[83] is authority that an applicant in judicial review disputing that such regard was had must adduce evidence to displace the Board's assertion of regard. I do not see that Mr Duffy has done so.

	<u>Plea</u>
	• The Planning Authority was aware of issues with capacity as far back as at least 2006 in relation to
	  o planning application 06/1754 for an adjacent temporary WwTP to serve housing development (see the Council's 2008 discharge licence application).
	  o planning refusal 07/798.
	• WwTP upgrade permission 18/1004 for upgrade works to the inlet apparatus and a stormwater tank is again cited.

	<u>Observation</u>

[82] I explain these concepts further below.
[83] G.K. & Ors v Minister for Justice, Equality and Law Reform [2001] IESC 205, [2002] 2 I.R. 418, [2001] 12 JIC 1704; Cork County Council v Minister for Housing, Local Government and Heritage (No. 1) [2021] IEHC 683 , [2021] 11 JIC 0501 §43.

§	**Amended Statement of Grounds**
	• Planning application 06/1754 (permission was granted in 2007 to a private developer) for an adjacent temporary WwTP to serve housing development[84] is cited in the Council's 2008 discharge licence application which envisaged diversion of significant flow from Clareabbey WwTP to that temporary WwTP pending construction of the Ennis Main Drainage Scheme designed for 50,000 p.e. and expected to be operational in 2012. Neither the temporary WwTP nor the Ennis Main Drainage Scheme has been built.[85] However the DBO[86] Contract Employer's Requirements for the temporary WwTP[87] include the following: o "*The existing treatment plant at Clareabbey caters for about 6,000PE at present …"* o *"This existing sewage treatment plant in Clareabbey is at capacity and as a consequence planning applications on zoned lands have been considered as premature pending the construction of the Ennis Main Drainage Scheme."* • I have rejected above the plea as to refusal 07/798 which was considered premature. I have been unable to ascertain that the DBO Contract Employer's Requirements were before the Board. It is undated but is likely to have been generated prior to 2010.
	<u>Plea</u> • Various exhibits are cited.
	<u>Observation</u> • As recorded above, exhibits may have evidential value but cannot substitute for pleading "*the facts or matters relied upon*" as required by O.84, r.20(3) RSC.
7.	<u>Plea</u> • The Inspector's Report §3.1 cites "*conditions of note*" in the Council's decision – including as to details of the Proposed Development's wastewater connection to the sewer. • The Board's decision does not refer to any wastewater connection or to UÉ's prescribed body response requirements as to that connection. • This is project-splitting as the Proposed Development can't proceed without UÉ getting planning permission, including AA because of its connectivity to European Sites, for the connecting link - the conditioned discharge man-hole and gravity sewer. That prospect has not had AA. There is no guarantee that UÉ will get such permission.
	<u>Observation</u> • The project-splitting ground was, in my view wisely, abandoned by Mr Duffy at trial.
8.	<u>Plea</u> • In what is supposed to be a *de novo* assessment, the Inspector commences with a recital of most of the conditions in the decision of the PA, including prescribed body submissions and 3rd party submissions.
	<u>Observation</u> • This is not, per se, a flaw in the Impugned Decision.

[84] See Notification of Decision to Grant of Permission in Exhibit MD7, Tab 18.
[85] Perhaps due to the financial crisis.
[86] Design Build Operate.
[87] Exhibit MD4, Tab 9, p 27 et seq.

§	**Amended Statement of Grounds**
	Plea • The Inspector either erred in not citing, or chose to ignore, the Council Planner's report in Council planning refusal 07/798 in which the Council was not satisfied of Clareabbey WwTP capacity. • This created a lacuna in the Inspector's AA and precluded a decision.
	Observation • I have rejected this plea above.
9.	Plea • The Inspector records[88] that UÉ has "*no objection*" to the proposal and says there is "*sufficient capacity*" in the WwTP. • The Inspector states that the proposed connection to a municipal WwTP designed to cater for Ennis is a reasonable arrangement.
	Observation • These are accurate pleas of content of the Inspector's report but there is no plea of legal error in the Board's consideration of UÉ's correspondence with the Board. • I consider below the significance of UÉ's correspondence with the Board.

	Plea
	• This despite
	  ○ a paucity of regard to submissions questioning WwTP capacity,
	  ○ a lack of acknowledgement of a reason for refusal in 07/798, and
	  ○ lacunae in AA as to all impacts and/or in-combination impacts.

	Observation • I have already rejected the plea as to refusal 07/798. • The plea of lacunae in AA is a plea in law and requires an evidential basis.

	Plea
	• The infrastructural requirements of Ennis have altered since the WwTP was designed in about 1981.
	• I have been unsuccessful in accessing design drawings and details for this plant.
	• However in its 2008 WwDL[89] application[90] to the EPA for the Clareabbey WwTP, the Council
	  ○ conceded that the WwTP was operating above its design capacity of 6,000 PE.
	  ○ referred, in implicit mitigation, to a permission for a temporary private WwTP granted on condition that much Clareabbey wastewater would immediately be diverted to it.
	• That temporary WwTP was never built yet the Council has continued to date to permit development in the catchment without any additional WwTP capacity.

	Observation
	• In its 2008 WwDL Application, the Council identified the Clarecastle WwTP as
	  ○ having a design capacity of 6,000 PE.
	  ○ operating at 6,095 PE.[91]

[88] report §7.5.4.
[89] Wastewater Discharge Licence.
[90] Exhibited.
[91] Calculated in accordance with the definition of p.e. set in the Waste Water Discharge (Authorisation) Regulations, 2007. See below.

§	Amended Statement of Grounds
10.	Plea • The Inspector has presumed that Councils perform their duties in accordance with rules and regulations.
	Observation • Such a presumption is valid until rebutted.
	Plea • The Board's first duty was to ensure, on the basis of the best scientific knowledge available, that the Proposed Development, on its own or in combination with other projects, is not likely to have significant impacts on European Sites. • The Board failed to do so. Lacunae in its AA precluded the Impugned Decision.
	Observation • Subject to the significant qualification that the criterion set by Article 6(3) of the Habitats Directive is of significant adverse impacts on the integrity of European Sites, this is a valid plea in law. • But it lacks the required particulars of fact.
11.	Plea • UÉ's submission makes clear that there is no guarantee of capacity in or a connection to the municipal system. It was "coy" and tacitly acknowledges capacity issues. • Therefore AA required further scientific enquiry. • The Board did not consult the EPA or its discharge licence portal.
	Observation #1 – UÉ's submissions • UÉ made two relevant submissions. • On 20 October 2020 UÉ responded, subject to contract, to Mr McDonagh's pre-connection inquiry and that response was before the Board. It noted the proposed On-Site WwTP and proposed connection to the public sewer. It advised that based on its desk-top analysis of "*capacity currently available*" the proposed wastewater connection: o "*can be facilitated at this moment in time*". o was feasible without infrastructure upgrade by UÉ. • "General Note" #1 to the UÉ response is clearly framed in terms of its "*initial assessment*", "*wastewater discharge volumes*" and the "*availability of capacity*". • On 11 December 2020, as a prescribed body,[92] its statutory response "*recommendation*" read "*No objection*".

[92] i.e. prescribed by Art 28(1)(y) PDR 2001 (Planning and Development Regulations 2001 as amended). Such bodies are entitled to make submissions on planning applications and the planning decisionmaker must take them into account in making the planning decision: see Browne, Simons on Planning Law, 3rd Ed'n §3.140.

§	**Amended Statement of Grounds**
	• Reading both UÉ submissions together, their gravamen is clear that it had no objection to the Proposed Development on grounds of lack of capacity in the public waste water collection and treatment system, including Clareabbey WwTP. • Of course, it is open to others to tender conflicting submissions and in my view the UÉ position does not bind the Board. But it cannot be said that the UÉ submissions were irrelevant or that the Board was entitled, much less obliged, to ignore them. The Board may have regard to such UÉ responses to pre-connection inquiries and must have regard to such statutory responses - **Baile Eamoinn**.[93]
	<u>Observation #2 – UÉ's submissions</u> • Mr Duffy alleges that UÉ had *"a material interest in the proposal."*[94] - "*a vested interest to maintain the status quo. Anything else would be seen as a de facto failure to do its statutory duty to provide wastewater services.*"[95] • Any such allegation of, in essence, conflict of interest in UÉ in the discharge of its statutory role as prescribed body was not pleaded and UÉ was not joined in the proceedings to answer such a serious allegation. Accordingly, I cannot consider or lend weight to such an allegation. • Mr Duffy alleges[96] also that UÉ's statutory response does not refer to wastewater or a wastewater connection. This unpleaded allegation is in any event of no substance. • UÉ's recommendation is undoubtedly laconic – "*No objection*". I will return to that observation. But it must be understood as encompassing the statutory functions which formed part of the basis for which it was prescribed and notified of the planning application. Those functions include wastewater treatment. Further, the response specifically records that the Proposed Development includes connection to the public sewer by a rising main. Nor do I accept Mr Duffy's submission that "*no objection*" means "*no comment*" – the two are very different and, understood in context, the former amounts in substance to a positive assertion. • Neither UÉ document, o justifies their characterisation in Mr Duffy's plea as acknowledging capacity issues, tacitly or otherwise. o put the Board, as to the issue of WwTP capacity, on notice of a requirement of further scientific enquiry or of recourse by the Board to the EPA or its discharge licence portal. • I will return to this issue below. However it is clear for the purpose of these proceedings that the Board was not disabled from regard to the views of UÉ on any of the bases canvassed above.
	<u>Plea</u> • The Council o recognised that the WwTP was operating above design capacity as far back as 2006. o was not satisfied of available capacity in refusal 07/798.

[93] Baile Eamoinn Teoranta v An Bord Pleanála [2020] IEHC 642 §60. The facts of that case differed from those of the present case. First, it seems that the UÉ pre-connection response limited itself to the technical feasibility of the proposed connection whereas in the present case the response is explicitly framed in terms of the capacity of the waste water infrastructure. Second, in Baile Eamoinn UÉ had not made any statutory submission in the planning objection and so had not positively recorded that it had no objection to the proposed development.
[94] Affidavit of Michael Duffy 16 February 2024 §29.
[95] Written Submissions of Michael Duffy 17 May 2024. Also Transcript Day 1 p70.
[96] Affidavit of Michael Duffy 16 February 2024 §29. Written Submissions of Michael Duffy 17 May 2024.

§	**Amended Statement of Grounds**
	o has no evidence of such capacity since. o is aware of the UÉ proposal to pipe all Clarecastle wastewater to Clareabbey WwTP.
	Observation • The reference to 2006 is clearly to permission 06/1754 granted in 2007. • I have already rejected the plea as to refusal 07/798. • The reference to the Clarecastle wastewater is factually correct. • I will consider WwTP capacity further below.
12	Plea • Clareabbey WwTP operates in breach of its discharge licence.
	Observation – Plea that Clareabbey WwTP operates in breach of its WwDL. • An assertion that a WwTP is overloaded or is operating in breach of its WwDL may well be a relevant consideration in deciding a planning application. • But as a general plea it is not a ground for quashing a planning permission in judicial review as unlawful. • Breaches of a WwDL can come in many forms, degrees and durations. They are primarily questions of WwDL enforcement. It is not the law that no planning permission can be granted in an agglomeration merely if it can be said that the WwTP is or has been in breach of its WwDL.
	Plea • The Westfields PS SWO is associated with Clareabbey WwTP. • Discharges from this SWO are not monitored, measured or recorded.
	Observation • These pleas are factually correct.
	Plea • There was no proper AA as to the additional wastewater loading and/or cumulative or in-combination wastewater loadings, and discharges to the SAC via o the unmonitored SWO. o Clareabbey WwTP. • In effect this SWO operates as a pressure release valve when Clareabbey WwTP can't deal with flows. • This is balanced by accelerating the volume of wastewater through the WwTP, reducing the residence time and reducing or eliminating appropriate treatment. • Once sampling avoids such events they will never be discovered or highlighted. • The physics are undeniable - wastewater arriving at Westfields PS either o passes through the plant, at whatever rate, or o the excess is disposed through the unmonitored SWO. • The CJEU judgment in case **C-427/17 Commission v Ireland**[97] as to managing SWOs required action in respect of the SWO which has not been taken. • This judgment prompted amendment of the Clareabbey WwDL in December 2021.
	Observation – SWOs & case C-427/17

[97] CJEU - Judgment of 28 March 2019.

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	• In my view this plea suffices to direct the Board to Technical Amendment B of the Clareabbey WwDL which added and amended WwDL Conditions as follows:
	• §1.3
	  ○ restricted points of discharge to those listed and described in Schedule A of the WwDL.
	  ○ prohibited other discharges of environmental significance.
	• §3.5 provided that
	  ○ SWOs shall be as specified in Schedule A of the WwDL.
	  ○ UÉ shall investigate to identify any additional SWOs and notify the EPA.
	  ○ All SWOs shall comply with the 1995 Departmental SWO Guidelines.[98]
	  ○ SWO discharges shall not cause environmental pollution.
	
	• This plea indirectly directs the Board, via the pleaded case C-427/17, to the application of the UWWTD to SWOs. That is what case C-427/17 is about. However any such plea of the UWWTD is merely general and not particular as is required by O.84, r.20(3) RSC and AP v DPP.[99] Accordingly I must regard it as not pleaded.
	
	• However as the UWWTD provides must of the relevant context to waste water collection and treatment and given certain arguments made at trial by Mr Duffy, I will say something of it.
	
	• By Article 4(1) UWWTD, all urban waste water entering collecting systems[100] must be subject to secondary or equivalent treatment[101] before discharge. The UWWTD recognises a general need for secondary treatment to prevent adverse effect on the environment by urban waste water effluent discharge.[102]
	
	• The UWWTD defines 'secondary treatment' as treatment of urban waste water by a process generally involving biological treatment with a secondary settlement or other process in which the requirements established in Table 1 of Annex I are respected. Table 1 states requirements for discharges from urban waste water treatment plants as to Biochemical Oxygen Demand (BOD_5), Chemical Oxygen Demand (COD) and Total Suspended Solids.
	
	• To enable confirmation that those requirements are met, Annex I,B, §1.1 UWWTD specifies that WwTPs must enable <u>representative</u>[103] sampling of influent and of treated effluent before discharge to receiving waters. Mr Duffy pleads that "*Once sampling avoids such events they will never be discovered or highlighted.*" But his plea stops short of alleging such avoidance – of alleging non-representative sampling. Such a plea, in effect of deliberate wrongdoing by UÉ, would have to be

[98] "Procedures and Criteria in Relation to Storm Water Overflows" published by the Department of the Environment in 1995 in response to the UWWTD. The Condition also requires compliance with any other guidance specified by the EPA but none has been drawn to my attention.
[99] [2011] 1 IR 729.
[100] The UWWTD defines 'collecting system' as a system of conduits which collects and conducts urban waste water; essentially it is a town's sewer system.
[101] The UWWTD defines 'secondary treatment' as treatment of urban waste water by a process generally involving biological treatment with a secondary settlement or other process in which the requirements established in Table 1 of Annex I are respected. Table 1 states Requirements for discharges from urban waste water treatment plants as to Biochemical oxygen demand (BOD_5), Chemical oxygen demand (COD) and Total Suspended Solids.
[102] UWWTD Recital 3.
[103] Emphasis added.

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	explicit and would require the presence in the proceedings of UÉ as a party entitled to answer the accusation. And, importantly, Mr Duffy pleads no particulars. Accordingly, I need not further interrogate that plea. • SWOs in combined systems[104] are designed to discharge wastewater without treatment when the volume of wastewater accumulating in the collection system (typically in high rainfall) exceeds its hydraulic capacity or that of the WwTP which serves it. Mr Duffy's characterisation of a "pressure release valve" is not inapt. Very generally, excessive numbers or volumes of SWO spills suggest capacity in the collecting system and/or the WwTP inadequate to the agglomeration they serve. • In general terms, SWOs represent failure to comply with the obligation imposed by Article 4(1) UWWTD that all urban waste water be subjected to secondary treatment before discharge. • Also, Annex 1A UWWTD requires that *"The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding: ….. limitation of pollution of receiving waters due to storm water overflows."* • However, Annex 1A, Footnote 1 UWWTD acknowledges situations in which urban waste water will not in practice be capable of being collected or treated in its entirety and that failure to do so may be tolerated in exceptional situations such as, though not limited to, unusually heavy rainfall. But such failure may not be tolerated in normal circumstances. And, even in such exceptional situations, Member States must adopt '*measures to limit pollution from SWOs*'.[105] • The CJEU, in **Case C-427/17 Commission v Ireland**, upheld complaints that Ireland was in breach of the UWWTD inter alia, by repeated and excessive spills of untreated waste water from SWOs in identified agglomerations (They did not include Ennis – but that does not signify here). • Oddly, though he exhibited it, Mr Duffy did not cite case C-427/17 in his written submissions nor did he include it in the agreed authorities. However he did cite it on affidavit and in oral argument. • I was not at any point made aware of any explicit legal obligation to monitor, measure or record SWO spills[106] - automatically or otherwise. The WwDL does not require it. • Given it is the source cited in **Case C-427/17** for the proposition that Member States must adopt 'measures to limit pollution from SWOs' even in exceptional situations, I note that **Case C-301/10, Commission v UK**,[107] (which Mr Duffy cites) is authority also that discharges from SWOs are permissible only exceptionally and not in any locally normal climactic or other locally normal conditions. This reflects the requirement that WwTPs be designed, built, maintained and operated to cope with all normal local climatic conditions – see **Article 10 UWWTD** and **Case C-502/14 Commission v UK**,[108] (which Mr Duffy cites). In that case, it was held that as the relevant agglomerations did not have collection systems allowing all urban waste waters to be retained and

[104] Combined systems collect both foul water and storm water in a single sewer system and drain the resulting combined wastewater to treatment and discharge.
[105] Judgment of 28 March 2019, Commission v Ireland, Case C-427/17, citing judgment of 18 October 2012, Commission v United Kingdom, C-301/10, EU:C:2012:633.
[106] SWO discharges are in various documents referred to as "spills" – see for example the judgment of the CJEU in Case C-427/17, European Commission v Ireland. This seems to me a term appropriate to the principle that while in some circumstances inevitable, such occurrences are undesirable and the law is that they should be exceptional.
[107] Judgment of 18 October 2012, Commission v United Kingdom, C-301/10, EU:C:2012:633.
[108] Judgment of 4 May 2017, Commission v United Kingdom, C-502/14 §45.

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	conducted for treatment, the obligation to subject all those waters to secondary or equivalent treatment, as provided for in Articles 4 and 10 UWWTD, was not complied with. • It appears to me arguable, as Mr Duffy argues, on the bases of cases **C-301/10**, **C-502/14** and **C-427/17** that, if spills from SWOs are permissible only exceptionally, it follows that Member States must take measures – presumably by monitoring SWOs - to reliably confirm that they are occurring only exceptionally. I am unaware of any direct authority on point. It is clear that monitoring is, at least generally, technically feasible. But it is equally clear that it is not regarded as required in the case of every SWO.[109] And it may be that different modalities and degrees of monitoring would be appropriate, as a matter of risk-based expert judgment, to different SWOs. • Had the issue been properly pleaded and there been a sufficient evidential basis for pursuit of the issue as to adequacy of AA (the issue of risk to the SAC and SPA[110]), I might have had to hear further argument and consider whether a reference to the CJEU on the issue of an obligation to monitor SWOs was appropriate. • For similar reasons I consider that I need not consider further Mr Duffy's submission that §3.3 of the 1995 Departmental SWO Guidelines requires monitoring of SWOs generally or any SWO particular to this case.[111]

OPPOSITION

38. The Board and Mr McDonagh dispute Mr Duffy's claim. Beyond traverses they plead that:

a. The challenge is based solely on alleged flaws in the AA.

b. The Board's conclusions in AA were open to it on materials before it. Mr Duffy has not engaged with those materials.

c. The challenge is based only on mere assertion and impermissible merits-based argument, advanced in the abstract, unsupported by evidence, and without any proper engagement with the Board's Decision or the materials before the Board, all of which, correctly read, undermine his assertions.

d. As to AA, Mr Duffy has not identified any:
   - supposed lacuna;
   - allegedly affected European site;
   - Conservation Objectives/Qualifying Interests of any such site;

[109] See below.
[110] See below.
[111] "Procedures and Criteria in Relation to Storm Water Overflows" published by the Department of the Environment in 1995 in response to the UWWTD. §3.3 as to sensitive areas reads: "The requirements for effluent-treatment prior to discharge to sensitive areas is for a minimum percentage reduction of 80% of total phosphorus and 70-80% of total nitrogen. It would appear reasonable that a volume reduction in storm sewage spill of this Magnitude would be a consistent standard in this area. That is, the volume overflows as a percentage of rainfall run-off volume to the foul sewer would be a maximum of 20%." Mr Duffy argues that such results cannot be achieved without monitoring SWOs.

- specific risk to any European sites;
- likely significant effect or harm.

e. Mr Duffy alleges lacuna in the AA in that the Board ignored information available outside the planning process as to increase in wastewater loadings, stormwater overflows and as to, essentially, the capacity of Clareabbey WwTP . That complaint is flawed as it fails to engage with the factual context of the Board's Decision, including the material before the Board which clearly demonstrated capacity in the Clareabbey WwTP.

f. Mr Duffy's allegation that the Board failed to consider in-combination effects of the intended diversion of the Clarecastle agglomeration wastewater to the Clareabbey WwTP lacks substance. He fails to engage with the factual context to the Board's Decision, including the evidence before the Board such as the Ecology Response of 19th February 2021[112] as to "*the Clarecastle loading*". Further, the Inspector in AA expressly addressed combination/cumulative impacts as to Clareabbey WwTP.[113]

g. Mr Duffy impugns the Board's Decision on unsubstantiated allegations against UÉ as to its correspondence relating to the subject application and the capacity of the Clareabbey WwTP. UÉ are not a party to these proceedings and the allegations cannot be maintained in these proceedings or form any basis for relief as to the Board's Decision.

h. Mr Duffy has not
   - demonstrated that the materials before the Board were so flawed on their face that a reasonable expert would have objected to them. demonstrated that a "*reasonable expert*" could have a reasonable scientific doubt as to whether there could be an effect on a European Site.
   - pleaded by reference to the totality of the evidence before the Board and has ignored relevant evidence. He relies on a selective and incorrect reading of the Inspector's Report, Board's Decision and the material before the Board.
   - pleaded by reference to or based upon any expert/scientific evidence and yet incongruously purports to provide opinions as to the existence of a reasonable scientific doubt and lacunae relative to the best scientific information available.
   - established failure to consider submissions. That the Board ignored third-party submissions is mere assertion. They were properly considered.

GRAVAMEN OF CASE IS AA, ONUS OF PROOF, CURIAL DEFERENCE & READING PLANNING DECISIONS

39. In my view, the Board correctly discerns that Mr Duffy's case is focused on alleged illegality in the Board's AA.

[112] internal page 5.
[113] Inspector's report §§8.18, 8.19 & 8.20.3.

40. The presumption of validity of administrative decisions, as a fundamental and fixed principle of judicial review – **Sherwin**[114] - including as to AA, puts the burden of demonstrating such illegality on Mr Duffy. Mere assertion will not discharge it – see **Kilkenny Cheese**[115] as explained in **Sherwin**[116] and **Harrington**.[117] In particular, mere assertion does not create scientific doubt in AA. Harrington, and the rule that applicants in judicial review as to AA cannot by mere assertion unsupported by evidence impose a "Johnson - Make the Board Deny it" burden on the Board, were recently considered in **Heather Hill #2**[118] in which it was noted that,

> *"As the caselaw has evolved[119] it is clear that the requirement for AA is triggered in AA Screening by a possibility (as opposed to a probability) of a significant such effect on a European Site – a low threshold but not of merely "any effect whatsoever" having "no appreciable effect".[120] As AG Kokott said in **Waddenzee**[121] "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment"."*

Accordingly, it was also noted in **Heather Hill #2,** citing **Mynydd Y Gwynt**,[122] that the precautionary principle is activated in AA by *"real (as opposed to merely hypothetical) risk"* such that, citing **Reid #2**,[123] the question which arises as to the legal adequacy of AA and AA Screening is whether *"there was any material before the board to create real doubt"* as to the risk of significant adverse effect on the integrity of a European Site.

41. I accept the Board's citation of **Dublin Cycling**[124] for the view, as to the validity of AA screening, that:

> *"It must also be borne in mind that the competent authority under the 2016 Act for carrying out a screening exercise is the Board and these judicial review proceedings are in no sense an appeal from the decision of the Board on that issue. In contrast to the court, the Board is a body with significant expertise and experience of carrying out such assessments."*

42. As to interpreting planning decisions, the Board correctly invokes two principles recently reiterated by Phelan J in **St. Margaret's Recycling**.[125]

- First, Phelan J says that planning decisions, documents and policy "*should be construed not as complex legal documents drafted by lawyers but in a way in which members of the public, without legal training,*

[114] Sherwin v An Bord Pleanála [2023] IEHC 26 §85.
[115] An Taisce v An Bord Pleanála, & Kilkenny Cheese [2022] IESC 8 ([2022], 1 ILRM 281) §121.
[116] Sherwin v An Bord Pleanála [2023] IEHC 26 at §85.
[117] Harrington v An Bord Pleanála [2014] IEHC 232 §43.
[118] Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §269 et seq.
[119] Waddenzee Case C–127/02; Judgment 7 September 2004; Case C 258/11; AG Sharpston in Sweetman, Ireland, et al v An Bord Pleanála, Galway County Council, Galway City Council; 22 November 2012.; Kelly (Eoin) v An Bord Pleanála & Aldi [2019] IEHC 84, §68(6); Case C-323/17 People Over Wind & Sweetman v Coillte Teoranta: CJEU 12 April 2018; Alen-Buckley v An Bord Pleanála (No. 2) [2017] IEHC 541; Orleans v Gewest Joined Cases C-387/15 and C-388/15.
[120] Kelly (Eoin) v An Bord Pleanála & Aldi [2019] IEHC 84, §68(6).
[121] Case C-127/02, §72.
[122] R (Mynydd Y Gwynt Limited v The Secretary of State for Business, Energy & Industrial Strategy [2016] EWHC 2581 (Admin); Upheld [2018] EWCA Civ 231 - [2018] PTSR 1274.
[123] Reid v An Bord Pleanála #2 [2021] IEHC 362 §50.
[124] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §104.
[125] St. Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 §57.

might understand them".[126] Interpretation of planning decisions, documents and policy "*is not to be undertaken in the same way in which Acts of the Oireachtas or subordinate legislation would be construed*". Such documents should not be "*read narrowly and restrictively*" but rather in should be read a "*holistic manner*".[127] So, *"… one should avoid a "legalistic over-analysis of decisions*".[128] One must *"stand back and ask what the decision is fundamentally saying*".[129]

I readily accept these propositions as representing elements of the working out of the well-established **XJS** principles[130] of interpreting planning documents. I would add that they are to be read as if by an intelligent layperson with knowledge of the file as an "*informed participant*" – **Kelly (Eoin)**[131] - and read as a whole and on the pragmatic and common-sense approach to interpretation described by Simons J in **Ardragh**.[132] Also, and as observed in **MRRA**[133] as to inspector's reports, the Court does not construe them *" ……. as if they were statutory provisions. It is not appropriate to read those reports as if they were statutes or even contractual provisions. In my view, the correct approach for the court to take is to consider the substance of the reports and not to approach what is said in the reports with an excessive degree of formalism."*

- Second, Phelan J says that planning decisions should be read "not *solely from an applicant's[134] point of view (an impossible standard), but from the starting point of their being valid rather than invalid where possible.*"

Again, I accept this proposition as deriving from the rebuttable presumption of validity of planning decisions and as well-established in the cases.[135] But it has its limits as it represents a "*starting point*" and applies only where the impugned decision is ambiguous and a validating reading is "*possible*" and "*makes sense*" on a "*fair reading*" – **Fernleigh** and **Krikke**.[136]

43. Also, the presumption of validity, though fundamental and fixed, is not to be "*supercharged*" and its application depends on the impugned decision being properly reasoned – **Stanberry**.[137]

WWTPS – LOAD & CAPACITY – HYDRAULIC & ORGANIC

[126] Citing Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §29.
[127] Citing Dublin Cycling §63 and Ballyboden TTG v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §120. Sherwin v An Bord Pleanála [2023] IEHC 26 §126.
[128] Citing Sweetman v An Bord Pleanála [2021] IEHC 390 (§28), MR v International Protection Appeals Tribunal [2020] IEHC 41 (§§6-7), Ratheniska Timahoe and Spink (RTS) Substation Action Group v An Bord Pleanála [2015] IEHC 18.
[129] Citing O'Donnell & Ors v An Bord Pleanála [2023] IEHC 381 §54.
[130] See In re XJS Investments Ltd [1986] IR 750 and many cases since – including recently and for example, Barford Holdings Ltd v Fingal County Council [2022] IEHC 233 and Monkstown Road Residents' Association v An Bord Pleanála & Lulani [2022] IEHC 318. Essentially this line of authority requires that planning documents be construed in their ordinary meaning as it would be understood by intelligent and informed members of the public without particular expertise in law or planning.
[131] Kelly v An Bord Pleanála & Aldi [2019] IEHC 84.
[132] Ardragh Wind Farm Ltd v An Bord Pleanála [2019] IEHC 795.
[133] Monkstown Road Residents' Association v An Bord Pleanála & Lulani [2022] IEHC 318 §304, citing Eoin Kelly v An Bord Pleanála [2019] IEHC 84.
[134] i.e. the applicant for judicial review.
[135] For example, Reid v Bord Pleanála & Intel [2024] IEHC 27 §72, Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §14 et seq and cases cited therein, O'Donnell v An Bord Pleanála [2023] IEHC 381 §54 and Sweetman v APB [2021] IEHC 390 §28.
[136] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §14, Krikke v Barranafaddock Sustainable Electricity Ltd [2022] IESC 41; [2023] 1 ILRM 81. Woulfe J §105.
[137] Stanberry Investments Ltd. v Commissioner of Valuation [2020] IECA 33.

44. What follows is no doubt a simplified understanding of complex and variable phenomena and interrelationships but it suffices for present purposes.

45. The load of effluent flowing to a WwTP and its capacity to treat it can both be expressed in at least two ways – hydraulic and organic. Hydraulic measurements are of flow (i.e. volume over time) of influent through the WwTP. Organic measurements are of the quantum of foul matter in the influent which the WwTP is expected to treat by, inter alia, aerobic bacteriological digestion. Designing a WwTP – and thereby determining its capacity - must consider both likely organic load and likely hydraulic load.

46. Hydraulic load in a combined collection system (i.e. collecting both foul water and storm water) can be highly variable, primarily due to rainfall. The phrase "storm water" appears to encompass all contribution by rainfall – it is not limited to rain due to storms. What is known as Dry Weather Flow ("dwf") consists predominantly of foul water.[138] But flow in times of rain can be – often is - a multiple of dwf, perhaps many multiples.

47. Hydraulic load and capacity relate to the rate of peak hydraulic flow through a WwTP - volume of influent flowing through the WwTP in a given period. In part, the adequacy of treatment and the quality of effluent depend on residence time – how long the influent spends in treatment in the WwTP. If the influent flows too fast through the WwTP, treatment will be inadequate and the effluent discharged may be non-compliant with regulatory requirements in greater or lesser degree. So hydraulic flow is typically expressed in m^3/day as a quantum of influent flow which the WwTP can physically accommodate while allowing adequate residence time and so treating effluent adequately to produce a discharge compliant with regulatory requirements.

48. However, for various reasons, a given volume of influent may contain more or less of that which makes it foul – its organic load. As I understand, the capacity of the secondary treatment part of the WwTP[139] - in practice and essentially aerated aerobic bacteriological digestion – is limited also as a matter distinct from the hydraulic capacity of a WwTP. As aerobic bacteriological digestion is fuelled by oxygen, influent load can be expressed in terms of the maximum Biological Oxygen Demand ("BOD") of the influent which a WwTP can effectively treat to produce a compliant discharge effluent.

49. By making assumptions as to the volume of foul water on average associated with each person in the catchment of a WwTP and as to the quantum of the organic load on average associated with each such person, one can translate volumes of foul water and quantum of organic load (expressed in BOD terms) into estimates of the numbers of people they represent – a Population Equivalent – ("p.e."). The generated load or the "size" of the agglomeration served by a WwTP is expressed in p.e.. While, in theory, the p.e. of a particular sample should be the same whether calculated by reference to volume of effluent or BOD, in

[138] Dwf may in practice also include infiltration of groundwater into the collection system, via defectively sealed piping. Infiltration may also occur in wet weather as stormwater percolates into the soil but that is less likely to be an element of dwf.
[139] Primary treatment involves primarily settlement of solids from the effluent.

practice and for various reasons they may differ – even substantially. I imagine, though do not find, that such variations may be more common and greater in combined foul and storm water effluents depending on how much storm water is involved in a given location. As will be readily understood, the volume of storm water in a combined collection system is, at least in wet weather, relatively unrelated to the size of the population of the area served by that collection system and, at least typically in Ireland, is highly variable over time. Seasonal fluctuations – including of population - may be another factor at play. But whatever the reasons, the point is that in practice the two figures – hydraulic p.e. and organic p.e. - may well differ.

50. However, the issue is resolved from a legal point of view in that the UWWTD defines p.e. and the load on a WwTP, in organic, not hydraulic, terms. It does so as follows:

> "*'1 p.e. (population equivalent)' means the organic biodegradable load having a five-day biochemical oxygen demand (BOD_5) of 60 g of oxygen per day."*[140]
>
> *"The load expressed in p.e. shall be calculated on the basis of the maximum average weekly load entering the treatment plant during the year, excluding unusual situations such as those due to heavy rain."*[141]

These provisions are combined in the definition of p.e. in the Urban Waste Water Treatment Regulations 2001[142] and in the definitions section of WwDLs.[143] Given BOD is more closely related to population numbers than is hydraulic load, it seems sensible that p.e. be based on BOD. Though whether I am correct in that observation does not in the end matter. As the definition is established in law, I need not interrogate the reason underlying it.

51. As I understand, and while it is no doubt not a precise description, a "*five-day biochemical oxygen demand*" ("BOD_5") is a measurement of the oxygen consumed daily in the aerobic digestion of an influent sample over 5 days. I have been cited and have found no authority on the precise meaning of the phrase "*maximum average weekly load*". While I do not decide it, I am content to adopt for present purposes the view of the Board and Mr McDonagh, absent disagreement by Mr Duffy, that it requires the averaging of the BOD_5 of samples taken each week, the exclusion of those affected by heavy rainfall[144] or unusual events and the selection, as the load on the WwTP, of the highest of all such weekly averages calculated in a year. In any event, the point for present purposes is that p.e. is calculated in terms of organic load - BOD_5 - rather than in terms of hydraulic load - effluent flow rate.

52. It also bears noting that a different BOD measurement is sometimes used – in terms of mg of oxygen required to digest a litre of influent – mg/l.

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[140] Art. 2.6. UWWTD.
[141] Art. 4.4. UWWTD.
[142] Also Art 3 of the Waste Water Discharge (Authorisation) Regulations 2007.
[143] Urban Waste Water Treatment Regulations, 2001 S.I. No. 254/2001 – Art.2.
[144] This is a conservative/precautionary exclusion as heavy rain in a combined system dilutes the foul content and so reduces the BOD of a given sample volume.

53. It should also be understood that as in the planning application Mr Duffy asserted the hydraulic overloading of Clareabbey WwTP that was not, as it were, for its own sake. Mr Duffy says hydraulic capacity is important specifically because it has an organic consequence: he says that hydraulically overloading the WwTP must result in pushing the load through the WwTP faster than is appropriate, thus reducing both residence time in the WwTP and treatment effectiveness and thereby reducing effluent quality. Thus, he says, inadequately treated and non-compliant effluent will be discharged into the SAC and SPA, adversely affecting their integrity.

STORM WATER BALANCING TANKS

54. What one might call the "rated"[145] capacity of a WwTP in hydraulic and organic terms relates to its capacity at a given instant or measured over a relatively short period of time. However, the practical reality is that flow to and organic load on a WwTP waxes and wanes (for example with rainfall). Accordingly, and unless the plant is so grossly overloaded that it cannot cope with even low flow, its capacity may be exceeded at some times while at other times it may operate below capacity. This use profile represents inefficient use of WwTP capacity.

55. By storing influent prior to its arrival at the WwTP in times when high flow or (I imagine less likely but I may be wrong) high BOD would otherwise exceed capacity and by releasing it to the WwTP at times of lower ambient flow or BOD, load can be, as it were, "evened out" or balanced such that the WwTP operates over time more consistently, and hence more efficiently, at or near capacity. Broadly, the intended effect is to decrease peak hydraulic loading to fall within WwTP capacity rating while maintaining, or even increasing, average hydraulic loading within capacity. In practical reality, while such a course of managing the flow to a WwTP does not affect what I have called its "rated" instantaneous or short-term flow capacity, it de facto increases its capacity in volume terms over the longer term. Also, in avoiding or reducing the incidence of flows exceeding plant capacity such balancing storage, at least generally, may be expected to improve effluent quality.

56. Accordingly, the 1995 Departmental SWO Guidelines,[146] recommend installing storm water holding tanks as an alternative to up-sizing WwTPs for reducing or eliminating SWO spills. Such tanks "*operate on the principle that flows in excess of the downstream capacity can be contained until the storm has sufficiently abated to allow the stored storm water to be returned to the sewer. The downstream capacity of the system is therefore maximised and overflows are minimised."* It says that such tanks are generally sized for a built-up area to contain a one-hour storm with a return period of five years.

[145] My term.
[146] They record that "The criteria and guidelines set out in this paper will be reviewed in due course in the light of any recommendations of the (European Commission) study report which is due to be completed shortly." The 1995 Guidelines have not been updated.

CAPACITY OF & LOAD ON CLAREABBEY WwTP & STORM WATER TANK UPGRADE

57. The clear constant at all relevant times is that what I have called the rated or design capacity of the Clareabbey WwTP is 6,000 p.e.

Clareabbey Agglomeration WwDL

58. As to load on Clareabbey WwTP, and by way of example of the possibility of difference between organic p.e. and hydraulic p.e.,[147] an attachment[148] to Clare County Council's 2008 Clareabbey Wastewater Discharge Licence ("WwDL") application to the EPA, headed "*Discharge Flow Volumes at Clareabbey Wastewater Treatment Plant*", listed quite different organic p.e. and hydraulic p.e. loads:

- organic p.e. - 6,095 – based on flow and mean BOD loading and calculated in accordance with the regulatory definition of p.e.[149]
- hydraulic p.e. - 7,777 - assuming 225 litres per person per day.

Clare County Council in its WwDL application adopted the p.e. of 6,095 as more realistic.

For the WwDL application, and as all influent to Clareabbey WwTP is pumped to it from Westfields PS, influent flow data were calculated using Westfields PS pump operation hours and pump capacity.[150] Treated effluent discharge volume was recorded daily at the WWTP.[151]

The figures above were based on August 2008 flow data, an average daily influent of 1,750 m^3/day, a mean influent BOD of 209mg/l and a BOD load of 60g/person/day.[152] As seen above, 60g/person/day is the assumption required by the UWWTD definition of p.e.

59. It is convenient here to note that Mr Duffy alleged and pleaded that the Council's 2008 WwDL application recorded a load on Clareabbey WwTP of 7,197 p.e.. Mr Duffy was asked at trial for the source of this alleged p.e. of 7,197 as no-one else could find it. Neither could he and he accepted that he was mistaken and could not stand over it.[153] He sought to rely instead on the hydraulic p.e. of 7,777 cited above.

60. In response to specific EPA inquiry in that WwDL application,[154] Clare County Council explained[155] why it thought the load p.e. of 6,095 more realistic. It is apparent from this correspondence that the EPA questioned and was concerned to verify the load p.e. in its consideration of the WwDL application. The resultant 2012 WwDL states that the capacity of the Clareabbey WwTP is 6,000 p.e. and it "currently serves a

[147] As has been seen, hydraulic p.e. is as a matter of legal definition, a misnomer but its colloquial meaning will be readily understood.
[148] Mr Duffy enclosed it with his submission to the Board dated 31/3/21 for Mr Bx. It is undated and unattributed. But it is clear from the listed dates of the samples and from the correlation of the p.e. of 6,095 with other documents in that process that it was part of the 2008 WwDL licensing process.
[149] Waste Water Discharge (Authorisation) Regulations, 2007 – See Clare County Council, Application for Wastewater Discharge Licence for Clareabbey treatment plant Non-technical summary In accordance with Article 5 of Waste Water Discharge (Authorisation) Regulations 2007 page 10.
[150] Hours of operation x pump capacity = influent volume.
[151] Non-Technical Summary p15.
[152] Clare County Council to EPA 9 April 2009 §5.
[153] Transcript Day 2 p34.
[154] By letter dated 30 January 2009 in accordance with Art 18 of the Waste Water Discharge (Authorisation) Regulations 2007. – Exhibit MD7 Tab 18.
[155] Clare County Council to EPA 9 April 2009. – See Exhibit MD7 Tab 18. §5 of that response explained the preference for the p.e. of 6,095.

p.e. of 6,095". The EPA, in adopting that figure in its 2012 WwDL, clearly accepted the Council's explanation. Equally clearly, it was entitled to do so. In other words, the WwTP was operating slightly in excess of its capacity. As the grant of the WwDL implies, the EPA was, in 2012, content with that situation - as it is prohibited from issuing a WwDL which, in its opinion will, inter alia, exclude or compromise the achievement of the objectives established for protected species and natural habitats in the case of European sites where the maintenance or improvement of the status of water is an important factor in their protection.[156]

Clareabbey WwTP AERs

61. WwDL licensees must make "Annual Environmental Reports" ("AER") to the EPA as to the agglomeration, WwTP and discharge to which the WwDL relates. As far as I can see, this obligation derives only from a standard condition inserted by the EPA in WwDLs.[157] Schedule D stipulates AER content but also stipulates that the EPA may agree revised content stipulations. AERs, de facto, provide an up-to-date summary of the WwDL status of the agglomerations to which they relate and of the performance of any waste water collection systems and WwTPs serving such agglomerations.

62. At least ordinarily, ceteris paribus and to the extent that WwDL status and performance is relevant to the Board's determination of a planning application, I do not see that the Board can be criticised for reliance on such AERs.

63. The parties helpfully tabulated summaries of certain of the content of the exhibited Clareabbey WwTP AERs. Mr Duffy had drawn the Board's attention to those AERs. As to agglomeration size, WwTP hydraulic capacity and WwTP discharge quality, the NIS had drawn the Board's attention to content of the then-latest, 2019 AER. I amalgamate the parties' helpfully tabulated collected load data as follows:

AER[158]	**Clareabbey WwTP Collected Load**		
	AER by	**PE**[159] **- peak week (Capacity 6,000)**	**Hydraulic**[160] **(annual - m^3/day - mean unless otherwise indicated) (Capacity 4,050**[161]**)**
2012	CCC[162]	2,206	1,575

[156] Art 6(3) Waste Water Discharge (Authorisation) Regulations 2007. The article lists other similar criteria also.
[157] In the Clareabbey WwDL 2012 it is condition 6.8.
[158] The date relates to the year of WwTP Operation. The AER is made during the following year.
[159] Organic Load – derived from BOD_5. Source: ABP Table to ABP Counsel's note 6/6/24. See transcript Day 3 p77. Given the UWWTD Art. 4.4. definition of load expressed in p.e. I understand "peak week" to refer to the "maximum average weekly load entering the treatment plant during the year, excluding unusual situations such as those due to heavy rain."
[160] Source: Mr Duffy – note provided 6/6/24. See Transcript Day 3 p205 & 210 et seq. Mr Duffy supplied annual average hydraulic load figures for all years but 2019 and 2021 for which he provided annual maxima. I have no doubt the inconsistency was unintentional on his part. I have added the annual average hydraulic load figures for 2019 and 2021 to the list. Mr Duffy's document also contained a column of p.e.s which he had calculated and which I deemed inadmissible in evidence – See transcript day 3 p212 et seq.
Mr Duffy also provided a hydraulic load figure for 2022 but I have excluded it as it was not available when the Board made its decision.
[161] In the 2016 Report and thereafter. It was stated at slightly less in earlier years.
[162] Clare County Council.

AER[158]	Clareabbey WwTP Collected Load		
	AER by	**PE[159] - peak week (Capacity 6,000)**	**Hydraulic[160] (annual - m^3/day - mean unless otherwise indicated) (Capacity 4,050[161])**
2013		3,957	2,170
2014	UÉ	3,089	2,560
2015		2,355	2,518
2016		2,999	2,174
2017		4,984	2,441[163]
2018		Not in evidence[164]	
2019[165]		4,742	2,856[166]/1,866[167]
2020[168]		4,795	2,087
2021[169]		4,829	3,995[170]/1,862[171]

Table 1 Clareabbey WwTP Collected Load – AERs 2012 – 2021

64. I should note that, though exhibited in these proceedings, the 2020 and 2021 AERs were not before the Board as far as the documentary record reveals, though they had been published by the date of the Impugned Decision.

65. As will be seen, and at least as disclosed by the AERs, load has gradually increased over time and Clareabbey WwTP has at all times operated within its capacity and has sufficient spare capacity for the load to be imposed by the Proposed Development in both organic and hydraulic terms. The 2019 AER states that the annual maximum hydraulic loading is less than the peak WwTP capacity – the table above suggests by 1,194m^3/d. Before the Board, Mr McDonagh's Expert Ecology Response[172] to the Appeals asserted that the 2019 AER hydraulic load records establish that that the additional hydraulic load from the Proposed Development will be well within the existing WwTP treatment capacity. For his part, Mr Duffy says that the AER figures are wrong. He does not suggest that the AER figures over the 9 years shown are, inter se inconsistent. Rather, he disputes their accuracy by contrasting the 2012 WwDL load p.e. of 6,095 and the 2012 AER load p.e. of 2,206 and also by citing the 2018 EPA site visit report – to which I will come in due course.

2012 WwDL & 2012 AER Contrasted & Board's Acceptance of the Latter

[163] Mr Duffy's entry was 2,444 but the correct figure is 2,441.
[164] It seems there may be no 2018 AER.
[165] Published 16/3/20.
[166] Annual Maximum.
[167] Annual Mean
[168] Published 5/7/21.
[169] Published 28/4/22.
[170] Annual Maximum.
[171] Annual Mean
[172] Ecology Response to Appeal of Motorway Services and Rest Area, adjacent to Junction 12, off the M18, February 2021, Malachy Walsh and Partners.

66. Mr Duffy raises an issue as to the adequacy of the information before the Board regarding whether Clarecastle WwTP has capacity to spare for the expected influent from the On-Site WwTP.

67. The contrast between Clare County Council's 2008 WwDL application and the EPA's 2012 WwDL on the one hand and Clare County Council's 2012 AER is striking. It can be tabulated as follows:

Clareabbey WwTP Load			
Data Source	**2008 WwDL application & 2012 WwDL**	**2012 AER**	**Comment**
Date	August 2008 (part of)	All 2012	
Organic (p.e.)	6,095	2,206	2,206 is 36% of 6,095 The 2008 WwDL figure is broadly repeated in the Temporary WwTP DBO contract document cited above.
Hydraulic - m^3/d	1,750	1,575	Average daily flow to the WwTP.
Average BOD	209mg/l	84mg/l	84mg/l is • 40% of 209mg/l. • calculated from 12 samples over a year.

Table 2 2012 WwDL & 2012 AER contrasted.

68. Absent explanation, it is difficult to see that both load figures, 6,095 p.e. and 2,206 p.e., each prima facie authoritative, can be right. That said, the effect of the differences in hydraulic flow and mean BOD influent figures can be almost precisely seen in the following calculations:

- Effect of hydraulic flow difference - **6,095** p.e. / 1,750 x 1,575 ≈ 5,485
- Effect of BOD/l influent difference - 5,485 / 209 x 84 ≈ **2,205** p.e.

It will be seen that the much the greater part of the difference is accounted for by the difference in average BOD measured in mg/l.[173]

69. Explanation of such differences is not impossible. For example, an effluent-producing factory could have closed or effluent could have been diverted away from Clareabbey WwTP.[174] Mr Duffy himself cites the EPA[175] for the observations that

[173] While these BOD measurements are in mg/l not BOD_5 I have assumed that, however measured, they bear the same ratio to each other and so can be used in comparing the p.e. figures

[174] I emphasise that I do not suggest any such occurrence. My purpose is merely to demonstrate by hypothetical example that reductions in p.e. load on a WwTP are possible.

[175] BX appeal 19/1/20 citing EPA Manual-Treatment Systems for Small Communities, Business, Leisure Centres and Hotels, EPA (1999)

- flow rates and wastewater characteristics discharged to small scale treatment systems[176] may differ significantly.
- knowledge of the expected wastewater flow rates and characteristics is therefore essential for the design of these systems.
- measurements should be made over a representative time period to accurately determine the flow rates and characteristics of the particular wastewater.

It is suggested in the 2008 WwDL application[177] that the August 2008 flows relied upon represented a particular period of full occupancy of tourist accommodation.

70. I emphasise that my purpose in canvassing these issues is not to suggest resolution of, or purport to decide, any merits of the subject planning application. It is merely to observe that Mr Duffy's assertion is incorrect when he says, in effect, that the 2008 WwDL application figures are self-evidently right and the later AER figures are self-evidently wrong such that, as he asserts on affidavit, (and leaving pleading objections aside) "*There is no information, or no proper information on the file, to come to the conclusion that the wwtp has available capacity*."[178]

71. The Board makes the point that UÉ are not before the Court, nor are its AERs impugned in judicial review. That is true. The same can be said for the EPA and its WwDL. And it seems to me that while the respective load p.e. figures in the WwDL (now a decade old) and the AERs are each prima facie authoritative, they do not bind the Board in making its decision, nor is their legal validity at issue before the Board or me. They are, rather, evidential material available to the Board to assist its coming to its own independent view as to the load on the WwTP and whether it has capacity for the Proposed Development. Ceteris paribus, it could accept either load p.e. figure or, conceivably, neither.

72. It may be repeated that the difference in these figures is striking. A WwTP described by the responsible sanitary authority and the EPA as at capacity in 2008 and 2012 is depicted in the AERs from 2012 as far below capacity. The Board had no explanation for the difference, not having interrogated it.[179] It can be sensibly suggested that the absence of an explanation for the difference is distinctly regrettable.

73. Yet, as far as is known, the AER figures were accepted repeatedly over many years by the EPA to which the AERs were addressed and which had itself issued the WwDL and was responsible for supervision of compliance with the WwDL. While I have not yet described the Board's decision, I can observe at this point that it cannot be said that the Board was irrational in considering:

- figures based on samples taken over a year – over numerous years – preferable to a figure based on a single month;
- such figures preferable to a figure based on a single month in which wastewater characteristics may have been untypical;

[176] I acknowledge that Clareabbey WwTP may not be considered a small scale treatment system.
[177] Clare County Council response dated 9 April 2009 to EPA Notice dated 30 January 2009.
[178] Duffy Affidavit 16/2/24 §25.
[179] Transcript Day 3 p80 & 81.

- the AERs generally consistent over a lengthy time – 9 years – at least as compared to the 2008/2012 WwDL figure which might fairly be described as a snapshot;
- 2019 data preferable, as more recent, to 2008/2012 data.

Even if I thought it "clearly wrong", I could not find the Board's acceptance of 2019 data submitted by UÉ to the EPA in fulfilment of its WwDL obligations to make AERs at "*fundamental variance from reason and common sense*".[180] Pleading objections aside and allowing the presence of conflicting information before the Board, there is nonetheless no factual basis for Mr Duffy's averment that *"There is no information, or no proper information on the file, to come to the conclusion that the WwTP has available capacity.*"[181]

Capacity of a WwTP – A Relative Matter For UÉ

74. I should say something more as to WwTP capacity – specifically information from UÉ made available to the Board. In a **BbTTG** case[182] Humphreys J considered the requirement that SHD[183] planning applications include *"where it is proposed to connect the development to a public water or wastewater network or both, evidence that [Uisce Éireann] has confirmed that it is feasible to provide the appropriate service or services and that the relevant network or networks have the capacity to service the development".*[184] That obligation does not apply here, but Mr Duffy makes essentially the point that UÉ's certification of no objection to the Proposed Development was inadequate and I am satisfied that, in appreciable degree at least, the same rationale applies. The following appears in the judgment in that case:

> *"The applicant submits in effect that "capacity" is a black-and-white, objective situation and that capacity in the Ringsend Waste Water Treatment facility has now been exceeded as illustrated by EPA reports and submissions made to the board in the present case. But that is a misunderstanding. Depending on the context, capacity is not all or nothing – it inherently involves trade-offs. ……. In some situations that is absolute ….. In the more relative situations, such as the capacity of a water or wastewater network, it is up to the relevant statutory decision-maker – UÉ in this case as the body required to submit confirmation of capacity – to determine how these trade-offs should be managed, and for example to determine how many overflow incidents are acceptable before we hit a red line whereby no more additional connections can be allowed without expansion works."*
>
> *"If the board accepted a manifestly unreasonable assertion of capacity by UÉ, or one tainted by error of fact, then that would be a separate administrative law ground for judicial review, …….. UÉ confirmation is a statutory act but not in itself a decision with self-executing legal consequences, and nor is it separate to the planning process. It is a step in the planning process, albeit not one taken by a planning decision-maker. If a party wants to argue that that step was unlawful, it can challenge the letter by certiorari, but UÉ would have to be a respondent, and a specific relief should be sought against the letter."*

[180] The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642.
[181] Affidavit of Michael Duffy sworn & 81.6 February 2024 §25.
[182] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66 §48 et seq.
[183] Strategic Housing Development within the meaning of the Planning and Development (Housing) and Residential Tenancies Act 2016.
[184] Article 297(2)(d) PDR 2001.

> *"… the wording of the 2001 regulations articulates two separate concepts, feasibility of provision and capacity of the network. …… If there is nothing external to show that there is any issue as to capacity, then one should be slow to find a problem or lacuna in loose wording by UÉ. But if there is significant evidence before the decision-maker of problems in capacity or feasibility, then non-statutory language needs to be looked at more sceptically if it is ambiguous enough to be reasonably open to interpretations that fail to include the precise confirmations mandated by the regulations. But such ambiguity must not be artificially read in."*

75. I respectfully adopt the views of Humphreys J as to the relativity of the expert judgment by UÉ, as operators of a WwTP, whether that WwTP has capacity to serve a Proposed Development. And of course, it is entirely possible that a WwTP will have capacity to serve a particular proposed development but not another, larger or otherwise different, proposed development.

76. As in the present case the view of UÉ as to capacity to serve the proposed development was to hand not pursuant to a regulatory requirement but in the form an evidential contribution by a statutory consultee, I am content to leave to another case whether to challenge such a view given pursuant to a regulatory requirement would require UÉ as a party to the proceedings. I incline to the view that it would not. In **BbTTG**[185] Humphreys J took a contrary view in the context of a regulatory pre-condition to permission specific to SHDs.[186] Here it suffices to say that it is not, at least ordinarily, unreasonable for the Board to rely on such a view of UÉ as to WwTP capacity. Similarly, as to the status of AERs produced by UÉ in compliance with WwDL conditions but without public participation in their adoption, I incline to the view that, when adduced in planning applications, they are evidence on which the Board may rely but by which it is not inevitably bound and they do not preclude an objector from disputing in the planning process their substantive accuracy or the capacity of a WwTP to serve a proposed development. I would be concerned that any other view would tend to undermine, in substance and reality, public participation and fact-determination in environmental decision-making and tend to abdication by the Board of its decision-making obligations both generally and in environmental assessment under directives such as the EIA and Habitats Directives.

77. Though, strictly, the issue of "statutory language" does not arise, I respectfully share the views of Humphreys J as to its use by prescribed bodies and statutory consultees such as UÉ when conveying their opinions to the Board – it may not be legally required but it is certainly highly desirable. It may also be counterproductive if, on particular facts it was perceived as a deliberate decision not to use the statutory language.

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[185] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66 §48 et seq.

[186] Article 297(2)(d) PD R 2001 as to SHDs provides that an application for SHD permission shall, where it is proposed to connect the development to a public water or wastewater network, or both, be accompanied by evidence that Irish Water has confirmed that it is feasible to provide the appropriate service or services and that the relevant water network or networks have the capacity to service the development. A similar requirement applies in the case of application for permission for a Large-scale Residential Development within the meaning of the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021.

78. In the present case, UÉ's laconically confining itself to the words "*No Objection*" is disappointing when a little more effort could easily have explicitly confirmed that, and explained why, in its view, the wastewater collection and treatment network had capacity to service the Proposed Development. Such laconicism savours somewhat of the "*bare ipse dixit*" of experts by which Collins J was unimpressed in **Duffy v McGee**.[187] After all, UÉ cannot, ex hypothesi, express "no objection" to a planning application without having first checked and formed an evidentially-based view whether there is capacity in the local WwTP to serve the proposed development. It hardly seems demanding to expect that they will briefly and succinctly commit that basis of their view to paper.

79. However, and as I have said earlier, UÉ's submission of 11 December 2020, as a prescribed body reading "*No objection*", read with its letter to Mr McDonagh of 20 October 2020, which was before the Board, makes it apparent that it had no objection to the Proposed Development on grounds of lack of capacity in the public waste water collection and treatment systems, including Clareabbey WwTP. While framed negatively as to absence of objection, it is in substance a positive assertion of WwTP capacity. Any hypothetical doubt in that regard is dispelled by the AER content as to WwTP load and capacity - which content was also known to the Board.

80. While entirely agreeing that capacity to serve a proposed development may well in a given case be relative and far from a black/white issue, I would also, and respectfully, reserve to a case in which it arises for decision, the status of any determination by UÉ, in expressing a view as to the capacity of a WwTP to serve a proposed development, of how many SWO overflow incidents are acceptable before no more additional connections can be allowed to a WwTP. It seems to me that any implications of cases C-427/17 Commission v Ireland, C-502/14 Commission v UK, and C-301/10, Commission v UK - in their requirements that SWO spills be exceptional and that they not occur in climactic conditions within the normal range for the locus of the WwTP in question[188] - could require careful consideration in that context.

81. And, as I have said, despite the information from 2008 as to load on the WwTP, and not least given that consistent AER content from 2012 on, it cannot be said, as Humphreys J posited, that *"the board accepted a manifestly unreasonable assertion of capacity by UÉ".*

<u>What Can Be Done With Excess Flow?</u>

82. Where, due to rain, hydraulic flow to a WwTP exceeds design flow, broadly a number of reactions and consequences are possible. What follows may well not be a complete list. I say "*broadly*" as, in practice the situation is dynamic and a combination of reactions and consequences may be fully or partially, contemporaneously or sequentially, applied and realised in a particular instance, depending on circumstance and the management of the waste water system.

[187] Duffy v McGee [2022] IECA 254 §19.
[188] To put this requirement another way, it amounts to a requirement that collection systems and WwTPs be designed and built to a capacity to treat all waste water arising in climactic conditions normal in the locality.

- Excess flow is discharged untreated from an SWO, prior to the WwTP inlet, thus limiting the flow into the WwTP – preferably to its hydraulic capacity.

  There is no SWO just prior to the inlet to Clareabbey WwTP.[189] But there is an SWO at Westfields PS. If
  - influent to Westfields PS exceeds the hydraulic capacity of the WwTP and
  - pumping from Westfields PS is limited to the hydraulic capacity of the WwTP and
  - the result is that the capacity of the sumps/tanks at Westfields PS is defeated,

  then an SWO spill will occur at Westfields PS.

- Excess flow is stored in a storm water holding tank prior to the WwTP inlet for later release into the WwTP when ambient flow is lower and limiting pro tem the flow into the WwTP – preferably to its hydraulic capacity.

  As applied to Clareabbey WwTP, this implies that Westfields PS pumping is not limited to the hydraulic capacity of the WwTP and the excess would be stored pro tem in a storm water holding tank upstream of the PS and downstream of the WwTP. In turn, this would tend to avoid an SWO spill.

- Excess flow is discharged, more or less treated,[190] from an SWO within the WwTP.

  I am unclear if this occurs in general practice but, as stated, there is – or has at least until recently been - no SWO in Clareabbey WwTP (see below as to the new storm water holding tank).

- Flow through the WwTP is permitted to exceed its capacity, thus reducing residence time of the influent in the WwTP and hence its capacity fully to treat influent and so potentially reducing effluent quality in greater or lesser degree.

EPA Site Visit 2018

83. As stated, the design capacity in p.e. of Clareabbey WwTP (what I have called its "rated" capacity) has, at all relevant times, been and remains 6,000 p.e. Its design hydraulic capacity was not recorded in AERs[191] until 2014 when its peak flow capacity was stated as 1,445,400 m^3/y. The equivalent figure in the 2015 AER was 1,478,250 m^3/y. In the 2016 AER it was stated as 4,056 m^3/d – by my calculation that is 1,480,440 m^3/y – at which, in the AERs - it has remained even after later upgrade works. However, those figures are theoretical as they assume a WwTP operating constantly at full capacity. As flow naturally waxes and wanes, that does not happen in practice.

[189] Ignoring the Storm Water Tank for present purposes.
[190] Depending on the point in the sequential WwTP process at which the SWO is located.
[191] Annual Environmental Reports required by statute.

84. An EPA Site Visit Report of May 2018 notes numerous ELV[192] breaches for total phosphorus in 2017 and 2018. However, significant process optimisation works had been completed, with more scheduled for summer 2018.[193] These works were not in issue at trial. The NIS included a weblink to the EPA Site Visit Report,[194] so it was before the Board. That report also contains the following:

§	EPA Site Visit Report - May 2018	
1.2	Significant improvement works have been completed at the WWTP following the process optimisation visits, which include the upgrade of the aeration system, installation of a larger screen and the emptying and cleaning of the aeration tank. Irish Water is also in the process of upgrading the sludge management system at the WWTP. These works are planned to commence in June 2018 with the completion of works due in July 2018.	
1.5	Is the plant overloaded?	Yes
	Comment / Corrective Action	
	The WWTP is operating at the biological design capacity. The agglomeration does not have a storm water overflow or storm water holding tank and as a result the entire collected load is processed through the WWTP. At peak flows this can be up to sixteen dry weather flows (DWF). Irish Water stated that the agglomeration has been included as a candidate site for the storm water tank programme. As part of the programme the WWTP will be assessed for options to reduce the peak hydraulic loading to the WWTP.	
	Corrective Action Required	
	Irish Water should ensure that these works are progressed in a timely manner.	
1.9	Is the composite sampler operational at all times the discharge is taking place?	Yes
1.11	Is there visual evidence of pollution at, or downstream of, the discharge point to the receiving water?	Not Checked
	Comment / Corrective Action The primary discharge point is located in a marshy area and is not accessible.	

Table 3 - EPA Site Visit Report, May 2018 - extracts

85. This content of the 2018 EPA Site Visit Report bears some comment:

[192] Emission Limit Values – imposed on WwTP discharges by the WwDL, Schedule A.
[193] Works done and scheduled for summer 2018 included upgrade of the aeration system, installation of a larger screen, the emptying and cleaning of the aeration tank and upgrading the sludge management system.
[194] NIS p76.

- The bald statements that the WwTP is overloaded is and "*operating at the biological design capacity*" are also notable. The biological design capacity was and is 6,000 p.e. The latest AER then available – that for 2017 – put the WwTP load at 4,984 p.e. So that clearly cannot have been the source of the view that the WwTP *"is operating at the biological design capacity*". On the evidence before me, the most likely explanation would seem to be that the EPA inspector was referring to the EPA's own WwDL which in 2012 had put the load at 6,095 p.e.

- The report clearly identifies:
  - the problem of overloading the WwTP as relating to storm water; and
  - the corrective action required as being the installation of a storm water holding tank – which has occurred.

- The assertion that the *"agglomeration does not have a storm water overflow"* is wrong: as all at trial agreed, Westfields PS has an SWO.

Clareabbey WwTP Storm Water Holding Tank

86. In March 2019 Clare County Council granted UÉ planning permission 18/1004 for Clareabbey WwTP upgrade works including a balancing storage facility – a storm water holding tank located prior to the WwTP inlet works.[195] It has been installed. I have set out a general description above of the purpose of such tanks. It allows storage of effluent during high rainfall and its gradual release to the WwTP over time thereafter.[196] This buffers, or balances, the hydraulic load on the WwTP over time. In effect it allows increase of average flow such that, while the daily "rated" hydraulic flow capacity of the WwTP remains unaltered as reflected in the AERs, the WwTP is enabled, by controlling the rate of flow, to handle higher storm water volumes over time, within its hydraulic flow capacity, than prior to the upgrade.

87. The rationale for these WwTP upgrade works[197] was that,

- *"…….. the plant has a treatment capacity of 6000p.e. I also note that the works as proposed "increase the efficiency of the existing treatment capacity of the wastewater treatment plant, as opposed to increasing the overall treatment capacity''.*

- "*…. the proposed development would enable the treatment of wastewater to a standard that will comply with the Urban Wastewater Treatment Regulations ….. and the effluent discharge licence parameters set out by the EPA for discharging to the River Fergus*"

[195] There was a "bottleneck" at the WwTP inlet works where screens removed solids. Occasionally high flow overflowed the screens and entered the WwTP treatment system without screening. The upgrade also included replacing the inlet works and screens.
[196] The Urban Waste Water Treatment Directive, Procedures and Criteria in relation to Storm Water Overflows, Department of the Environment 1995.
[197] As stated in UÉ's planning application as recorded in the Clare County Council planner's report dated 5 February 2019 in Clareabbey WwTP upgrade planning application P18/1004 citing UÉ's AA and EIA Screening reports.

- the expectation was that the upgrade will improve the quality of discharge to the estuary, reduce the incidences of capacity issues with the treatment system and improve local water quality.

88. As stated, hydraulic capacity, in m^3/day, is measured in terms of flow not volume. So, it is true that the capacity of the WwTP as recorded in terms of peak hydraulic flow at 4,050m^3/day has not been increased by the addition of the storm water holding tank. However, the efficiency and practical capacity of the WwTP, in terms of the total volume of influent it can treat over time, has been increased by the storm tank in that it is better equipped to handle a high rainfall event by distributing the treatment of the influent volume thereby created over a longer period than that of the event itself. Though the WwTP cannot deal with a higher peak flow on the instant, over time, by balancing flow, it can deal with greater volume. This has increased its effective hydraulic capacity in volume terms, though not in flow terms.

89. Mr Duffy submitted that at §3.4.5 of an exhibited contractual tender specification for the Clareabbey WwTP upgrade, including the storm water holding tank, UÉ had assumed that the WwTP design organic capacity was 9,200 p.e.. I confess I have been unable to find that figure in the specification. It describes the WwTP design capacity as 6,000 p.e. in 2006.[198] I should say that the storm water holding tank is part of a greater scope of works at Clareabbey WwTP which included new inlet works, and final effluent pumping all of which, "new facilities" §3.3.1 of the specification required to be designed to serve a p.e. of 10,900 – which requirement informed the sizing of the storm water holding tank. The parties did not fully clarify exactly what this means, nor am I quite sure. As best I can discern, I assume it is a form of future proofing in that, while the overall capacity of the WwTP will remain 6,000 p.e., the new facilities, including the storm water holding tank, will have a higher capacity. Indeed that seems to be Mr Duffy's understanding too – he says that the tank was sized for 10,900 p.e..[199] What I am clear on is that the contractual tender specification does not bear the meaning for which Mr Duffy contends: that the specification implies that Clareabbey WwTP is currently overloaded at 9,200 p.e. or, for that matter, 10,900 p.e. In this respect it seems to me, respectfully, that Mr Duffy conflates or confuses capacity and load – both of which can be expressed in terms of p.e. but which are very different concepts. I also reject as unpleaded an allegation that, in sizing the storm water holding tank in the contractual tender specification, UÉ misapplied Formula A of the 1995 Departmental SWO Guidelines as to SWOs.[200]

90. It bears mentioning that the tender specification for the storm water holding tank stipulates a monitored SWO which, if activated, would spill untreated waste water directly to the Fergus.[201] Mr Duffy say that this should have been, but was not, considered in AA in planning application 18/1004 for Clareabbey WwTP upgrade works. But there is no challenge before me to permission 18/1004 and there is no plea of alleged failure in the subject decision-making process to assess any significance of an SWO at the storm water holding tank. More generally, the same may be said of allegations by Mr Duffy of breach of permission 18/1004 in the construction and operation of the storm water holding tank. In fairness to Mr Duffy, I should

[198] §1.3.
[199] Transcript day 1 p93
[200] "Procedures and Criteria in Relation to Storm Water Overflows" published by the Department of the Environment in 1995 in response to the UWWTD. Formula A provides a mathematical basis for calculations as to the volume of storm water in a tank, sump or other container at which an SWO spill will start.
[201] P45 & §3.4.5 & 3.4.5.5

record that he ultimately dropped all issues as to alleged unauthorised development at Clareabbey WwTP.[202] I therefore consider these issues no further.

MR DUFFY'S PARTICIPATION IN THE PLANNING PROCESS #1

91. As stated, Mr Duffy objected to the Proposed Development by submissions to the Council for himself and for a Mr Bx. Though he tried to persuade me to the contrary, Mr Duffy ultimately agreed,[203] and in any event I hold, that those submissions to the Council did not object on the basis that the Proposed Development would cause a deterioration in the quality of effluent discharging to the SAC and SPA from Clareabbey WwTP or via the Westfields PO SWO.

92. To the Board, Mr Duffy appealed only for Mr Bx. That appeal, dated 19 January 2021, as here arguably relevant, alleged inadequate AA Screening and AA citing:

- Failure to properly analyse the characteristics of the wastewater likely to be produced by the Proposed Development or peak wastewater loadings on the system and hence the quality of its discharges. It is alleged that even a slight underestimation would have a catastrophic effect on the efficiency of the WWTP and the quality of the discharge.
- That Clareabbey WwTP is hydraulically overloaded in rainfall events. (No material beyond assertion was supplied.)
- Failure to assess the prospect of increased SWO spills of untreated effluent at Westfields PS.
- The resultant prospect of increased pollution in the SAC requires AA Screening and AA.

Notably, the Bx Appeal does not record enclosure of supporting documents.

MR MCDONAGH'S REPORTS & RESPONSES TO APPEAL

NIS, Ecological Impact Assessment & Engineering Planning Report – October 2020

93. The NIS[204] submitted by Mr McDonagh in his planning application to the Council:

a. Identifies the Clareabbey WwTP as located just south-west of the N85 River Fergus Bridge and its primary discharge as to the River Fergus, tidal at that point, about 180m downstream of the bridge. Its design p.e. is 6,000 and its agglomeration p.e. load was recorded as 4,742 in 2019.[205]

[202] Transcript Day 3 p 17 & 18.
[203] Transcript Day 2 p48.
[204] Natura Impact Statement, Proposed M18 Motorway Services Area, Kilbreckan, Ennis Co. Clare, October 2020, Malachy Walsh and Partners.
[205] NIS §5.1.3 EPA Licenced Facilities. Though it is not cited, this is clearly taken from the 2019 AER – see table above.

b. Asserts that the proposed on-Site WwTP, by producing treated effluent (at 24 p.e.[206]), will ensure that the Clareabbey WwTP will not be subjected to excessive organic loadings.[207]

c. Asserts that "*The latest plant compliance for the WWTP is 'Pass'*".[208] A weblink is footnoted, apparently in verification. I return to this issue below.

d. Refers to the EPA Site Visit Report of May 2018 and its reference to Clareabbey WwTP upgrades.[209] It in effect corrects the EPA Site Visit Report in that it records that, while there is no SWO at the WwTP, there is one at the Westfield PS. The NIS cites a 2018 Report[210] to the effect that any additional storm flows entering the WwTP by-pass the inlet works and are diverted straight to the main treatment process, affecting[211] plant efficiency.

- I observe that this statement refers to the position prior to installation of the storm water holding tank at the WwTP inlet works.

e. Does not, in its "*Identification of Potential Effects*",[212] list deterioration, due the Proposed Development, of Clareabbey WwTP effluent discharging to the SAC.

f. Identifies other relevant plans projects as including Clareabbey WwTP[213] and its proposed upgrade including the storm water holding tank.[214] It addresses in-combination/cumulative effects separately.[215] It records of Clareabbey WwTP that *"Several operating issues were highlighted during EPA site visits in 2017 and 2018. In the absence of a storm water holding tank the WWTP was deemed to be operating at biological design capacity."* [216] As recorded above, the NIS provides a weblink to the May 2018 EPA Site Visit Report.[217]

- Accordingly, it would be unfair to regard the NIS as failing to bring to the Board's attention the EPS site visits, the 2018 Site Visit Report and its identification of WwTP capacity issues.

g. Records permission 18/1004[218] to upgrade Clareabbey WwTP by, inter alia, adding a storm water holding tank to provide additional buffering capacity and improve overall treatment efficiency.[219] The NIS records that AA screening of the proposed upgrade (including the storm water holding tank) for in-combination or cumulative effects was negative.

[206] Ecology Response to Appeal Malachy Walsh and Partners February 2001 p4.
[207] NIS §4.5.2.2 Management of Wastewater.
[208] NIS §5.1.3 EPA Licenced Facilities.
[209] NIS §5.1.3 EPA Licenced Facilities.
[210] Barry and Partners Consulting Engineers, 2018. Inlet Works, Storm and Sludge Programme EIA Screening Report – Clareabbey WWTP, Dublin, Ireland: Irish Water.
[211] The text says "effecting" but the typo is obvious and the effect is clearly negative.
[212] NIS §7 & Table 4
[213] NIS §5.1.3
[214] NIS §5.1.2 & Table 2.
[215] NIS §9.8.
[216]NIS §9.8.3.
[217] NIS p76
[218] described above.
[219] NIS p28 - Table 2. List of granted and on-going planning applications – see also §9.8.3.

- I observe that the Proposed Development was, properly, not included in that consideration of the in-combination or cumulative effects of the WwTP upgrade. But the negative finding remains relevant to the considerations of the NIS as to the Proposed Development.

h. Concludes, as to potential in-combination or cumulative effects, that "*In light of the plant upgrade works which have already been completed and are due to take place, and with the predicted improvement in plant operation and efficiency, it is considered that significant cumulative water quality impacts due to interaction between the proposed MSA*[220] *and the WWTP are not likely*." [221]

- For the avoidance of doubt, I note that the WwTP to which this passage refers is the Clareabbey WwTP not the On-Site WwTP.

i. Concludes, generally, that the Proposed Development will not result in significant adverse impacts on the conservation objectives of the European sites considered – including the SAC and the SPA.[222]

94. The assertion that "*The latest plant compliance for the WWTP is 'Pass'*"[223] caused confusion at trial.[224] In terms it is opaque. It prompts the question, compliance with what and where is it recorded? Even if the answer is obvious to an expert, that is no answer in a process which is to be transparent and reasonably intelligible to the intelligent, informed, interested and lay public. Counsel for the Board initially attributed this assertion of a "Pass" to the 2019 AER on a misapprehension that a footnoted weblink in the NIS was to that AER. I queried this, as the 2019 AER in fact recorded the WwTP as failing 4 of 6 aspects of effluent quality. It transpired at trial that the weblink was in fact to a web-based EPA mapping system. Access to that EPA mapping system at trial was necessarily to the version current at trial but, as Counsel for the Board observed, the relevant status was unchanged. It reads "Directive Compliance Pass". It is unfortunate that this entry on the EPA mapping system does not explicitly and proximately, even if briefly, identify the Directive in question. But in my view it is readily to be inferred that the reference is to the Urban Waste Water Treatment Directive[225] and ultimately that was confirmed to me by Counsel for the Board.[226] However, I was not directed to the system or criteria by which the EPA assigns what is clearly an overall or general "Pass" or other status to a WwTP.[227] I make this observation given, as I have said, the 2019 AER (the last to hand at the date the NIS was prepared) recorded the WwTP as failing 4 of 6 aspects of effluent quality.[228] I do so not to doubt the assigned status (that seems to be a matter for the EPA) but rather to observe that the true legal basis and substantive significance of the assigned status, as recorded in the NIS and the EPA mapping system and as informing the decision of a planning application is not, as it should be (at least in the NIS), reasonably readily discernible to the intelligent, informed and interested public – or, for

[220] Motorway Service Area.
[221] NIS §9.8.
[222] NIS §12
[223] NIS §5.1.3 EPA Licenced Facilities.
[224] Transcript Day 3 p 74 & p111 et seq
[225] Counsel for the Board referred variously at trial to the Waste Framework Directive and to the Water Framework Directive. However, as the Pass status is specifically ascribed to a Waste Water Treatment Plant, I am satisfied that the directive in question must be the UWWTD.
[226] Transcript Day 3 p218 & 219.
[227] The Urban Waste Water Treatment Regulations, 2001 as amended do state Reference methods for evaluation of monitoring results and the number of test results for specific parameters which result in a pass or a fail but I have been unable to discern how this results in an overall pass/fail designation for a WwTP.
[228] The EPA Mapping Site states that the map data is from 2016 but I note from the 2016 AER that the WwTP Compliance Status for Total Phosphorous was "Fail".

that matter, to the legal teams and the Court in the present case. It prompts repetition of the general principle that documents in planning processes, including (perhaps in particular) expert reports, should be written with the reader in mind - not the cognoscenti but the intelligent, informed, interested and lay public.[229] This general principle seems to me to an inevitable implication of the **XJS** principles[230] of interpretation of planning documents.

95. However, it is not apparent to me that this reference in the NIS to the overall compliance status of the WwTP was impugned by Mr Duffy in either pleadings or argument. So, I do not consider that, on the case he makes, my observations need be taken any further or that they affect the outcome of this case. I accept the arguments of Counsel for the Board in this respect.[231]

96. For present purposes, Mr McDonagh's Ecological Impact Assessment[232] and Engineering Planning Report[233] add little – merely repeating the NIS as to in-combination or cumulative effects with Clareabbey WwTP.[234] The Engineering Planning Report describes the on-Site WwTP and the hydraulic load thereon at 25 m^3/day. It follows that its effluent should be in the region of 25 m^3/day.

Ecology Response to Appeals & CST Engineering Response to Appeals – February 2021

97. Mr McDonagh's "*Ecology Response*"[235] was explicitly to the Appeals – including that by Mr Duffy for Mr Bx. As to AA it:

a. Identifies Mr Bx's concerns as including the AA, *"including proposal to discharge effluent to Clareabbey WWTP via Westfields Pumping Station."*[236]

b. Notes the appellants' concerns as to risk of adverse effects to European sites, including as to the foul water connection to Clareabbey WwTP.[237]

c. Repeats that on-Site treatment prior to discharge of 25m^3/day and 24 p.e. of treated effluent to Clareabbey WwTP "*ensures that the existing municipal plant at Clareabbey will not be subjected to excessive organic loadings*."

d. Records that the effluent from the Proposed Development will be further treated at Clareabbey WwTP prior to discharge to the River Fergus through the licensed discharge point.

[229] I recognise that there are practical limits to this general principle and bear in mind the observation of Clarke J in Connelly v An Bord Pleanála & Clare County Council [2021] 2 IR 752 §74 that it is inevitable that public engagement in planning matters may require its engagement with complex concepts – both legal and scientific. But those limits seem unlikely to be at issue in the present instance.
[230] See, for example, Ballyboden Tidy Towns Group v. An Bord Pleanála [2022] IEHC 7 §119 et seq.
[231] Transcript Day 3 p114, 116 & 117.
[232] Ecological Impact Statement, Proposed M18 Motorway Services Area, Kilbreckan, Ennis Co. Clare. Malachy Walsh and Partners, October 2020.
[233] By Punch Engineers, October 2020.
[234] §7.2.1.
[235] Ecology Response to Appeal of Motorway Services and Rest Area, adjacent to Junction 12, off the M18, February 2021, Malachy Walsh and Partners.
[236] §1.2. sic.
[237] §1.2.3.

e. Records that Clareabbey WwTP has an existing agglomeration p.e. load of 4,742 as recorded in the latest AER (2019). Connection of the Clarecastle agglomeration to Clareabbey WwTP is targeted for the end of 2020. Irish Water estimates the combined connected loads for Clarecastle and Clareabbey at Clareabbey WwTP to be 5,857 PE – citing the Clarecastle Sewerage Scheme EIA Screening Report 2019[238] – within the Clareabbey WwTP design capacity of 6,000 p.e..

f. Records that the Clare County Council Planner's Report states that the existing Clareabbey WwTP is operating below its hydraulic capacity.

   - I add that the Planner's Report also stated that *"the proposed loading from the M18 motorway service area will be well within the treatment capacity of the existing plan"* but observe that the precise source of this view is not apparent from the Council Planner's Report. It may be no more than reliance on the AERs. If so, while it is not irrelevant, it does not add in substance to the information available from UÉ.

g. The 2019 AER records that Clareabbey WwTP has a peak hydraulic capacity of 4,050m^3/day, an annual maximum hydraulic load of 2,856m^3/day and an average hydraulic load of 1,866m^3/day, such that the additional hydraulic load from the Proposed Development will be well within the existing WwTP treatment capacity.

h. The 2019 AER records non-compliances with WwDL ELVs[239] but the NIS notes that:
   - The ambient monitoring results meet the EQS[240] for Oxygenation and Nutrient Conditions.
   - The WwTP discharge has no observable impact on water quality or on WFD status.

i. Refers to the Clareabbey WwTP upgrade planning permission 18/1004 granted in 2019 and states that the new storm tank will provide additional buffering capacity and improve the overall efficiency of treatment at Clareabbey WwTP. It also notes that the UÉ Investment Programme (2020-2024), includes an additional capacity upgrade to Clareabbey WwTP.[241]

j. Notes the emergency SWO at Westfields PS which, it says (on the basis of 2012 information[242]), only operates in times of pump failure. Two new pumps have been recently installed. Any overflows "*will comprise overflow of treated effluent (which has already undergone both primary and secondary treatment prior to leaving the development site), rather than untreated or raw effluent*."

   - This assertion as the quality of SWO effluent is, strictly, incorrect. Any spill at the Westfields PS SWO will inevitably comprise, I imagine in minor part, treated effluent from the Proposed Development but, in larger part, untreated effluent from elsewhere.
   - However, it is true to state, as to BOD, that the component of any SWO effluent deriving from the treated effluent of the Proposed Development will have been treated. More pertinently, that is to say that it will, on arrival at Westfields PS, constitute 24 p.e.

[238] RPS Group (August 2019).
[239] Emission Limit Values.
[240] Environmental Quality Standard. Set in the Surface Water Regulations 2009.
[241] Cited in Irish Water's submission to Clare County Council on the Clare County Development Plan Issues Paper 2022-2028.
[242] Citing the 2012 EPA Inspectors Report on the wastewater discharge licence application for Clareabbey WWTP.

98. Mr McDonagh's "*Engineering Response*"[243] to the Appeals, adds that "*it is understood*" that there has been no storm water overflow at Westfields PS since 2014. As I explain below, this assertion is of little or no weight. It also asserts that that the characteristics of the foul effluent at Moneygall and the Galway Plaza Motorway Service Stations are well-known and so were used to in specifying the on-Site WwTP.

99. The Ecological Response as to AA concludes:

> *"Bearing in mind the level of treatment which generated effluent will undergo on-site prior to disposal and discharge to the public sewer system, the volume of additional loading to Clareabbey WWTP which will arise in the context of the available capacity of the WWTP, upgrade works at Clareabbey WWTP comprising installation of a new storm tank with further Irish Water plant upgrade works planned, and the absence of evidence regarding significant water quality impacts associated with the WWTP within the Fergus, it is not considered that disposal of treated effluent from the development to Clareabbey WWTP, has potential for significant adverse effects on the Lower River Shannon SAC, the River Shannon and River Fergus Estuaries SPA or any other European site. Significant adverse effects on the integrity of any European sites are not likely to occur as a result of this element of the development."*

100. I observe that the Ecology Response, and specifically this conclusion, addresses, albeit not to his satisfaction, Mr Duffy's concerns as to adverse effect of the Proposed Development on Clareabbey WWTP effluent quality and on SWO spills, thereby, on the integrity of the European Sites. Whatever might be said in this regard about the Board, it cannot be said that Mr McDonagh, via the Ecology Response, failed to engage with Mr Duffy's submissions on this issue. Indeed, this is no surprise as the Ecology Response was explicitly a response to the Appeals.

MR DUFFY'S PARTICIPATION IN THE PLANNING PROCESS #2 – THE BX RESPONSE

101. The McDonagh responses to the Appeals, described above, were circulated and Mr Duffy responded for Mr Bx on 31 March 2021.[244] As to AA, he:

a. Cited and enclosed Clareabbey AERs 2012 – 2019[245] and Clarecastle AERs.

b. Disputed the asserted Clareabbey agglomeration organic p.e. load of 4,742[246] on the basis that:

   - It is based on grab samples.

[243] By CST Group, Engineers, February 2021.
[244] I have reordered the following content thematically.
[245] There is none for 2018.
[246] From the 2019 Clareabbey AER.

- This is incorrect in fact. The 2017 AER records installation of composite samplers.[247]

- The 2008 WwDL application had stated a calculated Clareabbey agglomeration p.e. load of 7,197.
  - As stated above, Mr Duffy no longer cites this load of 7,197. He seeks to rely instead on the hydraulic p.e. of 7,777 cited in the 2008 WwDL application. I elaborate on this issue below.

- Clareabbey WwTP was operating over capacity in 2008 and no additional capacity was provided since.
  - As framed by Mr Duffy, this assertion depends on asserting the p.e. load in hydraulic, not organic terms. The UWWTD stipulates expression of p.e. load in organic – BOD_5 - terms.
  - However, that is not to say that hydraulic overloading of the plant would not be a legitimate concern.

- The Clareabbey WwTP load in 2008 did not include the Clarecastle agglomeration load yet to be added. That load may be about 1,000 p.e.,[248] but Mr Duffy says it is in fact unknown and will be increased by pending permitted development.[249]
  - I note that by end-2021 Clarecastle had not been connected to the Clareabbey WwTP[250] - though, in his affidavit of 16 February 2024, Mr Duffy referred to it as "recently connected".)

- There is no flow data for the Clareabbey WwTP or for the Clarecastle agglomeration.

- In short, Clareabbey WwTP is grossly hydraulically overloaded.

- Accordingly, the level of on-Site treatment is immaterial. The additional hydraulic loading will increase existing pollution of the designated sites. "*Any possibility*" of such impact requires AA - which did not happen.
  - I observe that the standard of "*any possibility*" is not the standard imposed by law. I will return to this issue.

c. Disputed the claim that Westfields PS SWO spills occur only on pump failure[251] on the basis that:
   - it is "*recognised and is well established*" that in wet conditions the network is inundated – which inundation must be released somewhere in the system.
     - I observe that Mr Duffy does not – in this document or in these proceedings - substantiate or quantify his assertion of inundation which he says is "*recognised and is well established*".
   - There is no SWO at the WwTP[252] so the only possible reliefs of pressure are by
     i. discharge at the Westfields PS SWO or
     ii. forcing the excess flow through the WwTP to discharge untreated via the WwTP discharge.

[247] As I understand, grab sampling involves "grabbing" for testing a single sample assembled over short period of time. Composite sampling involves automated assembly for testing of a composite sample composed either by continuous sampling or by mixing discrete samples taken over time. Testing of composite samples is considered a more reliably representative of average or general effluent quality for the parameter tested.
[248] Mr Duffy enclosed extracts from a WwDL application for the Clarecastle PS. It estimates p.e. on the basis of Geo Directory data in the absence of a meter at the PS. The date of the WwDL application is not apparent on the extracts to hand.
[249] Listed in the enclosed extracts from the Clarecastle PS WwDL application.
[250] Clarecastle AER 2021.
[251] Assertion made in Mr McDonagh's "Ecology Response" to the Appeals - §1.2.3 citing the 2012 EPA Inspector's Report on the Clareabbey WWTP WwDL application.
[252] This was correct until the installation of the Storm Water Holding Tank just prior to the WwTP inlet. It has a SWO – though it will not spill until the storm water holding tank capacity is defeated.

d. There is no flow data for storm water overflows and no analysis of what effect such overflows are having on receiving waters.

e. The WwTP discharge cannot be tested because it is in marshy land and is inaccessible.[253]

102. Mr Duffy's enclosures to the Board on behalf of Mr Bx include:

- A list of developments permitted in Clareabbey since 2003 and p.e. calculations in respect thereof.
- Undated extracts from a Clare County Council Clarecastle PS WwDL application.
- Materials as to the Clarecastle Agglomeration.
- The 2008 document entitled "Discharge Flow Volumes" at Clareabbey WwTP to which I have referred above. It is from the WwDL application and asserts a p.e. load of 6,095.

103. The Board decided not to circulate the Bx response of 31 March 2021 for further response as it took the view that the Bx response contained no new information. In that sense, Mr Duffy had the last word on these issues.

104. It is convenient here to dispose of Mr Duffy's reliance on an alleged Clareabbey agglomeration p.e. of 7,197 in 2008. As stated above, at trial, Mr Duffy could not explain this figure and argued instead for the hydraulic p.e. of 7,777 stated in the WwDL application. I have already explained that the EPA was entitled to prefer the figure of 6,095 p.e. in granting the resultant WwDL. In that light and in light of the lesser p.e. loads recorded in the subsequent AERs over many years, I cannot see that the Board was obliged to attribute any weight to that hydraulic figure of 7,777 p.e..

105. In addition, of course, the UWWTD and the Irish implementing regulations define p.e. in organic, not hydraulic, terms. Accordingly, and expressing myself somewhat diffidently as I appreciate that it may be necessary for design and perhaps other purposes to make population-based assumptions as to effluent volume generation, it seems to me that arguments as to hydraulic overload of a WwTP should be made in terms of volume and flow rather than in terms of population equivalents.

106. Mr Duffy's complaint of a lack of flow data for the Clareabbey WwTP appears to be directed at impugning the validity or accuracy of the WwTP loads – in p.e. and hydraulic terms – recorded in the AERs. In effect he says he cannot verify them as he does not have the raw data which underlies them. He says Irish Water don't publish the weekly or the daily inflows into WwTPs.[254] While that may be so and Mr Duffy may have other courses open to him to discover that information, I do not consider it relevant in these proceedings. It is not pleaded and, as I have said, I do not think it irrational of the Board to rely on AERs and the advice of UÉ as to WwTP capacity.

[253] This is a reference to a statement in the EPA's 2018 Site Visit report.
[254] Transcript Day 1 p127.

MR DUFFY'S PARTICIPATION IN THE PLANNING PROCESS AND THESE PROCEEDINGS – AN OBSERVATION.

107. Importantly, Mr Duffy did not, either in the planning process or in these proceedings, adduce any evidence of real – as opposed to hypothetical, theoretical or conceivable – risk that the organic content of WwTP effluent or of any spill at Westfields PS will be so increased by the contribution from the Proposed Development as to be likely thereby to incrementally and adversely affect the integrity of the SAC or the SPA by reference to its conservation objectives.

108. Nor, as to any risk of stormwater volume defeating the Westfields PS pumps, did Mr Duffy adduce any evidence of real risk that the hydraulic load deriving from the Proposed Development would so increase the hydraulic load on the pumps at Westfields PS as to materially cause or contribute to the occurrence, duration or volume of any overflow there such as to incrementally and adversely affect the integrity of the SAC or the SPA by reference to its conservation objectives.

BOARD'S DECISION & INSPECTOR'S REPORT

109. The Board's Impugned Decision, dated 22 October 2022, includes agreement with and adoption of the Inspector's Report dated 4 August 2022, as to both AA Screening and AA. In AA, it records consideration of Mr McDonagh's NIS *"and all other relevant submissions on the file including the Inspector's assessmen*t" and that it did an AA of "*the implications of the proposed development on*",[255] inter alia, the SAC and SPA, in view of those Sites' conservation objectives. It records consideration of likely direct, indirect and in-combination[256] impacts. The Board considered that the information before it was adequate to allow AA. It recorded that:

> *"In overall conclusion, the Board was satisfied that the proposed development, by itself or in combination with other plans or projects, would not adversely affect the integrity of European Sites in view of the sites' conservation objectives.*
> *This conclusion is based on a complete assessment of all aspects of the proposed project and there is no reasonable doubt as to the absence of adverse effects."*

110. The Board was entitled in law to agree with and adopt the Inspector's report in this regard whilst nonetheless exercising its own judgment and decision-making powers in doing its own AA. Accordingly, while the Board expressly records that it did an AA, one may look to the Inspector's report for at least a large part of the record of its substance.

[255] Sic. But the intention is clear and adequate.
[256] i.e. impacts of the Proposed Development in combination with other plans or projects.

111. The Inspector notes:

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- The Bx appeal to the Board: "*Flawed Appropriate Assessment with inadequate acknowledgement of objectivity to European Sites. The Clareabbey wastewater treatment plant does not have storm water overflow with such occurring directly to the adjacent SAC. The proposal will increase pollution to the SAC. Irish Water"*[257]; and

- The Council's Response to the Appeals – including: *"It is noted that the existing wastewater treatment plan serving Ennis is operating within capacity and the proposal to connect to it with rising main. It is noted that a screening assessment required a Stage 2 AA and that such has conclude that no significant effects on any designated Natura 2000 sites."* [258]

112. The Inspector notes the Bx Response of 31 March 2021 as to "*inadequate appropriate assessment*" and "*adequacy of foul sewerage infrastructure*".[259] This necessarily implies consideration by the Inspector of the detail of that Bx Response in those regards as set out above.

113. The Inspector's report as to AA Screening and AA[260] was explicitly based on the NIS and AA Screening submitted with the planning application and "*had regard to the submissions of prescribed bodies*".[261] In identifying for AA Screening the European Sites[262] likely to be affected, the Inspector noted that the route of the rising main overlaps the SAC at the N85 River Fergus Bridge.[263] His report locates the SPA at 1.07km south of the Site and about 1.3km downstream of the N85 River Fergus Bridge. The Inspector, without having identified specific risks, identified the possibility of significant effects on (inter alia[264]) the SAC and SPA and screens them in for AA.[265] However, he then identifies potential effects on the SAC and SPA (the "Qualifying Interests/Species of Conservation Interest" ("SCI") he lists[266]) as follows:

> *"The appeal site overlaps the … SAC … with potential for direct effects and several watercourses draining the site into the SAC area. … the … SPA … is 1.3km downstream of the site where it overlaps the river area with a potential significant effects due to minor watercourses draining the site into the designated site."*

114. His AA Screening concludes that "*the impacts as described above cannot be ruled out and if they occurred, would be significant given the hydrological links and proximity to these Natura 2000 sites. As such, likely effects on cannot be ruled out, having regard to the sites' conservation objectives*". So, the Inspector

[257] Sic. Inspector's report §6.1.3.
[258] Inspector's report §6.3.1
[259] Inspector's report §6.4.3.
[260] Inspector's report §8.
[261] Inspector's report §8.1 & 8.2.
[262] i.e. SACs and SPAs.
[263] Inspector's report §8.5.1 & 8.6. (As recorded above, the rising main from the on-Site WwTP to the public sewer runs under the River Fergus).
[264] The other sites screened in for AA are not relevant in these proceedings.
[265] Inspector's report §8.7 & also by way of conclusion, §8.12.
[266] Inspector's report Table 8.1.

moves on to AA.[267] He essentially considers risk to the SAC and SPA, including as to water quality, as relating to the building and operation of the Proposed Development - including the rising main connecting it to the public sewer system and thence to Clareabbey WwTP.[268] The risks to the SAC and SPA considered do not include risk of adverse effect on European Site integrity due to deterioration in Clareabbey WwTP effluent quality. The Inspector's consideration of mitigation and "In-Combination / Cumulative Impacts" is also directed at those risks.[269]

115. However, the Inspector records the Clareabbey WwTP as having been identified in the NIS as a project having potential for effects in-combination with the Proposed Development – as to which he says that the WwTP "*has been upgraded with further upgrades planned with a screening assessment identifying no significant effects*." The Inspector expresses himself *"satisfied with the assessment of potential cumulative impacts described in the NIS"* and concludes that the Proposed Development is not likely to lead to any cumulative impacts on the integrity of the SAC or the SPA when considered in combination with other developments.[270] As I have said, he had identified the Clareabbey WwTP as one of those other developments.

116. Accordingly, the Inspector concludes that, considered as required by ss.177U and 177V PDA 2000,[271] the Proposed Development, individually or in combination with other plans or projects would not adversely affect the integrity of, inter alia, the SAC and SPA. He records that "*This conclusion is based on a complete assessment of all aspects of the proposed project, both alone and in combination with other plans and projects, and it has been established beyond scientific reasonable doubt that there will be no adverse effects."*[272]

117. Though it is relevant, the mere citation of the history and prospects of WwTP upgrades would not per se suffice to support a conclusion in AA favourable to the project. But the Inspector's report must be read as a whole - **MRRA**.[273] As stated, the Inspector records the Council's view that the WwTP "*is operating within capacity*".[274] In his general planning assessment,[275] which immediately precedes his AA,[276] the report Inspector notes, as to "*Water*", the developer's intention to treat foul water in an on-site WwTP and pump its treated effluent to Westfield PS for pumping on to Clareabbey WwTP, "*a municipal wastewater treatment system*".[277] The report continues:

[267] Inspector's report §8.14 et seq.
[268] Inspector's report §8.16, §8.17.3 & 4.
[269] Inspector's report §8.18 & §8.19. – i.e. risks relating to the building and operation of the Proposed Development - including the rising main
[270] Inspector's report §8.19.2.
[271] S.177U addresses AA Screening and s.177V addresses AA.
[272] Inspector's report §8.20.
[273] Monkstown Road Residents' Association v An Bord Pleanála & Lulani [2022] IEHC 318 §315.
[274] Inspector's report §6.3.1.
[275] Inspector's report §7.
[276] Inspector's report §8.
[277] Inspector's report §7.5.2 – 4.

> *"7.5.4 … The appellant question[278] the impact of the proposal in relation to the Clareabbey Wastewater treatment plant and its implications for discharges from such.[279] Based on the information on file including a no objection from Irish Water, the existing wastewater treatment plant to which the development is to discharge has sufficient capacity to cater for the proposed development and the fact that the proposal is connecting to a municipal wastewater treatment plan designed to cater for the urban settlement of Ennis is a reasonable arrangement. Based on the information available the plant has been subject to upgrades in recent times. …….. I am satisfied that the adequate provision is made to service the proposal development in terms of foul sewerage and that such can be catered for by the existing municipal wastewater infrastructure."*

118. Mr Duffy says this conclusion is irrational.[280] Reading this report, as I must, on the **XJS** principles described above - as a whole, in context and on a pragmatic and common-sense basis - it seems to me that any intelligent well-informed lay reader would readily infer that the Inspector relied for his conclusion as to WwTP capacity on the content of the AERs recorded above – reliance on which was entirely rational. Also, in **MRRA**[281] it was said that "*The Inspector's report must be read as a whole. The foregoing excerpt[282] is not found in the AA Screening section of the report but its terms are such that it must be considered relevant to the crucial question in AA Screening in this case – that of significant impact by foul water effluent from the Site on the integrity of a European Site having regard to its conservation objectives."*

119. The Inspector's report must be read in the context of the materials before him. As to the issue of WwTP capacity the NIS and, particularly, the Ecology Response to, inter alia, the Bx appeal are significant. The latter, in some detail and explicitly in response to, inter alia, the BX appeal, considers the issue of the capacity of Clareabbey WWTP and explains why it is not considered that disposal of treated effluent from the Proposed Development to Clareabbey WWTP has potential for significant adverse effects on the SAC, and the SPA.

120. When one recollects, importantly, that production of compliant effluent is inherent in the concept of capacity of a WwTP, the Inspector's report can only be interpreted as a finding, in light of the considerable supportive data to hand, that the Proposed Development will not adversely affect the integrity of the SAC and SPA by causing a deterioration in the quality of the WwTP effluent of any degree material to a prospect of such adverse effect. It is also clear that, in particular, the combination of the AERs, the Irish Water view and the figures provided for both the hydraulic and organic loads of the effluent from the on-site WwTP provided an ample basis for such a view.

[278] Sic.
[279] Emphasis added.
[280] Transcript Day 1 p51.
[281] Monkstown Road Residents' Association v An Bord Pleanála & Lulani [2022] IEHC 318 §315.
[282] Concluding that "that there is no significant impact on Dublin Bay or any other European Site as a result of foul water drainage".

121. While it is a matter for the Board as experts, and its view is entitled to curial deference in that respect (see for example **Sliabh Luachra**[283] and **Kemper**[284]) and cannot be considered irrational, I would add that this conclusion of no incremental in combination effect on WwTP effluent quality seems to me entirely unsurprising. After all, what is at issue is the addition of an influent load of 24 p.e. and 25m^3/day to the Clareabbey WwTP which, per the 2019 AER had spare capacity of 1,258 p.e.[285] and 1,194 m^3/day,[286] (and per the 2021 AER, had spare capacity of 1,171 p.e.[287] and 65 m^3/day[288]). To this one may add regard to the WwTP upgrade.

WESTFIELDS PS SWO

122. It is clear that spills at the Westfields PS SWO are not automatically monitored and that, if indirectly, any such spills make their way to the Fergus. It is unclear what, if any, level of non-automatic monitoring or surveillance of such spills occurs. However, Clare County Council, who operated Westfields PS as the time, stated in their 2008 WWDL Application NTS[289] and, accordingly, the 2012 EPA Inspector's report in that WWDL Application recorded, that

- normal operations of Westfields PS, even in heavy rainfall, do not result in SWO overflow.
- SWO overflow is possible in long periods of pump dysfunction, or power outages at Westfields PS.
- no complaints have arisen in connection with this SWO. (I observe that while this is not irrelevant, neither is it the point.)

In essence, the Council asserted that, as a matter of fact, the overflow at Westfields PS operated as an emergency overflow for pump failure rather than as a storm water overflow in heavy rainfall.[290] Notably also, the Council's 2008 WWDL Application NTS stated that new pumps for the Westfields PS were "*currently on order*", "*will be installed at the station in the near future*" and *"will ensure the pumping station will adequately cater for flows in excess of 6DWF, with no overflow from the system during prolonged wet weather."*

123. The McDonagh Ecological Response in 2021 to the Appeals[291] cites the 9-year old 2012 EPA Inspector's Report on the WwDL application for Clareabbey WWTP to the effect that Westfields PS emergency overflow only operates in times of pump failure – the Ecological Response thereby necessarily ignoring any incremental load since then.[292] However, it also

- records that two new pumps had been recently installed by way of upgrade.

[283] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019).
[284] Kemper v An Bord Pleanála [2020] IEHC 601.
[285] 6,000 – 4,742 = 1,258.
[286] 4,050 – 2856 = 1,194.
[287] 6,000 – 4,829 = 1,171.
[288] 4,050 – 3995 = 65.
[289] Non-Technical Summary.
[290] I am not clear that "emergency overflow" and "storm water overflow" are mutually exclusive terms of art and even if they are, clearly a given overflow could, depending on circumstance and location, perform both functions. However, the general point made by the Council is clear that in practice overflows had not arisen from heavy rainfall.
[291] Ecology Response to Appeal of Motorway Services and Rest Area, adjacent to Junction 12, off the M18, February 2021, Malachy Walsh & Partners. P6.
[292] Citing the 2012 EPA Inspectors Report on the wastewater discharge licence application for Clareabbey WWTP.

- asserts that any overflows "*will comprise overflow of treated effluent (which has already undergone both primary and secondary treatment prior to leaving the development site), rather than untreated or raw effluent.*"

124. This last assertion is, strictly, incorrect. It is true that the component of any SWO spill deriving from the effluent of the Proposed Development will have been treated. That said, it will on arrival at Westfields PS, constitute 24 p.e. However, any such spill at Westfields PS will inevitably comprise, in very minor part, that treated effluent from the Proposed Development and, in very large part, the combined untreated storm water and foul water of the rest of the Clareabbey agglomeration. So there is, prima facie, no reason to doubt the general thrust, and there is no evidence from Mr Duffy to cast doubt on the general thrust, of the assertion. In substance, that assertion is that there is no reason to consider that the incremental effect of the effluent from the Proposed Development on the organic quality of an SWO spill, if it occurs, will be significant or will affect the integrity of any European Site. Indeed, to the extent that any additional load from the rest of the Clareabbey agglomeration has accrued since 2008 or 2012, the relative contribution of the treated effluent from the Proposed Development the organic quality of a spill, if it occurs, will be even less.

125. Mr McDonagh's "*Engineering Response*"[293] in 2021 to the Appeals, asserts that "*it is understood that*" there has been no spill from the Westfields PS SWO since February 2014. On that occasion river flooding flooded the pump sump. This was resolved by the addition of a non-return valve to prevent river flooding backing up into the pump chamber. Notably, while it is clear that the engineers rely on others, as opposed to their own knowledge, for this information, they do not identify the source of their understanding. So, it is impossible to interrogate its reliability.

126. The rule of evidence against hearsay does not apply in planning processes. Nonetheless, it cannot be satisfactory in an expert report that it fails to record the source of its information – especially so as to a matter bearing on AA and as to the occurrence of SWO spills into European Sites which, as the European caselaw reveals, are of considerable concern in the context of the UWWTD. Though the strictures of **Ryan v Dengrove**[294] and **Duffy v McGee**[295] relate to expert evidence in court, they clearly apply to expert reports to the Board. That is because the Board as an independent, impartial, quasi-judicial tribunal determines matters of very considerable public and private importance and dispute, environmental, societal and commercial, for the purpose of forming an autonomous conclusion in AA to a standard of scientific certainty on an issue which may, as a matter of law, require refusal of permission in the cause of the high level of environmental protection enjoined by Article 191 of the TFEU. As was said in **Duffy**: "*Mere assertion or "bare ipse dixit" on the part of the expert witness is, accordingly, "worthless*"". And as was said in **Ryan**, *"an abrupt statement of opinion by an expert … is not proof of anything. Before a court can act on opinion evidence, it must both understand the basis of the opinion, and be confident from the face of the expert's evidence that he has taken all relevant matters into account informing it.".* **Ryan** cited **Loveday**[296] as to expert opinion - to

[293] By CST Group, Engineers, February 2021.
[294] Ryan v Dengrove DAC [2021] IECA 38.
[295] Duffy v McGee [2022] IECA 254.
[296] Loveday v Renton [1989] 1 Med. LR 117 in a passage approved by Charleton J in James Elliott Construction v Irish Asphalt [2011] IEHC 269 §12.

the effect that a court must "*evaluate the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence."* While these observations related to expert opinions as opposed to assertions of fact such as were made in this case, the same principle in my view applies: the Board cannot interrogate and verify a fact for which the only stated authority is that the reporting engineer "understands" it to be so. In the present case, that is especially so given the content of the relevant AERs, to the effect that the SWO is not monitored and hard data as to the occurrence of spills is explicitly "unknown".

127. By the WwDL, as issued in 2012, Condition 3.5 as to discharges stipulated that *"Storm Water overflows shall be as specified in Schedule A.4:"Storm Water Overflows" of this licence".* However, and arguably surprisingly, Schedule A.4 contains – still contains - a table as follows:

Discharge Point Code	**Location**	**Name of Receiving Waters**
Any other overflows as notified in writing by the Agency.		

128. So, while the EPA's standard form WwDL in Condition 3.5 and Schedule A.4 required – or at very least envisaged – the identification of SWOs in a WwDL, in substance none were identified in this WwDL. This even though the Westfields PS SWO was explicitly identified in the Council's 2008 WwDL application which resulted in the WwDL.

129. In the foregoing context, the AERS are puzzling as to SWOs in the Clareabbey Agglomeration. By the WwDL Schedule B, AERs are to include a "*Storm water overflow identification and inspection report*". The 2017, 2019, 2020 and 2021 AERs include the following:

2017 AER							
4.1 Storm Water Overflow Identification and Inspection Report							
A Storm Water Overflow Identification and Inspection report from 2014 is included in Appendix 7.4[297]							
Table 4.1.1 SWO Identification and Inspection Summary report							
WWDL Name / Code for Storm Water Overflow	Irish Grid Ref.	Included in Schedule A4 of the WWDL	Significance of the Overflow (High / Medium / Low)[298]	Assessed against DoEHLG Criteria	No. of times activated in 2017 (No. of events)	Total volume discharged in 2017 (m3)	Estimated/Measured Data
Unknown	Unknown	No	Medium	Not compliant	Unknown	Unknown	N/A

[297] Not Exhibited.

[298] Criteria for assessment of SWO significance are set by the UWWTD Procedures and Criteria in relation to Storm Water Overflows 1995 published by the Department of the Environment and set out also at Table 4.1. of the EPA Report No. 240 Technologies for Monitoring, Detecting and Treating Overflows from Urban Wastewater Networks published March 2018. It is clear that the analysis involved is of an expert technical nature.

Table 4.1.2 - SWO Identification and Inspection Summary report	
How much sewage was discharged via SWOs in the agglomeration in the year (m3/yr)?	Unknown
How much sewage was discharged via SWOs in the agglomeration in the year (p.e.)?	Unknown
What % of the total volume of sewage generated in the agglomeration was discharged via SWOs in the Agglomeration in 2017	Unknown
Is each SWO identified as not meeting DoEHLG Guidance included in the Programme of Improvements?	No
The SWO Assessment included the requirements of Schedule A3 and C3?[299]	N/A
Have the EPA been advised of any additional SWOs / changes to Schedule C3 and A4 under Condition 1.7? [300]	N/A

2019 AER							
4.1 STORM WATER OVERFLOW IDENTIFICATION AND INSPECTION REPORT							
A summary of the operation of the storm water overflows and their significance where known is included below:							
4.1.1 SWO IDENTIFICATION							
WWDL Name / Code for Storm Water Overflow	Irish Grid Ref.	Included in Schedule A4 of the WWDL	Significance of the Overflow (High / Medium / Low)	Assessed against DoEHLG Criteria	No. of times activated in 2019 (No. of events)	Total volume discharged in 2019 (m3)	Monitoring Status
TBC	TBC	No	Unknown	Not yet Assessed	Unknown	Unknown	Unknown
TBC	TBC	No	Low	Meeting	Unknown	Unknown	Not Monitored
SWO Summary							
How much sewage was discharged via SWOs in the agglomeration in the year (m3)?							Unknown
Is each SWO identified as not meeting DoEHLG Guidance included in the Programme of Improvements?							N/A
The SWO Assessment included the requirements of relevant of WWDL schedules?							N/A
Have the EPA been advised of any additional SWOs / changes to Schedule C3 and A4 under Condition 1.7?							No

130. I should repeat my awareness that, though exhibited in these proceedings, the 2020 and 2021 AERs were not before the Board as far as the documentary record reveals.

[299] This refers to WWDL schedules.
[300] This refers to WWDL schedules.

<table>
<tr><td colspan="8">2020 & 2021 AERs</td></tr>
<tr><td colspan="8">4.1 STORM WATER OVERFLOW IDENTIFICATION AND INSPECTION REPORT</td></tr>
<tr><td colspan="8">A summary of the operation of the storm water overflows and their significance where known is included below:</td></tr>
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<tr><td>TBC</td><td>134595, 176161</td><td>No</td><td>Low</td><td>Meeting</td><td>Unknown</td><td>Unknown</td><td>Not Monitored</td></tr>
<tr><td>SWO Summary</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">How much sewage was discharged via SWOs in the agglomeration in the year (m3)?</td><td>Unknown</td></tr>
<tr><td colspan="7">Is each SWO identified as not meeting DoEHLG Guidance included in the Programme of Improvements?</td><td>No[301]
N/A[302]</td></tr>
<tr><td colspan="7">The SWO Assessment included the requirements of relevant of WWDL schedules?</td><td>yes</td></tr>
<tr><td colspan="7">Have the EPA been advised of any additional SWOs / changes to Schedule C3 and A4 under Condition 1.7?</td><td>N/A</td></tr>
</table>

Table 3 2017, 2019, 2020 and 2021 AERs - SWO Reports.

131. These Clareabbey AERs, as to SWOs, are, at least, puzzling as;

- the existence, location of and, one presumes, a name for the Westfields PS SWO were known since at least 2008 when it was identified in the WwDL application NTS;

- it is unclear why the Westfields PS SWO was not scheduled in the 2012 WwDL. As far as I can see, Mr Duffy correctly describes it as, de facto, an unlicensed SWO. However, whether this amounts to a legal defect in the WwDL was not demonstrated and, in any event, the WwDL was not impugned in these proceedings;

- one SWO was listed in 2017 – presumably the Westfields PS SWO. A second SWO was listed in 2019 – I cannot identify it. But puzzlingly, as far as the AERs reveal, the location of neither was known;

- in 2020, again, only one SWO was listed. Its grid reference was identified but it was not named. It does seem difficult to imagine that one could identify the grid reference of an SWO but be unable to ascribe it a name. The reduction in the number of SWOs remains unexplained.

[301] 2020 AER.
[302] 2021 AER.

132. One may observe that in December 2021 Technical Amendment B to the WwDL

- replaced Condition 1.3 by explicitly restricting discharges to those "*listed and described*" in Schedule A and stipulating that there shall be "*no other discharges of environmental significance*".
- replaced Condition 3.5 by explicitly requiring investigation and identification to the EPA of SWOs, that they comply with the 1995 Departmental SWO Guidelines and that SWO discharges "*shall not cause environmental pollution*".

One may fairly speculate that this amendment was in response to the judgment of the CJEU in **Case C-427/17 Commission v Ireland**.[303] I will leave to another case a precise interpretation of this amendment and its relationship to the requirements of the relevant European caselaw: arguably it prohibits discharges from unidentified SWOs only where they are of "*environmental significance*" and limits such discharge to identified SWOs. However, the general thrust is clear: SWOs are to be identified. The amendment does not require that they be monitored – though, as I have said, whether such an obligation is implied by the caselaw of the CJEU – even if only as to some SWOs and by whatever of, no doubt, various possible means - must also await another case.

133. All that said, it is important to re-emphasise that neither the presumptively valid Clareabbey WwDL nor the presumptively valid planning status of the Clareabbey WwTP were impugned in these proceedings.

134. What is clear however is that SWO "*Monitoring Status*" is consistently identified in the AERs as either "*Not Monitored*" or "*Unknown*". It is difficult to see that "*Unknown*" can signify anything other than "*Not Monitored*" as monitoring, ex hypothesi, implies knowledge. It is also clear that UÉ consistently claims no knowledge of the number, volume or (in 2017) p.e. of SWO spills in the Clareabbey agglomeration. This can only cast very real doubt on the reliability of the unattributed and unidentified information on the basis of which the engineers "*understood*" that there have been no spills since 2014. It is thus unclear on what evidential basis any view might be taken by the Board, for AA purposes, as to any significance of such spills – by which I mean specifically spills prior to the operation of the Proposed Development - for effect on the SAC and SPA.

135. What is also clear, from the very fact that the question as to monitoring is posed in AERs, is that monitoring of SWOs is, at least generally, technically feasible. Also, Mr Duffy exhibits EPA Report 240,[304]. Chapter 6 and Table 6.1 of which identify the many options for SWO monitoring – from the very basic to the highly technologically advanced. That report also noted that in 2018 only about 4% of SWOs in Ireland were monitored.[305] I am unaware of any extent to which that figure has risen since nor is it my present concern.

136. Chapter 5 of EPA Report 240 is of interest in

- taking the approach that not all SWOs require monitoring and proposing a method for identifying and prioritising those that do.

[303] Judgment of 28 March 2019.
[304] Technologies for Monitoring, Detecting and Treating Overflows from Urban Wastewater Networks, published in March 2018.
[305] §8.1.1.

- observing that "*compliance with the PCSWO does not guarantee compliance of a SWO with current legislation, including the UWWTD*" and the WFD.[306]

The "PCSWO" is the UWWTD guidance document "Procedures and Criteria in Relation to Storm Water Overflows" published by the Department of the Environment in 1995 to which I have earlier referred. Indeed, the observation that *compliance with the PCSWO does not guarantee compliance of a SWO with current legislation,* is hardly surprising given the PCSWO states, of a then-awaited European Commission review study of stormwater pollution control systems, that *"The criteria and guidelines set out in this paper will be reviewed in due course in the light of any recommendations of the study report which is due to be completed shortly."* On the evidence before me it is not apparent that such review ever occurred – nor, for that matter, that the EC Review was published. Given the exhibition of the 1995 Departmental SWO Guidelines as remaining current, I must presume not.

137. All that said, it is important to recollect that, as I have noted earlier, we are concerned here with

- effect, posited by Mr Duffy, of the Proposed Development in-combination with the activity constituted by the operation of the SWO in the public wastewater collection system.
- an inevitably minor contribution of the effluent of the Proposed Development to the organic content of any SWO spill.

138. Mr Duffy did not, either in the planning process or in these proceedings, adduce any evidence of real – as opposed to hypothetical, theoretical or conceivable[307] – risk that

- the hydraulic load deriving from the Proposed Development would so increase the hydraulic load on the pumps at Westfields PS as to cause or contribute to the more frequent occurrence or greater volume of any SWO spill there or do so in any appreciable or relevant frequency or degree.

- the organic content of any such spill, if it occurs, will be so increased by the contribution from the Proposed Development as to be likely to incrementally, significantly and adversely affect the integrity of the SAC or the SPA beyond any effect which such spill might cause absent contribution from the Proposed Development.

139. Accordingly, in my view Mr Duffy has not adduced a sufficient evidential basis for pursuit in these proceedings of the issue of incremental risk to the SAC and SPA by reason of the Proposed Development via the Westfields PS SWO.

140. As to the prospect of SWO spills at the new storm water holding tank and their effect on effluent quality, again there was no sufficient evidential basis for pursuit of the issue – but more importantly it was

[306] Water Framework Directive Directive, 2000/60/EC establishing a framework for Community action in the field of water policy.
[307] As to such risks see further below.

not pleaded. Nor were allegations pleaded, which were made at trial, that the storm water holding tank was not built in accordance with its planning permission[308] and/or had not been commissioned.

LACUNAE AND DOUBT IN AA AND AA SCREENING

141. There is a fundamental basis on which Mr Duffy's challenge, as it relates to Westfields PS SWO and to WwTP effluent quality, must be rejected. Counsel for the Board correctly called it a gaping hole in his case. He has failed completely to address in any substantive, as opposed to hypothetical, way the question whether effluent quality deterioration due to the Proposed Development poses risk to the SAC and SPA. I have addressed this issue above but it bears some further elucidation.

142. Mr McDonagh submits that, to successfully impugn the AA, Mr Duffy must identify the European Site or Sites which he alleges are likely to be harmed, the Conservation Objectives/Qualifying Interests likely to be harmed and the nature and significance of the allegedly likely harm. Mr McDonagh submits that Mr Duffy has not done so. I agree.

143. For a development to proceed, AA screening and AA must stringently result in certainty - an absence of reasonable scientific doubt - as to the absence of risk to the integrity of the European sites in question. But absolute certainty is not required – precisely because it is "*almost impossible*" – and the assessment is "*of necessity subjective*" – see Kokott AG in **Waddenzee**.[309] And **Sliabh Luachra** is authority that *"decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified"* and the conclusion is necessarily subjective.[310] See also **ETI**.[311]

144. In **Reid #2**[312] Humphreys J considered the question of adequacy of AA in terms of whether "*there was any material before the board to create real doubt*" and a test *"whether the applicant has demonstrated that a "reasonable expert"*[313] *could have a reasonable scientific doubt as to whether there could be an effect on a European site."* Note the assignment of burden of proof here. While this is not as strict a test as demonstration that "*no reasonable decision-maker could have concluded that there was no scientific doubt*", it is nonetheless a test requiring "demonstration" by the applicant for judicial review. The "reasonable expert" test has been repeated in **ETI**, **Reid #5**[314] and **Toole** to the effect that "*if what is alleged to be a lacuna is a matter of pure reason and logic, then the court can identify that, but if the issue is one of expert*

[308] As I understand, an unpleaded and withdrawn allegation that the storm Water tank had been impermissibly built with a view to use also as a temporary clarifier tank to enable cleaning of the main clarifier tank. As I understand, a clarifier is a sedimentation tank in which solids are precipitated from effluent.
[309] Case C-127/02 Waddenzee [2004] ECR I-7448.
[310] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019), citing Case C-236/01 Monsanto [2003] ECR I-8166 and Case C-127/02 Waddenzee [2004] ECR I-7448.
[311] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540.
[312] Reid v An Bord Pleanála #2 [2021] IEHC 362 §50.
[313] Whom Humphreys J described as "a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker".
[314] Reid v. An Bord Pleanála [2022] IEHC 687.

evidence, the court can't determine that without it being established evidentially that a reasonable expert body would have seen scientific doubt on the face of the materials." [315]

145. The Court in **Heather Hill #2**:[316]

a. considered an alleged risk that sewage pumping station spills would, by discharge to a nearby stream, reach an SPA and SAC to which the stream was, as had been established, potentially hydrologically linked.

b. expanded on this view of hypothetical risk, citing authority[317] - including Kokott AG in **Waddenzee**[318] as to both AA and AA Screening and as cited by McDonald J in **Sliabh Luachra:**
   - *"… to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm".*
   - *"it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment".*

c. noted that decision-makers "*may not take a purely hypothetical approach to risk and may not base their decisions on a 'zero risk' approach*".

d. held that where *"the allegation is that the AA contained a lacuna, … by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the Applicant to persuade the court that the putative risk is not merely "hypothetical" or "conceivable" but is one with which the Board should have "bothered". That may be a light burden but, … a burden nonetheless …".*

e. cited Humphreys J in **Reid #2**[319] as to the *"reasonable expert"* test as reflecting "*the position that in impugning AA, as in all other areas of judicial review of presumptively valid decisions, the onus to demonstrate error lies on the Applicant. The legal burden rests with the Applicant. While the "reasonable expert" standard may not, strictly, require expert evidence, or any evidence, of the applicant in judicial review, it is easy to see how in practice and in most cases, it could most obviously be met by such evidence."* And *"the validity of the AA is in general to be judged in judicial review on the basis of the evidence which was before the Board."*

f. observed that "*The absence of particular information from an NIS does not constitute a lacuna save by reference to the purpose of AA. The Applicant cannot just point to a supposed lacuna in a sense unrelated to a prospect of adverse effects on the integrity of a European Site having regard to its conservation objectives. The difference between a mere absence and a "lacuna" must turn on the question whether it is such as to raise a reasonable scientific doubt as to the absence of adverse effect*

[315] Toole v. The Minister for Housing, Local Government and Heritage [2023] IEHC 378.
[316] Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §247 et seq.
[317] Citing Joined Cases T-429/13 and T-451/13; Bayer CropScience and others v Commission Judgment of 17. 5. 2018, Case T-257/07; France v EU Commission, Judgment of the General Court (Third Chamber, Extended Composition), 9 September 2011; R (Mynydd Y Gwynt Limited v The Secretary of State for Business, Energy & Industrial Strategy [2016] EWHC 2581 (Admin); Upheld [2018] EWCA Civ 231 - [2018] PTSR 1274.
[318] Case C-127/02, §108 & 73.
[319] [2021] IEHC 362

on the integrity of a European site in light of its conservation objectives and of the characteristics and specific environmental conditions of the site concerned and of the likelihood of harm occurring and the extent and nature of the anticipated harm."

g. adopted the view of McDonald J in **Sliabh Luachra** that "*As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk …. is sufficiently remote to be discounted"* in AA. I would add that even in AA, as Allen J noted in **Kemper**,[320] *"the court will acknowledge and respect the expert knowledge and expertise of the authority entrusted by law to make the decision."*

h. recalled the obiter of MacGrath J. in **M28**[321] *"that there is much merit in the submission of the notice party that the applicant appears to go no further than raise the fact of a hydrological link between the quarry and the SPA, but without advancing any evidence of any likely effects."*

i. cited Barniville J in **Kelly (Eoin)**[322] as to AA Screening as holding[323] that the applicant had "*failed to discharge the onus of proof which rests on him …. to show that there were gaps or lacunae in the screening report relied on by the Board's inspector to screen the application for this development for appropriate assessment."*

j. observed, as to the facts of that case, that "*Heather Hill raises these issues at a high level of abstraction - in the sense at least that it does not identify, much less engage with or analyse the significance of, the conservation objectives of the sites in question - much less again the prospect of adverse effect on the integrity of those sites by reference to those conservation objectives. Nor does it identify or engage with the question of likelihood of harm occurring and the extent and nature of the anticipated harm."*

146. In similar vein in **ETI**,[324] rejecting a challenge to AA as to a posited risk of cement leaching during the construction, via groundwater and nearby river, to an SAC, it was said that the risk of leaching, though important, was:

> *"not the ultimate issue. The ultimate issue is whether it has been shown beyond reasonable scientific doubt that the proposed development will not adversely affect the integrity of the SAC having regard to its qualifying interests and conservation objectives. The Board has found it has and is rebuttably presumed to have been correct in that regard. Notably, and however light the burden on it, ETI has not attempted to address the issue of consequences of cement leaching for the integrity of the SAC by reference to its characteristics and specific environmental conditions, qualifying interests and conservation objectives. There has been no attempt by ETI to address "the likelihood of harm occurring and the extent and nature of the anticipated harm." Counsel for the Board argued that any alleged doubt in AA "has to be brought to bear on the whole purpose of habitats assessment; in other words, the Applicant has to tie it together with an argument about how the conservation*

[320] Kemper v An Bord Pleanála [2020] IEHC 601.
[321] M28 Steering Group v An Bord Pleanála [2019] IEHC 929.
[322] Kelly (Eoin) v An Bord Pleanála & Aldi [2019] IEHC 84.
[323] Citing Harrington v An Bord Pleanála [2014] IEHC 232 and An Taisce v An Bord Pleanála [2015] IEHC 633.
[324] Environmental Trust Ireland v An Bord Pleanála & Cloncaragh [2022] IEHC 540 §285 et seq.

> *objective of the various European sites might be affected." … ETI's burden in addressing this issue was light but was not addressed at all."*

147. I mention **MRRA**[325] and **Dublin Cycling**,[326] as the risks posited in those cases were factually similar to that posited here. Both unsuccessfully pleaded error in screening out AA as to certain European Sites in Dublin Bay and as to foreseen contribution of the foul water from the developments proposed - 290 residential units in the case of MRRA and 741 units in the case of Dublin Cycling - to the admittedly overloaded Ringsend WwTP and its inadequately treated non-compliant effluent discharge to Dublin Bay. In MRRA, I accepted the Board's submission that AA Screening is concerned, not directly with effluent quality, but with risk of significant effect on European sites. MRRA had adduced no evidence of risk posed by inadequately treated foul water from the development proposed in that case - beyond saying that the European Sites were already polluted by excessive nutrients and merely asserting that the 290 residential units' foul water would worsen them in that regard. The applicants pleaded "*nothing of any specific risk to European sites – much less having regard to their conservation objectives*". They:

> *"adduced no evidence of risk posed by inadequately treated foul water from the Proposed Development beyond saying that these areas were already polluted by excessive nutrients and merely asserting that the Proposed Development will make them worse in that regard. The Applicants pleadings say nothing of any specific risk to European Sites – much less having regard to their conservation objectives. Nor were these issues raised before the Board…The Applicants cannot raise these issues now."*

148. It simply does not follow that any and every diminution in WwTP effluent quality automatically poses a risk to the integrity of a European site with which it is hydrologically connected. Mr Duffy has failed to grapple with this reality.

149. It is fair to say that the respective 290 and 741 residential units' foul water almost certainly bore an appreciably smaller relation to the load on Ringsend WwTP (which serves all of Dublin) than the effluent of the on-Site WwTP in the present case does to the load on Clareabbey WwTP. While the issue is, at least partly, relativity and proportionality and Ringsend WwTP no doubt dwarfs Clareabbey WwTP by many multiples, I think I may at least illustratively compare the failed challenges in **MRRA** and **Dublin Cycling** as to (conservatively assuming an occupancy rate of 1.5)[327] 435 p.e. and 1,112 p.e. to the 24 p.e. to be contributed to the Clareabbey WwTP by the present Proposed Development.

150. Nonetheless, in the present case the On-Site WwTP's contribution to the total load on Clareabbey WwTP will clearly be very small. It bears observing that it was held in **MRRA** that it was for the Inspector to decide whether to accept expert views that, given their quantum, the effects of the 290 residential units' effluent in combination with that of other developments discharging to Ringsend WwTP would not be

[325] Monkstown Road Residents' Association v An Bord Pleanála & Lulani [2022] IEHC 318.
[326] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020).
[327] See Fernleigh v ABP & Ironborn [2023] IEHC 525 §127.

significant and it was difficult to see that the Inspector was not entitled at law to accept them. The failure of the challenges in both **MRRA** and **Dublin Cycling** is explained in the judgments in both cases and need not be repeated here at length. But both are notable for the view that "*Projects that have no appreciable effect on the relevant European site are excluded*" from the need for AA[328] and that "*unsubstantiated assertion*" of risk does not weigh in AA Screening.[329] **MRRA**[330] also dismissed a "*thousand cuts*" argument as to the nature and analysis of in-combination effect, such that the question is whether,

> *"… the inadequately treated effluent of the incremental foul load of the proposed development will either*
>
> *i. tip the situation into one of significant risk of effect on European Sites where no such risk subsisted before or*
>
> *ii. significantly exacerbate such a risk already existing.*
>
> *Collecting both questions, one may ask in AA Screening whether in combination with other projects, existing and permitted, the proposed development is capable of making things worse."*

151. It bears repeating that in AA the ultimate issue of in-combination effect as it relates to effluent discharge, if it arises at all, is not of in-combination effect on the discharge: it is of adverse in-combination effect on the integrity on the SAC and SPA.

152. The most significant issue in this case, it seems to me, is that whatever the quality of the Clareabbey WwTP effluent and whatever its effect, if any, on the SAC and SPA, Mr Duffy pleads no particulars and adduces no evidence to the Court, and adduced none to the Board, that the effluent from the Proposed Development – from its on-Site WwTP and which will become treated influent to the Clareabbey WwTP - will make the Clareabbey WwTP effluent, or its effect on the SAC and SPA any worse. He pleads no particulars and adduces no evidence of any risk that, by its 24 p.e. or its hydraulic addition to the Clareabbey WwTP load, the on-site WwTP effluent will in fact make any appreciable difference to the quality of its effluent or that any such difference is at all likely to incrementally adversely affect the integrity of the SAC and SPA in light of their respective conservation objectives. Nor, as I have said above, does he plead particulars or adduce any evidence that the hydraulic addition of the Proposed Development to the Clareabbey WwTP load is in any appreciable degree likely to increase any risk posed by SWO spills – as to their frequency, volume or effluent quality or as to risk posed to the integrity of the SAC and SPA – at either the Westfields PS SWO or the Storm Water Holding Tank SWO. To the extent that he pleaded these issues he did so in a completely general – even abstract – way and Mr Duffy appeared to consider these propositions self-evident. They are not. The evidential burden on an objector requiring a decision maker to investigate an issue may be relatively light but it is a burden nonetheless and he has not addressed it either before the Board or before the Court. The risks he posits are in my view, and on the evidence before me, theoretical and hypothetical.

[328] Dublin Cycling §103, MRRA §318.
[329] MRRA §321.
[330] MRRA §334 - 340. Citing also Eoin Kelly v An Bord Pleanála [2019] IEHC 84 §68 (10).

153. In my view it follows also that, as to the theoretical risk posited by Mr Duffy's mere assertion of in-combination effect of the Proposed Development on the SAC and the SPA by WwTP effluent discharge, and framing the issue as it was framed in **Reid #2**,[331] there was no *"material before the board to create real doubt"* as to the risk of significant adverse effect on the integrity of a European Site. Accordingly, it was not a "*main issue*" on which "*main reasons*" were required - **O'Donnell**.[332] So, the question of engagement in such reasons with Mr Duffy's submissions in this regard, did not arise and the Impugned Decision cannot be quashed on that account. In this respect, I recall that at trial Mr Duffy ultimately agreed with my formulation of his case as in large part a complaint of failure to engage with his submissions.[333]

154. Accordingly, Mr Duffy's challenge to the Impugned Decision must be rejected.

REASONS - ENGAGEMENT WITH MR DUFFY'S SUBMISSIONS[334]

155. Lest I am wrong in the foregoing, I will consider further the question of the Board's engagement, in the reasons for the Board's decisions, with Mr Duffy's submissions on the issue of Clareabbey WwTP capacity as it allegedly bears on its effluent quality and, in turn, on AA of potential effect on the SAC and SPA.

156. Until his reply, Mr Duffy did not really develop orally any of his arguments by reference to caselaw. In reply he cited **Balz,**[335] **NECI** [336] and two **BbTTG** cases as to the obligation to give reasons and as to the Board's obligation of "*detailed scrutiny*" of planning applications in the context of the imbalance of resources as between developers and objectors.**[337]** I consider the issue in the context of this and another **Balz** decision.[338] In the former it was described as "*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.*" In the latter the relevant question was identified whether the decisionmaker had "*truly engaged*" with relevant submissions.

157. Adequacy of reasons is case- and context-specific – **MRRA**[339] and **FC**.[340] In the latter case, Ní Raifeartaigh J thought the adequacy of reasons case-specific "*in the sense that the issue turns on the specific language used in communicating the particular decision in the context of the hearing which has gone before,*

[331] Reid v An Bord Pleanála #2 [2021] IEHC 362 §50.
[332] O'Donnell v An Bord Pleanála [2023] IEHC 381 §39 – citing that standard as established in, for example, Balscadden Road SAA Residents Association v An Bord Pleanála, [2020] IEHC 586, [2020] 11 JIC 2501 "and at least ten High Court judgments since."
[333] Transcript Day 2 p 63.
[334] Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722; Ballyboden TTG v An Bord Pleanála and Shannon Homes [2022] IEHC 7.
[335] Balz v An Bord Pleanála, [2020] IESC 22.
[336] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2021] IESC 36; [2021] 2 I.L.R.M. 1.
[337] Ballyboden TTG v An Bord Pleanála & Ardstone [2023] IEHC 722; Ballyboden TTG v An Bord Pleanála and Shannon Homes [2022] IEHC 7.
[338] Balz v An Bord Pleanála [2019] IESC 90, [2020] I ILRM 367 §57
[339]MRRA v An Bord Pleanála & Lulani [2022] IEHC 318 §64.
[340] FC v. Mental Health Tribunal [2022] IECA 290.

including the evidence adduced and the submissions made". Charleton J said in **Marques**[341] that reasons must be "*adequate to the situation*". Humphreys J in **Carrownagowan**[342] recently said that "*the inspector says she has considered the issues and the applicants haven't proved otherwise. Lack of narrative detail sufficient to satisfy an applicant (an impossible standard anyway) does not constitute a failure in substantive consideration*." It can fairly be said that, as Barr J has recently said,[343] as to a submission that the authorities are in some tension regarding the requirement for reasons, differences of judicial emphasis or phraseology between judges need not amount to conflict in the authorities. One may add that this may especially so as to a requirement which is case- and context-specific. And as Ní Raifeartaigh J said: *"there is a balance to be struck. It is of course ultimately a question of substance and not form, and there must be an element of common sense and practicality in approaching the question of adequacy of reasons."* One must also and importantly remember that the underlying objective of reasons is fairness in the process **– Mallak**.[344]

158. Recently in **Roache**,[345] Phelan J reviewed the caselaw and said that *"[i]f it is broadly clear why a view is preferred in arriving at a decision, the requirement for reasons identified in Connelly and applied in case law since then is satisfied."* She also considered it "*beyond question that a decision maker is entitled to prefer one item of evidence over another, provided the basis for preference is understood and is sustainable*". Also, as was said by Clarke CJ in **Connelly**[346] and Fennelly J **Mallak**, it may be that reasons are obvious from the context of the decision, or in some other fashion. As was also said by Clarke CJ in **Connelly**[347] and as applies mutatis mutandis here

> *"the Decision and any other materials which are either expressly referred to in it or can be taken by necessary implication to form part of the reasoning, provide adequate information to enable any interested party to assess whether an appropriate EIA has been carried out."*

159. As I have said, it cannot be said that Mr McDonagh, via the Ecology Response, failed to engage with Mr Duffy's submissions on this issue of Clareabbey WwTP capacity. Reading the Inspector's report as a whole, including §7.5.4, and in light of the Ecology Response, it is apparent that the Inspector:

- was conscious of Mr Duffy's submission as to, and so considered, the questions of impact on of the Proposed Development on the Clareabbey WwTP discharges and the impact in turn of those discharges on the SAC and SPA;
- concluded that the WwTP had sufficient capacity to cater for the Proposed Development; and
- formed that conclusion at least in part on the basis of the content of Mr McDonagh's Ecology Response, including reliance on the 2019 AER and, indeed, the other AERs which Mr Duffy himself had later supplied with his Bx response of 31 March 2021.

[341] Marques v. Minister for Justice and Equality [2019] IESC 16.
[342] Carrownagowan Concern Group v. An Bord Pleanála & Futureenergy [2024] IEHC 300 at §167.
[343] Graymount House Action group v An Bord Pleanála & Trafalgar Capital [2024] IEHC 542.
[344] Mallak v Minister for Justice [2012] IESC 59.
[345] Roache v An Bord Pleanála and others [2024] IEHC 311.
[346] *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 ILRM 453, [2021] 2 I.R. 752, [2018] 7 JIC 1701 §7.5.
[347] §14.2.

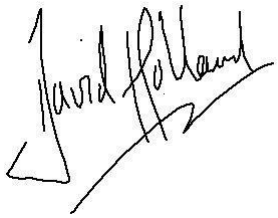
160. While, in my view, the Inspector very desirably could have expressed them more clearly and explicitly, these reasons were on balance, and on a common-sense and pragmatic view of matters, adequately discernible to Mr Duffy from the Board's Decision as he read it as an informed participant in the planning process. Put simply, his right is to understand the reasons - **Mallak** - and he knows why he lost. Of course, Mr Duffy vehemently disagrees with those reasons: but he is not entitled to reasons with which he agrees or finds convincing.

161. I therefore reject Mr Duffy's complaint that the Board failed to have regard to or engage with his submissions – whether made for himself or for Mr Bx.

CONCLUSION

162. For the reasons stated above, the proceedings will be dismissed.

163. Provisionally and given s.50B PDA 2000, I consider that no order should be made as to costs. I will list the matter on 7 October 2024 for mention and final orders.



DAVID HOLLAND
27 September 2024