



[2026] IEHC 414

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2025.0001301]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000

BETWEEN

MARCIA D'ALTON, MELLA LEONARD AND NORMA LOMBARD

APPLICANTS

AND
AN COIMISIÚN PLEANÁLA

RESPONDENT

AND
CORK COUNTY COUNCIL

NOTICE PARTY

<i>Date of impugned decision:</i>	<i>7 July 2025</i>
<i>Date proceedings commenced:</i>	<i>29 August 2025</i>
<i>Date of main hearing:</i>	<i>10 June 2026</i>
<i>Date draft judgment circulated:</i>	<i>18 June 2026</i>

JUDGMENT of Humphreys J. delivered on Friday 26 June 2026

"Conservation is the process of caring for buildings and places and of managing change to them in such a way as to retain their character and special interest. **Historic structures are a unique resource. Once lost, they cannot be replaced.** ... it is **vitaly important** that proposals for works to protected structures, and within [architectural conservation areas], be **examined at a detailed level.**" (Ministerial guidance: *Architectural heritage protection – guidelines for planning authorities*, para. 7.2.1 – emphasis added)

1. In this case the commission approved a proposal to demolish a 177-year old wall associated with the historic local railway, within an architectural conservation area (ACA) designated as such by the county development plan (CDP), that is the central feature of Cork St., a coastal road at Passage West, Co. Cork, together with an original stile that was recognised as a heritage feature by the town council and expressly included in its heritage trail and signage at both ends of the trail. The latter heritage feature is being demolished without any express consideration whatsoever by the inspector and commission. An express objective of the development plan provides that there "shall" be a character assessment for works of this kind within an ACA – there was no such assessment and nor was there any equivalent document that considered the stile in particular or the wall in any detailed way. Ministerial guidance sets out the need for granular examination of structures to be demolished and consideration of alternatives. The commission conducted no discernible examination of the demolition of the stile and considered no alternatives in that regard or in relation to the wall. The ministerial guidelines were referred to by the inspector only in the (irrelevant in that regard) context of a condition about other structures. The commission took the view that alteration of some of the wall militated against the need to preserve the remaining original wall without meaningfully considering alternatives and even though the modifications are limited, the original wall is of more than minor extent, it extends beyond the development site (not properly acknowledged by the commission), and the original and modified walls form a visual continuum. The removal of the wall to one side of the water tower, a protected structure, self-evidently affects its setting by nullifying the symmetry of its setting given that the historic wall is currently situated on both sides. The commission did not address this issue by reference to the setting of or impact on the protected structure. The question is whether the decision can survive these sort of shortcomings individually or collectively.

Geographical context

2. The project (<https://www.pleanala.ie/en-ie/case/321292>) is upgrading of an existing 2-kilometre-long pedestrian and cycle route, including the following: upgrading 2 kilometres of existing 2.5-metre-wide pedestrian and cycle path to an approximate 4-metre-wide pedestrian and cycle path; alterations to existing opening to stone masonry wall at Passage West Maritime Museum; repair to existing steps next to slipway at Passage West; new ducting and light emitting diode (LED) lighting; planting of new native Irish trees to compensate for some tree-felling along the route at a ratio of 3:1, including the planting of new native Irish hedgerows; upgrading of existing paths at the tie in points at Robert's Bridge Car Park; ancillary and amenity elements including fencing, signage,

shared pedestrian and cycle track markings, information boards, bike racks, picnic tables and benches; and all associated site development and landscaping.

3. The existing Passage Railway Greenway is part of the wider Lee to Sea Greenway corridor from Inniscarra Dam to the west of the city to Crosshaven to the south-east (<https://lee2sea.com/the-route/>) (inspector's report, §1.3) which is 40-45 km long and is under development and only partly constructed/consented. Apparently 85% has been completed and there will be a development consent application for two remaining pieces, an M28 link in the county area and a longer piece in the city area. The site <https://corkcyclenetwork.com/> provides a clickable map of what is completed and what is yet to be completed.

4. The Passage Railway Greenway is 2 km long within the county boundary.

5. As stated on the Ring of Cork site (<https://www.ringofcork.ie/listings/passage-west-greenway/>):

"The Passage West Greenway is part of a trail that extends from Cork City to Passage West on the old Cork City to Passage West Railway line which operated for 72 years before closing in September 1932. The walk was opened in November 2007 to commemorate the 75 years of the closure of the railway and features many historical plaques and photographs describing the history of the route."

6. The upgrade works involve an upgrade of the existing 2 km-long pedestrian and cycle route between the Cork City/ Cork County boundary and Mariner's Quay, increasing the pedestrian and cycle path from 2-2.5 m wide to approximately 4 m wide.

7. Around 400 m of the existing Passage Railway Greenway and the area subject to the upgrade works, specifically the southeastern end of the site, is located in the Passage West Architectural Conservation Area (inspector's report, §6.5.2).

8. The parties state:

"This proposed development is for the widening of an existing greenway along a 2km stretch described as running between the Cork City/County boundary to Mariner's Quay. (Mariner's Quay is actually an apartment development on Railway Quay. The proposed development is to finish on Railway Quay.) Because the development is off-road for much of its length, visibility on Google Street View is limited.

Notice Party:

Location of the starting point:

https://www.google.com/maps/place/51%C2%B052'42.6%22N+8%C2%B021'43.8%22W/@51.8784947,-8.3647296,647m/data=!3m2!1e3!4b1!4m4!3m3!8m2!3d51.8784914!4d-8.3621547?entry=ttu&q_ep=EgoyMDI2MDYwMS4wIKXMDSoASAFQAw%3D%3D

Location of the end point:

https://www.google.com/maps/place/51%C2%B052'21.3%22N+8%C2%B020'10.6%22W/@51.8725719,-8.3388417,647m/data=!3m2!1e3!4b1!4m4!3m3!8m2!3d51.8725686!4d-8.3362668?entry=ttu&q_ep=EgoyMDI2MDYwMS4wIKXMDSoASAFQAw%3D%3D

Parties

9. The first named applicant is Marcia D'Alton, resident of Passage West. In her submission to the commission she refers to having served as an elected councillor on Passage West Town Council and subsequently as a member of the notice party council.

10. The second named applicant is Mella Leonard, resident of Passage West and the third named applicant is Norma Lombard, Chairperson of Passage West/ Monkstown Biodiversity Group. The respondent is An Coimisiún Pleanála, the decision-taker, and the notice party is Cork County Council.

Facts

11. The Cork, Blackrock and Passage Railway Act 1846 (9 & 10 Vict. c. cxlviii) (repealed by the Statute Law Revision Act 2009) provided for one of Ireland's earliest railways, running through Passage West to the south-east of Cork city.

12. The wall proposed for demolition was associated with construction of the railway, and dates from 1849, according to the applicants (this has not been meaningfully controverted). The railway opened in 1850. A water tower was constructed around that time and the current structure dates from some time between 1879 to 1901.

13. The railway closed in 1932.

14. The ACA for Passage West was designated in the 2003 development plan.

15. A part 8 development took place in 2009 involving a greenway along the coast at Passage West. Sub-optimally this involved a car park right beside the greenway with no physical barrier. The council are now relying on that lack of a barrier in order to warrant the destruction of a Victorian wall and stile to provide alternative car parking.

16. On 19 November 2024, Cork County Council submitted an application to An Coimisiún Pleanála for approval under Part XAB, s. 177(AE) of the Planning & Development Act 2000 (the 2000 Act) for the proposed Passage West pedestrian and cycle route in the townlands of Ardmore and Pembroke, Passage West, Co. Cork.

17. On 22 November 2024, Cork County Council submitted the press notice to accompany the application to the commission.
18. On 2 December 2024, the commission assigned a planning inspector to the case.
19. Public consultation ran from 20 November 2024 until 15 January 2025.
20. On 14 January 2025, Norma Lombard made a submission on behalf of the Passage West and Monkstown Biodiversity Group.
21. On 15 January 2025, Marcia D'Alton made a submission on her own behalf.
22. On 15 January 2025, Mella Leonard made a submission on her own behalf.
23. On 15 January 2025, the commission acknowledged the submission from Norma Lombard (Passage West and Monkstown Biodiversity Group).
24. On 20 January 2025, the commission acknowledged the submissions from Marcia D'Alton and Mella Leonard.
25. On 27 January 2025, the commission sent copies of submissions received to Cork County Council.
26. On 31 January 2025, the commission sent copies of more submissions received to Cork County Council.
27. On 10 February 2025, the assigned inspector wrote a memorandum to the commission's assistant director of planning confirming that sufficient information was on file for the commission to carry out an assessment of the application. He also confirmed that following a site inspection and a review of the application documentation, including drawings, environmental impact assessment (EIA) screening report and Natura impact statement (NIS), there was enough information on the file to assess the application under s. 177AE of the 2000 Act. He asked that the submissions would be circulated and that the applicants would be invited to respond to the submissions received. (The memorandum was mis-dated 10 February 2024.)
28. On 11 February 2025, the commission sent all submissions in electronic format (USB) to Cork County Council, asking that same would be made available for public inspection.
29. On 21 May 2025, the assigned inspector prepared a report on the application, recommending a grant of planning subject to nine conditions and his reasons and considerations for same.
30. On 26 June 2025, the commission issued a direction stating that the submissions and inspector's report had been considered at a meeting on the same day at which the commission had decided to approve the proposed development generally in accordance with the inspector's recommendation.
31. On 7 July 2025, the commission issued an order confirming approval for the proposed development subject to six conditions and its reasons and considerations for same.
32. On 8 July 2025, the commission wrote to the applicants to notify them of the decision on the application.

Procedural history

33. On 29 August 2025, the applicants lodged a statement of grounds with the Central Office of the High Court.
34. On 29 September 2025, the applicants were granted leave to apply for judicial review for the reliefs set out in the statement of grounds.
35. On 20 February 2026, the respondent served a statement of opposition and the accompanying affidavit of Robert Brophy, copying all parties. On 23 February 2026, the respondent sent filed versions of the statement of opposition and affidavit of Robert Brophy to all parties.
36. On 5 May 2026, the notice party served a statement of opposition and the accompanying affidavit of John Slattery, copying all parties. On the 12 May 2026, the notice party uploaded filed versions of the statement of opposition and affidavit of John Slattery.
37. On 29 May 2026, the applicants served a replying affidavit, uploading same and accompanying exhibits to the ShareFile.
38. On 2 June 2026, the applicants served their written submissions.
39. On 4 June 2026, the commission served its written submissions.
40. On 5 June 2026, the council served its written submissions.
41. On 5 June 2026, the statement of case was uploaded to the ShareFile.
42. The matter was listed for hearing on 10 June 2026.
43. Judgment was reserved at the end of that hearing. I would like to record my thanks to the applicants and all of the lawyers involved for their unfailingly courteous, professional and helpful assistance. As I have previously sought to make clear, insofar as any points advanced are not being accepted in this or any other given judgment, that is solely to do with the inherent merits of such points and is no reflection on those making or instructed to convey such points, a distinction that most certainly should be, and I believe generally is in fact, self-evident to all concerned.
44. On 18 June 2026, a draft of the present judgment was sent to the parties, pursuant to paras. 15, 195 to 198 and 204 of Practice Direction HC 137, to give an opportunity to address matters such as errors/ ambiguities on the basis set out below.

45. Parties are required to:

- (i) Read the draft or have their legal representatives if applicable do so on their behalf.
- (ii) Identify any matters falling within the below.
- (iii) Positively communicate with the court in writing in response to the draft by the deadline specified, such responses to be emailed to the court and uploaded to ShareFile, either stating that they have no comments or setting out the comments.
- (iv) Carry out the foregoing without delay - the draft judgment procedure is a concession which parties can engage with but must do so with immediate dispatch, discipline and focus – it is not the opening of a new phase of the litigation that gives rise to “an entitlement to elaborate procedures at every point” (to use a phrase of O’Donnell C.J. (Dunne, Charleton and Baker JJ. concurring) in *O’Sullivan v. Health Service Executive* [2023] IESC 11 (Unreported, Supreme Court, 10 May 2023) at para. 39); and still less should the procedure invite the perhaps “serious error, to which lawyers are prone, to approach any such case on the tacit assumption that only procedures which approximate to a criminal trial are fair, and anything which departs from that is somehow dubious” (O’Donnell J. (Clarke C.J., McKechnie, MacMenamin, Dunne JJ. concurring) in *O’Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751, [2018] 1 I.L.R.M. 245, 780).
- (v) Keep the draft confidential. Draft judgments are not public domain materials and, while they can be shared between the lawyers concerned and their clients, subject to the following, it is inappropriate for any person to refer to them for any purpose other than to assist the court in relation to the finalisation of the formal judgment. Therefore anyone with information as to the text, content or proposed outcome of any draft is required not to publish or transmit such information to others save solely by way of private transmission for the legitimate purposes of assisting in the finalisation of the judgment and subject to a similar restriction on any recipient. Trial participants should take reasonable steps to keep drafts confidential. On this topic, see *Attorney General v. Crosland (No. 2)* [2021] UKSC 58, [2022] 1 W.L.R. 367, [24/01/2022] T.L.R. 1 (Briggs, Kitchin, Burrows, Rose, Arden SCJJ) which discusses why restriction on publication of draft judgments is in the interests of the administration of justice; see also *Baigent v. Random House Group Ltd* [2006] EWHC 1131 (Ch), [2006] 5 WLUK 45, (2006) 150 S.J.L.B. 603 (Smith J.); *R. (Counsel General for Wales) v. Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 W.L.R. 1915, [2022] 4 All E.R. 599 (Sir Geoffrey Vos MR; Davies and Dingemans LJ. concurring); *Public Institution for Social Security v. Banque Pictet & Cie SA and others* [2022] EWCA Civ 368, [2022] 3 WLUK 291, [2022] B.L.R. 349 (Carr LJ; Jackson and Simler LJ. concurring); *Itkin v. Wood* [2023] JRC 101 (Unreported, Royal Court of Jersey, 22 June 2023).

46. The foregoing constitutes an immediately effective direction of the court to the parties and anyone having notice of the draft judgment with effect from the date of circulation of the draft.

47. The responses should not be to reargue the substance (submissions to that effect will be disregarded) but are confined to matters such as:

- (i) informing the court as to whether the party prefers an alternative to a formal written judgment as proposed, and if the party so considers, whether that party considers that the entire matter or some specified part of it can be disposed of (a) by order without a reasoned judgment, or (b) by *ex tempore* reasons without a written judgment;
- (ii) informing the court, assuming that the court proceeds with a formal judgment, as to whether the party wishes to propose any corrections to the draft such as:
 - (a) any apparent typographical, factual, legal or other errors in the draft;
 - (b) any apparent ambiguity or other matter in the draft that could unnecessarily multiply issues or complicate the further processing of the matter;
 - (c) any redaction of personal or other information that a party wishes to request;
 - (d) in the event that the court proposes to refer to any matter (whether factual, legal (including reference to authorities or other legal material), *obiter* comment or otherwise) not referred to at the hearing, any submission as to why such reference is not relevant or otherwise should not be included or as to why such matter if included should not lead to the proposed conclusion;
 - (e) any other matter in the draft judgment that the party considers should be omitted;
 - (f) any matter not included in the draft judgment that the party considers should be added to it (including where the party considers that procedural, factual or legal points not set out in the judgment should be addressed or where the party

considers that reasons for any aspect of the decision are not set out or where an overall ground is disposed of but detail of the ground or sub-ground is not expressly addressed, or where an issue arose the disposition of which would be *obiter* but on which the party concerned considers that there would be a benefit in the court expressing a view); and

- (g) any other proposals as to the wording (as opposed to substance) of the decision if the proposed wording causes any issue for a party for any identified reason; and

- (iii) assisting the court by providing views on such matters if any on which views are specifically invited in the draft judgment.

48. In particular, parties should draw the court's attention to any apparent error or ambiguity whether they have been successful on the point or not.

49. The rules of engagement in such a situation are that the draft is without prejudice to the right of the court ultimately to issue a judgment in whatever form or with whatever content it considers appropriate. It is then entirely a matter for the court as to whether to give judgment with or without amendment including any amendment that appears appropriate to the court whether arising from submissions or not. Any judgment may be given without further notice following the expiry of the specified period, whether comments are made or not. That period will not be extended save in exceptional circumstances.

50. The deadline for such comments from the parties was to be 11:00 on 22 June 2026. Comments were as follows:

- (i) Applicants: submitted a 6 page document consisting of the following:
 - i. suggested syntax change in para. 1 – no change was in fact required but I have added brackets to avoid confusion;
 - ii. para. 12 – added more historical information;
 - iii. paras. 74-75 – suggested change - see below;
 - iv. para. 80 – lack of clarity in the permission – see below;
 - v. para. 121, now 129 – typo correction;
 - vi. paras. 149-150 – form of the order – see below; and
 - vii. paras. 73 and 83 – reasons issue – see below.

- (ii) Commission: no comments subject to any submissions from the applicants or the council on para. 153 (i) and (ii).

- (iii) Council: helpfully suggested correction of a number of typos/ambiguities, and also commented as follows:

"The Council is considering the aspect of the draft judgment which makes reference to the Court's intended use of s.50A(9) of the Planning and Development Act 2000 (as amended), as set out at §150 of the draft judgment:

'150. Wherever the junction point is, the limited nature of the challenge allows me to permit an amendment under s. 50A(9) of the 2000 Act to facilitate a designed transition between the new and existing greenway at that point, a proposed order which again is subject to submissions.'

In the circumstances, we should be obliged if the Court might delay any finalisation of the judgment for a period of two weeks to allow further consideration of the draft and possible further comment by the Council."

51. In the light of the foregoing I suggested to the parties on 23 June 2026 that the judgment might be issued on the basis of a more open ended order with the form of the order to be agreed or directed unless there was a major objection. Responses were as follows:

- (i) Applicants: "We have no major objection to the Court's proposed approach and remain supportive of the severance solution proposed in the draft judgement. We rely on our previous submissions regarding the form of order and the proposed transition."
- (ii) Commission: no major objection.
- (iii) Council: "no major objection to what is proposed, with the keeping of the possibility of remittal as a consideration" – I have added text preserving remittal as an option.

Relief sought

52. The reliefs sought are as follows:

"1. An Order of Certiorari quashing the Order of the Board (ABP-321292-24) made on 7th July 2025 granting permission with conditions under section 177AE of the Planning and Development Act 2000, as amended, to Cork County Council for the upgrading of an existing 2-kilometre-long pedestrian and cycle route in the townlands of Ardmore and Pembroke, Passage West, Co. Cork.

2. A Declaration that the Respondent has erred in law in granting permission for the planning application, with or without conditions.

3. Any such other Declaration as the Court considers necessary.
4. An Order providing for the Costs of the application.
5. Any such further Order as the Court may consider appropriate."

Grounds of challenge

53. The core grounds of challenge are as follows:

"Domestic Law Grounds

1. The decision of the Commission is invalid because it failed to discharge its mandatory duty under s.18(3)(a) of the Planning and Development Act 2000 ('the Act') to have regard to the provisions of the Local Area Plan. That failure deprived the Commission of material considerations and undermined its assessment of proper planning and sustainable development as required by s.177AE(6)(a)(ii) and s.34(2)(a) of the Act.
2. The decision of the Commission is invalid because, by failing to have regard to non-statutory but place-specific plans for Passage West, which were expressly referenced in both statutory plans and third-party submissions, the Commission deprived itself of material considerations relevant to proper planning and sustainable development. The Commission therefore failed to meet its duty under s.177AE(6)(a)(ii) of the Act.
3. The decision of the Commission is invalid because it failed to have regard to material objectives contained in statutory planning documents as required by s.10(2) of the Act. This omission deprived the Commission of relevant considerations necessary to assess proper planning and sustainable development under s.177AE(6)(a)(ii) of the Act.
4. The Commission's decision is invalid because it failed to justify its conclusion that demolition of the historic railway wall within the Passage West Architectural Conservation Area (ACA) would not affect the character of the ACA. In doing so, the Commission:
 - (i) undermined its assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act;
 - (ii) failed to comply with its obligations under s.82(2) of the Act in respect of works within an ACA; and
 - (iii) failed to have regard to relevant Ministerial Guidelines issued under s.28 of the Act to which the Commission is required to have regard.
5. The decision of the Commission is invalid because it failed to consider:
 - (i) the part of the historic railway wall ('the Wall') adjacent to the Water Tower as a protected structure, and/or
 - (ii) the effect of demolition of the Wall upon the Water Tower, a protected structure (RPS no. 01469),
 thereby depriving itself of material considerations necessary for assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act.
6. The decision of the Commission is invalid because the planning application itself was deficient under Article 22 of the Planning and Development Regulations 2001 (as amended) ('the Regulations'):
 - (i) Material discrepancies in the planning documentation regarding works to protected structures and to Railway Structures not included in the Record of protected structures have led to:
 - serious concerns about the completeness and clarity of the application
 - lack of clarification for the public, prescribed bodies and planning authority and
 - lack of clarity on the particulars for which planning permission have been granted.
 - (ii) the notices associated with the planning application failed to comply with Articles 81(2)(c)(i) and 81(2)(c)(ii) of the Regulations;
 - (iii) in failing to take account of Ministerial Guidelines issued under s.52 of the Act, the notices failed to comply with Article 18(1)(d)(iii) of the Regulations;
 - (iv) the content of the planning application failed to comply with Article 23(2) of the Regulations.
7. The decision of the Commission is invalid because it failed to provide reasons for disregarding material concerns regarding traffic and parking raised in the overwhelming majority of third-party submissions, such concerns being reflected in the statutory Local Area Plan and County Development Plan. This failure undermined transparency and procedural fairness."

The impugned decision

54. The impugned decision provides as follows:

"Decision

APPROVE the above proposed development based on the reasons and considerations under and subject to the conditions set out below.

Reasons and Considerations

In performing its functions in relation to the making of its decision, the Commission had regard to:

- (a) Section 15(1) of the Climate Action and Low Carbon Development Act 2015, as amended by Section 17 of the Climate Action and Low Carbon Development (Amendment) Act 2021, and the requirement to, in so far as practicable, perform its functions in a manner consistent with Climate Action Plan 2024 and Climate Action Plan 2025 and the national long term climate action strategy, national adaptation framework and approved sectoral adaptation plans set out in those Plans and in furtherance of the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State,
- (b) Directive 2000/60/EC, the Water Framework Directive and the requirement to exercise its functions in a manner which is consistent with the provisions of the Directive and which achieves or promotes compliance with the requirements of the Directive,
- (c) the European Union Habitats Directive (92/43/EEC),
- (d) the European Communities (Birds and Natural Habitats) Regulations 2011, as amended,
- (e) the likely consequences for the environment and the proper planning and sustainable development of the area in which it is proposed to carry out the proposed development and the likely significant effects of the proposed development on a European Site,
- (f) the conservation objectives, qualifying interests, and special conservation interests for the Cork Harbour Special Protection Area (Site Code: 004030),
- (g) Project Ireland 2040 – the National Planning Framework the Regional Spatial and Economic Strategy for the Southern Region,
- (h) the National Cycle Policy Framework, 2009-2020,
- (j) the Strategy for the Future Development of National and Regional Greenways, 2018,
- (k) the policies and objectives of the Cork County Development Plan 2022-2028,
- (l) the policies and objectives of the Cork City Development Plan 2022-2028,
- (m) the nature and extent of the proposed works as set out in the application for approval,
- (n) the information submitted in relation to the potential impacts on habitats, flora and fauna, including the Natura Impact Statement,
- (o) the submissions and observations received in relation to the proposed development, and,
- (p) the report and recommendation of the person appointed by the Commission, to make a report and recommendation on the matter.

Appropriate Assessment: Stage 1:

The Commission agreed with and adopted the screening assessment and conclusion carried out in the Inspector's report that the Cork Harbour Special Protection Area (Site Code: 004030) is the only European Site in respect of which the proposed development has the potential to have a significant effect.

Appropriate Assessment: Stage 2:

The Commission considered the Natura Impact Statement and associated documentation submitted with the application for approval, the mitigation measures contained therein, the submissions and observations on file, and the Inspector's assessment. The Commission completed an appropriate assessment of the implications of the proposed development for the affected European Site, namely the Cork Harbour Special Protection Area (Site Code: 004030), in view of the Site's conservation objectives. The Commission considered that the information before it was adequate to allow the carrying out of an appropriate assessment. In completing the appropriate assessment, the Commission considered, in particular, the following:

- i. the likely direct and indirect impacts arising from the proposed development both individually or in combination with other plans or projects,
- ii. the mitigation measures which are included as part of the current proposal, and,
- iii. the conservation objectives for the European Site.

In completing the appropriate assessment, the Commission accepted and adopted the appropriate assessment carried out in the Inspector's report in respect of the potential effects of the proposed development on the integrity of the aforementioned European Site, having regard to the Site's conservation objectives.

In overall conclusion, the Commission was satisfied that the proposed development, by itself or in combination with other plans or projects, would not adversely affect the integrity of the European Site, in view of the Site's conservation objectives.

Proper Planning and Sustainable Development/Likely effects on the environment:

It is considered that, subject to compliance with the conditions set out below, the proposed development would not have significant negative effects on the environment or the community in the vicinity, would not give rise to a risk of pollution, would not be detrimental to the visual or landscape amenities of the area, would not seriously injure the amenities of property in the vicinity, would not adversely impact on the cultural, archaeological and built

heritage of the area and would not interfere with the existing land uses in the area. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

Conditions

1. The proposed development shall be carried out and completed in accordance with the plans and particulars lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where any mitigation measures set out in the Natura Impact Statement or any conditions of approval require further details to be prepared by or on behalf of the local authority, these details shall be placed on the file and retained as part of the public record.

Reason: In the interests of clarity and the proper planning and sustainable development of the area and to ensure the protection of the environment.

2. The mitigation and monitoring measures outlined in the plans and particulars relating to the proposed development, including those set out in Chapter 7 of the Natura Impact Statement (AtkinsRéalis, October 2024) and those set out in Chapter 6 of the Ecological Impact Assessment (AtkinsRéalis, October 2024), shall be implemented in full or as may be required in order to comply with the following conditions. Prior to the commencement of development, details of a time schedule for implementation of mitigation measures and associated monitoring shall be prepared by the local authority and placed on file and retained as part of the public record.

Reason: In the interest of protecting the environment, the protection of European Sites and in the interest of public health.

3. Prior to the commencement of development, the local authority, or any agent acting on its behalf, shall prepare an Invasive Alien Plant Species Management Plan, which will address the eradication of Invasive Alien Plant Species, tasks associated with the construction phase to avoid the risk of transporting or spreading Invasive Alien Plant Species and landscaping/re-vegetation phase on completion of construction to avoid the risk of Invasive Alien Plant Species re-establishing. The Invasive Alien Plant Species Management Plan shall also address the non-Third Schedule species identified within the Greenway site and shall include recommendations to manage non-Third Schedule species, to prevent further spread.

Reason: In the interest of proper planning and sustainable development.

4. Prior to the commencement of development, the local authority, or any agent acting on its behalf, shall prepare in consultation with the relevant statutory agencies, a Construction Environmental Management Plan (CEMP), incorporating all mitigation measures indicated in the Natura Impact Statement and all other relevant reports, and demonstration of proposals to adhere to best practice and protocols. The CEMP shall also include but not be limited to construction phase controls for dust, noise and vibration, waste management, protection of soils, groundwaters, and surface waters, site housekeeping, emergency response planning, site environmental policy, and project roles and responsibilities.

Reason: In the interests of environmental protection, residential amenities, and public health and safety.

5. A suitably qualified Project Ecological Clerk of Works and Licenced Ecologist shall be retained by the local authority to oversee the site set up and construction phase of the proposed Passage Railway Greenway Improvement Scheme and the implementation of mitigation measures relating to ecology set out in the Natura Impact Statement. The ecologist shall be present during site construction works. Upon completion of works, an ecological report of the site works shall be prepared by the appointed ecologist to be kept on file as part of the public record. Where necessary, the project ecologist shall have 'Cease Works' powers.

Reason: In the interest of nature conservation and the protection of terrestrial and aquatic biodiversity.

6. All repair works to Robert's Bridge, Abbott's Bridge and Wooden Bridge (Protected Structures) shall be carried out under the supervision of a qualified professional with specialised conservation expertise and in accordance with best conservation practice as detailed in 'Architectural Heritage Protection: Guidelines for Planning Authorities' issued by the Department of Arts, Heritage and the Gaeltacht in 2011. The repair works shall retain the maximum amount possible of surviving historic fabric in-situ and shall be designed to give rise to minimum interference with the fabric of the bridges.

Reason: To ensure that the character and integrity of the protected structures is maintained, and that the bridges are protected from unnecessary damage and loss of fabric."

Preliminary issues

55. The parties' positions on preliminary issues as recorded in the statement of case are summarised as follows:

- "1. Applicants - there are no preliminary issues.
2. Respondent - the Respondent objects to the admissibility of the report exhibited to the Applicants' Replying Affidavit from Mr Paul Maxwell of StoneMax (undated), based on an inspection carried out on 25 May 2026. The exhibit comprises hearsay evidence and is not properly a reply.
3. Notice Party - The Notice Party adopts and supports the preliminary objection raised by the Respondent to the admissibility of the report of Mr Paul Maxwell of StoneMax (undated), exhibited to the Applicants' Replying Affidavit and based on an inspection carried out on 25 May 2026. That material was not before the Commission, post-dates the impugned decision, comprises hearsay, contains no statement of the maker's expertise or independence, and is not properly a reply. The same objection applies to any other material in the Replying Affidavit, and in the Applicants' written submissions, that was not before the Commission and is not by way of reply."

56. As regards the report of Mr Maxwell, this is not admissible insofar as it relates to matters not before the commission and in any event is impermissible as is not properly a reply.

Whether the points were made at the appropriate time

57. The parties' positions on whether the applicants' points were made at the appropriate time as recorded in the statement of case are summarised as follows:

"(i) Points contended to be referenced in submissions/affidavits/statement of case or otherwise in the proceedings (excluding pleadings) but not made in the process and not pleaded

- Respondent - Not applicable
- Notice Party - The contention that the existing route is 'already 3 m wide' such that the Works are 'mere widening'.
- The StoneMax/Maxwell report, the CB&PR history and the Cllr Fahy correspondence (Replying Affidavit, Exhibit N).

(ii) Points contended to have been made in the process but not pleaded

- Respondent - Not applicable.
- (iii) Points contended to be referred to narratively/contextually in the pleadings but without any properly formulated legal plea
- Respondent - Not applicable
- Notice Party -

The asserted reliance, under Core Grounds 4-5, on sections 51, 57 and 58 of the 2000 Act as free-standing obligations. The pleaded Core Grounds 4 and 5 are founded on sections 2, 82(2), 28 and 177AE; sections 81(1) and 57(10)(b) appear only in passing recitals. Section 58 (duties of owners and occupiers) has no application to a development-consent challenge. These provisions are not the subject of any properly formulated plea.

The 'Stile' as a separate heritage asset said to require discrete assessment: it is referred to narratively but is not the subject of a distinct, properly formulated legal plea separate from the wall of which it forms part.

The contention (Core Ground 6) that the substance of Articles 22-23 of the Regulations 'continued through section 249' of the 2000 Act - a legal theory first articulated in the Applicants' Replying Affidavit and submissions and not pleaded.

- Applicant -

The statutory planning framework requires consideration of the effects of development on the special interest of protected structures. In this case, the impact of the proposed development and in particular the proposed demolition element, on the protected structure was not identified and not assessed.

The Stile is an intrinsic part of the heritage structure already pleaded, i.e. the railway Wall. It is physically part of the wall and was an integral part of its function. It cannot physically stand alone. To demolish the Wall is to demolish the Stile. A separate legal plea is not necessary.

Core Ground 6 pleads deficiencies in the planning documentation, lack of clarity in the particulars of the proposed development and the resulting impact on public participation and understanding of the application. References to Articles 22-23, section 249 or any similar provisions simply illustrate the legislative importance attached to the availability of adequate plans and particulars. They do not amount to a new ground of challenge.

(iv) Points contended to have been pleaded but not made by the applicant in the process

- Respondent -
- In respect of Core Grounds 1-3, some of the specific objectives referred to in the pleadings [were] not raised in the planning process - TM12-8(a); TM 12-9(h); PL 3-1; and TCR 9-1(j).

- In respect of Core Ground 5, no complaint was made during the planning process that the wall was part of the curtilage of the Water Tower, Protected Structure.
- In respect of Core Ground 6, no complaint was made during the process of any contravention of the PDRs.

- Notice Party – agrees with the Respondent

In addition:

The contention that the Commission was required to carry out, and failed to carry out, a formal ACA 'character assessment' under Objective HE 16-18(h) and the s.28 Guidelines (Core Ground 4): the need for such a discrete character assessment was not raised in the Applicants' submissions to the Commission.

In addition to the matters identified by the Respondent, the Council notes that the reliance under Core Grounds 4-5 on sections 51, 57 and 58 of the Act, and (under Core Ground 6) the contention that the substance of Articles 22-23 of the Regulations 'continued through' section 249, are not the subject of any properly formulated plea. Otherwise, not applicable.

- Applicant –

When making submissions during the planning process, participants do so on the basis of the information then available to them. At that stage, neither the Inspector's Report nor the Commission's decision has been published. The purpose of a submission is to identify matters of concern and information considered relevant to the assessment of the application. During submissions, concerns raised included the demolition of the Wall, omissions from and inconsistencies in the planning documentation, traffic and parking impacts, and the relevant planning framework for Passage West. Those matters were placed before the Commission for consideration.

The specific matters now identified by the Respondent and Notice Party arise only following publication of the Inspector's Report and the Commission's decision. It is neither possible nor necessary for participants in the planning process to anticipate every legal characterisation, development plan objective or statutory provision that may subsequently support a complaint. What matters is whether the substance of the concern was raised.

(v) Points contended to have been both made in the process and also pleaded

- Respondent – aside from the above, it is accepted that the Applicants' raised the other matters advanced in the pleadings.

- Notice Party – adopts the Commission's response"

58. These can be addressed as follows:

- (i) The attempt to introduce further evidence not before the commission and not properly a reply is not permissible. Any other issue about the dimensions of the existing route, the Cork Blackrock & Passage Railway (CB&PR) history and the Cllr Fahy correspondence are not particularly material to the outcome either way.
- (ii) Section 51 is simply legal context, not a basis for relief in itself.
- (iii) Section 57 could have been relevant had there been demolition of a protected structure in whole or part but I am not persuaded that the wall is part of the curtilage of the water tower as a protected structure so I don't need to decide whether the applicants can rely on s. 57 for that purpose.
- (iv) Section 58 is just context at best.
- (v) Section 81(1) is legal context as the statutory provision under which the plan objective was adopted. A party does not have to plead context to this level of detail. The applicants can rely on the ACA and the plan objective in any event which were adopted pursuant to this provision.
- (vi) As to the objection that the stile was not pleaded, the defensive nature of this complaint by the council is perhaps telling. The point is adequately pleaded, *inter alia* by the following: "There was therefore no assessment of the impact of demolition of the Wall and Stile on the Passage West ACA, contrary to s.82(1) of the Act". It is not correct that the only reference is narrative.
- (vii) As to reliance on arts. 22 and 23 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (the 2001 regulations) *via* s. 249 of the 2000 Act, it is not necessary to decide this because even assuming that the point is in the case, *certiorari* should not be granted on this ground as outlined below.
- (viii) As to the failure to raise TM12-8(a), TM 12-9(h), PL 3-1, and TCR 9-1(j) in the process, I do not need to consider whether this was fatal because the case under core grounds 1 to 3 in these respects does not succeed in any event.
- (ix) As regards the fact that no complaint was made during the planning process that the wall was part of the curtilage of the water tower, a protected structure, I agree that this is a bar to relief unless the issue would have been apparent to a reasonable decision-taker acting autonomously (which it was not – see below).

- (x) The fact that no complaint was made during the process of any contravention of the 2001 regulations reinforces the conclusion that the applicants should not succeed on this point, barring demonstration that the process overall was compromised fundamentally as a result of shortcomings in the application (which they haven't done) or that the final decision was also flawed (see below under heritage).
- (xi) As to the failure to raise the need for an ACA character assessment under Objective HE 16-18(h) of the CDP, that is an autonomous obligation so failure to raise it is not fatal.

Domestic law issues

59. The central issue at the hearing was impact on heritage but I will deal with the other grounds first, slightly out of sequence.

Core ground 1 – regard to any LAP

60. Core ground 1 is:

"1. The decision of the Commission is invalid because it failed to discharge its mandatory duty under s.18(3)(a) of the Planning and Development Act 2000 ('the Act') to have regard to the provisions of the Local Area Plan. That failure deprived the Commission of material considerations and undermined its assessment of proper planning and sustainable development as required by s.177AE(6)(a)(ii) and s.34(2)(a) of the Act."

61. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

s.177AE of the Act makes it clear that proper planning and sustainable development cannot be assessed without consideration of the place for which that development is proposed. The statutory planning framework linking proper planning and sustainable development to the local planning framework is reflected in ss.18(3) and 34(2) of the Act and similarly informs the assessment required under s.177AE.

In carrying out its assessment under s.177AE, other than a singular reference to general policy support for greenways, neither the Commission nor its Inspector demonstrated any engagement with Volume 4 of the Cork County Development Plan 2022-2028 containing that settlement-level planning framework applicable to Passage West. That framework contains the place-specific planning objectives, policies and actions relevant to the receiving environment of the proposed development. These considerations were materially relevant to the assessment required under s.177AE and should have informed the Commission's evaluation of the proposed development within its particular local setting. The complaint is not about the weight given to planning considerations but rather the absence of consideration of the local statutory planning framework. That absence has undermined the Commission's assessment and rendered its decision unlawful.

Respondent:

The Applicants plead that the Commission failed to have regard to the Local Area Plan ('LAP') for Carrigaline Municipal District, contrary to s.18(3) of the PDA. The factual premise of this complaint, that there is a LAP for Carrigaline Municipal District, is incorrect – there is no such LAP. Rather, the policies and objectives for the relevant area are contained in the Development Plan (see Volume 4: South Cork). In the circumstances, no contravention of s.18(3) arises.

The Applicants further complain that by failing to have regard to the LAP, the Commission acted contrary to s.34(2) of the PDA. Again, the factual premise for this complaint is incorrect. The application before the Commission was not one under s.34 of the PDA – rather, it was made pursuant s.177AE of the PDA. In the circumstances, no contravention of s.34(2) arises.

Insofar as the Applicants contend that the Commission failed to have regard to the Development Plan – in particular, Volume 4 of same which contains objectives for Passage West – contrary to s.177AE of the PDA, this is without substance. The Commission's Order and the Inspector's Report expressly record that regard was had to the Development Plan. Where a decision-maker expressly states that regard was had to a matter, that is sufficient for complying with this obligation, unless there is 'some evidence-based' reason for considering that they did not – *Rana v Minister for Justice* [2024] IESC 46 (§93); *GK v Minister for Justice* [2002] 2 IR 418. There is no obligation to cite every policy/objective in the Development Plan for the purposes of complying with the 'have regard to' obligation.

No attempt is made to plead/articulate how the generic policies/objectives cited are relevant to, or undermine, the Commission's Decision – including in respect of the assessment of cultural heritage (Inspector's Report, §9.2.21 et seq) and traffic/car parking (Inspector's Report, §9.2.30 et seq). In this respect, the complaint of lack of regard is not made by reference to the substantive assessment carried out – it is not properly developed. No

evidence is adduced which would contradict the Commission's express statement that it had regard to the Development Plan (see *GK v Minister for Justice* [2002] 2 IR 418).

Notice Party:

As an overarching observation common to its response to all Core Grounds, the Notice Party notes that the decision was made under section 177AE of the 2000 Act, a discrete regime, distinct from Part III of the 2000 Act, and enjoys a presumption of validity. It must be read as a whole and with the Inspector's report as a composite reasoning document (*Connelly v An Bord Pleanála* [2021] 2 I.R. 752). The onus of proof lies on the Applicants throughout and will not be discharged by non-expert assertion. The legality of the decision is judged through the lens of the material that was before the Commission.

The challenge is, in substance, a merits-based and documentary critique of an expert-assessed, conditioned and beneficial active-travel project that attracted no objection from any prescribed heritage or environmental body, and discloses no reviewable error.

Specifically in response to Core Ground 1, there is no Local Area Plan, within sections 18–20 of the 2000 Act for the Carrigaline Municipal District. The policies and objectives for the area are in Volume 4 (South Cork) of the Development Plan, an integral component of a single statutory plan.

The section 18(3)(a) duty is therefore not engaged, and section 34(2)(a) governs planning applications under Part III of the 2000 Act only.

The duty under section 177AE(12)(a) is to have regard to the Development Plan, which the Commission discharged (Order, item (k); Inspector's Report, §§6.4.1-6.4.3, 9.3.2–9.3.3, engaging Volume 4 and Objectives TM 12-2-5 and TO 10-8).

There is no obligation to recite every objective, and an express statement of regard suffices absent evidence to the contrary (*Rana v Minister for Justice* [2024] IESC 46; *GK v Minister for Justice* [2002] 2 I.R. 418).

The Works are positively supported by Volume 4 (Objective PW-GO-05; Figure 4.19). The complaint that engagement was not 'meaningful' is, at its height, a complaint about weight, reviewable only for irrationality, which is not pleaded."

62. Section 18(3)(a) of the 2000 Act (now repealed) provided at the material time:

"(3) (a) When considering an application for permission under section 34, a planning authority, or the Board on appeal, shall have regard to the provisions of any local area plan prepared for the area to which the application relates, and the authority or the Board may also consider any relevant draft local plan which has been prepared but not yet made in accordance with section 20."

63. It is perhaps unfortunate that for superseded versions of legislation, the Law Reform Commission website only makes a PDF available, and takes the previous html version offline. The html is significantly easier to navigate and one wonders whether there is some way to retain the availability of such versions. If a pilot project would be considered, I will modestly volunteer the 2000 Act as a candidate piece of legislation.

64. Returning to the matter at hand, the problem for this point is that this has no application here because there is no local area plan (LAP). Local planning policy is contained in the CDP, not a stand-alone LAP subject to s. 18(3)(a). So this point is unfortunately misconceived.

65. Insofar as the point is to be construed as a complaint of failure to consider the place-specific provisions of the CDP, even if the pleading could be read in this way, which I think would be inappropriate, it is unclear how these provisions assist the applicants in a way that warrants relief.

Core ground 2 – regard to non-statutory plans

66. Core ground 2 is:

"2. The decision of the Commission is invalid because, by failing to have regard to non-statutory but place-specific plans for Passage West, which were expressly referenced in both statutory plans and third-party submissions, the Commission deprived itself of material considerations relevant to proper planning and sustainable development. The Commission therefore failed to meet its duty under s.177AE(6)(a)(ii) of the Act."

67. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

Cork County Council has prepared and endorsed several non-statutory but place-specific planning and regeneration documents concerning Passage West, including the Passage West Framework Plan, the SECAD Passage West Strategic Plan and a heritage-led regeneration plan. All three of these documents were referred to in submissions from the public. The two that are referenced within the broader statutory planning framework address material matters, some of which the Inspector himself identified as relevant to proper planning and sustainable development, including heritage, traffic parking, public realm, placemaking and integration of active travel infrastructure within the urban environment.

The Inspector's assessment did not meaningfully engage with the detailed place-based analyses and regeneration objectives developed for Passage West through the Framework Plan and Strategic Plan processes. These documents celebrated local strengths, identified longstanding local weaknesses and developed planning aims intended to strengthen the public realm, heritage setting, accessibility and town centre environment. Without meaningful engagement with those place-specific planning considerations, the Commission could not properly inform its assessment of proper planning and sustainable development as required by s.177AE.

Respondent:

The pleaded complaint is that the Commission did not 'have regard to' 'local non-statutory plans' – Passage West Framework Plan or the SECAD Passage West Strategic Plan 2018-2022. The Applicants, whilst acknowledging that these matters are 'not binding', described same as 'material considerations' relevant to proper planning and sustainable development. There was no statutory obligation on the Commission to consider these non-statutory plans. In *Keogh v An Coimisiún Pleanála* [2026] IEHC 339 (§47), the Inspector and Commission were entitled, but not obliged, to consider same. Thus, the fact that these plans were not a central consideration in respect of the Commission's Decision discloses no legal error (there was nothing irrational about the Commission's approach). No basis has been identified for asserting that the Commission acted contrary to its obligation under s.177AE(6)(a)(ii) of the PDA by reference to these non-statutory plans.

Notice Party:

There was no statutory obligation to have regard to the non-statutory plans relied on; they fall within the category of matters the decision-taker is entitled, but not obliged, to consider (*Keogh v An Coimisiún Pleanála* [2026] IEHC 339, §47). The fact that they are not a central consideration does not disclose a legal error.

In any event the point is immaterial: the Framework Plan and the SECAD Strategic Plan are referenced within the Development Plan (Volume 1, §3.5.7 and Volume 4, §§1.5.6, 1.5.63 et seq.), so the Commission's regard to the plan encompassed them, and, as the Applicants' Replying Affidavit accepts (§35), both support the greenway and its upgrade, such that their express citation could not have altered the outcome.

The third document referred to by the Applicants above (described only as a 'heritage-led regeneration plan') is not named, is not referenced in the Development Plan and is not shown to have been before the Commission; there was no obligation to have regard to it."

68. The first question is what non-statutory plans are we talking about. The pleaded case refers to the following (obviously an applicant is confined to what is pleaded):

- (i) **Passage West Framework Plan** is referred to as having been "developed" at Section 1.5.63 of Volume 4 of the CDP (<https://www.corkcoco.ie/en/resident/planning-and-development/cork-county-development-plan-2022-2028/volume-four>). Section 3.5.7 of Volume 1 of the CDP references "Town Framework Plans" as an important part of the place-making toolkit, specifically listing Passage West as one of the first towns for which such a plan was prepared. The Passage West Framework Plan was referenced by Marcia D'Alton, who quoted its provisions on car parking and provided photomontages therefrom.
- (ii) **Passage West Strategic Plan 2018–2022** (<https://www.corkcoco.ie/sites/default/files/2022-03/passage-west-strategic-plan-2018-2022-pdf.pdf>). Undertaken by SECAD (South & East Cork Area Development) in conjunction with Cork County Council, this "democratic piece of work aimed to inspire projects and activities through community-led socio-economic development that would have a lasting impact for the growth and development of Passage West". Section 1.5.6 of the LAP also refers to this. The Passage West Strategic Plan 2018–2022 was referenced by Claire, Euna, and Grace Leonard, who also provided an internet link to the document.
- (iii) **A heritage-led regeneration plan for Passage West**, supported by Cork County Council's Architects Department, was also referenced by multiple third parties with validation through a link to published media. This apparently involved a €50,000 grant from the Heritage Council but has not been published – perhaps one might be forgiven for suggesting that that could be considered now unless there is some reason to the contrary.

69. The problem with this ground is that non-statutory plans generally fall into the category of things a decision-taker can consider if she wants to but that she is not obliged to consider. Failure to address something in that category is not a ground for *certiorari*, even assuming these were not considered in some material respect not arising from consideration of submissions.

Core ground 3 – regard to CDP objectives

70. Core ground 3 is:

"3. The decision of the Commission is invalid because it failed to have regard to material objectives contained in statutory planning documents as required by s.10(2) of the Act. This omission deprived the Commission of relevant considerations necessary to assess proper planning and sustainable development under s.177AE(6)(a)(ii) of the Act."

71. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

The statutory planning framework articulated by the Inspector in support of his recommendation was confined to objectives supportive of greenway delivery, active travel and sustainable transport. Whilst we do not expect every statutory objective to be cited, our complaint is that it is not possible to identify evaluative engagement, either directly or implicitly, with other materially relevant objectives within Volume 1 of the Cork County Development Plan. The statutory policy relied on by the Inspector was selectively confined to objectives supportive of the proposed development. He did not present, again either directly or implicitly, any balancing exercise involving competing, equally relevant, statutory objectives. In the making of its decision, the Commission relied on the Inspector's Report and recommendation. Legally adequate consideration of the statutory planning framework precedes planning judgement. The absence of such evaluative engagement undermined the assessment required to achieve proper planning and sustainable development under s.177AE.

Respondent:

This Core Ground is similar to Core Ground 1 insofar as same concerns the Development Plan – with, for example, the Applicants appearing to assert that the '266 policy objectives' in the Development Plan should have been addressed by the Commission. For the reasons set out above, this is incorrect.

Again, the Applicants' approach is to list a number of Objectives – including in relation to, inter alia, built and cultural heritage; placemaking; transport; and town centre/retail – and assert that as same were not expressly referred to by the Commission, this means it 'failed to have regard' to the Development Plan. No attempt is made to then develop this by reference to the relevancy of the Objectives to the actual substantive assessment carried out by the Inspector and Commission on the issues of cultural heritage (Inspector's Report, §9.2.21 et seq) and traffic/car parking (Inspector's Report, §9.2.30 et seq).

Beyond listing the aforesaid Objectives, the Applicants make no attempt to look at the substance of same in asserting a failure to have regard to and/or (as applicable) for the purposes of demonstrating the relevancy of same to the actual assessment carried out by the Commission.

The Commission expressly had regard to the Development Plan (as was relevant to the application) and the Applicants have not discharged the onus of proof of demonstrating anything to the contrary.

Notice Party:

Sections 10(1) and (2) of the 2000 Act govern the content of a development plan and impose no obligation on the Commission.

The duty is to have regard to the plan under section 177AE(12)(a), which does not require it to recite, or expressly to discount, every objective.

The Applicants do no more than list objectives (HE 16-18(a)/(h), PL 3-1, TM 12-8(a), TM 12-9(h), TCR 9-1(j)) and infer, from the absence of express citation, a failure to have regard; they connect no objective to the substance of the assessment actually carried out on cultural heritage (§9.2.21 et seq.) and traffic and parking (§9.2.30 et seq.), and adduce no evidence displacing the Commission's express statement of regard (see *G.K. v Minister for Justice* [2002] 2 I.R. 418).

The contention that Objective TM 12-2-5 was 'misinterpreted' is incorrect; the residual complaint of a lack of 'balancing' is a challenge to evaluative judgement, reviewable only for irrationality, which isn't pleaded."

72. Section 10(2) of the 2000 Act (now repealed) sets out matters for which objectives are to be provided in the development plan.

73. If a complaint is a **general one** of lack of consideration of something, the decision-taker is to be presumed to have considered it if she says so subject to potential proof to the contrary. There are **specific situations** where more express engagement is required. Material contravention is one of those – irrevocable demolition of heritage assets, particularly where there is a plan objective in that regard, is another. Such categories may overlap in a given case.

74. In so far as concerns the generalised complaint, the applicants have not discharged the onus of proof to show lack of legal consideration here. The unworkability of a requirement for narrative discussion is well illustrated by the applicants' submissions here (emphasis added):

"31. Volume 1 of the County Development Plan is the main policy document for the county, containing **266 policy objectives** across the full range of matters under s.10(2) of the Act.

32. The Inspector's Report, however, identifies **only two such objectives** ..."

75. The logic of the complaint would be a need for express narrative discussion of all of the other 264 objectives. Should examples be sought of why there can be no general requirement for narrative discussion, this is a good candidate. In the draft judgment process the applicants commented as follows:

"Paras. 74 and 75 appear to proceed on the basis that our complaint would logically require narrative discussion of all 264 County Development Plan objectives not referred to in the Inspector's Report.

We respectfully suggest that this does not accurately characterise the argument we advanced. The reference in para. 31 of our Statement of Grounds to the 266 policy objectives of the County Development Plan was to illustrate the breadth of issues addressed by the statutory planning framework. The complaint was not that all such objectives required narrative discussion. Rather, paras. 34-37 of the Statement of Grounds identified six specific policy objectives which we contended were materially relevant to the issues under consideration. The same point was developed further in Exhibit G, in our Replying Affidavit, paras. 42-44 and in our Written Submissions, para. 35.

Whilst accepting that Ground 3 has not succeeded, we are concerned that a future reader might incorrectly conclude from paras. 74-75 that we expected narrative discussion of all 266 policies of the County Development Plan. That was not the case we advanced."

76. While accepting that the applicants were not looking for narrative discussion of 266 policies, what that misses is that there has to be something very specific that requires express engagement with CDP text, albeit not limited to material contravention. In the absence of a specific imperative requirement arising from the particular consent, an applicant can't just select text from a plan after the event (even limited text) and seek to condemn a decision for failing to deal with it. Such a procedure could, in theory, draw from up to 266 policies. But that only gets the opposing parties so far. There remains the very specific provision of objective HE 16-18. That will be addressed under core grounds 4 and 5 below.

77. On reasons generally the applicants commented in the draft judgment process:

"Paras. 73 and 83 indicate that Core Grounds 3 and 7 have not succeeded. We accept those conclusions.

However, we are struggling to understand the relationship between those findings and aspects of the subsequent analysis under Grounds 4 and 5.

In relation to Ground 3, our complaint was that the Inspector's evaluation relied principally on County Development Plan objectives supportive of greenway delivery whilst not engaging with a number of other identified objectives which we considered relevant to the issues arising. We therefore find it difficult to reconcile the rejection of that ground with Objective HE 16-18 being considered a material provision in the Grounds 4 and 5 analysis.

Similarly, in relation to Ground 7, the judgment concludes that the Inspector provided legally sufficient reasons regarding traffic and parking. However, para. 148 discusses the kind of traffic-related safety considerations which formed part of our Ground 7 complaint.

Possibly this is simply a misunderstanding on our part. However, as lay litigants, we are especially conscious of the need for the reasoning to be readily understandable to the future reader. If there is a particular reason why the matters relied upon under Grounds 3 and 7 were insufficient yet became material to the successful heritage analysis and to discretionary considerations, it may assist that reader if the distinction were stated more explicitly in the judgment."

78. I am not sure what if anything I can usefully add. While I agree that it is desirable at a general level in relation to any decision for "the reasoning to be readily understandable to the future reader", such a reader, being a hypothetical reasonable person, would also appreciate that there is nothing that cannot be misunderstood, and that the level of detail in any judgment has to be proportionate in the circumstances, bearing in mind the finite amount of time that can be devoted to any one case. If it helps the applicants:

- (i) Paras. 73 to 76 above attempt to make the point that **generally**, narrative discussion of plan objectives or text is not legally indispensable, and lack of such discussion does not equate to lack of consideration. That disposes of core ground 3.

- (ii) Relatedly, the reasons obligation only relates to **main reasons on the main issues**. Hence the discussion of traffic and parking was generally acceptable. That disposes of core ground 7.
- (iii) My only caveat to the foregoing was that rejection of these points does not take from the need for engaging with the plan or alternatively phrased main reasons when it came to destruction of heritage assets.
- (iv) Those paragraphs also seek to make the point that there are **specific situations** where narrative discussion is necessary. Material contravention is an obvious one but irreversible demolition of heritage assets has to be another situation giving rise objectively to a main issue which therefore calls for main reasons. That can't be just subsumed into some general conclusion of acceptability of a project. Hence Objective HE 16-18 required attention from that perspective.
- (v) My comments about parking safety in what is now para. 158 (ex 148) are purely in the context of why discretion should not be exercised against relief. They are not a complaint that the council did not address these issues in more detail. Obviously if the council want to address such issues in more detail at a future point and generate some more options and/or more opportunities for consensus, I would welcome that, but the foregoing is as far as it goes.

Core ground 6 – alleged breach of art. 22 of 2001 regulations

79. Core ground 6 is:

"6. The decision of the Commission is invalid because the planning application itself was deficient under Article 22 of the Planning and Development Regulations 2001 (as amended) ('the Regulations'):

(i) Material discrepancies in the planning documentation regarding works to protected structures and to Railway Structures not included in the Record of protected structures have led to:

- serious concerns about the completeness and clarity of the application
- lack of clarification for the public, prescribed bodies and planning authority and
- lack of clarity on the particulars for which planning permission have been granted.

(ii) the notices associated with the planning application failed to comply with Articles 81(2)(c)(i) and 81(2)(c)(ii) of the Regulations;

(iii) in failing to take account of Ministerial Guidelines issued under s.52 of the Act, the notices failed to comply with Article 18(1)(d)(iii) of the Regulations;

(iv) the content of the planning application failed to comply with Article 23(2) of the Regulations."

80. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

This Ground concerns the failure of the plans and particulars submitted with the planning application to clearly and consistently describe the proposed development, particularly in relation to works affecting railway bridges, three of which are protected structures and the fourth of which is in the Passage West ACA. The ACHIA described replacement or widening of bridge decks with associated structural interventions and for one of the bridges, new parapet walls. The drawings showed significantly less intervention with works majoring on resilience and repair. Although acknowledging these significant discrepancies, the Inspector did not seek clarification from the applicant, declaring the drawings to set out the definitive proposed works. As the Commission's approval is based on both the plans and particulars, the true extent of interventions permitted for these heritage structures remains unclear.

The complaint in this Ground is not dependent on whether Articles 22, 23 and/or 81 of the Regulations apply directly to the s.177AE process as they do to projects advanced under Part III of the Act. Rather, it is that the planning process always requires clear presentation of works proposed in a way that is understandable to the public, prescribed bodies and the decision-maker. The planning documentation submitted for this proposed development also failed entirely to identify demolition within the ACA and its heritage implications. The Commission's own guidance for s.177AE applications emphasises the importance of clear presentation of heritage-related matters. The s.28 Architectural Heritage Protection Guidelines provide excellent assistance towards achieving this legibility, including setting out how works to protected structures and/or buildings within ACAs should be clearly indicated in the site notice and application documentation. No photographs, photomontages or similar interpretation of the proposed works and its potential impact accompanied the planning application. This absence of clarity undermined the legibility of the proposal for statutory consultees, the public and consequently the assessment of proper planning and sustainable development.

Respondent:

The application before the Commission was made under s.177AE of the PDA. The relevant Articles of the PDRs are Art.249-253. The Applicants' pleas are premised on Art.18, Art.22 and Art.23 of the PDRs applying to the application – however, these articles do not apply and these complaints should be dismissed, noting the absence of any pleaded complaint by reference to the relevant aspects of the PDRs which actually apply.

Notwithstanding the fatal manner in which this Core Ground is pleaded (breach of non-applicable Articles of the PDRs), the Applicants' main contention under Core Ground 6 amounts, in substance, to a disagreement with the Commission's exercise of its evaluative planning judgment in relation to the description of Upgrade Works. In the Applicants' view, the application is deficient or inadequate because it did not describe certain elements of the Upgrade Works with the degree of detail or narrative explanation which they would have preferred. The Commission considered the information to be adequate and there was nothing irrational about this.

As outlined above, the Applicants do not identify any breach of the PDRs and there was none. The application documents comprehensively described the Upgrade Works. The Applicants suffered no prejudice due to the level of detail provided (and they claim none) and they were able to fully participate in the planning process. Moreover, the Commission fully understood and assessed the nature and scope of the said works. No substantive flaw in any of the assessments has been evidenced (the Applicants' non-expert assertions are not evidence).

In terms of the detail provided relating to bridges (with which the Applicants plead issue), it is noted that the drawings provided clearly depict the nature and extent of the Upgrade Works in respect of all bridges, including 'bridge 4' and the three protected structures (which is what the Commission assessed). The Inspector expressly address this in his Report also. Insofar as this complaint is about the adequacy of the information before the Commission – there was nothing irrational in the Commission considering same to be adequate for the purposes of its assessment - *Heather Hill v An Bord Pleanála* [2022] IEHC 146 (§232).

Notice Party:

Articles 18, 22, 23 and 81 of the Regulations form part of the Part III code and do not apply to a section 177AE application, the requirements for which are in section 177AE(4) and Articles 249–253, with which the Council complied; the ground is fatally pleaded by reference to inapplicable provisions (and see *Minoa Ltd v An Bord Pleanála* [2024] IEHC 704).

The Applicants concede the point and seek, impermissibly and for the first time in submissions, to argue that the substance of Articles 22–23 'continued through' section 249. Section 249, raised only for the first time in the Applicants' Replying Affidavit and not pleaded as a ground of challenge, concerns methods of public notice only and creates no invalidating obligation.

The alleged bridge 'discrepancy' is immaterial: the drawings clearly annotated the works at each bridge, the Inspector was satisfied that no widening of the three protected-structure bridge decks was proposed and that the further works would secure their long-term conservation (§§9.2.22–9.2.23), the drawings govern what was approved (Condition 1), and 'Bridge 4' is not a protected structure.

The adequacy of the application information was a matter for the Commission, reviewable only for irrationality (*Heather Hill v An Bord Pleanála* [2022] IEHC 146, §232; *Coyne v An Bord Pleanála* [2023] IEHC 412, §414).

All three Applicants made detailed submissions and 65 submissions were received; no prejudice is shown; and any non-compliance would be immaterial and would not warrant *certiorari* (*Monaghan U.D.C. v Alf-a-Bet* [1980] I.L.R.M. 64; *Carrownagowan* [2025] IESCDT 9; *Massey* [2025] IESCDT 126; *Save the South Leinster Way* [2025] IEHC 541, *Doyle (No.1)* [2026] IEHC 156"

81. Leaving aside the pleading problem, it would be generally inappropriate to grant *certiorari* on the basis of these kinds of qualitative deficiencies in application documentation unless either the process was fundamentally compromised or the decision-taker failed to address any issues in the course of the process. Or put another way, if any deficiencies in analysis were rectified in the final decision, *certiorari* would be inappropriate. But if errors and omissions flowed through to the final decision or compromised the process overall then *certiorari* would arise. Other than regarding heritage, the applicants have not made out a terminal infirmity having regard to the process overall. In relation to heritage, the logic of the applicants' argument is that the commission did not compensate for such infirmities as might have existed in the application documentation. Therefore the issue is best viewed through the lens of the acts of the commission, rather than of deficits in the initial papers.

82. Finally under this heading, the terms of the permission are not unclear as alleged.

83. As a general comment, a permission conditioned on the basis of compliance with all plans and particulars must be read as referring to all material submitted throughout the process by the applicant for permission, not just material submitted initially. The applicants say that that does not quite capture what happened here so I need to set out further detail.

84. The applicants commented on the draft judgment as follows:

"In this case, no material was submitted throughout the planning process by the applicant for permission other than that submitted initially. The discrepancies were in the application documentation as initially submitted. Whilst those discrepancies were subsequently noted by the Inspector, no clarification was sought from the applicant. Nor was clarification volunteered, although the applicant was offered the opportunity to comment on third party submissions.

The Commission's Order ultimately conditions the development's construction and completion in accordance with the plans and particulars submitted. Yet the identified discrepancies between the plans and the particulars were not clarified during the planning process.

Again, we accept that Ground 6 has not succeeded. However, it would assist both the Passage West community and the future reader if the judgement were to clarify what development has in fact been permitted, particularly in relation to proposed works at the 'Wooden Bridge' (Bridge 4 in the ACA)."

85. To clarify this point it would be helpful to quote the applicants' submissions (emphasis added):

"Contradictory descriptions of the proposed works

55. The planning application contained materially inconsistent descriptions of the works proposed to the four railway bridges. The drawings and planning report indicated one form of intervention. The Archaeological and Cultural Heritage Impact Assessment (ACHIA) described another. Those differences were not minor matters of drafting or presentation. Three of the structures concerned are protected structures and the fourth forms part of the historic railway infrastructure within the Passage West ACA (SoG, paras. 103-106).

56. The discrepancies were brought to the attention of the Inspector through third-party submissions. The Inspector acknowledged the issue but did not resolve it. Instead, **he treated the drawings as definitive** whilst simultaneously continuing to rely upon and discuss the ACHIA's descriptions of the bridge works (SoG, para. 107; RA, paras. 77, 79-80). The Commission adopted the Inspector's recommendation without addressing the contradictions.

57. The result is that the approval was granted on the basis of documents that described materially different interventions to the same structures. Neither the public nor prescribed bodies could be expected to determine with confidence which description represented the development actually proposed. In addition, as the Commission Order conditions the permission 'in accordance with the plans and particulars lodged with the application', it remains unclear whether the permission granted authorises the works shown on the drawings or the works described in the ACHIA or some combination of both (SoG, para. 110, 111; RA. Para. 79)."

86. The commission's submission was (emphasis added):

"64. In terms of the detail provided relating to bridges (with which the Applicants plead issue), it is noted that **the drawings provided clearly depict the nature and extent of the Upgrade Works in respect of all bridges**, including 'bridge 4' and the three protected structures (which is what the Commission assessed). In this respect, the Inspector addressed this issue insofar as it repeats the First Named Applicant's submission made to the Commission (inter alia, §9.2.22 et seq) – stating:

'A third-party (Marcia D'Alton) queries the details of the existing and proposed bridge decks along the route of the greenway. It is clearly annotated on the submitted drawings that at Robert's Bridge (chainage 260) the parapets and bridge are to remain. Similarly, **the parapets and bridge at Wooden Bridge (chainage 1350) are to remain**. I note that the treatment for Abbott's Bridge (chainage 1060) states that the existing bridge parapets are to remain, and new railings are to be installed at either side of the bridge. Although no details are specified for the railings, I am satisfied that the removal of the existing railings at Abbott's Bridge would not detract from its integrity or setting, although the Conservation Officer of Cork County Council should be consulted regarding their appropriate replacement. Further to this, **no widening of any of these bridge decks is proposed** and, consequently, the width of the path will constrict at these locations from the proposed 4m wide greenway path to the respective widths of the bridge decks.

There are further works specified in the ACHIA at Abbott's Bridge and the Wooden Bridge where it is proposed that existing bridge decks shall be removed, existing abutments be

made good (where required), and new reinforced concrete pads are proposed on top of the existing abutments. Furthermore, it is proposed that a new bridge deck in reinforced concrete or structural steel be installed to provide safe passage for pedestrians and cyclists. Similarly, it is proposed to repair the riverside wingwalls of Robert's Bridge to mitigate against further erosion. I am satisfied that these works would lead to the long-term conservation of these protected structures and would have no significant impact on their integrity as protected structures. I advise the Board, if they are minded to grant permission for the proposed development, that these works should be carried out in consultation with the Conservation Officer of Cork County Council, in accordance with best conservation practice, and that an appropriate condition requiring this should be attached to such a grant of permission.'

65. Further, per Condition 1 of the Commission's Decision, the Upgrade Works are to be constructed in accordance with the plans and particulars lodged (including the drawings). Moreover, Condition 6 requires all works to the bridges comprising Protected Structures to be carried out under the supervision of a qualified professional with specialised conservation expertise and in accordance with best conservation practices as detailed in the Architectural Heritage Protection Guidelines (2011). The Inspector and the Commission correctly understood the nature and extent of the Upgrade Works (as set out in the said drawings) – contrary to the Applicants' various pleaded contentions. Insofar as there is a difference between the description of the works in the Archaeological and Cultural Heritage Impact Assessment Report and the drawings, the Commission based its assessment on the drawings submitted (any difference was thus inconsequential/harmless/trivial)."

87. The council's submission was:

"59. The alleged bridge 'discrepancy' is immaterial. The General Arrangement Drawings clearly annotated the works at each bridge; the Inspector was satisfied that no widening of the three protected-structure bridge decks was proposed (§9.2.22 of the Inspector's report) and that the further ACHIA works would lead to the long-term conservation of those structures with no significant impact on their integrity (§9.2.23 of the Inspector's report).

60. The drawings govern what was approved: Condition 1 requires construction 'in accordance with the plans and particulars lodged'. Insofar as any inconsistency concerns 'Bridge 4,' that structure is not a protected structure, and any inconsistency is de minimis and creates no uncertainty as to what was approved. The suggestion that it is 'unclear what was permitted' is unreal and represents an approach of reading the Commission's decision in the most erroneous way possible."

88. The archaeological and Cultural Heritage Impact Assessment was dated 29 November 2022 and stamped as received on 19 November 2024. It states:

"Regarding Abbots Bridge (RPS Ref. 01 476), Existing Bridge 3 (RPS Ref. 01 475), and the Wooden Bridge it was noted that these bridges have not been designed for a marine environment. As such, it is proposed that existing bridge decks shall be removed, existing abutments be made good (where required), and to cast new reinforced concrete pads on top of the existing abutments. Furthermore, it is proposed that a new bridge deck in reinforced concrete or structural steel be installed to provide safe passage for pedestrians and cyclists

...

The width of the second bridge (Wooden Bridge on 25-inch OS map) will be extended to the northeast by approximately 0.75m and to the south-west by approximately 0.8m. To do this, a new 4.5m wide concrete deck will be constructed. New 300mm wide parapet walls and 1.45m high railings will be constructed at 4.5m wide centres. This will result in a 4.5m path width but will not infringe on the existing railway infrastructure (girders) located at the north-east side of the bridge"

89. The general arrangement drawings are dated July 2024, and are also stamped as received on 19 November 2024.

90. So technically the applicants are correct that the drawings are not material received later in the process. But they are certainly material generated later in the process. It is not unclear that this later formal material in the form of drawings qualifies the earlier less formal material in the form of an assessment. Indeed the applicants expressly argue that the inspector treated the drawings as definitive. So the answer to the question "what development has in fact been permitted, particularly in relation to proposed works at the 'Wooden Bridge' (Bridge 4 in the ACA)", is "per the drawings".

Core ground 7 – reasons regarding traffic and parking

91. Core ground 7 is:

"7. The decision of the Commission is invalid because it failed to provide reasons for disregarding material concerns regarding traffic and parking raised in the overwhelming majority of third-party submissions, such concerns being reflected in the statutory Local

Area Plan and County Development Plan. This failure undermined transparency and procedural fairness.”

- 92.** The parties’ positions as recorded in the statement of case are summarised as follows:

“Applicants:

This Ground concerns the adequacy of the reasons given by the Inspector and Commission for rejecting widespread concern expressed during the public consultation process regarding traffic and parking. The Inspector grouped these concerns into four themes: adequate provision of spaces, risks to vulnerable road users, increased proximity to HGVs and congestion arising from the proposed new parallel parking arrangements. Whilst this was a reasonable way of approaching a large number of submissions with similar concerns, the Inspector’s assessment substantively addressed only the theme relating to parking spaces. The remaining concerns, despite being raised repeatedly by residents, business owners and elected representatives and reflected in both statutory and non-statutory policy for Passage West, were not addressed in any meaningful way.

Third parties took the time and trouble to engage with a statutory process to share concerns arising out of their lived experience. As those concerns are reflected in both statutory and non-statutory policy, they are entitled to see them properly addressed in the decision-making process. Neither the Inspector nor the Commission was obliged to agree with those concerns but third parties are entitled to understand why they did not.

Respondent:

The Applicants’ complaints here allege a lack of reasons. The law on the obligation to provide reasons is well-settled – see *Ventaway Ltd v An Coimisiún Pleanála* [2025] IEHC 406, (§46); *Killegland Estates Ltd v Meath County Council* [2023] IESC 39 (§71); and *Connelly v An Bord Pleanála* [2018] IESC 31; [2018] 2 IRLM 453. As required by s.177AE of the PDA and Art.252 of the PDRs, the Commission’s Decision stated the ‘main reasons and consideration on which the decision [was] based.’

Contrary to the Applicants’ various complaints, in light of the submissions received, the Commission considered potential traffic and parking impacts arising from the Upgrade Works and concluded that same were acceptable. It is not correct to maintain that the Inspector did not consider the form of parking – he expressly did. Further, no evidence was adduced to suggest, by reference to any appropriate standards, that what was proposed was unsafe. In addition, the reasoning provided adequately explained the Commission’s conclusion on the issue of parking. There was no obligation on the Inspector or the Commission to engage in a point-by-point rebuttal of every submission made – contrary to what the Applicants appear to contend. The requirement is for the main reasons on the main issues – which were provided.

Notice Party:

The duty is to give the main reasons on the main issues, not a point-by-point rebuttal of every submission (*Connelly* [2021] 2 I.R. 752 and the avalanche of case law on reasons).

The Inspector summarised the four strands of concern on traffic issues (§9.2.31) and addressed them: on safety, he found the existing car park (from which cars reverse onto the greenway) the greater danger, so the Works would improve safety (§9.2.33); on quantum, that the 28 on-street spaces equate favourably to the 28–30 existing spaces, parallel parking being normal at such a location (§9.2.36); and on policy, he set out the relevant support (§§9.2.34–9.2.35), with a reasoned conclusion at §9.2.37 adopted by the Commission.

Congestion, vulnerable-road-user and HGV-proximity concerns are subsumed in that analysis. The real complaint, that the Inspector did not agree, or did not require a Traffic and Transport Assessment, concerns the merits and a planning judgement reasonably open to him. This is a merits challenge dressed as a reasons challenge.”

- 93.** This is not a case where the traffic/parking issue was dismissed without reasons. The inspector discusses traffic and parking and safety issues arising from submissions and gives general reasons. Inevitably, judged by an applicant’s standard, the reasons could be more detailed, but a decision-taker only has to give main reasons on main issues, and no failure to meet that standard has been demonstrated in relation to this issue.

- 94.** The foregoing relates to the adequacy of reasons considering the traffic/parking issue in isolation as opposed to considering the reasoning of the heritage-related analysis, to which we will now turn.

Core grounds 4 and 5 – heritage

- 95.** Core ground 4 is:

“4. The Commission’s decision is invalid because it failed to justify its conclusion that demolition of the historic railway wall within the Passage West Architectural Conservation Area (ACA) would not affect the character of the ACA. In doing so, the Commission:

- (i) undermined its assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act;
- (ii) failed to comply with its obligations under s.82(2) of the Act in respect of works within an ACA; and
- (iii) failed to have regard to relevant Ministerial Guidelines issued under s.28 of the Act to which the Commission is required to have regard."

96. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

This Ground concerns the absence of any legally adequate assessment of the impact which demolition of the historic railway Wall and embedded Stile would have on the character of the Passage West ACA. The Wall, Stile and adjacent Water Tower (a protected structure) form part of the surviving railway heritage of Passage West. All form a central historic spine through the Passage West ACA. Although some 170m of the Wall and Stile are proposed for demolition, the ACHIA neither mentioned either feature nor assessed the character of the ACA. None of the other planning particulars mentioned the Wall, the Stile or their demolition beyond a singular annotation on a drawing. The Inspector acknowledged that the ACHIA did not mention the Wall. His assessment focused only on the altered physical condition of the Wall. He did not mention the Stile.

The complaint in this Ground is not that the Commission lacked awareness of the ACA or of the Wall itself nor that the Court should revisit the planning merits of the decision. Rather it is that there was no substantive assessment of the character of the ACA nor those elements which made it worthy of designation before the conclusion that demolishing and realigning the historic railway boundary would not adversely affect that character. Such analysis is required by s.82(2) of the Act. The s.28 Guidelines would have provided guidance on assessing demolition proposals within an ACA. The absence of such assessment undermined the Commission's evaluation of proper planning and sustainable development in this heritage-rich location.

Respondent:

Core Ground 4 is, in substance, a merits-based complaint that the demolition of the wall will adversely affect the character of the ACA. It is a complaint premised on the Applicants view as to the adequacy of the assessment. The Applicants disagree with the conclusion of the Inspector and Commission that there would be no significant impacts on the ACA in this respect. This disagreement does not provide any basis for impugning the Commission's Decision.

In this regard, the identification, assessment and determination on the acceptability of impacts are quintessentially matters for the Commission to assess in its expert decision-making role – with same subject to an irrationality standard of review. The Applicants, who bear the onus of proof, have not demonstrated that the approach of the Commission was unreasonable or irrational.

The Inspector considered the removal of the existing stone wall as part of the Upgrade Works and the proposed construction of the 1.3m block and stone wall (as depicted, for example, in General Arrangement Drawing, GA0011), finding same to be acceptable. The Commission agreed with the Inspector's evaluation/evaluative assessment of impacts on the ACA – with the conclusion being that there would be no significant adverse impact on the integrity of the ACA. The Commission found that the Upgrade Works would 'not adversely impact on the cultural, archaeological and built heritage of the area' (Order, pg.4-5).

The Applicant has not identified any legal error in this approach.

Notice Party:

The heritage and ACA issues were assessed.

The Inspector was aware that the south-eastern part of the route lies within the ACA (§§6.5.2, 9.2.21), addressed the widening within it (§9.2.24) and the wall specifically (§§9.2.25–9.2.26), and, having personally inspected the wall, recorded that it had already been lowered and concrete-capped over most of its length, with only c. 40 m remaining in original condition, concluding that the integrity of this part of the built environment had been 'irrevocably altered' and that a new stone-faced wall would not have any significant adverse impact on cultural heritage or the integrity of the ACA, with an overall conclusion at §9.2.29. The Commission adopted that assessment; the Order notes that the Works 'would not adversely impact on the cultural, archaeological and built heritage of the area'.

Section 82(2) required the material effect (if any) on ACA character to be taken into account, which it was.

The ground is a merits disagreement reviewable only for irrationality; the Applicants adduce no admissible expert evidence and the onus is undischarged."

97. Core ground 5 is:

"5. The decision of the Commission is invalid because it failed to consider:
 (i) the part of the historic railway wall ('the Wall') adjacent to the Water Tower as a protected structure, and/or
 (ii) the effect of demolition of the Wall upon the Water Tower, a protected structure (RPS no. 01469),
 thereby depriving itself of material considerations necessary for assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act."

98. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicants:

Ground 5 concerns the complete absence of assessment of the relationship between the historic railway Wall and the adjacent Water Tower, a protected structure (RPS 01469). There was sufficient information before both the Inspector and the Commission to require consideration of whether the intact section of the Wall beside the Water Tower is within the curtilage of that protected structure within the meaning of s.2 of the Act. The Wall and Water Tower formed part of the infrastructure of the former Cork, Blackrock & Passage Railway, remain physically contiguous and together form part of the surviving historic railway boundary within the Passage West ACA. Despite this relationship, the planning application documentation, including the ACHIA, did not identify the Wall at all, did not assess the relationship between the Wall and the Water Tower and did not assess the potential implications of demolishing the Wall (and reconstructing a new wall in a different alignment) immediately adjacent to the protected structure.

The complaint is not that the Court should determine as a matter of fact that the Wall is within the curtilage of the Water Tower. Rather it is that the material before the Inspector and Commission was sufficient to require consideration of that possibility. Regardless, assessment of whether demolition of the Wall would affect the setting, character and streetscape relationship of the protected structure is a statutory requirement under the Act. The s.28 Architectural Heritage Protection Guidelines (2011) provide guidance for the kinds of heritage considerations ordinarily relevant to assessment in such situations. However there is no evidence that they were referred to in this regard. Whilst the Inspector noted both the Wall and the Water Tower during his site inspection, neither his Report nor the Commission's Order demonstrated any acknowledgement of their physical, historical and visual relationship nor engagement with the potential impact of the Wall's demolition on the protected structure. The absence of this assessment undermined the Commission's evaluation of proper planning and sustainable development under s.177AE in this heritage-sensitive location.

Respondent:

The Applicants' main complaint under this Core Ground is that the Commission's Decision is invalid because it failed to consider that the wall to be removed as part of the Upgrade Works formed part of the Water Tower Protected Structure ('the Water Tower') – specifically, the curtilage of same. The following points can be made in response to this:

- The Applicants did not raise this complaint before the Commission and cannot pursue same now – *North Great George's Street Preservation Society v An Bord Pleanála* [2023] IEHC 241 (§58 et seq); *Friends of the Irish Environment CLG v An Coimisiún Pleanála* [2026] IEHC 205 (§44 et seq); and *Friends of the Irish Environment CLG v The Government of Ireland* [2021] IECA 317 (§275 et seq).

- The wall is not part of the Water Tower, including the curtilage to same (noting the description of same in the Record of Protected Structures – quoted previously herein) – which, as per the evidence before the Commission, is located outside of the site of the Greenway Upgrade Works. The Water Tower is on the RPS – RPS No.01469 – with the description limited to the Water Tower only and not, for example, any walls located near same. Regarding the interpretation of the Development Plan, see *Re XJS Investments Ltd* [1986] I.R. 650; and *Sherwin v An Bord Pleanála* [2024] IESC 13.

- As with Core Ground 4, the substance of the Applicants' complaint here comprises an attempt to reargue the merits of the application – such an approach does not provide any basis for quashing the Commission's Decision.

There is no basis to this complaint – same is premised on the Applicants' non-expert assertions.

Notice Party:

The entry for the Water Tower on the Record of Protected Structures (RPS no. 01469) is limited to the Water Tower itself and does not extend to any boundary wall.

Whether the wall is within the curtilage is a question of heritage and planning expertise (Chapter 13 of the 2011 Guidelines refer to functional connection; ownership at the time of construction; historical relationship). Common origin in the former Cork, Blackrock &

Passage Railway does not, of itself, establish curtilage, and the Water Tower (now a coffee shop) has no functional dependence on the roadside wall.

The curtilage contention was not raised before the Commission (North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241; Friends of the Irish Environment CLG v An Coimisiún Pleanála [2026] IEHC 205; Friends of the Irish Environment CLG v Government of Ireland [2021] IECA 317).

Nothing in the material before the Commission (the expert ACHIA included) raised a curtilage question for determination, and the Applicants have adduced no admissible expert evidence to establish one now (the contention rises no higher than the wall 'may be' within the curtilage of the Water Tower, and Exhibit N is inadmissible).

The effect on the Water Tower was in any event considered (§§6.5.1, 9.2.13, 9.2.21, 9.2.29). The ground discloses no reviewable error and fails for want of expert evidence and the Applicants' discharging the onus of proof on them."

99. A list of heritage protection resources that might to be factored into the development process could include the following (see a useful summary article by Mona O'Rourke, "Heritage Protection in Ireland" (<https://ihbc.org.uk/Yearbook/articles/HeritageProtectionIreland/index.html>)):

- (i) the 2000 Act generally, particularly s. 57;
- (ii) development plan heritage-related policies and text;
- (iii) records of protected structures maintained by planning authorities under the 2000 Act;
- (iv) architectural conservation areas established by planning authorities under the 2000 Act;
- (v) ministerial guidance under s. 28 of the 2000 Act (particularly the 2011 guidelines, <https://www.gov.ie/en/department-of-housing-local-government-and-heritage/publications/architectural-heritage-protection-guidelines-for-planning-authorities/>);
- (vi) the National Monuments Act 1930 as amended;
- (vii) the National Monuments Service Sites and Monuments Record (SMR) (<https://data.gov.ie/dataset/national-monuments-service-archaeological-survey-of-ireland>);
- (viii) the National Monuments Service Record of Monuments and Places (RMP) (<https://www.archaeology.ie/collections-and-publications/collections/catalogued-collections/record-of-monuments-and-places-rmp/>);
- (ix) the Heritage Act 1995 and initiatives supported by the Heritage Council;
- (x) the National Inventory of Architectural Heritage under the Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act, 1999 consisting of buildings and gardens (<https://www.buildingsofireland.ie/buildings-search/>);
- (xi) the Granada Convention (<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=121>) implemented by the 1999 Act;
- (xii) non-statutory heritage interventions by local authorities and other actors such as heritage trails;
- (xiii) historic Ordnance Survey and heritage maps such as at <https://www.archaeology.ie/advice-and-support/locate-a-monument-or-wreck/historic-environment-viewer>, www.heritagemaps.ie or www.downsurvey.ie;
- (xiv) the database of excavation reports at <https://excavations.ie/>; and
- (xv) other heritage guidance documents (for example, <https://www.buildingsofireland.ie/resources/>)

100. The council's website (<https://www.corkcoco.ie/en/resident/heritage-and-conservation/architecturalbuilt-heritage>) gives context:

"Built Heritage in Cork

There are 1481 structures listed on the Record of Protected Structures in the County Development Plan. These structures include bridges, mansions, shop fronts, post offices, gate lodges, and buildings dating from the 1500s to the 1990s. There are 44 Architectural Conservation Areas identified and listed in the County Development Plan, 2014.

The National Inventory for Architectural Heritage (NIAH) survey is almost completed for the county with only Central Cork remaining and these surveys have already uncovered many more sites of architectural significance around the county. Details on the surveys conducted for West Cork, East Cork and North Cork can be accessed here <https://www.buildingsofireland.ie/publications/>."

101. The architectural heritage area is said to be defined in vol. 6 (maps) of the CDP. The online version at any rate of vol. 6 is essentially an online map reader, so it is a short document with a button to click that brings up a zoomable map.

102. There are a number of protected structures in Passage West in chapter 2 of the CDP of which 4 are relevant. The water tower is:

"01469 Water tower Pembroke, Main St, Passage West"

103. The water tower is outside the development site although the applicants sought to make a point that works on the wall were within its curtilage.

104. The 3 Railway bridges are:

"01474 Roberts Bridge Ardmore Passage West

01475 Stone Bridge Pembroke Passage West

01476 Abbotts Bridge Pembroke Passage West"

105. There is a fourth bridge called Wooden Bridge or no-name-bridge not on the RPS but in the ACA chainage 1530, GA0010.

106. The inspector's report identifies the four relevant protected structures:

"6.5. Cultural Heritage

6.5.1. The line of the greenway that is the subject of this application crosses three bridges that are protected structures, Robert's Bridge (RPS no.01474), Abbott's Bridge (RPS no.01476) and 'Wooden Bridge' (RPS no.01475). There is a water tower (RPS no.01469) located at the southeastern end of the greenway immediately adjacent to the subject site, which has been converted to a takeaway coffee shop and was in such use on the day of my site inspection.

6.5.2. There are no national monuments or structures listed on the NIAH within the subject site. The Board should note that the southeastern end of the site is located within the Passage West Architectural Conservation Area."

107. The CDP refers to 01475 as the Stone Bridge whereas the inspector refers to it as Wooden Bridge which seems to be a different structure so it is possible that the inspector was incorrect about the nomenclature.

108. The inspector's discussion of cultural heritage is (emphasis added):

"Cultural Heritage

9.2.21. Cork County Council submitted an Archaeological and Cultural Heritage Impact Assessment (Tobar Archaeological Services, November 2022) with their planning application. The ACHIA identifies three protected structures located along the route of the proposed development. These are Robert's Bridge (RPS Ref. 01474), Abbott's Bridge (RPS Ref. 01476) and Wooden Bridge (RPS Ref. 01475). The CHIA also identified a water tower (RPS Ref. 01469) located a short distance to the west of the subject site. There are no NIAH sites located within the subject site. Approximately **400m of the south-eastern part of the greenway is located within the Passage West ACA.**⁴ There are no recorded or national monuments located on or in the immediate vicinity of the subject site and, consequently, no archaeological issues arise.

9.2.22. A third-party (Marcia D'Alton) queries the details of the existing and proposed bridge decks along the route of the greenway. It is clearly annotated on the submitted drawings that at Robert's Bridge (chainage 260) the parapets and bridge are to remain.⁵ Similarly, the parapets and bridge at Wooden Bridge (chainage 1350) are to remain.⁶ I note that the treatment for Abbott's Bridge (chainage 1060) states that the existing bridge parapets are to remain, and new railings are to be installed at either side of the bridge.⁷ Although no details are specified for the railings, I am satisfied that the removal of the existing railings at Abbott's Bridge would not detract from its integrity or setting, although the Conservation Officer of Cork County Council should be consulted regarding their appropriate replacement. Further to this, no widening of any of these bridge decks is proposed and, consequently, the width of the path will constrict at these locations from the proposed 4m wide greenway path to the respective widths of the bridge decks.

9.2.23. There are further works specified in the ACHIA at Abbott's Bridge and the Wooden Bridge where it is proposed that existing bridge decks shall be removed, existing abutments be made good (where required), and new reinforced concrete pads are proposed on top of the existing abutments. Furthermore, it is proposed that a new bridge deck in reinforced concrete or structural steel be installed to provide safe passage for pedestrians and cyclists.⁸ Similarly, it is proposed to repair the riverside wingwalls of Robert's Bridge to mitigate against further erosion. I am satisfied that these works would lead to the long-term conservation of these protected structures and would have no significant impact on their integrity as protected structures. I advise the Board, if they are minded to grant permission for the proposed development, that these works should be carried out in consultation with the Conservation Officer of Cork County Council, in accordance with best conservation practice, and that an appropriate condition requiring this should be attached to such a grant of permission.

9.2.24. In relation to the ACA, the proposed development works primarily comprise the widening of an existing 2m wide path to a 3.5-4m wide track. The nature of this work is unlikely to detract from the character of the ACA and significant visual effects are not anticipated. A third-party mentions that there is no mention of the removal of the railway wall within the ACHIA and it is contended by a number of third-parties that the removal of the railway wall along the Cork Street would undermine the unique character and heritage of Passage West. It is also stated that this goes against what Passage West is trying to achieve in the Heritage Generation Plan and the Passage West Strategic Plan 2018-2022.

9.2.25. For clarity, **it is proposed to remove this low wall and replace it with a block and stone wall from chainage 1610 to 1780 (a length of 170 metres)**. The new stone wall is proposed as 1.3m in height and a railing is to be erected opposite the ope [*sic*] in the wall at the entry/ exit point to/ from the greenway. I note under Section 6.1.1.6 of the ACHIA it is stated that no direct impacts to the ACA are anticipated as a result of the proposed development. As well as this, no reference is made to this wall in Section 6.1.1.5 where issues relating to railway structures not included in the RPS are addressed.

9.2.26. On the day of my site inspection, **I observed that works have been carried out to this wall for a substantial part of it notably from chainage 1610 to 1740 where the wall has been lowered and fixed with a concrete capping. Therefore, approximately 40 metres of the wall remains in what could be considered its original condition.** Overall, I consider that the integrity of this part of the built environment has been irrevocably altered and that the construction of a modern (a new stone faced wall) would not detract from the visual amenity of the area nor have any significant adverse impact on cultural heritage or the integrity of the ACA.

9.2.27. Another issue raised by a number of third-parties in relation to cultural heritage concerned the removal of the 'fairy wall' that runs perpendicular to the greenway and sits between the existing car park and the grassed area to the north of it. Residents are concerned about the knocking of the Fairy Wall, which carries an art installation that is the centre-piece of their annual Fairy festival. As also stated in a third-party submission, this is not mentioned in the documentation submitted with the application.

9.2.28. On the day of my site inspection, I observed the artwork on this wall and it was evident to me that this relatively innocuous structure plays a role in the civic life of the local community. I consider that this would have been identified in any preapplication consultation, if it had been undertaken. Unfortunately, it now falls to the Board to adjudicate on the matter. Although the low c.8m long wall has no historical or architectural merit, it is clear from the third-party submissions that there is a cultural aspect to it that merits the retention of its use. I consider that such a length of wall usable for artwork can be incorporated into the northeastern side of the proposed replacement wall. I am satisfied that this would address this concern and enable the continued civic use of a similar portion of wall and associated public open space. I advise the Board, if they are minded to grant permission for the proposed development, that these works should be carried out in consultation with the local community.

Cultural Heritage Conclusion

9.2.29. Overall, I am satisfied that the proposed improvement works to the existing pedestrian and cycle greenway at this location would be consistent with national, regional and local policy as they relate to the protection of cultural heritage and to the proper planning and sustainable development of the area. Having regard to the scale and nature of the linear project, I am satisfied that the proposal would not adversely affect cultural heritage in the surrounding area to any significant extent, subject to mitigation measures outlined in the ACHIA being carried out and attached conditions.

Footnotes

4 P.35, Figure 11: Proposed development in relation to the Passage West ACA, Archaeological and Cultural Heritage Impact Assessment (Tobar Archaeological Services, November 2022)

5 Please refer to General Arrangement Drawing no.GA0002 (Sheet 2 of 12).

6 Please refer to General Arrangement Drawing no.GA0009 (Sheet 9 of 12).

7 Please refer to General Arrangement Drawing no.GA0007 (Sheet 7 of 12).

8 P.38, Section 6.1.1.4 Protected Structures, Archaeological and Cultural Heritage Impact Assessment (Tobar Archaeological Services, November 2022)."

109. The critical drawing is General Arrangement Drawing GA0011 (PDF p. 105 of core book) which shows almost all of the area where the railway wall exists, chainage 1610 to 1780.

110. The pleaded grounds under these headings are:

"Core Ground 4:

The Commission's decision is invalid because it failed to justify its conclusion that demolition of the historic railway wall within the Passage West Architectural Conservation Area (ACA) would not affect the character of the ACA. In doing so, the Commission:

- (i) undermined its assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act;
- (ii) failed to comply with its obligations under s.82(2) of the Act in respect of works within an ACA; and
- (iii) failed to have regard to relevant Ministerial Guidelines issued under s.28 of the Act to which the Commission is required to have regard.

(a) The heritage context

49. The historic stone railway wall ('the Wall') extends for over 200m along Cork Street (R610) from the Toureen Inlet (opposite 2 Toureen Terrace, Eircode T12 XVX0) to the Water Tower, a protected structure (RPS no. 01469), forming the outer boundary of the former Cork Blackrock & Passage Railway (CB&PR) grounds. Both the Wall and the Water Tower formed the outer boundary of the Cork Blackrock & Passage Railway (CB&PR) ground. The CB&PR ground extended from the quay to the Wall. The quay was constructed to take the track and is consequently called Railway Quay.

50. Approximately 40m of the Wall closest to the Water Tower remains in original condition. The original cap has been removed from the remainder and replaced with concrete. Some 5m been broken open at the entrance to the Toureen car park and lowered on either side to enable visibility for entering/exiting vehicles.

51. The Wall, together with a historic stone stile ('the Stile') embedded into the Wall and the adjacent Water Tower, form part of the surviving CB&PR complex. The Stile and Water Tower are recognised heritage features on the Passage West-Monkstown Railway Trail erected by Passage West Town Council in 2007.

52. The Water Tower, Wall and Stile all lie within the designated Passage West ACA, identified in Volume 2 of the County Development Plan.

(b) Omission of assessment by the applicant

53. The proposed development involves demolition of 170m of the Wall (including the Stile), to be replaced with parallel parking, a footpath, and a modern stone wall.

54. The planning application documentation failed to identify or assess the demolition of the Wall and/or Stile:

- Not mentioned in the Part 8 Planning Report beyond a passing reference to new parking/footpath/wall (s.3, page 4).
- Omitted entirely from the Environmental Impact Assessment Screening Report.
- Omitted entirely from the Archaeological and Cultural Heritage Impact Assessment (ACHIA).

- Referenced by annotation on Drawing GA0011, although the Stile is not identified.

55. There was therefore no assessment of the impact of demolition of the Wall and Stile on the Passage West ACA, contrary to s.82(1) of the Act. Note that although the Act limits exempted works in an ACA to those not materially affecting its character, as no assessment has been carried out, a defence of no materiality is not possible.

(c) Statutory guidance

56. The Architectural Heritage Protection Guidelines for Planning Authorities (Department of Arts, Heritage and the Gaeltacht, 2011) issued under s.52 and binding under s.28, set out clear requirements:

- Preservation of ACA character continues across development plans (s.3.1.2).
- Proposals for works within ACAs should be examined at a detailed level (s. 7.2.1).
- Demolition within ACAs must be justified by the applicant, with effects on character of both the area and adjacent structures considered by the planning authority (s.3.10.2).
- Assessment prompts include whether the structure contributes to character, its effect on adjacent protected structures, and whether alternatives to demolition exist (s.3.10.3).
- Walls and structural elements must be assessed for their contribution to ACA character (s.8.1.4).

57. The applicant did not follow these requirements; the Wall and Stile were ignored entirely in its heritage assessment.

(d) Third-party submissions

58. 56 of 69 submissions raised the importance of the Wall as part of Passage West's heritage, identity, and ACA character. Examples include:

- 'Our history is built around our whole railway heritage, and this wall is part of the blueprint of Passage West' (M. Leonard).

- 'The railway wall is an integral part of the town's streetscape and a key feature of Passage West's industrial heritage... it contributes significantly to the cultural identity of the area' (Cllr. U. McCarthy).

- 'This wall is a remnant of the town's industrial heritage, representing the footprint of the former railway station. Preserving such elements is essential to maintain the identity of our community.' (Mark O'Shea).

- 'To enable destruction of this heritage would be to literally rip the soul from Passage West ... It would be social and cultural desecration of a kind that simply cannot be permitted' (M. D'Alton).

59. A third party submission (ref. Marcia D'Alton) provided a historic photograph dating to the 1960s, illustrating that part of the Wall had been lowered even at that time. Nonetheless it, together with the site of the former railway and adjacent 19th century buildings, was considered to collectively contribute to such an extent to the character, historic setting and interest of this part of Passage West as to warrant ACA designation under s.81(1) of the Act.

(e) The Inspector's/Commission's assessment

60. The Inspector acknowledged that the Wall is not mentioned in the ACHIA (para. 9.2.24, 9.2.25, Inspector's Report) but did not recommend that the Applicant would submit further information to fill this significant statutorily-relevant lacunae in the planning application.

61. He concluded that because the Wall has already been lowered/recapped, its integrity is compromised and its demolition would not detract from the ACA (para. 2.9.26). However:

- He did not reference or apply the statutory Guidelines (ss.3.10.2, 3.10.3, 8.1.4).
- He failed to consider the loss of the original 40m of unaltered Wall, the Stile, the Wall's contribution to the ACA's special railway character, the Wall as a boundary feature of the former railway ground or the contribution of the Wall to the character of the streetscape.
- No character assessment of the ACA was undertaken.

61. The Commission, adopting the Inspector's Report without comment, conducted no further assessment.

(f) Legal consequence

62. s.82(2) of the Act requires the planning authority/Board to 'take into account the material effect (if any)' of proposed works on the character of an ACA.

63. The Inspector's assessment, limited to noting the Wall's lowering/recapping, was silent on the integrity of the ACA as a whole and failed to examine the statutory questions prompted by the Guidelines.

64. The applicant's unlawful omission to assess the proposed demolition of the Wall and Stile combined with the failure of both the Inspector and Commission to address this omission deprived the decision-making process of a lawful assessment of impact on the ACA.

65. The Commission's conclusion of no significant adverse effect on cultural heritage (para. 2.9.26, Inspector's Report; pages 2/3, Order) was unfounded, unsupported by evidence, and contrary to s.82(2) of the Act, s.28 of the Guidelines and the requirements of s.177AE(6)(a)(ii) of the Act.

66. The decision is therefore unlawful, irrational, procedurally flawed, and invalid.

Core Ground 5:

The decision of the Commission is invalid because it failed to consider:

(i) the part of the historic railway wall ('the Wall') adjacent to the Water Tower as a protected structure, and/or

(ii) the effect of demolition of the Wall upon the Water Tower, a protected structure (RPS no. 01469)

thereby depriving itself of material considerations necessary for assessment of proper planning and sustainable development as required under s.177AE(6)(a)(ii) of the Act.

(i) The part of the Wall adjacent to the Water Tower is a protected structure

(a) Statutory duty

67. s.2 of the Act defines a protected structure as including 'the land lying within its curtilage and any other structures within that curtilage'. It further defines protection in relation to a structure or part of a structures as including 'conservation, preservation and improvement compatible with maintaining the character and interest of the structure or part'.

68. Although curtilage is not defined in the legislation, the statutory Architectural Heritage Protection Guidelines for Planning Authorities (2011) issued under s.52 of the Act and to which regard must be had under s.28 of the Act, advise that:

- Curtilage may be taken to be 'the parcel of land immediately associated with that structure and which is (or was) in use for the purposes of the structure (s.13.1.1).

- The extent of curtilage may be determined by functional connection, ownership at time of construction, and historical relationship (s.13.1.5).

- Boundary features can make an important contribution to the quality and character of a protected structure and its surrounding streetscape (s.13.4.1).

(b) Context

69. The Wall is adjacent to the Water Tower (RPS Ref. 01469) opposite the Tavern Bar at 39 Cork Street, Passage West. The Wall is immediately contiguous with the Water Tower, aligning to form the boundary wall of the former Cork Blackrock & Passage Railway (CB&PR).

70. For some 40 metres immediately beside the Water Tower, the Wall is in its fully original condition.

71. The Wall is immediately adjacent to the Water Tower. Both the Wall and Water Tower were part of the infrastructure associated with the CB&PR; both were part of the CB&PR site and form part of the historical boundary of same; both were in the same ownership at the time of construction; both are of similar construction and the capping stone of the Wall in its original condition is the same as the stone used to construct the Water Tower. Those same considerations apply also to the Stile, an integral feature of the Wall and referenced in Core Ground 4.

72. The intact section of Wall adjacent to the Water Tower is within the curtilage of the Water Tower (RPS no. 01469). That intact section of the Wall is therefore part of the protected structure of the Water Tower.

(c) The Inspector's assessment

73. Although the Inspector acknowledged the section of the Wall in original condition, he did not acknowledge this intact section of Wall as being adjacent to the Water Tower (para. 9.2.26).

74. He did not apply the Guidelines criteria (s.13.1.5) for determining curtilage and did not identify the intact section of Wall adjacent to the Water Tower as being within the curtilage of the Water Tower.

75. Instead, he concluded that the 'integrity of this part of the built environment has been irrevocably altered' (para. 9.2.26, Inspector's Report) and that replacement of the Wall with a modern stone-faced wall along a different alignment would not detract from cultural heritage. This is not merely an assertion inconsistent with the Guidelines and the statutory definition of a protected structure, it is also clearly untrue as the section of Wall in original condition remains and is adjacent to the Water Tower, a protected structure.

(d) The Commission's approach

76. The Commission adopted the Inspector's Report in full (page 3, Order), expressing no disagreement.

77. Like the Inspector, it did not apply the Guidelines nor consider whether the section of Wall in original condition adjacent to the Water Tower was part of the curtilage of the Water Tower and hence part of the protected structure.

(e) Legal consequence

78. The Commission's assessment as to cultural/built heritage as part of proper planning and sustainable development as required by s.177AE of the Act is fatally flawed because it failed to consider any part of the Wall as a protected structure, in particular that part of the Wall within the curtilage of the Water Tower which is a protected structure.

79. The Commission's assessment of proper planning and sustainable development required by s.177AE(6)(a)(ii) of the Act is therefore fatally flawed and the Commission's decision is invalid.

(ii) The effect of demolition of the Wall upon the Water Tower, a protected structure

(a) Statutory duty

80. s.177AE(6)(a)(ii) of the Act requires assessment of the likely consequences of a proposed development for proper planning and sustainable development.

81. The Guidelines (s.6.2.5) requires planning authorities to consider the impact of adjacent works on protected structures, particularly where there is a formal or functional relationship between structures. Section 13.5.2 of the statutory Guidelines references s.57(10)(b) of the Act, cautioning that:

'where a formal relationship exists between a protected structure and its ancillary buildings or features, new construction which interrupts that relationship should rarely be permitted ... Similarly, the relationship between the protected structure and the street should not be damaged. New works should not adversely impact on views of the principal elevations of the protected structure'.

(b) Context

82. That formal and functional contiguous relationship between the Wall and the Water Tower is integral to the streetscape and to views of the Water Tower when approaching in a southeasterly direction on Cork Street.

83. Demolition of the Wall would sever this relationship, replacing the consistency of streetscape with on-street parking, introducing visual and functional disruption into the setting of the protected structure that bears no relationship to the protected structure and impacting significantly on one of its principal elevations.

84. This is a significant and material impact.

(c) Omissions in the planning application

85. The Archaeological and Cultural Heritage Impact Assessment (ACHIA) submitted with the planning application (para.9.2.21, Inspector's Report) does not refer to any part of the Wall or to its demolition (paras. 9.2.24, 9.2.25, Inspector's Report).

86. The ACHIA does refer to the Water Tower (Section 5.2.2 and Plate 3, page 24) but identifies it only as being 'a short distance to the west of the proposed development site at the south-east end of same but not located within the redline boundary'. Plate 3, a photograph of the Water Tower included in the ACHIA, notably omits to show the proximity of the Water Tower to the adjacent Wall.

87. Drawings No. GA0011 and GA0012 submitted with the planning application show the Water Tower but label it only as 'building'.

(d) The Inspector's assessment

88. The Inspector noted the Water Tower as a protected structure (paras. 6.5.1, 9.2.13, 9.2.21) but did not assess the effect of demolishing the Wall on the cultural/built heritage of the area in relation to the Water Tower nor on the protected structure of the Water Tower itself.

89. His site photographs failed to capture the proximity, the visual relationship and the structural relationship between the Wall and Water Tower. He took no photograph of the fully intact section of Wall. These photographs are included in Exhibit 4 with relevant additional commentary.

90. He concluded, without analysis, that the development would not adversely affect cultural heritage 'to any significant extent' (paras. 9.2.29). In his overall conclusion, the Inspector stated that 'the proposed development will not give rise to significant adverse impacts on cultural heritage...' (para. 9.3.5). In his overall Reasons and Considerations regarding proper planning and sustainable development, he stated that the proposed development 'would not adversely impact on the cultural, archaeological and built heritage of the area...' (para. 11).

91. This conclusion was reached without application of the statutory Guidelines, without assessment of the impact of demolition of the Wall on the adjacent protected structure, without assessment of the Wall on the setting of the protected structure and without assessment of whether the part of the Wall closest to the protected structure is within the curtilage of that protected structure.

(e) The Commission's approach

92. The Commission did not comment on the omissions in the Inspector's assessment, did not follow the requirements of the statutory Guidelines and carried out no independent assessment of the effect of demolition of the Wall on the Water Tower as a protected structure.

93. It had regard to the Inspector's Report in making its decision (page 3, Order), expressing no disagreement. As held in *Shadowmill Limited v An Bord Pleanála* [2023] IEHC 157 at para. 84, the assessment of the Inspector is imputed to the Commission.

(g) Legal consequence

94. The Commission's assessment as to cultural/built heritage as part of proper planning and sustainable development as required by s.177AE of the Act is fatally flawed because it failed to consider the impact of demolition of the Wall upon the cultural/built heritage of the area and of the character of the Water Tower, a protected structure.

95. In the light of the omissions above, the Commission's assessment of proper planning and sustainable development required by s.177AE(6)(a)(ii) of the Act is therefore fatally flawed and the Commission's decision is invalid."

111. The core of the claim arises from the following related points about heritage:

- (i) **there was no assessment of the impact of demolition of the wall and stile on the Passage West ACA**, contrary to s. 82(1) of the Act;
- (ii) **the inspector failed to consider the loss of the original 40 m of unaltered wall, the stile, the wall's contribution to the ACA's special railway character, the wall as a boundary feature of the former railway ground or the contribution of the wall to the character of the streetscape;**

- (iii) **no character assessment** of the ACA was undertaken;
- (iv) there was a failure to have regard to relevant ministerial guidelines issued under s.28 of the Act to which the commission is required to have regard, specifically:
 - i. preservation of ACA character continues across development plans (s.3.1.2);
 - ii. proposals for works within ACAs should be examined at a detailed level (s. 7.2.1);
 - iii. demolition within ACAs must be justified by the applicant, with **effects on character of both the area and adjacent structures** considered by the planning authority (s.3.10.2);
 - iv. assessment prompts include whether the structure contributes to character, **its effect on adjacent protected structures, and whether alternatives to demolition exist** (s.3.10.3); and
 - v. walls and structural elements must be assessed for their contribution to ACA character (s.8.1.4); and
- (v) there was a **failure to analyse the historic railway wall in terms of the fact that it was adjacent to the water tower as a protected structure, and/or consider the effect of demolition of the wall upon the water tower**, as a protected structure contrary to s. 177AE(6)(a)(ii) of the Act.

112. There are also points about curtilage and the application documents:

- (i) The wall is claimed to be part of the curtilage of the water tower and thus it itself a protected structure.
- (ii) There was a lack of application of the guidelines criteria (s. 13.1.5) for determining curtilage and did not identify the intact section of wall adjacent to the water tower as being within the curtilage of the water tower. The guidelines (s. 6.2.5) require planning authorities to consider the impact of adjacent works on protected structures, particularly where there is a formal or functional relationship between structures. Section 13.5.2 of the statutory guidelines references s. 57(10)(b) of the Act, cautioning that: "where a formal relationship exists between a protected structure and its ancillary buildings or features, new construction which interrupts that relationship should rarely be permitted ... Similarly, the relationship between the protected structure and the street should not be damaged. New works should not adversely impact on views of the principal elevations of the protected structure". That formal and functional contiguous relationship between the wall and the water tower is integral to the streetscape and to views of the water tower when approaching in a southeasterly direction on Cork Street.
- (iii) The planning application documentation/ planning report/ EIA screening report/ ACHIA failed to (adequately) identify or assess the demolition of the wall and/or stile which were not mentioned in the part 8 planning report beyond a passing reference to new parking/footpath/wall (s. 3, p. 4).

113. Finally, the foregoing substantive complaints are then alleged to give rise to various consequential conclusions (these are not properly legal grounds in themselves). These do not really add a whole lot to the substantive points and don't require separate consideration:

- (i) there was therefore a breach of required assessment of proper planning and sustainable development as required under s. 177AE(6)(a)(ii) of the Act;
- (ii) there was also therefore a breach of s. 82(2) of the 2000 Act in respect of works within an ACA; and
- (iii) consequently there as a breach of s. 177AE(6)(a)(ii) of the Act which requires assessment of the likely consequences of a proposed development for proper planning and sustainable development.

114. As to the allegedly defective application documentation, consistent with the above discussion under core ground 6, that does not give rise to grounds for *certiorari* in and of itself in the circumstances. Assuming that the council's paperwork was inadequate, the critical question is whether such deficiency flows through to the decision-taker's reasoning. If not then it would be inappropriate to quash the decision on such a basis. If so, defective application information doesn't add anything to the order of *certiorari*.

115. As to the curtilage issue, there was not anything in the process making it apparent that the lands were part of the curtilage of the water tower. The applicant can't have the decision quashed on a basis that wasn't raised unless it would have been apparent to a reasonable decision-taker – that hasn't been proved. Indeed the images do not suggest that the development site is part of the curtilage of the water tower specifically but rather part of a wider green area.

116. Section 13.1.5 of the architectural heritage guidelines is:

"13.1.5 In making a decision as to the extent of the curtilage of a protected structure and the other structures within the curtilage, the planning authority should consider: a) Is, or was, there a functional connection between the structures? For example, was the structure within the curtilage constructed to service the main building, such as a coach-house, stores and the like? b) Was there a historical relationship between the main structure and the structure(s) within the curtilage which may no longer be obvious? In many cases, the planning authority will need to consult historic maps and other documents to ascertain this; c) Are the structures in the same ownership? Were they previously in the same ownership, for example, at the time of construction of one or other of the structures?"

117. Section 13.5.2 provides:

"13.5.2 Where a formal relationship exists between a protected structure and its ancillary buildings or features, new construction which interrupts that relationship should rarely be permitted. There may be a designed vista between a building and a built or landscape feature within its gardens or a less formal relationship between a house and its outbuildings. Similarly, the relationship between the protected structure and the street should not be damaged. New works should not adversely impact on views of the principal elevations of the protected structure."

118. As can be seen, these provisions of the guidelines relate to the curtilage issue and only arise if there is a plausible basis for that issue. So they are not independent grounds for relief. That does not preclude reliance on other provisions of the guidelines which do apply.

119. We can turn now to the core heritage issues. Section 81 of the 2000 Act provides:

"Architectural conservation areas.

81.—(1) A development plan shall include an objective to preserve the character of a place, area, group of structures or townscape, taking account of building lines and heights, that—
(a) is of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest or value, or

(b) contributes to the appreciation of protected structures,
if the planning authority is of the opinion that its inclusion is necessary for the preservation of the character of the place, area, group of structures or townscape concerned and any such place, area, group of structures or townscape shall be known as and is in this Act referred to as an 'architectural conservation area'.

(2) Where a development plan includes an objective referred to in subsection (1), any development plan that replaces the first-mentioned development plan shall, subject to any variation thereof under section 13, also include that objective."

120. The council places emphasis on vol. 4 of the CDP to suggest that the ACA was designated only for residential buildings:

"Architectural Heritage 1.5.85

The residential architecture of the settlement is of importance, as the area, including Monkstown, consists of a high number of large town houses, many of which are terraced. The town includes smaller artisan style housing, as well as a number of civic buildings. The mix of styles in these areas has led to the designation of an Architectural Conservation Area, both in Passage West and Monkstown, due to its retention of original fabric and styles. Architectural Design Guidelines have been prepared by the former Passage West Town Council to assist developers in formulating suitable design proposals for developments in the area to ensure such development is respectful of the character of the area. It is an objective of the Plan (HE 16-18) 'to conserve and enhance the special character of the Architectural Conservation Areas'.

Protected Structures

1.5.88 In all there are 20 structures in or in close proximity to Passage West/Glenbrook/Monkstown which are entered on the current record of protected structures showing the towns rich architectural heritage. Of these 11 protected structures are located within Passage West and 7 in Monkstown.

Archaeological Heritage

1.5.89 The town contains a number of archaeological monuments which reflect the historic significance of the area. These are awarded protection under national legislation and policies contained in the Plan. All of these are Recorded Monuments which are subject to statutory protection in the Record of Monuments and Places, established under section 12 of the National Monuments (Amendments) Act 1994. Any potential archaeological sites and their setting within the development boundary shall be protected in line with the objectives for the protection of archaeological heritage listed in the Plan. See Volume One Chapter 16 Built and Cultural Heritage."

121. But that interpretation is an obviously very reductionist reading. Dwellings obtain part of their character from surrounding non-residential structures – that certainly could include structures such as Victorian walls and stiles or other structures of heritage interest within an ACA.

122. The litigation-by-snippet adopted by the council here becomes more evident when we look at the actual development plan objective, as envisaged by s. 81 of the 2000 Act.

123. Objective HE 16-18 in vol. 1 of the CDP is (emphasis added):

“County Development Plan Objectives

HE 16-18: Architectural Conservation Areas

Conserve and enhance the special character of the Architectural Conservation Areas included in this Plan. The special character of an area includes its traditional building stock, material finishes, **spaces, streetscape, shopfronts, landscape and setting**. This will be achieved by;

(a) Protecting **all buildings, structures**, groups of structures, sites, **landscapes and all other features considered to be intrinsic elements to the special character of the ACA** from demolition and nonsympathetic alterations.

(b) Promoting appropriate and sensitive reuse and rehabilitation of buildings and sites within the ACA and securing appropriate infill development.

(c) Ensure new development within or adjacent to an ACA respects the established character of the area and contributes positively in terms of design, scale, setting and material finishes to the ACA.

(d) **Protect structures from demolition** and non sympathetic alterations.

(e) Promoting high quality architectural design within ACAs.

(f) Seek the repair and re-use of traditional shopfronts and where appropriate, encourage new shopfronts of a high quality architectural design.

(g) Ensure all new signage, lighting advertising and utilities to buildings within ACAs are designed, constructed and located in such a manner they do not detract from the character of the ACA.

(h) **Protect and enhance the character and quality of the public realm within ACAs. All projects which involve works within the public realm of an ACA shall undertake a character assessment of the said area which will inform a sensitive and appropriate approach to any proposed project in terms of design and material specifications.** All projects shall provide for the use of suitably qualified conservation architects/designers.

(i) Protect and enhance the character of the ACA and the open spaces contained therein. This shall be achieved through the careful and considered strategic management of all signage, lighting, utilities, art works/pieces/paintings, facilities etc to protect the integrity and quality of the structures and spaces within each ACA.

(j) Ensure the **protection and reuse of historic street finishes, furniture and features which contribute to the character of the ACA.**”

124. So when one examines the critical text within the development plan itself, the council’s reading of the ACA as something just to do with houses simply evaporates in the sunlight.

125. Section 82 of the 2000 Act provides:

“Development in architectural conservation areas.

82.—(1) Notwithstanding paragraph (a), (h), (i), (ia), (j), (k) or (l) of section 4(1), or any regulations made under section 4(2), the carrying out of works to the exterior of a structure located in an architectural conservation area shall be exempted development only if those works would not materially affect the character of the area.

(2) In considering an application for permission for development in relation to land situated in an architectural conservation area, a planning authority, or the Board on appeal, shall take into account the material effect (if any) that the proposed development would be likely to have on the character of the architectural conservation area.”

126. There are unfortunately a number of difficulties with the way in which the ACA issue was analysed by the commission.

127. We can start with the stile. The stile is a distinct heritage feature, as highlighted by Passage West Town Council when it existed. (While entirely a matter for the Oireachtas, there is a school of thought that from a historical, community and subsidiarity point of view, something was lost when sub-county councils were abolished in 2014 (municipal districts being, on that view, a poor substitute, lacking corporate personality) and on such a view there might be merit in revisiting this issue – indeed the heightened local attention to heritage features by the town council here possibly illustrates that loss of focus, on the applicants’ case at any rate). The town council created a heritage trail with information signs at the beginning and end, and identified the stile as one of the heritage features on the trail.

128. Where a local authority has identified a structure as of heritage interest, and created a trail with signs, and where this is drawn to the attention of the decision-taker, it is totally implausible to suggest that such a structure can be demolished without discussion and without reasons, and any complaint drowned in a generalised assertion that works will not affect the character of an ACA. The question only has to be posed for the implausibility of an affirmative answer to be apparent. The demolition of a feature identified by a local authority as a notable heritage feature, irrespective of whether that is by way of statutory protection, has to be a main issue requiring express consideration.

129. Alternatively put, there is no apparent rationale as to why the demolition of the stile will not affect the character of the ACA.

130. The fact that there was a site inspection does not deal with the demolition of an express feature. The suggestion that the stile is simply part of the wall ignores its distinct existence and characteristics as a separate heritage feature as identified by the town council. The fact that the applicants' submissions which refer to the stile were considered does not discharge the duty of reasoning regarding demolition of a distinct heritage feature within an ACA.

131. Reinforcing this, the ministerial guidelines (as quoted at the start of this judgment) recommend detailed, granular examination of structures being affected within ACAs (emphasis added):

"7.2.1 Conservation is the process of caring for buildings and places and of managing change to them in such a way as to retain their character and special interest. **Historic structures are a unique resource. Once lost, they cannot be replaced.** If their special qualities are degraded, these can rarely be recaptured. Damage can be caused to the character of a historic structure as much by over-attention as by neglect. Over-restoration can harm the special qualities of a building with the loss of details, materials and craftsmanship which, while sometimes seeming of little significance in themselves, can contribute to the character of the building and make it special. For this reason, **it is vitally important** that proposals for works to protected structures, and **within ACAs, be examined at a detailed level.** It is intended these detailed guidance notes will draw attention to the importance of the seemingly minor details of a historic building that nonetheless play an important part in establishing its character."

132. While the guidelines enjoy have-regard-to status, the irreplaceable destruction of cultural heritage requires some level of engagement with their provisions where it is a main issue – certainly more engagement than was afforded here.

133. There is only ephemeral reference to the guidelines in the inspector's report, limited to a condition about the bridges:

"All repair works to Robert's Bridge, Abbott's Bridge and Wooden Bridge (Protected Structures) shall be carried out under the supervision of a qualified professional with specialised conservation expertise and in accordance with best conservation practice as detailed in 'Architectural Heritage Protection: Guidelines for Planning Authorities' issued by the Department of the Environment, Heritage and Local Government in 2011. The repair works shall retain the maximum amount possible of surviving historic fabric in-situ and shall be designed to give rise to minimum interference with the fabric of the bridges.

Reason: To ensure that the character and integrity of the protected structures is maintained, and that the bridges are protected from unnecessary damage and loss of fabric."

134. This is simply irrelevant to the critical issue at hand, namely regard to the guidelines in the context of the main issue of demolishing a 177-year-old historic railway wall and stile recognised as heritage features by the local authority.

135. Turning then to the wall, some visual information may be of assistance:

- (i) <https://maps.app.goo.gl/JY3dDEjD5uN1Gw1D8> shows the original wall as viewed from the water tower looking into the development site;
- (ii) <https://maps.app.goo.gl/MHhWyUtzG7yXfzrM7> shows the change from the original wall to the modified, lower wall, with the stile at the junction; and
- (iii) <https://maps.app.goo.gl/HhUHfyiZyzQ26gVi9> shows the section of what appears as original wall on the far side of the tower.

136. The problem with the inspector's logic is that if you have a historic structure consisting of two parts, A and B, and if A has been modified, demolished or vandalised, that does not have any necessary knock-on effect on the value of the remaining structure B. Perhaps an extreme example, but it would be absurd to suggest that the existing fragments of Dublin City walls could be demolished because they have no heritage value due to the loss of the other 99%. In the present case, the remaining wall is quite substantial and appears visually in good condition. The modern capping of a section of the old wall does not inherently nullify its heritage value. Thus the asserted logic about alternation of other parts of the wall does not provide any logical basis for demolition of remaining original wall.

137. What is perhaps slightly disappointing is the absence of consideration of the possibility of more sensitive restoration of the modified wall as opposed to simply dismissing it as of no value due to the (somewhat limited) modifications. Surely rather than say part A of the heritage asset is modified therefore we can demolish both A and B, a better default answer is we could restore A so that A and B will read together more meaningfully.

138. One can note that the inspector's attempt to reduce the original wall to 40m seems to be selective – there appears to be more original wall on the other side of the water tower, which adds to the setting-related value of the wall.

139. Relatedly the issue of the composition of the area is stressed in the guidelines, as is the question of alternatives.

140. The fact that the original wall exists on both sides of the water tower creates a framing and setting for the tower, from which it follows that removal of the wall on one side would affect the setting and composition – obviously adversely since the symmetry is nullified. The inspector's conclusion to the contrary is arrived at without proper or any identifiable consideration of the impact on symmetry by reason of the fact of the wall being on both sides of the tower.

141. Section 3.10.2 and 3 of the guidelines stresses this theme, even for "undistinguished" structures (emphasis added):

"Proposals for demolition

3.10.2 Where it is proposed to demolish a structure that contributes to the character of an ACA or to demolish behind a retained façade, the onus should be on the applicant to make the case for demolition. The planning authority should consider the effect both on the character of the area and on any adjacent protected structures. When it is proposed to demolish **an undistinguished building** in an ACA, the proposed replacement should not be of lesser quality or interest than the existing one and should not adversely affect the character of the area.

3.10.3 The applicant and the planning authority should consider the material effect that that proposed demolition may have on the character of the ACA:

a) Does the structure (or part of the structure) to be demolished contribute to the character of the area?

b) What effect would removal of the structure have on the setting of other structures in the area, **the balance of an architectural composition** or the setting of any adjacent protected structures?

c) Would the character and special interest of the whole of the structure or of the ACA be diminished by the demolition of a part?

d) **Has the extent and potential impact of the proposed demolition been minimised?**

e) **Are there alternatives to demolition, even where the structure is in poor condition?**

f) In the case of accidental damage, could demolition be avoided and the structure saved by carrying out repairs or providing temporary support or shelter to the fabric?

g) Is partial demolition justifiable in the interests of the retention of the remainder of the structure?

h) If the special interest of the structure lies in its largely unaltered state, could permission be given to demolish any part of it without damaging that special interest?

i) Has the incorporation of the structure (or part of the structure) into a new development on the site been given adequate consideration?

j) **What are the merits of alternative proposals for the site, taking into consideration the development plan objective to conserve the character of the area?"**

142. No meaningful consideration was given to these critical points. *Pro forma* recitation of the name of guidelines, or recitation in an irrelevant context such as condition 6, only gets a decision-taker so far. Where the facts call for reasoned engagement, the content should be addressed, and demolition of a structure that has been in place for many lifetimes is at stake is such a situation.

143. The inspector's report does not meaningfully consider alternatives. Such matters frequently come in under EIA, but the inspector simply finds that this is not an EIA project (para. 8.1.1).

144. The council's response spreads things very thinly:

"78. The Guidelines are a material consideration, not a mandatory code, and need not be 'slavishly' followed or quoted – a proposition the Applicants now accept (relying on Doorly §197 and also McEvoy and Cork County Council referred to above. They were applied by the Council in preparing the application and expressly invoked by Condition 6 (works to the three protected-structure bridges to be carried out in accordance with the Guidelines, under conservation supervision). The Applicants identify no specific provision whose application would have produced a different conclusion, and adduce no expert evidence that a formal

character assessment would have done so. Reliance on Cork County Council (failure to 'even look') is inapt: the Inspector plainly looked at, and assessed, the heritage context."

145. On these points:

- (i) This incorrectly collapses everything into evaluation.
- (ii) The non-mandatory nature of the guidelines does not take from the obligation to consider them.
- (iii) While the guidelines were applied in condition 6, that proves the point to a degree because that is the only reference by the inspector, and has no relevance to the key issue of the wall.
- (iv) It is simply incorrect that the applicants identify no provision that would have produced a different outcome – specific provisions are identified and it is implicit from the complaint about the decision that the outcome potentially could have been different.
- (v) The complaint of no expert evidence falls flat in the context of failure to carry out a mandatory assessment step which the council "shall" perform under the CDP. On the contrary, where the applicant discharges the onus to show non-compliance with a requirement, the onus shifts to opposing parties to demonstrate that the decision would have been the same: *H.A. v. Minister for Justice* [2022] IECA 166, [2022] 7 JIC 2201 (Unreported, Court of Appeal, Donnelly J., 22 July 2022) at para. 48 (Ní Raifeartaigh and Collins JJ. concurring).
- (vi) The inspector did assess the heritage context to a degree but not in the way mandated by the plan and not in a way that engaged with ministerial guidelines.

146. Emphasising this but considered from a plan perspective, the development plan requires explicitly in the relevant objective that there "shall" be a character assessment of works of this kind. Not doing so cannot be reconciled with the autonomous duty to comply with the council's own plan.

147. As noted above, in *Sherwin v. An Bord Pleanála* [2024] IESC 13 (Unreported, Supreme Court, Woulfe J., 11 April 2024) (Charleton, O'Malley, Baker and Murray JJ. concurring), the Supreme Court decided that a planning decision-taker is required, where it relevantly arises, to **address the text of development plans**. As stated by Woulfe J. at para. 105:

"the first question must be the nature of the determination (if any) actually made by the decision-maker, 'as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan', (per Costello J. in *SWR [South-West Regional Shopping Centre Promotion Association Limited v. An Bord Pleanála* [2016] IEHC 84]), in circumstances where there has been the required focus by the decision-maker on the specific provision of the plan allegedly materially contravened. In my opinion that question is the crucial starting point, before one gets to the questions as to the standard of review by the court."

148. This is relevant by analogy to engagement with the plan generally where it arises in contexts other than material contravention.

149. Characterising core grounds 4 and 5 as merits-based does not get the opposing parties very far. The points made are legal in nature. Contrary to the view sometimes adopted by opposing parties (although in fairness expressly disclaimed by the commission in this case), not everything is a matter of evaluative judgement.

150. The complaint about lack of expert evidence also falls flat where we are not in the space of disputing evaluation within a reasonable margin of appreciation.

151. I might ask forgiveness for one very final point by way of *obiter* comment. Objective HE 16-6 (albeit referred to in the application documentation) is not pleaded by the applicants (emphasis added):

"HE 16-6: Industrial and Post Medieval Archaeology

Protect and preserve industrial and post-medieval archaeology and long-term management of heritage features such as mills, limekilns, forges, bridges, piers and harbours, waterrelated engineering works and buildings, penal chapels, dwellings, **walls and boundaries**, farm buildings, estate features, military and coastal installations. **There is a general presumption for retention of these structures and features. Proposals for appropriate redevelopment including conversion should be subject to an appropriate assessment** and record by a suitably qualified specialist/s."

152. But a predecessor clause requiring "careful assessment" in the 2014 plan was relied on by this council in recommending against permission for demolition of a structure that had not been properly assessed in *Condon v. An Bord Pleanála* [2025] IEHC 255 (Unreported, High Court, 2 May 2025), a sentiment I upheld (see also *Condon v. An Bord Pleanála (No. 2)* [2026] IEHC 137 (Unreported, High Court, 6 March 2026)). In the perhaps optimistic hope that they will be open to further reflection on this, there may be merit in adopting the precautionary principle this council

adhered to in *Condon* rather than the approach of demolition of old structures without rigorous consideration, which was unfortunately the situation here.

Discretion

153. The commission's submissions did not argue for discretionary refusal of relief.

154. The council submitted as follows:

"IX. HARMLESS ERROR, MATERIALITY AND THE COURT'S DISCRETION

86. If, contrary to the foregoing, any error were established, relief should be refused. Not every error results in certiorari; a decision is not quashed for harmless or non-material error: *Carrownagowan* [2025] IESCDet 9; *Massey* [2025] IESCDet 126; *Save the South Leinster Way* [2025] IEHC 541, *Doyle (No.1)* [2026] IEHC 156. Where error is shown the onus of harmlessness shifts; the uncontroverted material establishes that none of the matters complained of could have altered the outcome. The heritage bodies did not object, the wall was already substantially altered, the conservation regime is secured by condition, and the parking provision is equivalent.

87. Judicial review is discretionary: *Reid (No. 7)* [2024] IEHC 27; *G. v. DPP* [1994] 1 I.R. 374; *O'Connell v. Behan* [2021] IECA 186. The discretionary factors here point decisively against relief: the matters are of minor importance; there is no prejudice to the Applicants, who participated fully; the alleged defects are isolated; the proposed development is supported by national and local planning policy; and quashing a beneficial active-travel amenity would be disproportionate (cf. *Save Cork City Community Association CLG v. An Bord Pleanála* [2022] IESC 52: where Woulfe J noted there was 'a great deal of force' in refusing to quash for technical procedural error)."

155. In fairness to the council, if the issue arose under one of the less substantive pleaded grounds, then discretion could have come into the picture.

156. But demolition of a heritage asset is not a situation where discretionary refusal of relief could be appropriate. Irreversible loss of a heritage structure is something that needs to be addressed strictly in conformity with planning law and policy.

157. To answer the council specifically,

- (i) Failure to assess heritage assets is not "technical".
- (ii) It is certainly not "harmless" – by definition the harm is the demolition.
- (iii) It is incorrect that none of the matters complained of could have altered the outcome if the issue is lack of proper consideration and assessment.
- (iv) The fact that the heritage bodies did not object is in fairness a factor but only of modest weight.
- (v) The fact that the wall was already substantially altered does not get the council very far when the critical part of the wall was not substantially altered and even the altered parts still have a distinct value (intact albeit at a lesser height and forming a visual continuum).
- (vi) It is incorrect that the conservation regime is secured by condition – the harm is demolition.
- (vii) The fact that the parking provision is equivalent does not address the heritage issue.
- (viii) Contrary to the council's submission, the matters are not of minor importance. As noted above, the town council itself identified the structures as worthy enough to be the subject of inclusion in a heritage trail and signs to that effect.
- (ix) It is also incorrect that there is no prejudice to the applicants – the prejudice is the demolition.
- (x) The suggestion that the alleged defects are isolated does not apply to this issue.
- (xi) The fact that the proposed development is supported by national and local planning policy is, potentially, a factor, but of limited weight seeing as that does not in itself support any particular detail of the development.
- (xii) The argument that quashing a beneficial active-travel amenity would be disproportionate does have quite a degree of weight but can be accommodated in the form of the order to an extent that would ensure that the outcome is as proportional as the circumstances enable.

158. Oddly enough (or tellingly, depending on your point of view), the council did not major on traffic safety under this heading, but traffic safety is a two-way street if one can mangle the metaphors. Anything can be made to look bad by comparison with a hypothetically perfect solution, but the appropriate comparison is always with the available alternative, not the perfect alternative. The proposition that, in effect, "the car park creates risk to greenway users therefore we need this project to eliminate that risk" is a logical fallacy, albeit a superficially attractive one. We need to compare the *status quo* with the appropriate counterfactual which is not some fantasy of zero risk but the proposed replacement of parallel parking on a road with significant vehicular movement, including lorries associated with the port. The idea of 28 parallel parking spaces on a busy road with

fast-moving traffic, including heavy vehicles coming to and from the port, is not so self-evidently less dangerous than the theoretical risk of a collision by a slow-moving reversing car at the car park as to make it hugely imperative that the court refuse relief on discretionary grounds. The map images show numerous signs at the *locus in quo* on Cork St warning of children at play and urging drivers to slow down – presumably they were not erected for no reason.

Form of order

159. While the applicants' pleadings challenge the permission overall, in oral submissions they clarified that they were not challenging the whole project but only part of it related to Passage West. Given the extent to which the heritage points have succeeded, one option would be to quash the decision insofar as it permits works within the ACA. I do not completely rule that out but provisionally and subject to submissions on the form of the order, that appears overly formalistic in the absence of demonstrated risk that the works adversely impact on structures of interest within the ACA such as the wall/stile/tower specifically. I was initially inclined to quash the permission from the point at which the railway wall starts and thereafter eastwards – chainage 1610 to 1780 (a length of 170 metres) but I will not express this in terms of a provisional conclusion at this point, in the light of the parties' positions, pending receipt of submissions.

160. Wherever the junction point is, the limited nature of the challenge allows me to permit an amendment under s. 50A(9) of the 2000 Act to facilitate a designed transition between the new and existing greenway at that point, a proposed order which again is subject to submissions.

161. At draft judgment stage the applicants commented as follows:

"We are agreeable to the Court's proposal to sever the planning permission. We endorse the suggestion as a practical approach. The proposed widening can proceed along most of the proposed route. It will tie into Cork City Council's proposed works for their stretch of the greenway. The existing path will be maintained only where the additional width would affect the heritage features identified in the judgment.

We appreciate the opportunity to offer a proposal for the transition between the widened and existing greenway.

Whilst accepting that Ground 6 has not succeeded, we remain uncertain as to the precise works permitted at Bridge 4 (the Wooden Bridge), given the discrepancy identified between the plans and particulars. Clarification on that point has been requested above (see para. 80). This clarification may assist in determining the form of order. If the plans are taken to govern and the bridge itself is not being widened, it seems to us that Bridge 4 would provide a natural transition between the new and existing greenway.

The heritage issues identified in the judgment arise within what could be considered as a continuous heritage corridor extending from Bridge 4 through the section containing the historic wall, stile and water tower.

Rather than quash all works within the ACA, we respectfully suggest that a transition point shortly beyond the water tower may be a practical and sensitive boundary. This would avoid drawing the line immediately beside the water tower itself and would place the transition before the next significant change in the alignment of the route. Based on the drawings submitted with the planning application (GA0012), we suggest that this transition point would be at approximately chainage 1800.

There is a second natural transition point shown on drawing GA0012 at the bend immediately beyond chainage 1820. If the Court considers it preferable to locate the severance point at an existing geometric transition in the route rather than shortly beyond the water tower, that location would also provide a practical boundary."

162. In the light of the parties' submissions I was minded to rephrase the proposed order in general terms and leave the form of the order for a future discussion.

163. I appreciate that severing a part of the permission is going to cause design issues, particularly in relation to the car park. In that regard there are no perfect solutions. It is not the function of the court to solve such problems but presumably I can be allowed to encourage the council to generate more options. As an example, apart from the project or the *status quo*, perhaps one could impose (by bye-law, signs or otherwise) a requirement to reverse into the existing parking spaces, although one might have to be willing to enforce that. The applicants in their submission called for the council to give effect to its already-articulated policy to acquire properties for use as car parking and to make other changes to paths, roads, traffic flow and so forth as previously intended by the council. I could add other possibilities like chicane/ alternate-flow traffic calming to create parking spaces (which might also assist with any speeding problem), but no doubt the council has thought of all of these already and can dismiss them if they think appropriate. In theory, alternatives are considered in the EIA process. However I don't see too many options in the EIA screening document or indeed any discussion of alternatives at all. Page 7 of that document q. 11 (p. 178 PDF of core book) in reply to cultural impacts refers only to habitats impacts. Page 9 q. 19 regarding cultural features is not immediately informative. The planning report (pp. 200-201, 204

of core book) does not take matters further related to the wall. Perhaps this is unduly optimistic but maybe a specific initiative of enhanced engagement with local stake-holders might illuminate routes towards greater consensus.

164. Finally as to remittal of any quashed portion, that would be presumptively appropriate if the council so requests, and therefore it is to be made clear that the order does not preclude that.

Summary

165. For the avoidance of doubt, preambular matters prior to the first heading of this judgment, and the following summary, do not take from the operative parts of the judgment and must be read in a sense consistent with those. In outline summary, therefore:

- (i) Core ground 1 – this is misconceived because there is no LAP.
- (ii) Core ground 2 – there is no obligation to have regard to non-statutory plans in general.
- (iii) Core ground 3 – in general and absent specific situations calling for engagement, CDP objectives do not require narrative discussion. The mandatory heritage objective HE 16-18 is addressed under core grounds 4 and 5.
- (iv) Core ground 6 – qualitative infirmities in application documentation should not generally be a basis for *certiorari* unless they compromise the process overall or are not addressed by the time of the final decision. Any infirmities here do not reach that level save insofar as this point overlaps with core grounds 4 and 5.
- (v) Core ground 7 – the decision gave the main reasons on main issues regarding traffic and parking.
- (vi) Core grounds 4 and 5 – it has not been established that the wall is part of the curtilage of the water tower. However, the decision did not engage with or comply with the development plan (particularly objective HE 16-18) in the manner required, drawing by analogy on *Sherwin v. An Bord Pleanála* [2024] IESC 13 (Unreported, Supreme Court, Woulfe J., 11 April 2024) (Charleton, O'Malley, Baker and Murray JJ. concurring), did not adequately consider the impact on the tower as a protected structure, particularly the loss of symmetry, did not engage relevantly with ministerial guidelines given their relevance to a main issue, and did not comply with a reasoning process that was robust in administrative law terms regarding the proposed demolition of the wall/style.

Order

166. For the foregoing reasons, it is ordered that:

- (i) subject to submissions on the form of the order and to the proposed order under s. 50A(9) of the 2000 Act, there be an order based on relief 1 claimed in the statement of grounds by way of an order of *certiorari* removing for the purposes of being quashed the order of the respondent (ABP-321292-24) made on 7 July 2025 granting permission with conditions under section 177AE of the Planning and Development Act 2000, as amended, to the notice party for the upgrading of an existing 2-kilometre-long pedestrian and cycle route in the townlands of Ardmore and Pembroke, Passage West, Co. Cork, in part only, namely such part of the order as may be agreed or directed by the court following further submissions consistent with the judgment;
- (ii) subject to submissions on the form of the order, if requested by the council, there be an order providing for an amendment under s. 50A(9) of the 2000 Act in such terms as may be agreed or directed by the court following further submissions consistent with the judgment, noting that the council's position on remittal is reserved at the present time;
- (iii) unless any party otherwise applies by way of written legal submissions prior to the mention date, the foregoing order be perfected forthwith thereafter on the basis of an order for expenses (including reserved expenses) being awarded to the applicants against the respondent, insofar as concerns the relief against the first named respondent;
- (iv) any issue as to the extent of such expenses be determined, in default of agreement, by way of legal costs adjudication;
- (v) for the avoidance of doubt, the order for expenses shall include an order for the expenses (and costs, if incurred) of legal costs adjudication;
- (vi) there be no order as to costs in favour of or against the notice party;
- (vii) for the avoidance of doubt, any unsuccessful application to vary any provisional order as to costs proposed in this judgment may be addressed pursuant to O. 103 r. 40(4) RSC; and
- (viii) the matter be listed on 09:30 on Monday 6 July 2026 to confirm the foregoing.