AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No. 2025/89

[2026] IESC 36

O'Donnell C.J.

Woulfe J.

Hogan J.

Murray J.

Donnelly J.

BETWEEN/

PAT O'DONNELL AND COMPANY

Applicant/Respondent

-and-

DUBLIN CITY COUNCIL

Respondent/Appellant

-and-

UNIPHAR GROUP PLC

Notice Party

JUDGMENT of Mr. Justice Woulfe delivered on the 2nd day of July, 2026

Introduction

1. Dublin City Council (the "appellant") appeals against the judgment of the High Court (Holland J.) delivered on the 26th November, 2024, and his order made in consequence thereof on the 7th April, 2025. The High Court made an order of *certiorari* quashing the decision made by the appellant on the 2nd November, 2022, to adopt the Dublin City Development Plan 2022-2028 (the "Development Plan") in so far as it adopted a material alteration to the prior draft Development Plan, namely MA D-0004 (the "material alteration"), which provided for a change of zoning of lands owned by the notice party at Chapelizod, Dublin 20, (the "Uniphar site"), from Z6 (Employment/Enterprise) to Z10 (Inner Suburban and Inner City Sustainable Mixed-Uses).

2. The Development Plan process includes a report by the Chief Executive (the "CE") on any submissions or observations received with regard to any proposed material alteration to the draft Plan. Section 12(8)(b) of the Planning and Development Act, 2000 (the "2000 Act") stated that this report shall list the persons or bodies who made submissions or observations, provide a summary of the submissions or observations made, and give the response of the CE to the issues raised. In the present case the CE report did not list Pat O'Donnell and Company (the "respondent") as a person who had made a submission on the proposed material alteration, but instead listed the respondent's planning agent, as "Doyle Kent Ltd", who had prepared and made the submission for the respondent.

Background

3. The Uniphar site lies contiguous to lands owned by the respondent (the "Pat O'Donnell lands"). A map of the lands in question can be found at page 6 of the High Court judgment ([2024] IEHC 671).

4. The Pat O'Donnell lands are used for business purposes by the respondent, who is a major supplier of heavy construction plant, machinery and equipment. It operates its purpose-built industrial headquarters, including training, repair and maintenance facilities, on the Pat O'Donnell lands, and employs 100 staff, 75 of whom generally operate from the Pat O'Donnell lands. It uses the strip of land east of the Uniphar site to store plant and machinery, including large machinery, and for machinery demonstration and testing. Furthermore, it uses the lands immediately adjoining the northern boundary of the Uniphar site for outside storage of heavy buckets and other attachments associated with heavy machinery.

5. The respondent has previously asserted (in a submission to the appellant dated August, 2020) that it operates on a 24-hours a day basis in order to cater for urgent work and that its operations can be intrusive, especially at night, due to the noise of deliveries, equipment, alarms, and vehicles. It states that its operations are incompatible with adjacent residential use, and that complaints by residents on the Uniphar site would be inevitable. In addition, it asserts that it previously had to relocate from another location to the Pat O'Donnell lands for this very reason, and that to do so again would involve an estimated gross cost of €15,000,000.

6. On the 31st August, 2022, Doyle Kent Planning Partnership Limited (the respondent's planning consultant) made a submission on behalf of the respondent in respect of the proposed material alteration. The central basis on which the respondent opposed the rezoning was that residential use of the Uniphar site would be incompatible with the existing use of the Pat O'Donnell lands, for the reasons set out above. On the 21st September, 2022, the CE report on the submissions received on the proposed material alterations to the draft Development Plan was published. Of note is the fact that, in Part 5 of the CE report (entitled "List of the Persons or Bodies Who Made

Submissions/Observations”), the respondent was not named as the party who made the submission. Instead, it was stated that the submission was submitted by “Doyle Kent Ltd”, described as “Organisation”.

7. On the 2nd November, 2022, the appellant decided to adopt the Development Plan which included the proposed material alteration (the “impugned decision”). The respondent subsequently sought relief by way of judicial review.

The High Court

8. In a judgment delivered on the 26th November, 2024 ([2024] IEHC 671), the High Court (Holland J.) found in favour of the respondent, and granted *certiorari* quashing the impugned decision. Holland J. held that s. 12(8)(b)(i) of the 2000 Act imposed a mandatory obligation on a CE to list, in his or her report, the persons and bodies who have made submissions, and to do so by the name of those persons specifically rather than by the name of their planning agents. He set out a number of reasons for this finding, which included the following.

9. Firstly, relying on *Heather Hill v. An Bord Pleanála* [2022] IESC 43 (“*Heather Hill*”), Holland J. held that the above seemed to him to be the plain, ordinary, and literal meaning of s. 12(8)(b)(i). Secondly, he held that the word “shall”, as it appeared in s. 12(8)(b)(i), should not be read to mean “may”, given that similar obligations under s. 179(3)(b) of the 2000 Act were held to be mandatory in *Griffin v. Dublin City Council* [2020] IEHC 507.

10. Thirdly, Holland J. was of the view that a considerable purpose of the statutory list is to make the elected members properly aware of who, among their constituents and local employers (not excluding others), has made submissions. He referred to the fact that the CE report had addressed over one thousand submissions on material alterations, and stated that an elected member simply cannot master them all. He held that there can be no doubt but that the list, in a report of the CE proffered to the elected members, is intended to enable the elected member to locate, from amongst such a volume of submissions, the particular submissions which are of interest to him or her. He had no doubt that the name of the person who made the submission was valuable to that end. Given that many planning consultants will have made multiple submissions on behalf of different clients on different subject-matters, he felt that the value in terms of alerting the elected members most obviously lies in the name of the person on whose behalf the submission was made.

11. Fourthly, it seemed to Holland J. obvious as a matter of substance that the person to be identified is the person whose substantive interest (using the word "interest" in its broadest sense) is advanced in the submission. It is the person who wants to be heard and whose right of public participation is being exercised who should be identified in the list. He noted that it is trite law that the act of an agent, such as here a planning agent, is in law and in substance the act of its principal, citing *Dalton v. An Bord Pleanála* [2020] IEHC 27.

12. Holland J. did not think it relevant here to observe as he said Hogan J. correctly did in *Killegland Estates Ltd v. Meath County Council* [2023] IESC 39 ("*Killegland*") (at para. 84), that "…questions of the identity of the owner of lands are in general an irrelevant consideration in planning matters. Planning and zoning decisions should, generally speaking, at least, be blind as to issues of ownership". He held (at para. 64(b)) that what he described as "that explicitly general observation" must yield to the inevitable conclusion that, in the specific matter of listing persons who have made submissions, the Oireachtas by s. 11(4) and s. 12(4) and (8) explicitly made exceptions to that general rule as to CE reports on submissions, respectively in the Development Plan review process, on draft Development Plans, and on proposed material alterations. He stated that there were multiple other similar provisions in the 2000 Act.

13. The trial judge rejected the alternative submission suggested by the appellant, that the purpose of the list was that of a checklist to ensure that every submission was addressed in the CE report. He confessed that he was not entirely clear how reliably the list would perform that function, but he did not rule it out as a subsidiary purpose to assist the CE in performing his or her function in compiling the report. However, he held that the report, by statute, spoke primarily to elected members and the primary function of the list must be ascertained from that perspective.

14. Accordingly, Holland J. concluded that s. 12(8)(b)(i) imposed a mandatory obligation on a CE to list by name the principal who has made a submission, rather than his or her agent. He held that it followed that there was a breach of that obligation in this case in that "Doyle Kent Ltd." was listed rather than "Pat O'Donnell and Company". He was in no doubt that, in law and in substance, whatever about in form and in the context of agency, the "person or body" which was to be listed in the CE report was the respondent and not Doyle Kent. He contrasted the listing of Doyle Kent's name in the September, 2022 CE report list with the use in the CE report of February, 2020 of the helpfully informative formula "Doyle Kent Planning Partnership Ltd for Pat O'Donnell" and various others in similar form.

15. Holland J. went on to consider whether a breach of a mandatory statutory obligation can be excused on a *de minimis basis,* and he held that it must be shown that the obligation has been substantially complied with, citing *Monaghan Urban District Council v. Alf-a-Bet Promotions Ltd* [1980] ILRM 64 ("*Alf-a-Bet*"). He then reviewed some of the authorities dealing with the application of the *de minimis* rule as described in *Alf-a-Bet*.

16. One such authority was *Byrnes v. Dublin City Council* [2017] IEHC 19 ("*Byrnes*"), which concerned another provision in the 2000 Act which required the CE in a report to "list the persons or bodies who made submissions or observations". In *Byrnes* the list was entirely missing from the CE report, but the omission was described by Baker J. (at para. 126) as "minor and trivial", and she refused relief in the exercise of her discretion. In his judgment in this case Holland J. confessed to finding the decision in *Byrnes* "difficult", but he went on to find it distinguishable on its facts.

17. Holland J. also cited authority to the effect that it is difficult to apply the *de minimis* principle where the public authority is given no discretion in the performance of an obligation under a statutory provision. He stated that the appellant in the present case had no discretion whether to list the respondent as having made a submission.

18. The trial judge referred to the appellant's submission that even if it breached its listing obligation, relief should be refused on a discretionary basis as the breach was *de minimis* and merely formalistic. It seemed to him that, as the appellant was given no discretion in the performance of the obligation, it was difficult to apply the *de minimis* principle to a breach of that obligation. Amplifying that difficulty was the fact that, as to a particular listing of a person or body, compliance or non-compliance was, at least usually, a binary issue.

19. Holland J. noted the appellant's argument that nothing turns on the error, as the respondent's submission was considered by "the Council" and is expressly summarised in the CE report. He stated that this ambiguous observation failed, in referring to "the Council", to distinguish the Executive of the appellant from its elected members. While it was true that the respondent's submission was considered by the Executive, the function of the list was to inform specifically the elected members.

20. As regards the issue of prejudice caused by reason of the error, Holland J. stated that he was applying the view expressed by Finlay Geoghegan J. in *O'Connor v. An Bord Pleanála* [2008] IEHC 13, where she said that the Court had no discretion to excuse the non-compliance with the statutory requirement in that case, on the basis of an alleged absence of prejudice to the applicant or any other person. However, if to any extent prejudice could be relevant, he felt it was also relevant that the respondent was saying that the elected members of the appellant were, in breach of an express statutory requirement, disadvantaged in their appreciation of the information in reliance on which the respondent sought to persuade them of its view. He noted that there was no evidence that any members had actually read the respondent's submission.

21. For the foregoing reasons, Holland J. concluded that the appellant's breach of the obligation to list the respondent as having made a submission, with regard to the material alteration, could not be excused as *de minimis*. He considered whether a declaration of the appellant's breach might suffice, but in the end decided it would not. Accordingly, he decided to quash the impugned decision by reason of the failure to list the respondent by name.

Determination

22. The appellant was granted leave to appeal the High Court decision to this Court by a determination dated the 29th September, 2025 ([2025] IESCDET 118). Prior to their application to this Court, the appellant had sought leave to appeal to the Court of Appeal, and the High Court certified that such leave should be granted in respect of three questions as set out in the schedule to the High Court order dated the 7th April, 2025. The three questions were as follows:

"(i) What is the purpose/intention of the statutory requirement under section 12(8)(b)(i) of the Planning and Development Act 2000, as amended, for the Chief Executive's report to list persons who made submissions on proposed material amendments to a development plan and in the light of such purpose, is section 12(8)(b)(i) satisfied by listing an agent who lodged the submission?

(ii) Is a breach of a mandatory statutory obligation to list persons who made submissions, in and of itself and without more, incapable of being treated as a de minimis breach because the obligation is mandatory such that the listing of an agent cannot amount to substantial compliance with s. 12(8)(b)(i) of the Planning and Development Act 2000 as amended?

(iii) What principles are to be applied in assessing whether a breach of a statutory requirement under the Planning and Development Act 2000 as amended is to be treated as de minimis and/or whether such breach goes to certiorari of a decision?"

23. This Court was satisfied that the matters raised in the three questions proposed by the appellant constituted matters of general public importance. In particular, the Court found that the question of what principles are to be applied in assessing whether a breach of a statutory requirement under the 2000 Act is to be treated as *de minimis* has potentially far-reaching implications for the planning process, as it is likely to impact upon future planning decisions which contain errors similar to the one in question in these proceedings. The Court was also satisfied that the threshold of exceptional circumstances to warrant a direct appeal to this Court had been met in this case, where the nature of the issues for determination was such that there was an inevitability or strong probability of the case ending up in this Court.

Submissions in this Appeal

Submissions of the Appellant

24. The appellant submits that it is a point that bears emphasis that there was no pleaded case nor any evidence that the alleged breach of the listing requirement under s. 12(8)(b)(i) had any effect or consequence on the subsequent process or the impugned decision. To the contrary, it submits, the High Court upheld as adequate the summary of the respondent's submission and the response to same contained within the CE report which had been placed before the elected members. It considers it appropriate to address the three questions in a different sequence.

First Question: "What principles are to be applied in assessing whether a breach of a statutory requirement under the 2000 Act is to be treated as de minimis and/or whether such breach goes to certiorari of a decision?"

25. The appellant submits that certain of the existing case law has evinced a confusion and conflation of three interrelated, albeit distinct, concepts. It submits that the first matter, relating to whether a requirement is mandatory or directory, involves discerning the intention of the Oireachtas regarding the function and purpose of any statutory requirement. It is submitted that the second matter, relating to substantial compliance and *de minimis*, relates to the extent of deviation from the statutory requirement. The third matter, it is submitted, relates to the Court's function in judicial review as to whether to grant or refuse relief. The appellant contends that whether a requirement is mandatory or directory is a matter of discerning the intention of the Oireachtas regarding the function and purpose of that statutory requirement, and that this involves a consideration of the context in which the requirement appears. It is submitted that substantial compliance and *de minimis* relates to the extent of any *breach* of such statutory requirement. Regarding the discretionary grant/refusal of relief, the appellant contends that while in conducting this function a Court will be informed by the first two matters, it nonetheless retains a discretion in judicial review to take into account broader considerations, which relate to the particular circumstances of the case.

26. In the appellant's submission, in the planning context it is evident that in certain of the caselaw the discussion around whether a statutory requirement is mandatory or directory often involves an element of circularity by referring to the language used by the Oireachtas, in particular the word "shall". However, they contend, statutory requirements by their nature are typically phrased in terms of "shall" and, therefore, over-focusing on a single word as opposed to purpose and context is not consistent with the approach to statutory interpretation outlined in *Heather Hill*, at paras. 105 to 116. The appellant contends that the trial judge over-focused on the use of the word "shall" and attributed a purpose to the provision which was not warranted having regard to the broader context.

27. Whilst noting that each case depends on its individual circumstances, the appellant submits that the principles to be applied in assessing whether a breach of a statutory requirement under the 2000 Act is to be treated as *de minimis* and/or whether such breach goes to *certiorari* may be categorised under five broad headings, as follows.

(1) What is the purpose and significance of the requirement in the context of the statutory scheme?

28. The appellant submits that this question involves consideration of the nature and purposes of the requirement in the context of the statutory scheme, citing *The State (Elm Developments Limited) v. An Bord Pleanála* [1981] ILRM 108 ("*Elm Developments*"), and that a consideration of the requirement's context involves taking into account the objectives and purpose pursued by the Act. It refers to *Alf-a-Bet* and submits that where, as a matter of interpretation, a statutory requirement is construed as being necessary, only *de minimis* or trivial matters may be overlooked. However, it contends, the corollary of this is that if the intention of the Oireachtas is that a requirement, when taken in context, is not necessary, then more latitude is allowed; then a matter may be overlooked even if the deviation is not trivial or insubstantial.

(2) Whether the extent of the deviation from the requirement is significant?

29. The appellant submits that this question involves a fact-specific analysis as to the extent to which there has been a deviation from the requirement. It further submits that this analysis may involve a consideration of whether there has been a total breach and no compliance at all with the requirement, or a substantial breach and some compliance with same, or a partial breach and substantial compliance. It notes that the trial judge considered that naming the agent who made the submission as opposed to the principal to be total non-compliance with the requirement to list, and submits that this was not correct, even if the Court was correct in considering that the principal was required to be named.

(3) Whether the Oireachtas has expressly prescribed the consequences of non-compliance, such as invalidity or not resulting in invalidity?

30. The appellant notes that legislation may itself specifically state the consequences of non-compliance, which may include stating that same will result in invalidity, or that it will not, and it gives examples of both situations.

(4) What are the consequences (if any) of the breach including whether and the extent to which the rights and interests of a person or the public have been adversely affected or prejudiced?

31. The appellant submits that, assuming the consequences of non-compliance have not been expressly prescribed, a consideration of the extent of any adverse effects or prejudice to the rights or interests of any parties or the public as a whole may be warranted. It provides a non-exhaustive list of examples of possible consequences: did the breach adversely affect the rights of the judicial review applicant in the decision-making process? Did the breach impede or prejudice the participation by the judicial review applicant in the decision-making process? Did the breach negatively impact effective public participation in the decision-making process? Did the breach cause or give rise to other errors or legal infirmity in the decision-making process?

(5) Taking into account the previous stated principles and all the circumstances of the case, whether, in the interests of justice, certiorari should be granted or whether relief should be refused or a relief other than certiorari such as declaratory relief is appropriate.

32. The appellant notes that it is settled law in judicial review that both the granting of a remedy and the particular remedy to be granted are discretionary matters. It submits that whether the breach of the requirement is considered to be *de minimis* may often point to what is the appropriate remedy. It also submits that there is nothing in the 2000 Act which displaces the discretionary nature of judicial review. Furthermore, this principle also involves a consideration of the consequences of granting *certiorari*. However, the appellant accepts that this discretion is not open-ended and it must be exercised either within the framework of recognised categories of cases, or by reference to an identified principle.

Application to the Facts

33. The appellant submits that the application of the above principles to the facts of this case serves to demonstrate that the High Court erred in granting *certiorari*. As regards the first principle, it submits that the High Court erred in its conclusions as to the nature and purpose of the requirement in s. 12(8)(b)(i) of the 2000 Act. It submits that the High Court's view as to the purpose of the listing requirement is without supporting authority, and is inconsistent with the general legal position that the identity of persons is irrelevant to proper planning and sustainable development. Referring to the specific context of this case, the appellant submits that the Draft Plan addressed 4,323 submissions, and 1,096 submissions were received in relation to the material amendments. It states that, considering the volume of submissions, there is considerable scope for administrative errors such as a listing of a person. It is submitted that, when set within the scheme of the making of the development plan, it is difficult to see how the requirement to list a person could be considered integral to the scheme, in particular where the submissions were otherwise adequately summarised and responded to in the CE report.

34. As regards the second principle, the appellant submits that the High Court erred in attaching significant weight to the naming of the person who made a submission, and in rejecting the argument that naming the planning agent could amount to compliance or substantial compliance with the requirement. It is submitted that the High Court also erred in ascribing significance to the purpose of the requirement to name the person who made the submission. As regards the third principle, the appellant submits that this does not arise since an outcome is not prescribed by the Oireachtas.

35. As regards the fourth principle, the appellant submits that the High Court erred as there were no consequences. It is said that the error as found by the High Court made no difference at all in terms of the substantive planning consideration of the submission, which was accurately summarised in the CE report.

36. As regards the fifth principle, the appellant submits that the approach of the High Court was inconsistent with the proposition that decisions should not be quashed over errors that make no difference. It submits that there is ample authority for the proposition that decisions should not be quashed on this basis, and that the High Court erred in failing to properly engage with and/or reflect this line of authority in its judgment.

Second Question: "What is the purpose/intention of the statutory requirement under s. 12(8)(b)(i) of the 2000 Act for the Chief Executive's (CE) report to list persons who made submissions on proposed material amendments to a development plan and in the light of *such purpose, is s. 12(8(b)(i) satisfied by listing an agent who lodged the submission?"*

37. The appellant submits that the High Court erred in its interpretation of s. 12(8)(b)(i), in concluding that the identity of the person making a submission essentially served a *planning* purpose, in so far as it alerts elected members to examine particular submissions due to the identity of the person making the submission, as potentially containing matters of importance to the Development Plan and proper planning and sustainable development.

38. In relation to s. 12(8) of the 2000 Act, the appellant submits that there are a number of observations which might be made. Firstly, the requirement to list the persons who made submissions was one of three interrelated requirements in the CE report, and so is not to be read in isolation from the requirements to summarise and respond to the submissions made. Secondly, the most reasonable interpretation of the requirement to summarise the submissions is that, considering the likely volume of submissions, the limited timeframe and broad policy exercise in making the Development Plan, that a summary, as opposed to a *verbatim* recitation, was an adequate and appropriate means of conveying to elected members the planning considerations raised.

39. Thirdly, it is submitted, when this provision was introduced as a provision of the 2000 Act, there was no obligation to make available the submission itself on the website or otherwise. This obligation was subsequently added by way of amendment in the Planning and Development (Amendment) Act 2018, which inserted s. 12(8A) into the 2000 Act. Therefore, in so far as the trial judge found the purpose of the listing was to facilitate the elected members' consideration of whether the submissions deserved further consideration, the statutory provisions in place at the time did not facilitate this. While a statutory amendment was subsequently introduced, this cannot be used to retrospectively interpret the original purpose of the listing of names in the original version of the legislation.

40. Fourthly, it is submitted, there are obvious potential difficulties in attributing a significant planning purpose to the listing requirement. Apart from the potential for simple administrative error due to the volume of submissions, submissions from the public will often be handwritten, in which case it may be difficult to decipher names, and it is also possible that no name will be provided in some instances. Finally, the listing of names in the CE report was part of one step in a number of steps in the process of the making of a development plan.

41. The appellant contends that the High Court erred in rejecting its interpretation of s. 12(8)(b)(i), which is that the provision was intended to serve the administrative purpose of recording, verification and transparency, and to show that a submission was taken into account in the preparation of the CE report. It contrasts the making of a submission on a development plan with a submission made on a planning application. Unlike the latter, there is no fee for making a submission on a development plan, and no procedure for a formal acknowledgement of receipt of a submission. Therefore, the appellant submits, the listing of the names in the CE report was the only formal recording of the receipt of submissions from a person. The CE report listing therefore served this function in the absence of a requirement to acknowledge receipt of a submission, which would be too onerous, expensive and impractical.

42. The appellant submits that the listing requirement under s. 12(8)(b)(i) must be construed in light of the 2000 Act as a whole, and that personal considerations, including the identity of persons, are not treated as relevant planning considerations in either the 2000 Act or the planning code. It submits that the High Court's interpretation was erroneous in failing to recognise that the content of a submission, as opposed to the identity of the person making it, is what is of relevance, and was inconsistent with the principle that each submission is to be treated equally, as opposed to some deserving more consideration than others due to the identity of the person who made the submission. The appellant contends that, in so far as the purpose of the listing requirement is an administrative purpose linked to the summary of the submissions, such purpose was met in substance by the Council by listing the respondent's agent. It submits that it was correct, in fact, to list that the agent made the submission.

Third Question: "Is a breach of a mandatory statutory obligation to list persons who made submissions, in and of itself and without more, incapable of being treated as a de minimis breach because the obligation is mandatory such that the listing of an agent cannot amount to substantial compliance with s. 12(8)(b)(i) of the 2000 Act?"

43. The appellant submits that the correct answer to this question is "no". It argues that the trial judge's reasoning is wholly incompatible with the finding of Henchy J. in *Alf-a-Bet* (at 69) which, it submits, expressly states that mandatory obligations can be overlooked where the non-compliance is *de minimis*. It submits that the High Court was incorrect to consider that the naming of the respondent's agent amounted to complete non-compliance with the listing requirement, when there is manifestly a material difference between omitting to list any person at all and listing the agent who lodges the submission.

44. The appellant submits that the trial judge incorrectly sought to distinguish *Byrnes,* and argues that *Byrnes* involved the same statutory language/requirement as that in issue in the present case, and that the breach in *Byrnes* was more significant. In so far as the trial judge summarised certain comments of Baker J., the appellant submits that these were taken out of context and were not offered by Baker J. as a reason for why she considered the absence of any list of any persons who made submissions to be minor, trivial or technical.

45. The appellant notes that the trial judge considered (*e.g.*, at paras. 90, 91, 93, and 98) that the failure to list the respondent by name in some sense bore upon, undermined, or affected the elected members' consideration of the CE report and the submission of the respondent as summarised, as well as the CE's response to same therein. In the appellant's submission, the trial judge erred in this regard as, it submits, there was no evidence *at all* that that was the case, and no pleaded allegation was advanced to that effect. It is submitted that, had it been pleaded by the respondent that the elected members' substantive consideration of the respondent's submission was unlawfully impaired by reason of the breach of the listing requirement, the appellant would have responded to that case. Furthermore, the appellant submits that the respondent has not adduced any evidence that the breach of the listing requirement impaired the elected members' substantive consideration of the submission, or the summary or the CE's response to same.

46. The appellant submits that, in the particular context of judicial reviews regarding development plans, the approach of the High Court in granting *certiorari* for what is, in their submission, a trivial matter, is inconsistent with the approach followed in *Killegland* and *McGarrell Reilly v. Meath County Council* [2023] IESC 40, where latitude was given to the planning authority due to the scale, timeframe, and nature of the development plan making process. In the appellant's submission, the logical outworking and implication of the trial judge's approach leads to an unworkable system whereby mere inadvertence in omitting to list a person, misstating or misspelling a name, a name being illegible, or the naming of an agent, means that a subsequent decision, including the adoption of a development plan, could be determined to be invalid and liable to be quashed on this basis alone, without any other legal infirmity in the decision or decision-making process and without such inadvertent error making any difference to the decision.

Submissions of the Respondent

First Question: Principles in assessing whether a breach of a statutory requirement is de minimis

47. The respondent refers to Hogan, Morgan and Daly, *Administrative Law in Ireland* (5th ed., 2019, para. 12-68), where the authors state that "[w]hen the Oireachtas stipulates that certain formal and procedural requirements must be observed before an administrative decision is arrived at, it rarely states what consequences follow non-compliance with these statutory requirements." The authors suggest (at para. 12-69) that while there are exceptions to this general observation, including in the context of the planning code, "the courts are, for the most part, left to their own devices as far as the consequences of non-compliance with procedural requirements are concerned".

48. The respondent notes that the authors of *Administrative Law in Ireland* suggest an analytical framework which may be helpful in determining whether a failure to comply with a statutory or regulatory provision will invalidate a decision (at para. 12-75):

> "A court addressing this issue will have to ask two questions. First, was the provision mandatory or directory? Secondly, should the violation of the provision be tolerated or not? The first question is essentially an exercise in discerning legislative intent, in the abstract; the second more a matter of judicial policy as applied to the facts of particular cases."

The respondent then proceeds to examine these two issues in turn.

(i) Is the requirement in s. 12(8)(b)(i) mandatory or directory?

49. The respondent states that, in determining the question of whether the Oireachtas intended the provision to be treated as mandatory or directory, several considerations must be taken into account, including statutory language, fair procedures and the protection of personal interests, constitutional rights, the centrality of the provision to the statutory scheme, and statutory purpose. It submits that the language and syntax used in s. 12(8)(b) (*i.e.*, "*a report under paragraph (a) shall…list the persons or bodies who made submissions or observations under this section*") is clearly mandatory. The respondent refers to *Heather Hill*, where Murray J. summarised the essential points of the approach to be taken by the courts in interpreting statutory provisions, including (at para. 106) that "[t]he first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning". It submits that the words of s. 12(8)(b)(i) are thus to be given primacy, and that their "ordinary and natural meaning" imposed a mandatory obligation on a CE to list, in his or her report, the persons and bodies who have made submissions or observations on material alterations.

50. The respondent further submits that the context in which s. 12(8)(b) is posited impels a court to the same conclusion. The term "context" is to be given a broad meaning which includes, but is not limited to, the legal context which, by definition, includes relevant constitutional provisions. Furthermore, it is contended, the Oireachtas is taken to have intended that proceedings, procedures, discretions, and adjudications which are prescribed by an Act are to be conducted in accordance with the principles of constitutional justice. Therefore, the respondent submits, the context of interpreting s. 12(8)(b) must involve a fair and proper opportunity being afforded to persons or bodies to make submissions or observations, and to have those considered by the decision-maker prior to the making of any decision.

51. The respondent submits that, when read purposively, the requirement to list "the persons or bodies who made submissions" required listing the person on whose behalf the submission is made, and not the name of an intermediary. In its submission, where an agent files numerous submissions or observations on behalf of different persons or bodies, listing the name of the agent obscures the identity of the person or body on whose behalf the submission is made. Furthermore, the respondent submits, the appellant's contrary contention is undermined by listing (in the CE report dated the 29th April, 2022) the notice party as a person who made a submission on the draft Development Plan, rather than the agent who lodged the submission on its behalf.

(ii) Is the breach of the requirement in s. 12(8)(b) to be excused?

52. The respondent cites Henchy J.'s formulation of the *de minimis* rule in *Alf-a-Bet* (at 69), and also refers to Clarke J.'s statement in *Ballyedmond v. Commission for Energy Regulation* [2006] IEHC 206 (at para. 4.3) to the effect that any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the court. It submits that there exists a body of caselaw which makes it clear that the court's jurisdiction to excuse or waive a breach of a procedural requirement of planning law prescribed by legislation is "severely limited", citing, by way of example, *Southwood v. An Bord Pleanála* [2019] IEHC 504 ("*Southwood*") (at para. 34). To this end, the respondent also relies on *McAnenley v. An Bord Pleanála* [2002] 2 IR 763, where Kelly J stated (at 766) that "[i]t is difficult to treat non-compliance with an express statutory requirement on a *de minimis* basis."

53. The respondent submits that, against these principles, it is difficult – to say the least – to conceptualise the appellant's non-compliance with the statutory requirement to list the persons who made submissions as *de minimis*. It submits that the purpose of listing the names of those persons or bodies who make submissions was to alert the decision-makers, *i.e.* the elected members of the Council, to the identity of the persons or bodies who made such a submission. Furthermore, it submits, it is no answer to non-compliance with this statutory requirement for the appellant to submit that the elected members could have discovered that the respondent had, in fact, made a submission. It contends that the purpose of the express requirement in s. 12(8)(b)(i) was to ensure that persons or bodies who make submissions are identified in the CE report, which is a report submitted, pursuant to s. 12(8)(a), "to the members of the authority for their consideration". Accordingly, it is the members who are the decision-makers, and not the Executive of the Council.

The Appropriate Remedy

54. The respondent submits that the appellant is incorrect in its contention that the trial judge erred in its consideration of the appropriate remedy. It notes that the trial judge (at para. 100) expressly stated that he considered whether declaratory relief would have sufficed but decided, having considered six different issues arising in the circumstances of this case, to make an order of *certiorari*. In any event, it submits, the breach of the statutory requirement in this case was not a "harmless error", and this is not a case of "no difference" or disproportionate relief.

55. The respondent submits that, in circumstances where there is no statutory obligation placed on the members of a planning authority to consider the individual submissions made on material alterations (as opposed to the CE report summarising same), the mandatory requirement to list, by name, the persons or bodies who made submissions was of considerable practical significance, once the purpose served by the requirement is considered. It concludes that the appellant has not established any error on the part of the trial judge in the exercise of his discretion to make an order of *certiorari*.

Second Question: The Purpose/Intention of the Requirement in s. 12(8)(b)(i)

56. The respondent does not disagree with the proposition that the requirement to list the persons or bodies who made submissions should be read with the two other requirements contained in s. 12(8)(b) (*i.e.*, the requirements to summarise the submissions made, and the requirement to respond to same). However, it submits that compliance with two requirements of s. 12(8)(b) does not excuse non-compliance with the third.

57. The respondent refers to the appellant's submission that the interpretation of the trial judge is "inconsistent and incongruous with the general legal position that the identity of persons is irrelevant to proper planning and sustainable development", and that the trial judge erred in this regard, particularly in his consideration of *Killegland*. It submits that the trial judge carefully considered this contention and points to para. 64(b) of the High Court judgment. In any event, the respondent submits, the requirement to list under s. 12(8)(b)(i) did not require the members of the authority to give any particular weight to the nature of the persons or bodies who made such submissions. Rather, it submits, its purpose was to alert members of an authority as to the identity of persons or bodies, including those in their locality, who had made submissions regarding proposed material alterations of a draft development plan. In the respondent's submission, this statutory procedural requirement does not infringe the general principle that the identity of a person is not a proper planning consideration, as outlined by Hogan J. in *Killegland*.

58. In the respondent's submission, the listing of persons who made submissions by name enabled the elected members to consider whether to read individual submissions, so as to further consider the issues raised with regard to material alterations. It submits that the appellant incorrectly asserts that listing by name, rather than by agent, resulted in the conversion of the identification of the person or body who made the submission into a planning consideration.

59. The respondent contends that the submissions of the appellant in relation to "workability" are fatally undermined by the fact that the High Court's construction of the statutory wording – so as to require the listing of the persons who made submissions, rather than their agents – did not produce an unworkable interpretation. On the contrary, it submits, the CE report dated the 29th April, 2022, did list the persons and bodies who made submissions, with four times as many submissions involved there.

Third Question: Whether breach of a mandatory obligation is capable of being treated as de minimis

60. The respondent submits that it may not be necessary for this Court to answer this third question in order to determine the appeal. It notes that the trial judge stated (at para. 62) that whether the breach of a "truly mandatory" obligation will necessitate the invalidation of a decision will, in a given case, turn on whether the breach was *de minimis*. Furthermore, the trial judge held that "[t]he Oireachtas is taken to know the law – including that breach even of mandatory statutory obligations may be excused as *de minimis* if appropriate." Accordingly, the respondent submits, the premise upon which the High Court considered this issue was that a mandatory obligation may not, in every case, require invalidation.

61. If this Court does consider it necessary to answer this question, then the respondent submits the following:

(a) The focus of the appellant on whether the mandatory statutory obligation itself is *de minimis* is misconceived;

(b) Rather, the trial judge correctly decided (at para. 71) that, if mandatory, a statutory obligation cannot itself be *de minimis* and that only a breach of same can be *de minimis*;

(c) At the level of principle, a mandatory statutory obligation can, exceptionally, be treated as *de minimis*;

(d) However, a breach of a mandatory statutory obligation cannot, in and of itself and without more, be excused as a *de minimis* breach;

(e) Rather, in order to have a breach of a mandatory statutory obligation treated as a *de minimis* breach, "the person seeking to have it excused" – in this case, the appellant – must establish that the breach of the mandatory statutory obligation is "so technical, or so peripheral, or otherwise so insubstantial" that the mandatory statutory obligation has been "substantially, and therefore adequately, complied with"; and

(f) The mandatory statutory obligation in s. 12(8)(b)(i) is not "substantially, and therefore adequately, complied with" by listing an agent in the CE report, rather than listing the person or body who made the submission.

Decision

62. I propose to consider the three questions arising in the sequence set out in the High Court order dated the 7th April, 2025.

First Question: "What is the purpose/intention of the statutory requirement under s. 12(8)(b)(i) of the Planning and Development Act 2000, as amended, for the Chief Executive's report to list persons who made submissions on proposed material amendments to a development plan and in the light of such purpose, is s. 12(8)(b)(i) satisfied by listing an agent who lodged the submission?"

63. The principles governing statutory interpretation have recently been restated by this Court in *Heather Hill*. In his judgment for the Court Murray J. cited with approval the judgment of McKechnie J. in *The People (DPP) v. Brown* [2019] 2 IR 1, and he summarised the essential points which McKechnie J. had made as follows (at para. 106):

"(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning…

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including…LRC or other reports; and perhaps…the mischief which the Act sought to remedy'…

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language…

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted…"

64. In my opinion the application of the above principles leads to the conclusion that the correct interpretation of s. 12(8)(b)(i) is that listing *any* of the following, as the person who had made the submission, would amount to compliance with the statutory requirement: (a) the respondent's planning agent; (b) the respondent itself; (c) the respondent's planning agent on behalf of the respondent. This conclusion arises from both the ordinary and natural meaning of the words used in the statutory provision, and viewing those words in context.

65. As regards the ordinary and natural meaning of the words used in s. 12(8)(b)(i), the requirement was that the CE report shall "list the persons…who made submissions…under this section". In the present case the report listed the respondent's planning agent, as "Doyle Kent Ltd", who in one literal sense was the person who actually made the submission in question. However, as "Doyle Kent Ltd" made the submission as an agent on behalf of their principal, the respondent, the acts of the agent are also those of the principal, and the respondent can also properly be said to have made the submission. In the same way it would also have been correct to list "Doyle Kent Ltd" as having made the submission on behalf of Pat O'Donnell & Company.

66. In my opinion the above approach is consistent with the approach adopted in the recent decision of this Court in *Donegal County Council v. Quinn* [2025] IESC 19, where a somewhat similar issue arose, albeit under different legislation. In that case a firm of solicitors applied for the issue of a summons on behalf of their client, Donegal County Council, which was the party authorised by statute to prosecute the offence concerned. Section 1(6)(a) of the Courts (No. 3) Act, 1986 (as amended) provides that a summons shall "specify the name of the person who applied for the issue of the summons". An issue arose as to whether the requirement was to specify Donegal County Council, as prosecutor, or the firm of solicitors, as agent acting on behalf of that prosecutor.

67. In his judgment for the Court, Charleton J. held that the required specification may be of the prosecutor or of the agent acting on behalf of that prosecutor. He noted (at para. 35) that s. 1(3) of the 1986 Act gives a choice in express terms, whereby an application for the issue of a summons may be made "by or on behalf of" the person entitled to prosecute.

68. In his concurring judgment, Murray J. stated as follows (at para. 11):

"Before leaving this, it should be explained that in the course of the oral argument in this appeal the issue arose as to whether the "*person who applied for the issue of the summons*" referred to the prosecutor…or to the specific person (or entity) that undertook the operational act of seeking the summons. The case proceeded before the High Court on the basis that it was the latter. In fact, it seems clear to me that it referred to either and both. Prosecutors themselves can, of course, apply for the issue of a summons. Where they do so, they will be properly named as the person who made the application. As observed in the judgment of Charleton J., where an application is made for a summons by a firm of solicitors on behalf of a prosecutor the solicitors act as an agent for that client. So, they are the "*person*" who applies for the summons, but because they are doing so for, on behalf of and with the authority of the prosecutor, their application is that of the prosecutor and they also are the person that makes the application. A summons that identifies either (or both, as was the case here) is validly issued, and correct in form."

69. As regards viewing the words used in s. 12(8)(b)(i) in context, the relevant context appears to me to be the scale, timeframe and nature of the development plan making process. The making of a development plan is a very onerous undertaking for a planning authority, involving *inter alia* the processing of a large number of submissions from interested persons or bodies within limited timeframes.

70. In the present case 1,096 submissions were made on the proposed material alterations to the Development Plan. It was then necessary for the CE to prepare the report required under s. 12(8) of the 2000 Act, which had to be done "not later than eight weeks" after giving the required notice under s. 12(7) which notice *inter alia* invited submissions with regard to the proposed material alterations.

71. The s. 12(8) CE report was required not only to list the persons or bodies who made submissions, but also to provide a summary of the submissions made, and also to give the response of the CE to the issues raised. All of this had to be done in a period of less than eight weeks. In my opinion this contextual background is important in construing the nature of the listing requirement in s. 12(8)(b)(i). Any obligation to look behind the name of the person who actually made the submission in question, and to have to investigate whether that person made the submission as an agent or as a principal, could potentially impose an additional significant burden on the already heavily-burdened planning authority, and risk delay in complying with the s. 12(8) requirement.

72. In my judgment for this Court in *Save Cork City Community Association CLG v. An Bord Pleanála* [2024] 1 IR 205, I cited (at para. 60) the statement of Hogan J. in *Waltham Abbey v. An Bord Pleanála* [2022] 2 ILRM 417 (at para. 43) that "[t]here is clear judicial authority for the proposition that statutory provisions should be read, where possible, so as to produce a workable and coherent interpretation". In the present case the alternative interpretation of the listing requirement in s. 12(8)(b)(i), as suggested by the respondent, appears to me to go against a workable interpretation of the statutory scheme. On the other hand, the interpretation set out by me above appears to produce a much more workable interpretation.

73. In circumstances where the above exercise in interpreting the words used in s. 12(8)(b)(i), including interpreting them in context, does not yield any ambiguity, it may not be strictly necessary to seek to discern the intended purpose of the provision and the reasons why it was enacted. However, it may be useful to do so for completeness at this juncture, and in addition the purpose of the provision may well be relevant to the other questions arising.

74. As set out earlier in this judgment, the appellant submitted that the purpose of the listing requirement is the formal recording of the receipt of a submission, and to show that a submission was taken into account in the preparation of the CE report, in the absence of any procedure for a formal individual acknowledgment of receipt of a submission. The respondent, on the other hand, stands over the view expressed by the trial judge that the purpose of listing the names of those persons who made submissions is to alert the decision-makers, *i.e.* the elected members of the Council, to the identity of the persons who made such a submission in a manner which assists members to at least identify as worthy of examination certain submissions that may be of importance either generally to the development plan or to their local area.

75. I prefer the submissions of the appellant in respect of this issue, for the following reasons. Firstly, it seems to me that the purpose of the listing requirement is, on the face of it, administrative in nature, serving the non-planning purpose of formally recording who made submissions, in the absence of individual acknowledgement of each submission received.

76. Secondly, I accept the appellant's submission that the view expressed by the trial judge is inconsistent with the general principle that the identity of persons is irrelevant to proper planning and sustainable development. In *Killegland*, Hogan J. stated (at para. 84) that "[p]lanning and zoning decisions should, generally speaking, at least, be blind as to issues of ownership". While the trial judge described this statement as an explicitly general observation, and one capable of allowing for exceptions, it seems to me, with respect, that his view as to the "alerting" purpose of the provision is inconsistent with the principle that each submission in the development plan process is to be treated equally on the merits, as opposed to some deserving more consideration from the elected members than others due to the identity of the person making the submission.

77. Thirdly, and as noted by the appellant, in so far as the trial judge found that the purpose of the listing provision was to alert elected members to consider whether a submission deserved further examination, the legislation as enacted did not facilitate this. The original version of the legislation did not provide for making available the actual submission itself on the website or otherwise, and this was only provided for by way of amendment in the 2018 Act. The fact that there was no formal means of actually accessing such a submission appears to run counter to any "alerting" purpose of the listing provision.

78. Fourthly, the view expressed by the trial judge appears, with respect, to involve a large degree of speculation in the absence of any concrete evidence. It does appear to me notable that the respondent did not adduce any evidence from any elected member that the listing provision in fact served the "alerting" purpose relied upon.

79. In conclusion on this issue, therefore, it seems to me that the ordinary and natural meaning of the words used in s. 12(8)(b)(i) leads to the conclusion that the person to be listed was any of the following: the respondent's planning agent, or the respondent itself, or the respondent's planning agent on behalf of the respondent. This conclusion is also borne out by the statutory context, and if necessary also by considering the purpose of the provision.

Second Question: "Is a breach of a mandatory statutory obligation to list persons who made submissions, in and of itself and without more, incapable of being treated as a de minimis breach because the obligation is mandatory such that the listing of an agent cannot amount to substantial compliance with s. 12(8)(b)(i) of the 2000 Act?"

Third Question: "What principles are to be applied in assessing whether a breach of a statutory requirement under the 2000 Act, as amended, is to be treated as de minimis and/or whether such breach goes to certiorari of a decision?"

80. Given the above finding that there has been no breach of the statutory requirement, it is not strictly necessary to consider the second and third questions which are both premised upon such a breach arising. However, given that these questions were fully argued before the Court and involve matters of general public importance, I do propose to consider same. It seems to me that the two questions overlap and can be seen as arising within the umbrella of the more general question as to the Court's discretion whether to grant *certiorari* where there has been a breach of a statutory requirement under the 2000 Act, and as involving the possible relevance of factors such as whether the breach is a breach of a mandatory statutory obligation, and whether the breach is capable of being treated as a *de minimis* breach.

81. It is very well-settled law that both the granting of a judicial review remedy, and the particular remedy to be granted, are discretionary matters. The authors of Hogan, Morgan and Daly, *Administrative Law in Ireland* (5th ed., 2019) summarised the general position as follows (at para. 18-143):

> "The public law remedies, including the declaration and injunction, are all – and equally – discretionary remedies. It is, however, clear that this discretion is to be exercised on settled principles, regardless of the form of proceedings. In general, the Court will grant relief to a "person aggrieved" in respect of *ultra vires* administrative action in the absence of good reason to the contrary. In such circumstances, in the past, relief was said to issue *ex debito justitiae* (*i.e.* almost as a matter of right). It was true that the applicant's right to relief might be lost on account of his or her delay, bad conduct, etc but, generally speaking, this would only happen where to grant relief would prejudice the rights or interests of the administrative body concerned or third parties. This rule is, however, now generally regarded as somewhat inflexible and restrictive of the

extent of the Courts' discretion in relation to the granting of relief and it has been said that the Court must be satisfied 'not only as to matters such as default in the performance of a public duty and jurisdictional error, but also that it would be just and proper in the all the circumstances to grant [relief]'."

82. The effect of a breach of the planning legislation is clear in cases where express provision is made as to the effect of non-compliance, which may include stating that non-compliance will result in invalidity or will not in fact result in invalidity. An example of the former is Article 26 of the Planning and Development Regulations, 2001, which expressly provides that where a planning authority considers that a planning application fails to comply with certain procedural requirements set in the Regulations, the planning application "shall be invalid". An example of the latter is s. 12(16) of the 2000 Act, which provided that a person shall not question the validity of the development plan by reason only that certain procedures as set out under various subsections of s. 11 and s. 12 of the Act were not completed within the time required under the relevant subsection.

83. In many if not most cases, however, no express provision is made as to the effect of non-compliance with the statutory requirement, and it is left to the Courts to decide on the consequences of non-compliance, including in judicial review cases whether to grant an order of *certiorari*. One of the oldest authorities in this area is the 1980 decision of this Court in *Alf-a-Bet*, which concerned, *inter alia,* whether a planning application had been made in compliance with the then planning Regulations, and in particular with the Regulation which provided that the required newspaper notice "shall state…the nature and extent of the development".

84. In his judgment Henchy J. stated as follows (at 69):

"I do, however, feel it pertinent to express the opinion that when the 1963 Act prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or mediately in the Regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

85. The above passage shows the emergence of a distinction between what the Legislature has nominated as being obligatory, as opposed to merely directory, along with early references to the *de minimis* rule (albeit with perhaps a confused application of same), and to a principle of substantial compliance. The *Alf-a-Bet* decision was followed within a year by *Elm Developments*, which concerned the failure of an appellant to state the grounds of appeal as required by the relevant Regulations. The developer obtained a conditional order of prohibition against An Bord Pleanála hearing the appeal, but the High Court refused to make absolute the conditional order.

86. In his judgment for this Court dismissing the appeal, Henchy J. stated as follows (at 110):

> "Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word "shall"), should be treated by the Courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the Courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."

87. Henchy J. went on (at 110) to cite *Alf-a-Bet* as an example of non-compliance with a truly mandatory provision, which was "vital to the proper operation of the statutory scheme for the grant of development permission". He contrasted (at 112) this with the requirement of stating the grounds of appeal which was "essentially informative and directory, and therefore not mandatory". He concluded as follows as regards the developer's case (at 112):

> "In seeking an order of prohibition against the Board, he is endeavouring to benefit from what is no more than a technical breach of a regulation, which breach has been put right by the appellant and has been therefore rightly over-looked by the Board in the interests of justice."

88. The decision in *Elm Developments* highlighted the distinction between a provision which imposed a "truly mandatory" requirement and a provision which was "merely directory". The test suggested was whether the requirement might fairly be said to be an integral and indispensable part of the provision in question, in which case the Court would not excuse a departure from it, or whether what was apparently a requirement (because of the use of the word "shall") was in essence merely a direction which was not part of the substance of the scheme of the statute, in which case non-compliance might be excused. One might comment that the potential difficulty which remained after *Elm Developments* was applying that test in a particular case, as to whether a particular statutory requirement could be said to be an "integral and indispensable part of the statutory intendment".

Authorities since Elm Developments

89. The planning cases after *Elm Developments* did not always reduce to a black and white binary classification of a statutory requirement being either mandatory or directory. In *McAnenley*, the applicant had appealed a refusal of planning permission by the planning authority (the notice party) to the respondent, which upheld the decision of the notice party. He subsequently applied by way of judicial review for an order of *certiorari* quashing the respondent's decision on the grounds there had been a failure on the part of the notice party to comply with statutory requirements imposed on it in respect of the transmission of documents to the respondent, including a copy of the decision of the notice party. Kelly J. held that the statutory provision in question created a mandatory obligation on the planning authority, applying the passage from *Elm Developments* set out at para. 86 above. He noted the argument that the failure to comply with the statutory requirement should be excused on a *de minimis basis*, in circumstances where the respondent did have before it a copy of the notification to grant permission, as opposed to the decision itself.

90. Kelly J. held that it was difficult to treat non-compliance with an express statutory requirement on a *de minimis* basis. He accepted that the notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, Parliament had ordained that both should be provided to the respondent, and he could not disregard the statutory requirement. That was not to say that, notwithstanding non-compliance with the statutory requirement, "in an appropriate case *certiorari* might be withheld as a matter of discretion, if that were the only *lacuna* involved and no injustice would result" (at 766). But that was not the case here where the failure to submit a copy of the decision of the planning authority was not the only failure. In his view (at 768), there was "substantial non-compliance" with the obligations imposed on the notice party, and, given the *lacuna* he identified, the determination of the respondent would be quashed.

91. It can be noted from the above that Kelly J. found it difficult to excuse non-compliance with a statutory requirement creating a mandatory obligation on a *de minimis* basis, as he felt this would amount to disregarding the statutory requirement. However, he still felt that *certiorari* might be withheld even in a case of non-compliance with a mandatory requirement, as a matter of discretion. The factors going to the potential exercise of that discretion appear to have been whether the non-compliance was not substantial (which echoes what Henchy J. stated in *Alf-a-Bet*, and which might be seen as the opposite side of the same *de minimis* coin), and whether any injustice would result.

92. The next authority to consider is the 2002 decision of Ó Caoimh J. in *Ní Chonghaile v. Galway County Council* [2004] 4 IR 138. The applicant sought to judicially review a decision of the respondent to proceed with a housing scheme in County Galway. It was accepted that the respondent failed to comply with the relevant Regulations requiring a location map, with the relevant development area clearly outlined, to be available to the public in general. The respondent, however, submitted that the error was minor and that there was another map available.

93. It was submitted by the respondent that the High Court should exercise its discretion, and that the *de minimis* rule should be applied as the public were not misled and the spirit of the Regulation was more important than the letter. Ó Caoimh J. held that although the site map originally published was not accurate, he was satisfied that nobody was misled by the error therein. He was satisfied that the *de minimis* rule applied here, and that no relief should be granted to the applicants on this ground. It is noteworthy that this case did not turn on a classification of the relevant statutory requirement as being either mandatory or directory, but turned on the exercise of the Court's discretion and the application of the *de minimis* principle.

94. Both parties in their submissions cited the 2006 decision of Clarke J. (as he then was) in *Ballyedmond.* In that case the applicant sought to judicially review an order for the acquisition of certain lands owned by him, made by the Commission for Energy Regulation, as part of a project for the construction of a natural gas transmission pipeline from County Meath to the border with Northern Ireland, on the grounds *inter alia* of an absence of fair procedures at an Inquiry hearing leading up to the acquisition order.

95. In the course of his judgment Clarke J. stated as follows (at para. 4.3):

> "Firstly, where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the Court."

While *Ballyedmond* was not a judicial review of a planning decision, the reference to "significant deviation" appears to tie in with earlier references in other judgments to substantial compliance, trivial breach and the *de minimis* principle, as set out above.

Gillen

96. It is then necessary to consider the important 2012 decision of this Court in *Gillen v. Commissioner of An Garda Síochána* [2012] 1 IR 574 ("*Gillen*"), which dealt with the consequences of a breach of a statutory provision, albeit in the context of Garda disciplinary proceedings as opposed to planning law. Regulation 8 of the relevant Regulations provided that where it appears that there may have been a breach of discipline, "matters shall be investigated as soon as practicable" by an investigating officer. In this case a complaint was made in October 1999 regarding the conduct of the applicant, but an investigating officer was not appointed to investigate the matter until May 2004.

97. The applicant challenged, by way of judicial review, the validity of the disciplinary proceedings arising from the breach of the expedition obligation in Regulation 8. The High Court refused the relief sought, and the Supreme Court (Finnegan and O'Donnell JJ.; McKechnie J. dissenting) dismissed the applicant's appeal. In his judgment, Finnegan J. noted that Regulation 8 and certain of the other related Regulations employed the word "shall", and he considered the distinction between mandatory and directory provisions, citing the test set out in *Elm Developments* (as quoted at para. 86 above).

98. Having cited that test, Finnegan J. stated that essentially in each case the function of the Court will be to identify the statutory intention to be imputed to the Oireachtas. He then continued as follows:

"[28] In *R v. Soneji* [2006] 1 AC 340 the House of Lords was concerned with time limits in confiscation proceedings following conviction of a criminal offence. Lord Steyn approved of the analysis of the High Court of Australia in *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 which included the following passage at para. 93:

> 'The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.'

Lord Steyn concluded as follows at p. 353:

> 'Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead as held in *Attorney General's Reference (No. 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.'

> [29] On the foregoing analysis two question arise for consideration by the Court:
>
> > 1. Did the legislature intend total invalidity to result from failure to comply with the statutory time limit?
> >
> > 2. If the answer to that question is yes no further question arises. If the answer is no then the Court must consider whether there has been substantial compliance which would depend upon the facts of each individual case and will involve consideration of whether any prejudice has been caused or injustice done by regarding an act done out of time as valid."

99. Finnegan J. was satisfied that, in having regard to the dual purpose of the statutory requirement for expedition in garda disciplinary proceedings, in each case regard must be had not just to the interests of the individual garda concerned, but also to the public interest in maintaining public confidence in An Garda Síochána. It was, of course, open to the Legislature to provide a strict time limit for each stage of the disciplinary proceedings or an overall time limit, but this was not done. He was satisfied that it was not intended that a failure to proceed with expedition as required by the relevant Regulations would necessarily result in disciplinary proceedings becoming void.

100. Finnegan J. stated that each case would turn on its own particular circumstances, and that the Court would have regard to all the circumstances in determining whether or not the failure to progress the disciplinary proceedings has been such that to allow them to continue would be to disregard the legislative intention. He went on to consider all of the circumstances arising in that case, including the statutory scheme, an explanation for the delay, and possible prejudice to the applicant. He ultimately concluded as follows (at para. 40):

> "In short the Court in circumstances such as the present must balance the public interest against the prejudice to the individual concerned. The Court is satisfied that in this instance the balance falls in favour of the public interest and in favour of the disciplinary process proceeding. The public interest in this case should prevail."

101. In his judgment, also dismissing the appeal, O'Donnell J. (as he then was) stated that the question for the Court was whether the breach of the Regulation 8 requirement *simpliciter* rendered invalid the entire disciplinary proceedings, and that this involved determining whether compliance with the requirement was a condition precedent to further proceedings or, as it was sometimes put, whether Regulation 8 was mandatory or merely directory. He then continued as follows (at para. 49):

> "I am content to address the question in these terms, although I agree with Finnegan J. that cases such as…*R v. Soneji*…and the decision of the High Court of Australia in *Project Blue Sky Inc. v. Australian Broadcasting Authority*…cast a valuable light upon the exercise which the Court is to carry out. In particular, I would respectfully adopt Lord Steyn's observation in *R v. Soneji*…that 'the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly to be taken to have intended total invalidity'. I would also agree with my colleagues that the resolution of the issue is essentially a matter of statutory interpretation."

102. Later in his judgment (at paras. 54-56) O'Donnell J. stated again that the issue as to whether it was intended that invalidity would result from breach of a statutory instrument was essentially one of interpretation of the Regulations. He held that in each case the purpose of the legislation is an important consideration, to be discerned from an analysis of the Regulation set against its factual and legal background. He felt that the very fact that there was no express statement in Regulation 8 that breach of the expedition obligation would give rise to invalidity should not be overlooked. In his view such consequential invalidity would be a striking feature, and one therefore which might be expected to be expressly stated, and not left to be inferred from the overall statutory scheme.

Planning Cases since Gillen

103. During the hearing, counsel for the appellant suggested that the planning cases since 2012 had not applied *Gillen*, citing *Byrnes* and *Southwood* as examples. *Byrnes* was a judicial review of the respondent Council's decision to authorise local authority "own development". Section 179(3)(a) of the 2000 Act provided that the CE of a local authority shall prepare a written report in relation to the proposed development and submit the report to the members of the local authority. Section 179(3)(b)(iii) provided that the CE's report shall list the persons or bodies who made submissions with respect to the proposed development in accordance with the relevant regulations, but in this case the CE' s report failed to comply with the said listing requirement.

104. Baker J. refused to quash the decision because of the breach of the statutory requirement. She stated that some of the errors identified were trivial or technical. She noted the applicant's argument that all the statutory requirements must be performed in a transparent way, and that if any breach, no matter how minor, was found then the decision should fall. It was also argued in those circumstances that the Court should be slow to exercise its discretion to refuse relief.

105. Baker J. concluded as follows:

> "125. However, there is nothing in the legislation which displaces the characterisation of a judicial review as a discretionary remedy. Charleton J. made it clear in *McMahon v. An Bord Pleanála* [2010] IEHC 431 as follows:

> 'It has been argued that an order of the Court quashing a decision should automatically follow in every case where such procedures have been found to be defective. I cannot accept, however, that the Court is be shorn of its discretion in judicial review matters simply because the issue concerns planning.' (para. 18)

126. The errors identified are minor and trivial, and for the reasons stated and in the exercise of my discretion I reject this ground of challenge."

106. It is noteworthy that Baker J. did not make any reference to the two part test set out by Finnegan J. in *Gillen*, presumably because *Gillen* was not cited to her. There was certainly no express consideration of the first question, as to whether the Legislature intended invalidity to result from the failure to comply with the statutory provision, although one might argue that Baker J. was implicitly answering no to this question. However, it seems to me that Baker J. did in effect apply a test along the lines of the second part of the *Gillen* test, in terms of the exercise of the Court's discretion whether to grant *certiorari*.

107. The 2019 decision of Simons J. in *Southwood* is another example of a modern planning case where no reference was made to the two part test in *Gillen*. *Southwood* concerned a breach of the relevant Regulation which provided that an applicant for planning permission must make a copy of the planning application documents available for inspection online, with the breach involving a document containing information relating to the potential impact of the proposed development on various species of bat which are protected under EU law. The respondent Board contended that the breach of the Regulations was *de minimis*, and did not affect the validity of the decision to grant planning permission.

108. Simons J. held that the jurisdiction of the Courts to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited. He cited the passage from *Alf-a-Bet* regarding how any deviation from the statutory requirements may be overlooked (as quoted at para. 84 above). He stated that it appeared from same that before a breach can be waived, it must be technical, trivial, peripheral or otherwise insubstantial. The breach here could not be so categorised, in circumstances where the right to effective public participation had been undermined as a result of the failure to post the relevant document on the website, and Simons J. made an order setting aside the decision to grant planning permission.

Doctrine of Harmless Error

109. It is necessary to mention also another strand of recent planning jurisprudence, concerning the so-called doctrine of "harmless error". The invocation of this language appears to flow from the judgment of the Court of Justice in Case C-72/12 *Altrip*, and in particular the following passages from that judgment:

> "49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it…
>
> 50. In that regard, it should be borne in mind that Article 10a of [Directive 85/337] leaves the Member States significant discretion to determine what constitutes impairment of a right…
>
> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of Article 10a of that Directive if it is established that it is conceivable, in view of

the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked."

110. In *Carrownagowan Concern Group v. An Bord Pleanála (No. 3)* [2024] IEHC 549, Humphreys J. cited *Altrip* with approval, and described the concept as one of "harmless error". At para. 38 he stated as follows:

> "The concept that *certiorari* is a discretionary remedy is within the scope of national procedural autonomy and satisfies the tests of equivalence and effectiveness, provided that relief isn't refused in a case where relief is necessary to remedy the effects of a breach of EU law. But by definition, if there are no effects caused by the breach of EU law, then the Court isn't prohibited by the principle of effectiveness or any other principle from dismissing the proceedings. That is fact-specific and doesn't raise any question of law in relation to which there is uncertainty."

Humphreys J. went on to state (at para. 52) that "[u]ltimately there isn't anything revolutionary or even controversial about the proposition that decisions shouldn't be quashed over errors that make no difference, particularly in a context where the evidence to that effect was unchallenged", and he stated that this was compatible with European, domestic and British jurisprudence.

111. In *Doyle v. An Bord Pleanála* [2025] IEHC 158, Humphreys J. summarised (at para. 45) the law in relation to harmless error and discretion as follows:

> "(i) A decision should not be quashed for error (including in application of EU law) if the error was harmless and did not materially affect the result:…*Altrip*…The term 'procedural defect' in *Altrip* has an autonomous EU meaning which is not limited to narrow technical issues that do not include errors in relation to the facts – the phrase covers any defects committed in the

impugned procedure…In *Altrip* the law in relation to environmental impact assessment was viewed as procedural. In any event there is no logical or rational basis to limit the *Altrip* doctrine to particular kinds of harmless error. Indeed generally speaking it would trivialise judicial review and be an exercise in self-indulgence to quash decisions because of things that make no difference, in the absence of a mandatory provision that compels such an approach."

112. It seems to me that the doctrine of harmless error can be viewed as perhaps a case of "old wine in new bottles", in so far as it can be seen as new language for the well-established discretionary factor of whether the breach of a statutory requirement has caused any prejudice to the applicant and/or the public. See, by way of further examples, *The State (Toft) v. Galway Corporation* [1981] ILRM 439 and *Blessington and District Community v. Wicklow County Council* [1997] 1 IR 273. If no prejudice has been caused, then the breach may be viewed in terms of it being a "harmless error".

Summary of the Principles

113. Following that lengthy *excursus* over the authorities, I would summarise the applicable principles as follows. I would endorse the two part test set out by Finnegan J. in his judgment in *Gillen*, subject to the following comments. As regards the first question, whether the Legislature intended total invalidity to result from failure to comply with the statutory requirement, it is clear that this is a matter of statutory interpretation of the particular provision in a given statute or statutory instrument, which exercise is to be carried out in accordance with the approach set out by this Court in *Heather Hill.* This approach involves looking first at the words used in the statutory provision. As noted above, in many if not most cases the consequences of a breach of statutory provision is not explicitly addressed. If that is so, then the next question is whether consequential invalidity can be inferred from the overall statutory scheme, and this involves consideration of the statutory context and the purpose of the legislation, to be discerned from an analysis of the legislation set against its factual and legal background.

114. As per the second question set out by Finnegan J., if the answer to the first question is yes, *i.e.* the Legislature did intend validity, then no further question arises. It seems to me, however, that in many if not most cases it may not be possible to infer an intendment of invalidity, in the absence of an express statement to that effect. If the answer to the first question is no, then in my opinion the second part of the test goes back to the Court's underlying discretion whether to grant *certiorari,* and the exercise of that discretion will involve having regard to all the relevant circumstances, as *per* the line of authority linking *Alf-a-Bet, Elm Developments* and *Gillen*, which authority can be viewed to a large extent as saying similar things. These relevant circumstances include (but are not limited to) whether there has been substantial compliance with the statutory requirement, whether the breach is trivial or technical or *de minimis*, whether any prejudice has been caused to the applicant and/or the public and if so the extent of same, and also the possible public interest pointing against invalidity for breach.

115. While it is clear that the Court may exercise its discretion not to quash for trivial error, I might add the following *caveat*. In general, as part of ensuring observation of the rule of law, it is the duty of the Court to give effect to that which the Oireachtas has ordained should be done, as *per* Henchy J. in *Alf-a-Bet*. If a particular statutory requirement is thought to be burdensome, then the answer normally lies in legislative change. The Courts should not generally be asked to excuse or disregard what the Oireachtas has prescribed should be done.

Application of the Principles

116. It remains necessary to then consider the possible application of the above principles within the hypothetical framework that my above answer to the first question was in fact wrong, and by assuming instead that the appellant was in breach of the statutory requirements set out in s. 12(8)(b)(i) of the 2000 Act, by listing the name of the respondent's planning agent rather than listing the name of the respondent itself as the principal on whose behalf the submission was made.

117. The issue as to the consequences of any such breach would fall to be decided, in my opinion, by reference to the principles set out above, flowing from the two part test set out by Finnegan J. in *Gillen.*

118. The first question would be whether the Legislature intended total invalidity to result from any failure to comply with the statutory requirement. In the present case, as in most cases, the issue of the consequences of a breach of the statutory provision is not expressly addressed in the legislation. Furthermore, in my opinion, consequential invalidity could not be inferred from the overall statutory scheme, having regard in particular to the purpose of the provision as found by me earlier in this judgment (at para. 73 *et seq*.), *i.e.* the formal recording of the receipt of a submission.

119. In circumstances where I would find the answer to the first question to be no, then the second question would be whether the Court would exercise its discretion to grant *certiorari*, having regard to all of the relevant circumstances. The most relevant circumstances appear to me to be twofold. Firstly, any such breach of the listing requirement would appear to me to be merely trivial or technical or *de minimis*.

120. Secondly, I do not accept that the respondent has demonstrated that any prejudice has been caused to it, or to the public, by listing the name of the agent rather than listing the name of the party on whose behalf the submission was made. I accept the appellant's submission that there was no evidence that such listing had any effect on the subsequent development plan process, or on the impugned decision. As a result, even if such listing had amounted to a breach of the statutory requirement, any such breach could be viewed in terms of it being a "harmless error". Having regard to these circumstances, I believe the Court would properly exercise its discretion by refusing to grant *certiorari*, assuming that there was non-compliance.

Conclusion

121. In conclusion, I would allow the appeal for the reasons stated.