[2026] IEHC 517

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2025.0000088]

BETWEEN

JOHN SHORTEN

APPLICANT

AND

AN COIMISIÚN PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

PETER KING AND MILLTOWN CONSTRUCTION

NOTICE PARTIES

Date of impugned decision:	*20 November 2024*
Date proceedings commenced:	*22 January 2025*
Date of main hearing:	*7 July 2026*
Date draft judgment circulated:	*20 July 2026*

JUDGMENT of Humphreys J. delivered on Friday 24 July 2026

1. The present case involves issues concerning the interpretation of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (WFD) and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA directive). While certain points can be disposed of at this juncture, a number of specific questions will require further focused submissions as outlined below.

Judgment history

2. The initial application in 2021 was granted in 2023 (https://www.pleanala.ie/en-ie/case/312844) and was challenged in a first set of judicial review proceedings, Shorten v. An Bord Pleanála 2023 886 JR. The decision was quashed and remitted on consent.

Geographical context

3. The project (https://www.pleanala.ie/en-ie/case/319711) is construction of 19 bungalows, pedestrian links, vehicular entrances off R752, connection to all public services and ancillary site works all on lands at Ballymanus Lower and Ballyfree East, Glenealy, Co. Wicklow. It is located at or near the following: https://maps.app.goo.gl/oJsd6qRaTam7i9KWA.

4. Also relevant are the following links:

(i) original decision (quashed) https://www.pleanala.ie/en-ie/case/312844;

(ii) first instance decision https://www.eplanning.ie/WicklowCC/AppFileRefDetails/21840/0; and

(iii) related decision referred to in pleadings https://www.eplanning.ie/WicklowCC/AppFileRefDetails/2360169/0.

Parties

5. John Shorten, the applicant, lives immediately adjacent to the proposed development.

6. An Coimisiún Pleanála, the first named respondent, is the decision-maker. Ireland and the Attorney General, the second and third named respondents, have been joined to the proceedings by the applicant in respect of the reliefs and grounds alleging failure by Ireland in its transposition of the EIA directive.

7. The first and second named notice parties are Peter King and Milltown Construction, the applicants for permission, and are not participating.

Facts

8. On 14 July 2021, the notice parties made an application to Wicklow County Council for planning permission to construct 19 houses in Glenealy, Co. Wicklow. The reference is 21/840.

9. The applicant made a submission on 16 August 2021, which *inter alia* pointed out issues relating to wastewater treatment and lack of information about the proposed entrance way and its impact on the applicant's boundary.

10. On 6 September 2021, Wicklow County Council requested further information from the notice parties including a request to submit revised drawings, a revised application form, to consult with Uisce Éireann (UÉ) in relation to wastewater treatment capacity and to provide a report in relation to the ability of the existing wastewater treatment plant and the receiving waters to cater for the proposed development.

11. On 7 December 2021, the notice parties submitted their response to the further information request.

12. Uisce Éireann made an observation on 14 December 2021, pointing out that the headroom in the Ballymanus WWTP is reserved to assimilate the effluent from existing non-sewered development within the village centre as *per* the conditions of the existing wastewater certificate and that there were currently no plans to carry out those works.

13. On 17 January 2022, the applicant made a submission on the further information observing *inter alia* that it was still not clear that there was adequate space for the access road and inaccuracies in the drawings relating to his boundary.

14. Uisce Éireann issued a further report on 18 January 2022, in which it indicated no objection to the proposed development. The submissions confirmed that there was in fact capacity at the WWTP.

15. On 27 January 2022, on the recommendation of the planning officer dated 25 January 2022, Wicklow County Council refused permission on a single ground:

> "Having regard to the existing deficiency in public wastewater capacity in the area of the proposed development, it is considered that the proposed development would be premature by reference to the timescale within which this deficiency is likely to be made good. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

16. On 22 February 2022, the notice parties appealed to the commission arguing that the spare WWTP capacity could be used for their development, that ultimately UÉ raised no objection, and that the council was confused by the conflicting positions of UÉ during the process. The reference is 312844.

17. On 20 March 2022, the applicant made observations on the appeal in support of the decision of the council to refuse permission, pointing to irregularities in the UÉ material, and asking the commission to establish the true facts. The observation re-iterated other concerns, including in relation to the boundary and other particulars. The submission stated:

> "The deficiencies in the application as lodged were clearly of such a significant nature and extent that they should have led to the invalidation of the application. While this is not a matter for An Bord Pleanála to address, it may well place the planning application open to challenge in the future event of a grant of permission …"

18. The commission's inspector visited the site on 28 November 2022, and issued a report on 14 March 2023 recommending a grant of permission subject to 19 conditions. In relation to WWTP the inspector found that the deficiency in the sewer network (in relation to unconnected houses) was not planned to be addressed by UÉ, the notice parties were prepared to provide the connection to the proposed development, and therefore the reason for refusal could be set aside.

19. The commission met on 7 June 2023, and decided to grant permission subject to 23 conditions and its order was sealed on 22 June 2023.

20. On 24 July 2023, a third party applied to Wicklow County Council for a proposed development of 12 houses on a site 150 m to the west of the site of the proposed development (planning ref. 2360169).

21. The applicant issued judicial review proceedings on 26 July 2023, challenging the commission's order on six core grounds. The statement of grounds was amended twice and leave was granted on 16 October 2023 in relation to the second amended statement of grounds dated 16 October 2023.

22. On 15 August 2023, Inland Fisheries Ireland (IFI) made a submission regarding planning ref. 2360169, pointing out that the Ballymanus WWTP was having a negative effect on the Rathnew stream and that certain pollutants were above river water quality standards set to achieve good status under the WFD, and that development was premature pending provision of adequate infrastructure.

23. On 15 August 2023, the council's executive scientist issued a report recommending refusal of permission for planning ref. 2360169 due to inadequate capacity of the Rathnew stream to accept and additional loading from the Glenealy WWTP.

24. On 8 September 2023, the planning officer recommended that permission be refused for planning ref. 2360169 on the basis of the water framework directive, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the habitats directive) and contravention of objective CPO 4.13 of the county development plan.

25. This planning application planning ref. 2360169 was withdrawn on 12 February 2024.

26. The applicant's judicial review was conceded on 4 April 2024 by the commission *inter alia* on the basis of core ground 1 because the commission breached the applicant's right to fair procedures by not seeking observations from the applicant following the change in the applicable development plan.

27. The final order quashing the commission order of 22 June 2023 and remitting the matter was perfected on 23 April 2024.
28. On remittal the commission reactivated the appeal on 14 May 2024 under reference 319711.
29. On 28 May 2024, the commission wrote to the various parties/observers to the appeal, seeking further submissions on same – pursuant to s. 131 of the 2000 Act.
30. On 14 June 2024, the council wrote to the commission, indicating its position on the appeal – including, *inter alia*: that it did not consider same to be a material contravention of the development plan, that the principle of the development is acceptable, and that the proposed development complies with the development and design standards in the development plan. The council did not maintain that its previous reason for refusal should be upheld.
31. The applicant made a submission on 17 June 2024 with several comments including a detailed update on the wastewater treatment situation in Glenealy. The applicant updated the commission in relation to planning application 2360169 some 150 m west of the site for 12 houses that was withdrawn on 12 February 2024 following a recommendation from the council. The applicant referred to the concerns recorded on this file from the council's environment section, IFI and a third party with respect to the network connection and the impact on the Ballymanus WWTP on the Rathnew Stream and that IFI noted concerns about pollution from this plant.
32. The notice parties made observations on 17 June 2024.
33. On 12 August 2024, the commission wrote to the council seeking a previous submission from UÉ (a submission dated 18 January 2022). This submission was subsequently sent to the commission on 20 August 2024.
34. The inspector carried out a new site visit on 8 August 2024, and issued a report on 25 September 2024 recommending a grant of permission subject to 24 conditions.
35. The commission met on 8 November 2024, and decided to grant planning permission generally in accordance with the inspector's recommendation subject to 24 conditions. The commission order was sealed on 20 November 2024.

Procedural history

36. The applicant issued judicial review proceedings on 22 January 2025, and I granted leave *ex parte* on 27 January 2025.
37. The statement of grounds was amended on 29 January 2025.
38. The originating notice of motion was perfected on 29 January 2025.
39. The commission filed its statement of opposition on 15 July 2025 grounded on the affidavit of Robert Brophy.
40. The State parties filed their statement of opposition on 16 October 2025 grounded on the affidavit of Declan Grehan.
41. The applicant filed a replying affidavit on 4 January 2026.
42. The applicant filed a replying affidavit of Elaine Dromey, ecologist on 14 January 2026.
43. The applicant filed written submissions on 6 May 2026.
44. The respondent filed written submissions on 23 June 2026.
45. The State parties filed written submissions on 1 July 2026.
46. The matter was heard on 7 July 2026.
47. Judgment was reserved at the end of that hearing. I would like to record my thanks to all of the lawyers involved for their unfailingly courteous, professional and helpful assistance. As I have previously sought to make clear, insofar as any points advanced are not being accepted in this or any other given judgment, that is solely to do with the inherent merits of such points and is no reflection on those instructed to convey such points, a distinction that most certainly should be, and I believe generally is in fact, self-evident to all concerned.
48. On 20 July 2026, a draft of the present judgment was sent to the parties, pursuant to paras. 15, 195 to 198 and 204 of Practice Direction HC 137 issued by the President of the High Court, to give an opportunity to address matters such as errors/ambiguities on the basis set out below.
49. Parties are required to:

(i) Read the draft or have their legal representatives if applicable do so on their behalf.

(ii) Identify any matters falling within the below.

(iii) Positively communicate with the court in writing in response to the draft by the deadline specified, such responses to be emailed to the court and uploaded to ShareFile, either stating that they have no comments or setting out the comments.

(iv) Carry out the foregoing without delay – the draft judgment procedure is a concession which parties can engage with but must do so with immediate dispatch, discipline and focus – it is not the opening of a new phase of the litigation that gives rise to "an entitlement to elaborate procedures at every point" (to use a phrase of O'Donnell C.J. (Dunne, Charleton and Baker JJ. concurring) in *O'Sullivan v. Health Service Executive* [2023] IESC 11 (Unreported, Supreme Court, 10 May 2023) at para. 39); and still less should the procedure invite the perhaps "serious error, to which lawyers are prone, to approach any such case on the tacit assumption that only procedures which approximate to a criminal trial are fair, and anything which departs from that is somehow dubious" (O'Donnell J. (Clarke C.J., McKechnie, MacMenamin, Dunne JJ. concurring) in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751, [2018] 1 I.L.R.M. 245, 780).

(v) Keep the draft confidential. Draft judgments are not public domain materials and, while they can be shared between the lawyers concerned and their clients, subject to the following, it is inappropriate for any person to refer to them for any purpose other than to assist the court in relation to the finalisation of the formal judgment. Therefore anyone with information as to the text, content or proposed outcome of any draft is required not to publish or transmit such information to others save solely by way of private transmission for the legitimate purposes of assisting in the finalisation of the judgment and subject to a similar restriction on any recipient. Trial participants should take reasonable steps to keep drafts confidential. On this topic, see *Attorney General v. Crosland (No. 2)* [2021] UKSC 58, [2022] 1 W.L.R. 367, [24/01/2022] T.L.R. 1 (Briggs, Kitchin, Burrows, Rose, Arden SCJJ) which discusses why restriction on publication of draft judgments is in the interests of the administration of justice; see also *Baigent v. Random House Group Ltd* [2006] EWHC 1131 (Ch), [2006] 5 WLUK 45, (2006) 150 S.J.L.B. 603 (Smith J.); *R. (Counsel General for Wales) v. Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 W.L.R. 1915, [2022] 4 All E.R. 599 (Sir Geoffrey Vos MR; Davies and Dingemans LJJ. concurring); *Public Institution for Social Security v. Banque Pictet & Cie SA and others* [2022] EWCA Civ 368, [2022] 3 WLUK 291, [2022] B.L.R. 349 (Carr LJ; Jackson and Simler LJJ. concurring); *Itkin v. Wood* [2023] JRC 101 (Unreported, Royal Court of Jersey, 22 June 2023).

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

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

(i) informing the court as to whether the party prefers an alternative to a formal written judgment as proposed, and if the party so considers, whether that party considers that the entire matter or some specified part of it can be disposed of (a) by order without a reasoned judgment, or (b) by *ex tempore* reasons without a written judgment;

(ii) informing the court, assuming that the court proceeds with a formal judgment, as to whether the party wishes to propose any corrections to the draft such as:

(a) any apparent typographical, factual, legal or other errors in the draft;

(b) any apparent ambiguity or other matter in the draft that could unnecessarily multiply issues or complicate the further processing of the matter;

(c) any redaction of personal or other information that a party wishes to request;

(d) in the event that the court proposes to refer to any matter (whether factual, legal (including reference to authorities or other legal material), *obiter* comment or otherwise) not referred to at the hearing, any submission as to why such reference is not relevant or otherwise should not be included or as to why such matter if included should not lead to the proposed conclusion;

(e) any other matter in the draft judgment that the party considers should be omitted;

(f) any matter not included in the draft judgment that the party considers should be added to it (including where the party considers that procedural, factual or legal points not set out in the judgment should be addressed or where the party considers that reasons for any aspect of the decision are not set out or where an overall ground is disposed of but detail of the ground or sub-ground is not expressly addressed, or where an issue arose the disposition of which would be *obiter* but on which the party concerned considers that there would be a benefit in the court expressing a view); and

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

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

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

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

54. The deadline for such comments from the parties was to be 11:00 on Wednesday 22 July 2026. Responses were as follows:

(i) Applicant: The applicant helpfully pointed out some corrections, and more substantively submitted as follows:

i. In the draft judgment I had taken the view that validating the application was a matter for the council who should have been joined. That, it appears to me, is in line with the view of Costello J. in *O'Keeffe v. An Bord Pleanála and Others* 1990 WJSC-HC 2141, [1990] 7 JIC 3103 (Unreported, High Court, 31 July 1990), at 52 ("no defect in the proceedings before the planning authority should have any bearing, or impose any constraints, on the proceedings before the Board"), a point not affected on appeal. McGuinness J. (somewhat unconvincingly to me I have to confess) read this very narrowly in *Hynes v. An Bord Pleanála & Ors* [1998] IEHC 127 (Unreported, High Court, 10 December 1997) to the effect that validity was "primarily" for the planning authority but the board should not "simply ignore a situation where the original planning application was clearly invalid". That was followed in *Seery v. An Bord Pleanála and Others* (Unreported, High Court, Quirke J., 26 November 2003, at pp. 17-22), *McCallig v. An Bord Pleanála and Others* [2013] IEHC 60 (Unreported, High Court, Herbert J., 24 January 2013) and *Sweetman v. An Bord Pleanála (Sweetman XIV)* [2021] IEHC 16 (Unreported, High Court, Hyland J., 15 January 2021). The commission's response was that "the Commission does not have to re-open the decision of the Council to validate an appeal when it is originally received. That is not inconsistent with the decision of Hyland J in Sweetman v ABP [2021] IEHC 16". Overall however, and despite the obvious counter-arguments that (a) Costello J.'s position is somewhat preferable to that of McGuinness J., especially in the light of subsequent Supreme Court jurisprudence – one thinks particularly of the recent judgments in *Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026) *per* Woulfe and Hogan JJ., (b) a scenario where the commission should not "ignore" an application that is "clearly invalid" does not translate into a mechanical obligation to revisit the detail of any or all decisions of councils validating applications and (c) in any event, the formal validation remains that of the council, being the body to which that function is entrusted by regulations, so the argument for joining them as a party remains, the conclusion under this heading is ultimately that the applicant has done enough to convince me that the decision should not be based on this point in the absence of hearing further more detailed argument – which is unnecessary and therefore inappropriate since the point fails anyway on other grounds. I have therefore amended the judgment to reflect that conclusion.

ii. The applicant also raised a further issue about the interpretation of the directive. I deal with this below – essentially that there is currently no substance to the question that is apparent to me but I will keep an open mind depending on the answers to the questions as they stand.

(ii) Commission:

i. proposed additional matters for mention in the factual and legal context of core ground 4 (included below); and

ii. responded to the applicant's point i. above (response quoted above).

(iii) State: helpfully pointed out some typos.

(iv) Notice parties: not participating.

Relief sought

55. The reliefs sought are as follows:

"1. An order of certiorari quashing the Board Order dated 20 November 2024 granting planning permission subject to conditions for the construction of 19 houses and associated works at Ballymanus Lower and Ballyfree East, Glenealy, County Wicklow under Ref. No. ABP-319711-24.

2. Such declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate.

3. A stay on works being carried out pursuant to the impugned decision pending the resolution of these proceedings.

4. A Declaration that Article 109(2) of the 2001 Regulations is ultra vires and invalid in that it constitutes a mis-transposition of Article 4(3) of the EIA Directive (Directive 2011/92/EU as amended) and/or is not in accordance with and is contrary to the EIA Directive.

5. A Declaration that Article 109(2) of the 2001 Regulations as inserted by Article 69b of Statutory Instrument 296 of 2018, European Union (Planning and Development) (Environmental Impact Assessment) Regulations is invalid as Article 109(2) is not necessitated by Ireland's membership of the European Union and therefore was adopted in breach of Article 15.2.1 of the Constitution.

6. A Declaration that Section 50B of the Planning and Development Act 2000 ('the 2000 Act') as amended, and/or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and/or that the interpretative obligation set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.

7. Further or other order.

8. Costs."

Grounds of challenge

56. The core grounds of challenge are as follows:

"Domestic Grounds

1. The decision to grant planning permission by order dated 20 November 2024 ('the impugned decision') (ABP-319711-24) is invalid as the Board had no jurisdiction to decide the appeal in the absence of a decision of the planning authority made under the operative development plan. Section 37 of the Planning and Development Act 2000 is limited to an appeal of the decision of the Planning Authority. The Board has no jurisdiction to consider the application of the Wicklow County Development Plan 2022-2028 de novo and/or where the Planning Authority did not reach a conclusion on whether the proposed development would constitute a material contravention of the Wicklow County Development Plan 2022-2028 for the purposes of section 37(2)(b) of the Planning and Development Act 2000, further particulars of which are set out below.

2. The impugned decision is invalid as the Board granted permission on the basis of a planning application which does not comply with the requirements of Articles 22 and 23 of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations') and was an invalid under Article 26(3) of the 2001 Regulations, further particulars of which are set out below.

EU Law Grounds

3. The impugned decision is invalid because it was granted in breach of Article 4(2) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (the 'EIA Directive') because the Board did not make a lawful EIA Screening determination or give any or adequate reasons for its determination under Article 4(5)(b) of the EIA Directive or alternatively the Board unlawfully excluded the need for a determination under Article 4(2) of the EIA Directive pursuant to a case-by-case examination under Regulation 109(2)(a) of the Planning and Development Regulations 2001 which is invalid because it is a mis-transposition of the second sentence of Article 4(3) of the EIA Directive which does not provide for the exclusion of the need for a screening determination on a case-by-case basis, further particulars of which are set out below.

4. The impugned decision is invalid because planning permission was granted in breach of Article 4(1)(a) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the 'Water Framework Directive') and/or Regulations 4 and 5 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 because the Board did not ensure that the grant of planning permission would not cause a deterioration of the status of a body of surface water or that it would not jeopardise the attainment of good surface

water status or of good ecological potential and good surface water chemical status and/ or failed to identify describe and assess the significant environmental impacts for the purposes of the EIA Directive and/or reached conclusions unsupported by the evidence and or/erred in failing to seek further submissions in relation to section 131 and/or section 137 of the 2000 Act, further particulars of which are contained below.

Validity Grounds

5. Article 109(2) of the 2001 Regulations is ultra vires and invalid insofar as it contravenes and/or mis-transposes the second sentence of (3) of the EIA Directive by providing for a case-by-case examination as to whether a project need not undergo EIA screening or EIA and/or is not in accordance with and is in breach of the EIA Directive, further particulars of which are set out below.

6. Article 109(2) of the 2001 Regulations was invalidly transposed in breach of section 3 of the European Communities Act 1972 and thereby in breach of Article 15.2.1 of the Constitution insofar as it purported to transpose the option given to Member States to provide for a procedure where projects are not subject to EIA Screening or EIA since this option is not necessitated by Ireland’s membership of the EU, further particulars of which are set out below.”

57. As regards the extent to which these are pursued, section (i) of the statement of case records as follows:

“Core Ground 1 is not being pursued in the light of Millbourne Residents Association v An Coimisiún Pleanála [2025] IESC 50.”

The impugned decision

58. The impugned decision provides as follows:

“Decision

GRANT permission for the above proposed development in accordance with the said plans and particulars based on the reasons and considerations under and subject to the conditions set out below.

Reasons and Considerations

Having regard to the site's location within the settlement boundary of Glenealy, which is designated as a Level 7 (Type 1) Village in the Wicklow County Development Plan 2022-2028 and to the existing pattern of development in the area, it is considered that, subject to compliance with the conditions set out below, the proposed quantum of development would be acceptable, the design, layout, scale and height of the proposed scheme would be proportionate to the existing settlement, would not seriously injure the residential or visual amenities of the area or of property in the vicinity and would be consistent with relevant provisions of the development plan. The proposed development would be acceptable in terms of pedestrian and traffic safety, having regard to the design of the proposed scheme and the quality of the existing road network and would be acceptable in terms of its impact on the Ballymanus Wastewater Treatment Plant due to the availability of capacity within the public network. Notwithstanding that on the facts of the case, the proposed development would contravene materially Objective 4.13 of the development plan, which seeks to limit multi-unit development to no more than 10 units in Level 7 villages, and having regard to the totality of information on file, including the views of the planning authority that the site should be developed as a single entity and not in a piecemeal manner given its configuration and physical boundaries, it is considered that the proposed development would accord with objectives CPO 4.2 which seeks to deliver compact growth, CPO 4.3 which seeks to increase density in existing settlements through measures including infill development schemes and GPO 4.6 which requires new housing development to be located within the boundaries of settlements. In overview, it is considered that the proposed development warrants a grant of permission by reference to the totality of the relevant policies and objectives set out in the development plan. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by the planning authority on the 7th day of December 2021, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity.

2. The proposed development shall be amended as follows: -

(a) House numbers 10, 19 and 20 shall be redesigned as dual fronted dwellings to provide additional frontage onto the internal access road.
(b) At least one number accessible car parking space shall be provided within the surface car park area at the northeastern portion of the site.
The revised plans and particulars showing compliance with these requirements shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
Reason: In the interests of residential and visual amenity and to secure the integrity of the proposed development.
3. Prior to commencement of development, the applicant shall submit to the planning authority details of all buildings and structures to be demolished within the site.
Reason: In the interest of clarity.
4. The first sale of 50% of the homes herein permitted shall be restricted to persons who comply with Objective CPO 6.37 of the Wicklow County Development Plan 2022-2028 for a Level 7 - Village (Type 1) and as the planning authority agrees to in writing. There shall be no occupancy restriction to the remaining 50% houses. Details in this regard shall be submitted to, and agreed in writing with, the planning authority prior to the occupation of the development. Prior to the commencement of development, the dwelling units to be restricted in accordance with this condition shall be agreed in writing with the planning authority.
Reason: To ensure that dwellings are suitably restricted in accordance with Objective CPO 6.37 of the development plan the Settlement Strategy.
5. Public access to the car parking area in the northeastern portion of the site shall be permanent, open 24 hours a day, with no gates or security barrier at the entrance in a manner which would prevent pedestrian or vehicular access, unless otherwise agreed in writing with the planning authority.
Reason: In the interest of public amenity and to ensure adequate car parking is available for the village.
6. Details of the materials, colours and textures of all the external finishes to the proposed residential units shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
Reason: In the interest of visual amenity and to ensure an appropriate high standard of development.
7. A comprehensive boundary treatment and landscaping scheme shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This scheme shall include the following: -
(a) details of all proposed hard surface finishes,
(b) details of ramped access through the area of public open space,
(c) proposed locations of trees and other landscape planting in the development, including details of proposed species and settings, which shall comprise predominantly native species,
(d) details of proposed street furniture, including bollards, lighting fixtures and seating, and
(e) details of proposed boundary treatments at the perimeter of the site, including heights, materials and finishes.
The boundary treatment and landscaping shall be carried out in accordance with the agreed scheme.
Reason: In the interest of visual amenity.
8. Prior to commencement of development, the applicant shall agree in writing with the planning authority, the final details of areas of public seating within the area of public open space. All works shall be at the applicant's expense.
Reason: In the interests of residential amenity and place making.
9. The developer shall facilitate the preservation, recording and protection of archaeological materials or features that may exist within the site. In this regard, the developer shall -
(a) notify the planning authority in writing at least four weeks prior to the commencement of any site operation (including hydrological and geotechnical investigations) relating to the proposed development,
(b) employ a suitably-qualified archaeologist who shall monitor all site investigations and other excavation works, and
(c) provide arrangements, acceptable to the planning authority, for the recording and for the removal of any archaeological material which the authority considers appropriate to remove.
In default of agreement on any of these requirements, the matter shall be referred to An Bord Pleanála for determination.

Reason: In order to conserve the archaeological heritage of the site and to secure the preservation and protection of any remains that may exist within the site.
10. Proposals for an estate/street name, house numbering scheme and associated signage shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. Thereafter, all estate and street signs, and house numbers, shall be provided in accordance with the agreed scheme. No advertisements/marketing signage relating to the name(s) of the development shall be erected until the developer has obtained the planning authority's written agreement to the proposed name(s).
Reason: In the interest of urban legibility.
11. Public lighting shall be provided in accordance with a scheme which shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development. The scheme shall include lighting along pedestrian routes through open spaces. Such lighting shall be provided prior to the making available for occupation of any residential unit.
Reason: In the interests of amenity and public safety.
12. All service cables associated with the proposed development, such as electrical, telecommunications and communal television, shall be located underground. Ducting shall be provided by the developer to facilitate the provision of broadband infrastructure within the proposed development. Details of the ducting shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.
Reason: In the interests of visual and residential amenity.
13. All of the in-curtilage car parking spaces serving residential units and the surface car park located within the northeastern portion of the site shall be provided with electric connections to the exterior of the houses to allow for the provision of future electric vehicle charging points. The two number car parking spaces serving House number 11 and located outside of the curtilage of the property shall be provided with functional electric vehicle charging point. Details of how it is proposed to comply with these requirements shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
Reason: In the interest of sustainable transportation.
14. Drainage arrangements including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services. Prior to the commencement of development, the developer shall submit to the planning authority for written agreement, a Stage 2 - Detailed Design Stage Storm Water Audit. Upon completion of the development, a Stage 3 Completion Stormwater Audit to demonstrate Sustainable Urban Drainage System measures have been installed and are working as designed and that there has been no misconnections or damage to storm water drainage infrastructure during construction, shall be submitted to the planning authority for written agreement.
Reason: In the interests of public health and surface water management.
15. Prior to the commencement of development, the developer shall enter into a Connection Agreements with Uisce Eireann to provide for a service connection(s) to the public water supply and/or wastewater collection network.
Reason: In the interest of public health and to ensure adequate water/wastewater facilities.
16. Prior to commencement of development, the developer shall submit for the written agreement of the planning authority, details and schedule of works adjacent to the railway link that address the matters referred to by Irish Rail in their submission on this application dated 10th August 2021. Any works associated with the proposed development including boundary treatments and landscaping shall ensure that the integrity of the embankment adjacent to the railway line is maintained.
Reason: To protect the railway and in the interest of public safety.
17. The internal road network serving the proposed development including turning bays, junctions, parking areas, footpaths and kerbs shall comply with the detailed construction standards of the planning authority for such works and design standards outlined in Design Manual for Urban Roads and Streets (DMURS).
Reason: In the interests of amenity and of traffic and pedestrian safety.
18. Site development and building works shall be carried out between the hours of 0700 to 1900 Mondays to Fridays inclusive, between 0800 to 1400 on Saturdays and not at all on Sundays and public holidays. Deviation from these times shall only be allowed in exceptional circumstances where prior written agreement has been received from the planning authority.
Reason: To safeguard the amenity of property in the vicinity.

19. Prior to the commencement of development, the developer or any agent acting on its behalf, shall prepare a Resource Waste Management Plan (RWMP) as set out in the EPA's Best Practice Guidelines for the Preparation of Resource and Waste Management Plans for Construction and Demolition Projects (2021) including demonstration of proposals to adhere to best practice and protocols. The RWMP shall include specific proposals as to how the RWMP will be measured and monitored for effectiveness, these details shall be placed on the file and retained as part of the public record. The RWMP must be submitted to the planning authority for written agreement prior to the commencement of development. All records (including for waste and all resources) pursuant to the agreed RWMP shall be made available for inspection at the site office at all times.
Reason: In the interest of proper planning and sustainable development.
20. The management and maintenance of the proposed development following its completion shall be the responsibility of a legally constituted management company, or by the local authority in the event of the development being taken in charge. Detailed proposals in this regard shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
Reason: To ensure the satisfactory completion and maintenance of this development.
21. (a) Prior to the commencement of the development as permitted, the applicant or any person with an interest in the land shall enter into an agreement with the planning authority, such agreement must specify the number and location of each house, pursuant to Section 47 of the Planning and Development Act 2000, that restricts all residential units permitted, to first occupation by individual purchasers i.e. those not being a corporate entity, and/or by those eligible for the occupation of social and/or affordable housing, including cost rental housing.
(b) An agreement pursuant to Section 47 shall be applicable for the period of duration of the planning permission, except where after not less than two years from the date of completion of each specified housing unit, it is demonstrated to the satisfaction of the planning authority that it has not been possible to transact each of the residential units for use by individual purchasers and/or to those eligible for the occupation of social and/or affordable housing, including cost rental housing.
(c) The determination of the planning authority as required in (b) shall be subject to receipt by the planning and housing authority of satisfactory documentary evidence from the applicant or any person with an interest in the land regarding the sales and marketing of the specified housing units, in which case the planning authority shall confirm in writing to the applicant or any person with an interest in the land that the Section 47 agreement has been terminated and that the requirement of this planning condition has been discharged in respect of each specified housing unit.
Reason: To restrict new housing development to use by persons of a particular class or description in order to ensure an adequate choice and supply of housing, including affordable housing, in the common good.
22. Prior to commencement of development, the applicant or other person with an interest in the land to which the application relates shall enter into an agreement in writing with the planning authority in relation to the provision of housing in accordance with the requirements of section 94(4) and section 96(2) and (3) (Part V) of the Planning and Development Act 2000, as amended, unless an exemption certificate shall have been applied for and been granted under section 97 of the Act, as amended. Where such an agreement is not reached within eight weeks from the date of this order, the matter in dispute (other than a matter to which section 96(7) applies) may be referred by the planning authority or any other prospective party to the agreement to An Bord Pleanála for determination.
Reason: To comply with the requirements of Part V of the Planning and Development Act 2000, as amended, and of the housing strategy in the development plan of the area.
23. Prior to commencement of development, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion and maintenance until taken in charge by the local authority of roads, footpaths, watermains, drains, public open space and other services required in connection with the development, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion or maintenance of any part of the development. The form and amount of the security shall be as agreed between the planning authority and the developer or, in default of agreement, shall be referred to An Bord Pleanála for determination.
Reason: To ensure the satisfactory completion and maintenance of the development until taken in charge.

24. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.
Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission."

Pleadings

59. Some relevant legal principles concerning pleading requirements which have been rehearsed in previous caselaw include the following:

(i) **Applicants are confined to their pleadings**: *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501; *Khashaba v. Medical Council of Ireland* [2016] IESC 10, [2016] 3 JIC 0701, 2016 WJSC-SC 12280 *per* O'Malley J. (Denham C.J. and Clarke J. concurring) at para. 56; *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42, [2021] 7 JIC 1606 (Unreported, Supreme Court, Baker J., 16 July 2021) (Clarke C.J., O'Donnell, MacMenamin and Dunne JJ. concurring) at §§29 and 31; *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors*. [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4 July 2024) *per* Murray J. at paras. 39 *et seq.* (O'Donnell C.J., Woulfe, Collins and Donnelly JJ. concurring); *Eglington Residents Association v. An Bord Pleanála* [2025] IEHC 209 (Unreported, High Court, Farrell J., 15 April 2025) at 11. The rules of pleading are well-established, clear and mandatory, and are of particular importance in a context of special complexity such as technical EU-heavy areas of planning law; while exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment: *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401 (Unreported, High Court, 24 January 2024).

(ii) **Pleading requirements in judicial review are "stringent"**, allowing "little room for manoeuvre": *People Over Wind & Anor. v. An Bord Pleanála & Ors. (No. 1)* [2015] IEHC 271, [2015] 5 JIC 0106 (Unreported, High Court, Haughton J., 1 May 2015). "It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground": Order 84 r. 20(3) RSC. "If on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it", *per* Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors.* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10 January 2022) at para. 308.

(iii) **Complex EU law arguments need to be articulated with particular clarity**. It is particularly important, in the case of an allegation of a failure properly to transpose an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed: *Sweetman v. An Bord Pleanála (Sweetman XV)* [2020] IEHC 39, [2020] 1 JIC 3104 (Unreported, High Court, 31 January 2020) *per* McDonald J. at para. 103 (cited with approval by Murray J. (O'Donnell C.J., Woulfe, Collins and Donnelly JJ. concurring) in *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4 July 2024); *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 (Unreported, High Court, 5 March 2020) *per* Barniville J.; attempts to launch for example non-transposition claims not set out on the pleadings are impermissible: *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Unreported, High Court, Costello J., 12 May 2017).

(iv) Recital of high-level principles does not create *certiorari* by osmosis – an applicant **must specify a route-map** connecting the particular factual problem alleged with the particular relief sought *via* a chain of reasoning: *Ballyboden Tidy Towns v. An*

Bord Pleanála [2021] IEHC 648 (Unreported, High Court, 7 January 2022), para. 20; *Foley v. Environmental Protection Agency* [2022] IEHC 470 (Unreported, High Court, Twomey J., 24 January 2023), paras. 71-72; *Stapleton v. An Bord Pleanála & Savona* [2024] IEHC 3 (Unreported, High Court, Holland J., 13 February 2024), para. 124.

(v) **Scattergun pleadings** are liable to be viewed as "a witch's brew designed to spread maximum confusion and to permit any argument to be made at the hearing that ingenuity can suggest": *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38, [2024] 1 I.R. 386, [2022] 10 JIC 2402 *per* O'Donnell C.J. at para. 22 (Dunne, Woulfe, Hogan and Murray JJ. concurring). MacMenamin J. (Fennelly and Clarke JJ. concurring) in *Babington v. Minister for Justice Equality and Law Reform & Ors.* [2012] IESC 65 (Unreported, Supreme Court, 18 December 2012) referred to the pleading requirements in judicial review and said at para. 7: "Regrettably, these explicit stipulations are frequently not complied with, and the same grounds are set out in as many different, varying, (and wearying) reformulations of the same point as can be conceived. Practitioners should realise that, in this entirely counterproductive and unnecessary process, there is a real risk of not being able to see the wood for the trees. A good point does not gain force by repetition".

(vi) While the court has jurisdiction to grant unpleaded reliefs it **can allow such relief only within the contours of the case as defined by the pleaded grounds**: *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4 July 2024), para. 42 *per* Murray J. (O'Donnell C.J., Woulfe, Collins and Donnelly JJ. concurring). Therefore a court can't grant relief if there is no supporting ground for it.

(vii) **It is not necessary that the specific provisions of national or EU law relied on are expressly enumerated** if they are implicitly identifiable with acceptable clarity: *Eco Advocacy CLG v. An Bord Pleanála (No. 4)* [2023] IEHC 713 (Unreported, High Court, 18 December 2023); *Kennedy & Anor. v. An Bord Pleanála* [2024] IEHC 570 (Unreported, High Court, 7 October 2024), para. 132; *Leech v. An Bord Pleanála* [2024] IEHC 599 (Unreported, High Court, Farrell J., 12 November 2024); *Mount Salus Residents' Owners Management Company Limited by Guarantee v. An Bord Pleanála & Ors.* [2025] IEHC 14 (Unreported, High Court, Holland J., 15 January 2025), para. 39. The standard is acceptable clarity, not express enumeration.

(viii) As noted by the Court of Appeal in *Carvill v. An Bord Pleanála* [2025] IECA 84 (Unreported, Court of Appeal, Barniville P., Collins and Faherty JJ., 11 April 2025) at para. 148, where a developed pleading objection is made, **the court should not accept the point made by the applicant without first addressing the objection**. That said, the court can reject a point without deciding the pleading objection if it fails either way.

Preliminary issues

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

"Respondent's Position:

40. The Commission objects to the admission of the Affidavit of Elaine Dromey, dated 14 January 2026, and the report exhibited to same. In this regard, the Commission relies on Doyle v An Coimisiún Pleanála [2025] IEHC 725 (§50 et seq); Oxigen Environmental Unlimited Company v An Coimisiún Pleanála [2025] IEHC 632 (§49 et seq); Fahybeg Windfarm Opposition Group v. An Bord Pleanála [2025] IEHC 310 (§18 et seq); Sliabh Luachra v An Bord Pleanála [2019] IEHC 888 (§30 et seq); and Wild Irish Defence CLG v An Coimisiún Pleanála [2025] IEHC 726 (§76 et seq). The Commission notes that the said Affidavit (and the report exhibited to same) seeks to advance submission/evidence that were never made, without explanation, during the planning process. The Commission also notes that there was no basis as to why such evidence could not have been presented by the Applicant when seeking leave to apply for judicial review.

State Respondents' Position:

41. The State Respondents maintain the pleading objection at §§8 to 10 of their Statement of Opposition. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and the State Respondents object to the Applicant's failure to observe the requirements of Order 84, rule 20(3) of the Rules and/or Order 103, rule 14 of the Rules in respect of the pleas at Core Grounds 5 and 6 of the Amended Statement of Grounds.

42. The State Respondents rely, in this regard, on the principles of pleading comprehensively summarised in McGowan v An Coimisiún Pleanála [2025] IEHC 405, §49

and on the well-established law in Rushe v An Bord Pleanála [2020] IEHC 122, §§112–116, Joyce-Kemper v An Bord Pleanála [2020] IEHC 601, §§209–228, Casey v Minister for Housing [2021] IESC 42, §§22–35, and C-721/21–Eco Advocacy §§28–29.

43. Moreover, the principle of judicial restraint applies to the reliefs and grounds pleaded as against the State Respondents such that the High Court should determine the case pleaded against the State Respondents only to the extent that it is necessary to do.

Applicant's position:

44. The Affidavit of Ms Dromey is expert evidence that affirms the position adopted by the Applicant during the proceedings. It is expert evidence that the Applicant is required to adduce for the purpose of grounding these proceedings and to address the point made by the Commission as to the lack of expert evidence and the Commission's objection is clearly misconceived. This is particularly so where the Affidavit has not been contradicted – it is therefore uncontroverted expert evidence that fully supports the position adopted by the Applicant before the Commission and in his proceedings.

45. The State's pleading objections are entirely misconceived. The State clearly understand precisely the case they have to meet which is no more elaborate than the simple point that Preliminary Examination is not compatible with Article 4(3) of the Directive. The applicant in Julianstown Residents Association v An Bord Pleanala (2025/1050 JR) pleaded its case in identical terms and the Court (Farrell J.) had no difficulty in understanding the Applicant's simple point during the hearing on 9th/10th June 2026."

61. These points can be resolved as follows:

(i) The affidavit of Elaine Dromey, dated 14 January 2026, including the exhibited report is inadmissible and/or of no significant weight on the grounds that (a) it includes points never made in the process, (b) there is no explanation in that regard, (c) the material is not properly replying and could have been put forward at the outset of the judicial review in any event. The proceedings were instituted in January 2025 and Ms Dromey was only instructed in October 2025 *per* her report. While she reported promptly in January 2026, drip-feeding further evidence into case managed proceedings a year on is a totally inappropriate procedure. There is no apparent, still less demonstrated, reason why she could not have been instructed during the administrative process or at least forthwith on its conclusion.

(ii) The State pleading objection at §§8 to 10 of their statement of opposition is best addressed below under core ground 5.

Whether the points were made at the appropriate time

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

"Respondent's Position

46. Whilst the Applicant raised issues with the PDRs in his initial submission to the Council –

- the Applicant's subsequent Submission to the Council on the Developer's Response to Further Information, dated 17 January 2022, did not maintain that any of the non-compliances with the PDRs referred to in these proceedings;
- the Applicant's Appeal Observation to the Commission, dated 22 February 2022, took issue with the RFI request by the Council and indicated that this was 'not a matter' for the Commission – thus did not raise any of the non-compliances with the PDRs referred to in these proceedings;
- the Applicant's Appeal Observation to the Commission following Remittal, dated 14 June 2024 – similarly, this observation did not raise any issue with any continuous non-compliance with the PDRs

In such circumstances, insofar as he attempts to do so (albeit noting the pleaded complaint appears to be more narrow and relates only to the asserted invalidity of the application from the outset), the Applicant is precluded from pursuing such complaints in the within proceedings, including in the exercise of the Court's discretion.

Applicant's Position

47. The Applicant raised issues with compliance with the PDRs as accepted by the Commission and therefore the issue was squarely before the Commission in its original decision and on remittal. There is absolutely no basis upon which the Applicant is precluded from raising these issues and, in any event these are legal issues which the Commission is under an autonomous obligation to assess irrespective as to whether anyone raised them or not."

63. These points can be resolved as follows. Failure to raise the points with the commission (in support of a claim that the material was inadequate) is a factor going to discretion, to be weighed with other factors. This is considered in more detail below.

Domestic law issues

Core ground 2 – alleged invalid application

64. Core ground 2 is:

"2. The impugned decision is invalid as the Board granted permission on the basis of a planning application which does not comply with the requirements of Articles 22 and 23 of the Planning and Development Regulations 2001 (as amended) ('the 2001 Regulations') and was an invalid under Article 26(3) of the 2001 Regulations, further particulars of which are set out below."

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

"Applicant:

1. Sections 34 and 37 PDA2000 and the case-law make clear that the Commission's jurisdiction to grant permission is dependent on there being a valid application. There are multiple deficiencies in the prescribed application form and the accompanying documentation.

Respondent:

2. The Applicant's Submissions also confirm that this ground is not about the adequacy of the evidence ultimately considered by the Commission – rather, 'the issue is the validity of the application' – with the Applicant maintaining it was void ab initio.

3. This Core Ground is misconceived and fails to acknowledge that qualitative deficiencies in the application documentation initially lodged with the Council but subsequently addressed in a response to a Request for Further Information – on which the Applicant was afforded an opportunity to comment before the Council and, on appeal, before the Commission, including after remittal – do not warrant a grant of Certiorari.

4. Such relief would be entirely disproportionate and inappropriate where the said qualitative deficiencies did not affect the planning assessment carried out by the Commission (no pleaded case is made to the contrary); did not carry through to the final grant of permission (no pleaded case is made to the contrary); and did not affect the Applicant's participation in the planning process in any way (no pleaded case is made to the contrary by the Applicant). See Walsh v An Bord Pleanála [2022] IEHC 172; Reilly v An Coimisiún Pleanála [2025] IEHC 659 (§72 et seq); and D'Alton v An Coimisiún Pleanála [2026] IEHC 414 (§81 et seq)."

The pleading difficulty

66. A major problem for the applicant is the inadequacy of his pleading here.

67. The applicant's pleas as to the deficiencies in the application documentation are as follows:

"20. By way of further particulars of the claim, the Notice Parties did not include an Existing Layout Plan in the application documents. Nor did the Notice Parties provide any plans or elevations of the existing buildings within the site. The proposed development appears to involve demolition of a structure but no details of this structure are provided.

21. The Application Form did not identify any demolition being carried out nor did it accurately identify who Milltown Construction was – i.e. whether it was a company and if so to correctly identify the company and the relevant details. (Article 22(1)). Nor did it accurately or correctly answer Sections 6, 12, 14, 16, 17 and 18 of the Form, as ultimately identified by the Planning Authority.

22. The Notice Parties did not provide a Site Layout Plan that is consistent with the requirements of the 2001 Regulations (22(2)(b). It does not identify who prepared it nor does it show the full extent of the site or the red-line boundary. Nor is there a north point on the drawing (Article 23(1)(h)) Nor are distances provided from the proposed buildings to the red-line boundary (Article 23(1)(f)) nor is the orientation of the proposed development provided. Nor are levels provided on the drawing, despite the fact that the site is sloped (Article 23(1)(c)) Only 38 of the proposed 44 car parking spaces are shown and no adequate dimensions are shown for parking spaces or gardens. No pedestrian crossing points are identified. (Article 23(1)(a)).

23. The Notice Parties did not provide Proposed Elevations or Contiguous Elevations (Article 23(1)(f)) of the proposed development. The document submitted is dated 6th October 2020 and appears to relate to the previous application (Planning Authority Reg Ref: 21/840). The Proposed Elevations do not include principal dimensions for the proposed houses or the proposed boundaries or for the car parking spaces (Article 23(1)).

24. Many of the identified non-compliant elements of the Application Form and maps/elevations engage more than one element of Articles 22 and 23 of the 2001 Regulations and, in the interest of avoiding repetition are not all repeated."

68. The following table prepared by the commission (notes omitted) will assist in placing these complaints in context – particularly as to whether they are specific and also whether the alleged problems were later rectified:

Alleged Breach in Application	Application Documentation / Further Information provided to Council / Evidence otherwise before the Commission
Application documents did not include an existing site layout plan.	The Applicant does specify in its pleadings what aspect of the PDRs is breached here. In Submissions, the Applicant refers to the absence of an existing site layout plan and a site layout map referring to Art.22(2((b)(i)-(iv) – which concerns the Site Location Map and Art.23(1)(a)-(c) . In any event: - There was a Site Location Map submitted with the application. - As is clear from the Applicant's submissions on the application/appeal, he is clearly aware of the existing site layout and nature of the site. - The Inspector carried out a site visit – see, for example, photographs to the Inspector's Report. The related report demonstrates full awareness of the nature of same. Thus, the Applicant and the Inspector/Commission were fully aware of the existing nature of the development site.
Application Form did not identify who Milltown Construction was and was not completed properly. (Art.22(1)).	Further Information submitted to the Council, included: - Revised Planning Application Form – outlining that the applicants were Peter King and Milltown Construction. Similarly, a revised site plan was also prepared.
Site Layout Plan was not consistent with Art.22(2)(b) – does not say who prepared it or show full red-line boundary. Site Layout Plan does not have a north point on the drawing (Art.23(1)(h) Site Layout Plan does not show distances from red-line boundary (Art.23(1)(f).	The application documents included a Site Layout Plan. The Further Information Response includes Drawing No. E006_02a, which outlines the Proposed Site Layout, including the entire site and floor area and garden size in square metres for each type of dwelling. Same also includes a red-lined boundary and clearly shows it was designed by Plan 8 Architects for their Client, the Developer. This Drawing also shows the dimension from the Proposed Dwellings 01-10 and No. 19 to the boundary of the red-line. Furthermore, it shows garden dimensions and dimensions to a common boundary. Drawing No.08 shows parking arrangements and car parking details. Drawing No.E006, dated 6 December 2021, outlines Proposed Site Sections and the design of each of the different dwellings considering the sloped angle, ramps and contiguous elevations. Drawing No.E006_03, dated 21 October 2020c- outlines the proposed elevations of the bedrooms/dwellings. This included a northern facing compass for orientation.

	As is clear from the Applicant's Submissions/Observations made during the planning process, he clearly understood the Proposed Development. Moreover, the Inspector/Commission also properly understood the nature and extent of the Proposed Development.
No details of demolition of structures on the site, including in the application form.	The Applicant made submissions on the existing structures during the planning process. The Developer's documentation also referenced same. The Council's Planner's Report noted, following a site visit dated 6 August 2021, that existing buildings are located to the northeast of the site and would be required to be demolished as part of the proposal. This was outlined as acceptable. The Inspector/Commission were aware of this aspect of the Proposed Development – see §8.7 of the Inspector's Report and Condition 3.

69. We need to consider the pleaded points individually to assess their adequacy:

(i) "[T]he Notice Parties did not include an Existing Layout Plan in the application documents. Nor did the Notice Parties provide any plans or elevations of the existing buildings within the site. The proposed development appears to involve demolition of a structure but no details of this structure are provided" – no breached provision of the regulations is identified here so this plea is not a proper basis for *certiorari* in the highly technical context of planning regulations.

(ii) "The Application Form did not identify any demolition being carried out" – the same point applies.

(iii) "[N]or did it accurately identify who Milltown Construction was – i.e. whether it was a company and if so to correctly identify the company and the relevant details. (Article 22(1)). Nor did it accurately or correctly answer Sections 6, 12, 14, 16, 17 and 18 of the Form, as ultimately identified by the Planning Authority" – **this does adequately plead a breach of the regulations**.

(iv) "The Notice Parties did not provide a Site Layout Plan that is consistent with the requirements of the 2001 Regulations (22(2)(b)[)]" – Article 22(2)(b) refers to the location map so cannot be a proper basis for a complaint about the layout plan. This colours everything that follows because an applicant has to plead with specificity. An applicant cannot impose on an opposing party the obligation to plead to two possible interpretations of an ambiguous pleading. Faced with the reasonable alternative interpretations of the plea as referable to a layout plan not governed by art. 22(2)(b) or a location map governed by art. 22(2)(b), an applicant cannot insist on the more extensive interpretation of its own inadequately clear pleadings. This is an absolutely classic example of the principle identified by Holland J. that if the pleading is ambiguous, the pleader cannot get the advantage of that.

(v) "It does not identify who prepared it" – no provision of the regulations is identified so this cannot be a proper basis for *certiorari*.

(vi) "[N]or does it show the full extent of the site or the red-line boundary" – the same point applies.

(vii) "Nor is there a north point on the drawing (Article 23(1)(h))" – **this is adequately pleaded**.

(viii) "Nor are distances provided from the proposed buildings to the red-line boundary (Article 23(1)(f))" – this is adequately pleaded.

(ix) "[N]or is the orientation of the proposed development provided" – no provision of the regulations is identified.

(x) "Nor are levels provided on the drawing, despite the fact that the site is sloped (Article 23(1)(c))" – **this is adequately pleaded**.

(xi) "Only 38 of the proposed 44 car parking spaces are shown and no adequate dimensions are shown for parking spaces or gardens. No pedestrian crossing points are identified.(Article 23(1)(a))" – **this is adequately pleaded**.

(xii) "The Notice Parties did not provide Proposed Elevations or Contiguous Elevations (Article 23(1)(f)) of the proposed development" – **this is adequately pleaded**.

(xiii) "The document submitted is dated 6th October 2020 and appears to relate to the previous application (Planning Authority Reg Ref: 21/840)" – no provision of the regulations is identified here.

(xiv) "The Proposed Elevations do not include principal dimensions for the proposed houses or the proposed boundaries or for the car parking spaces (Article 23(1))" – **this is adequately pleaded**.

(xv) "Many of the identified non-compliant elements of the Application Form and maps/elevations engage more than one element of Articles 22 and 23 of the 2001 Regulations and, in the interest of avoiding repetition are not all repeated" – this is opaque and does not add anything to the foregoing.

Whether there was a breach

70. We can now examine the properly pleaded complaints individually to see if there was in fact a breach in any of the respects that are adequately pleaded:

(i) "[N]or did it accurately identify who Milltown Construction was – i.e. whether it was a company and if so to correctly identify the company and the relevant details. (Article 22(1)). Nor did it accurately or correctly answer Sections 6, 12, 14, 16, 17 and 18 of the Form, as ultimately identified by the Planning Authority" – **the commission accepts that there are omissions in the application form**.

(ii) "Nor is there a north point on the drawing (Article 23(1)(h))" – **construing the plea as I must as referring to the location plan, there is a north point**.

(iii) "Nor are levels provided on the drawing, despite the fact that the site is sloped (Article 23(1)(c)) – **construing the plea as I must as referring to the location plan, this is misconceived as the contour requirement does not apply to the location map**.

(iv) "Only 38 of the proposed 44 car parking spaces are shown and no adequate dimensions are shown for parking spaces or gardens. No pedestrian crossing points are identified.(Article 23(1)(a))." – **art. 23(1)(a) does not impose these requirements. Insofar as they apply they apply to the layout plan under art. 22(4) which is not pleaded with the required clarity.**

(v) "The Notice Parties did not provide Proposed Elevations or Contiguous Elevations (Article 23(1)(f)) of the proposed development" – **elevations and distance to boundaries are requirements for the layout plan rather than the location map**.

(vi) "The Proposed Elevations do not include principal dimensions for the proposed houses or the proposed boundaries or for the car parking spaces (Article 23(1))" – **again this is a matter for the layout plan rather than the location map**.

71. Therefore the only breach that is both clearly and unambiguously pleaded and demonstrated, even assuming I am wrong about the primary difficulty of not having joined the council, is the defect in the application form.

72. This brings us to the question of discretion, which applies even if I am wrong about the extent to which the applicant's pleadings are adequate.

Discretion

73. Some issues regarding discretion established by the caselaw are as follows:

(i) **Judicial review is a discretionary remedy**: *per* Murray J. (Whelan and Pilkington JJ. concurring) in *O'Connell v. Behan* [2021] IECA 186 (Unreported, Court of Appeal, 1 July 2021) at 43 (see also *per* Charleton J. (diss.) in *Dun Laoghaire Rathdown County Council v. Westwood Club Ltd* [2019] IESC 43, [2020] 3 I.R. 417 at 10). This historically arose from the development of judicial review out of the power to grant equitable relief.

(ii) Discretion applies **both at the leave stage and at the substantive stage**: *per* Finlay C.J. (Blayney and Denham JJ. concurring) in *G. v. DPP* [1994] 1 I.R. 374 at p. 378; *De Róiste v. Minister for Defence* [2001] IESC 4, [2001] 1 I.R. 190, [2001] 2 I.L.R.M. 241 at 204 *per* Denham J.; *Amariei v. Chief Appeals Officer* [2026] IESC 22 (Unreported, Supreme Court, Donnelly J., 25 March 2026) (O'Donnell C.J., Charleton and Murray JJ. concurring).

(iii) The effect of the doctrine of discretion is that even if there was a "jurisdictional" infirmity such as in planning application documents, AA, or other such requirement the process is **not automatically void *ab initio*** and *certiorari* is not automatic: *Byrnes v. Dublin City Council* [2017] IEHC 19 (Unreported, High Court, Baker J., 18 January 2017); *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403 (Unreported, High Court, Owens J., 16 June 2021); *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2023] IEHC 722 (Unreported, High Court, Holland J., 21 December 2023) (§102 *et seq*.); and *Reilly v. An Coimisiún Pleanála* [2025] IEHC 659 (Unreported, High Court, 28 November 2025) (§81 *et seq*.).

(iv) The court can exercise discretion **of its own motion** because the court itself has to be satisfied as to the correctness of granting relief: *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2024] IESC 4 (Unreported, Supreme Court, Donnelly J., 22 February 2024) (O'Donnell C.J., Woulfe, Hogan and Collins JJ. concurring). That implies that the court has an entitlement to exercise such discretion itself even if a party doesn't plead discretion as such or pleads it on limited grounds.

(v) The appropriate **two-stage inquiry** is (a) Did the legislature intend total invalidity to result from failure to comply with the statutory time limit? (noting 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" *Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026) *per* Woulfe J. at 114 (O'Donnell C.J., Hogan, Murray and Donnelly JJ. concurring)). If so, the inquiry ends there: "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" (*per* Woulfe J. at 115). (b) If not, should discretion be exercised against relief "having regard to all the relevant circumstances ... 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" (*Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026) *per* Woulfe J. (O'Donnell C.J., Hogan, Murray and Donnelly JJ. concurring) at 114).

(vi) Therefore in exercising that discretion the court is **bound by established principles as to the exercise of such discretion**: *Amariei v. Chief Appeals Officer* [2026] IESC 22 (Unreported, Supreme Court, Donnelly J., 25 March 2026) (O'Donnell C.J., Charleton and Murray JJ. concurring) at 60. As Donnelly J. pointed out in that case at 27, the use of the term discretion is strictly delineated. O'Donnell J. (Clarke C.J. and Dunne J. concurring) said in *Kelly v. Minister for Agriculture* [2021] IESC 62, [2023] 1 I.R. 38 that the court is not "at large", or is free to take into account "its views on the underlying merits" (the contrast with *Christian* below indicates that what is envisaged is merit in some general sense separate from the "constitutional or legal value[s]" concerned). Rather, "the circumstances which allow the court not to make an order which would otherwise be justified must be such as to derive from an important constitutional or legal value of sufficient weight to warrant not making an order otherwise justified" (Clarke J. in *Christian v. Dublin City Council* [2012] IEHC 163, [2012] 2 I.R. 506, at 567) as cited with approval by Donnelly J. in *Amariei* at 27. Thus the court must be conscious of the need for statutory requirements to be observed, see *e.g. Protect East Meath v. Meath County Council* [2026] IESC 1 (Unreported, Supreme Court, 22 January 2026).

(vii) The established principles as to the exercise of discretion fall into three broad categories: **conduct of the applicant, the practical value of the remedy, and disproportionality**. Under these headings the following points emerge:

  (a) "[T]he **action or inaction of the claimant** (such as a failure to exhaust an alternative remedy, delay, laches, waiver, acquiescence or misconduct in connection with the proceedings)" is relevant (*O'Connell v. Behan* [2021] IECA 186 (Unreported, Court of Appeal, Murray J. (Whelan and Pilkington JJ. concurring) 1 July 2021) at 43). In particular:

    1. **Failure to exhaust remedies** as the general rule: *Amariei v. Chief Appeals Officer* [2026] IESC 22 (Unreported, Supreme Court, Donnelly J., 25 March 2026) (O'Donnell C.J., Charleton and Murray JJ. concurring), save where for example there is a fundamental failure of justice: *A.B. v Chief International Protection Officer & Ors* [2026] IESC 23 (Unreported, Supreme Court, Donnelly J., 25 March

2026) (O'Donnell C.J., Charleton, Woulfe and Murray JJ. concurring). "It is a long-standing principle of the law relating to judicial review that the court asked to quash an administrative decision has a discretion to refuse to do so if there is an alternative remedy available to put right the wrong complained of in the proceedings." *per* Dunne J. (Charleton, Woulfe, Collins and Donnelly JJ. concurring), *S. v. Minister for Justice and Equality* [2025] IESC 48 (Unreported, Supreme Court, 25 November 2025) at 98.

2. This can include **failure by an applicant to take action** to protect their position: *Baile Bhruachlain Teoranta v. Galway County Council* [2024] IEHC 604 (Unreported, High Court, 1 November 2024); *Voyage Property v. Limerick City and County Council* [2025] IEHC 696 (Unreported, High Court, Holland J., 16 December 2025) at 263-264.
3. The **failure by the applicant to make the point in the process** is relevant: Costello J. in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317 (Unreported, Court of Appeal, 26 November 2021) at 277.
4. Unwarranted **failure to prosecute the proceedings**: *Delaney v. An Coimisiún Pleanála* [2025] IEHC 621 (Unreported High Court, 13 November 2025).

(b) Grounds relating to "**the practical value of the remedy** (such as mootness or futility) (see *Independent Newspapers (Ireland) Ltd v. IA* [2020] IECA 19, [[2021] 1 I.R. 384] at para. 78)" are relevant: *O'Connell v. Behan* [2021] IECA 186 (Unreported, Court of Appeal, Murray J. (Whelan and Pilkington JJ. concurring), 1 July 2021) at 43. Thus for example a remedy is not required where the order sought would be futile and inappropriate: *Protect East Meath v. Meath County Council* [2026] IESC 12 (Unreported, Supreme Court, 19 February 2026) at 8.

(c) The **proportionality** of *certiorari* (as opposed for example to either no order or declaratory relief only) may also be a factor: in *Save Cork City Community Association CLG v. An Bord Pleanála* [2022] IESC 52, [2024] 1 I.R. 205 at 60, Woulfe J. (Dunne, Charleton, O'Malley and Hogan JJ. concurring) said (without needing to decide the point) that there was "a great deal of force" in the submission that it would be disproportionate to quash a decision on the basis of a "technical procedural error". As noted above, the factors relevant to proportionality include "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" (*Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026) *per* Woulfe J. at 114). In particular:

1. Whether there was **substantial compliance** is a factor: *Monaghan Urban District Council v. Alf-a-Bet Promotions Ltd* 1980 WJSC-SC 1341, [1980] I.L.R.M. 64 (O'Higgins C.J.), *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 I.R. 574 *per* Finnegan J. and O'Donnell J., *Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026).
2. Looking at that issue from another point of view, the importance of the provision not complied with is a factor – the process requires "consideration of whether the matter concerned is one of importance or of **triviality**": *per* Finlay C.J. (Blayney and Denham JJ. concurring) in *G. v. DPP* [1994] 1 I.R. 374 at p. 378 (emphasis added). Thus an "inconsequential" breach was not a basis for the grant of relief as a matter of discretion in *Kenny v. Dublin City Council* [2009] IESC 19 (Unreported, Supreme Court, 5 March 2009) at 79 *per* Fennelly J. (Macken and Peart JJ. concurring).
3. Likewise the **public interest in or importance of the countervailing legal value** being protected by the impugned decision is a factor in the balance, whether that be a value enshrined in law generally, the ECHR as transposed, the Constitution or EU law – as cited above, the court can consider whether there is "an

important constitutional or legal value of sufficient weight to warrant not making an order otherwise justified" (Clarke J. in *Christian v Dublin City Council* [2012] IEHC 163, [2012] 2 I.R. 506, at 567) as cited with approval by Donnelly J. in *Amariei* at 27. A conclusion by a statutory decision-taker as to the acceptability of a project may have weight in this context.

4. **Prejudice** or the lack of it to the applicant or anyone else is a factor. This includes both any demonstrated prejudice caused by the breach itself (discussed in *Gillen v. Commissioner of An Garda Síochána* [2012] 1 IR 574 per Finnegan J. and O'Donnell J., *Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36) and any prejudice caused by invalidating the impugned decision in the particular circumstances (see *O'Connell v. Behan* [2021] IECA 186 (Unreported, Court of Appeal, 1 July 2021) at 43: "grounds relating to the impact a remedy will have on others (such as where the grant of relief would represent an unwarranted interference with the settled rights or expectations of third parties)").
5. Looking at that issue from another point of view, if there is **harmless error**, that is equivalent to saying that no prejudice is thereby caused: *Pat O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026) at 112.
6. More generally, it follows that the factors relevant to discretion include the **seriousness of any error** such as the extent of the non-compliance, whether the error was once-off, whether the issue is purely historic and cannot reoccur, the level of deliberation involved in the error and the extent to which reasonable steps were taken to prevent or identify such an error, whether the error was rectified promptly when it came to light (if capable of rectification), whether there is a pattern of non-compliance, and any other relevant circumstances may be relevant (see also *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401 (Unreported, High Court, 24 January 2024) para. 134).

74. The first question is whether the legislature has specified that the consequence of non-compliance is total invalidity.

75. Article 22A of the 2001 regulations provides:

> "Art. 22A. (1) In addition to the information required by article 22, the planning authority may require the applicant to submit with the planning application specified additional information.
> (2) No planning application shall be invalidated under article 26 for failure to submit with the application any information or particulars requested under subarticle (1)."

76. That does not get us very far and does not apply to this situation.

77. Section 34(1) states:

> "34.—(1) Where—
> (a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and
> (b) all requirements of the regulations are complied with,
> the authority may decide to grant the permission subject to or without conditions, or to refuse it."

78. That requires that to grant permission, the application must be made in accordance with the regulations. The applicant (as applicants do in this type of situation) calls this "jurisdictional", which sprays a veneer of legalistic jargon over the demand that any error must lead to *certiorari* and costs. But that is a misconception. The statute does not state that.

79. Somewhat nearer the mark is the form as specified in sch. 3, form no. 2 of the 2001 regulations which states:

> "Failure to complete this form or attach the necessary documentation, or the submission of incorrect information or omission of required information will lead to the invalidation of your application. Therefore please ensure that each section of this application form is fully completed and signed, entering n/a (not applicable) where appropriate, and that all necessary documentation is attached to the application form."

80. This is on its face the legislature specifying the consequences of non-compliance as envisaged in the recent authority of *O'Donnell & Co. v. Dublin City Council* [2026] IESC 36 (Unreported, Supreme Court, 2 July 2026).

81. The applicant accepts that this is subject to an implied doctrine of *de minimis* errors as envisaged in *Monaghan Urban District Council v. Alf-a-Bet Promotions Ltd* 1980 WJSC-SC 1341, [1980] I.L.R.M. 64 (O'Higgins C.J.), which continues to be the law as acknowledged in *O'Donnell & Co* (referenced in the judgments of both Woulfe and Hogan JJ.). Unfortunately for the applicant, the Supreme Court in *O'Donnell & Co.* did not treat the doctrine of *de minimis* as exhaustive of the discretion enjoyed by the court.

82. Ultimately, even though on its face the legislature has treated errors and omissions as leading to "invalidation", the Supreme Court has approached the question of defective planning application documentation on the basis that *Alf-a-Bet* represents a strand of discretion within established doctrinal bounds *per* Woulfe J. in *O'Donnell & Co.* (emphasis added):

> "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."

83. Going through the factors set out above that emerge from the caselaw:

- (i) **Action or inaction of the claimant** – in this regard the applicant consented to remittal which would have been unlawful if this point is valid – despite having pleaded this issue in the first judicial review. Furthermore he failed to make any complaint about the information available in two of his submissions to the commission. This leans somewhat against relief.
- (ii) **The practical value of the remedy** – *certiorari* would have a value for the applicant. This leans in favour of relief.
- (iii) **Proportionality/ substantial compliance** – these problems were all rectified in the process. This leans strongly against relief.
- (iv) **Triviality** – some of the points are of minor importance, albeit that others could be regarded as somewhat more substantive. This leans mildly in favour of relief.
- (v) **Public interest in or importance of the countervailing legal value** – provision of housing is a factor in terms of the public interest. Compliance with planning regulations is also in the public interest. This leans somewhat against relief on balance.
- (vi) **Prejudice** or the lack of it to the applicant or anyone else – there is no demonstrated prejudice. The applicant actively participated and raised any issues he wanted to raise. Any alleged prejudice to other persons is speculative and unproven. Also, the alleged omissions were rectified later in the process, and public participation has not been shown to have been fundamentally compromised. This leans strongly against relief.
- (vii) **Harmless error** – no actual harm has been demonstrated. This leans strongly against relief.

84. Balancing the foregoing here, insofar as there was a breach, I would as a matter of discretion refuse relief on balance having regard to the fact that the greater weight of discretionary factors leans against quashing the decision.

EU law issues

Core ground 3 – EIA screening

85. Core ground 3 is:

> "3. The impugned decision is invalid because it was granted in breach of Article 4(2) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

(codification) (the 'EIA Directive') because the Board did not make a lawful EIA Screening determination or give any or adequate reasons for its determination under Article 4(5)(b) of the EIA Directive or alternatively the Board unlawfully excluded the need for a determination under Article 4(2) of the EIA Directive pursuant to a case-by-case examination under Regulation 109(2)(a) of the Planning and Development Regulations 2001 which is invalid because it is a mis-transposition of the second sentence of Article 4(3) of the EIA Directive which does not provide for the exclusion of the need for a screening determination on a case-by-case basis, further particulars of which are set out below."

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

"Applicant:

5. The the [*sic*] Commission could not have lawfully excluded the necessity for at least Screening for EIA on the basis that Schedule 7A information was not before it. The Applicant also maintains that the Commission could not lawfully have excluded the necessity for EIA (whether on the basis of Preliminary Examination or Screening) given the absence of any information before it necessary to exclude the possibility of significant effects on the environment in relation to, in particular, impacts on the Rathnew Stream. Even if it is accepted that the Commission carried out Preliminary Examination, it still requires an objective basis to exclude the possibility of a significant effect on the environment in the materials before it; but there was no such basis.

Respondent:

6. The Applicant's pleaded complaint alleges an error in the Commission's Decision because the application for the Proposed Development 'was not accompanied by the information required by Schedule 7A' of the PDRs. However, as Art.109 of the PDRs makes clear, there is no requirement for such information to accompany an application – rather, same will be requested if the Commission has a 'significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development' (Art.109(2)(b)(ii) of the PDRs). As per the Commission's Decision and Inspector's Report, no such doubt arose in this case to trigger such a request.

7. Insofar as the Applicant, by reference to water impacts (which complaint (wastewater) is also made under Core Ground 4), seeks to assert (and only assert as opposed to establish evidentially by reference to the evidence before the Commission) that significant effects would arise from the Proposed Development, such complaints are without substance and the Applicant has not, and did not before the Commission, establish such complaints evidentially. As outlined in Reilly v An Coimisiún Pleanála [2025] IEHC 659, the burden of proof which rests on an applicant will not be discharged by mere assertion - the Applicant has not established any flaw in the Commission's EIA Preliminary Examination in this respect.

8. Moreover, noting the Applicant's subjective, non-expert views regarding the significance of any effects arising from the Proposed Development, the Applicant has not demonstrated that the conclusions of the Commission on EIA Preliminary Examination were irrational or unreasonable having regard to the evidence before it.

State Respondents:

9. The State Respondents have pleaded to Core Ground 3 only insofar as it impugns the validity of article 109(2) of the 2001 Regulations. In response to Core Ground 3, the State Respondents adopt the submissions delivered by the Commission dated 22 June 2026 and rely on the description by the Commission of its decision and conclusions on preliminary examination under article 109(2) of the 2001 Regulations."

87. The applicant now accepts that this is predicated on the success of core grounds 5 and 6 so it adds nothing in itself. No serious argument was made that the preliminary assessment "as done" was invalid – the complaint was in relation to the legislation.

Core ground 4 – water framework directive

88. Core ground 4 is:

"4. The impugned decision is invalid because planning permission was granted in breach of Article 4(1)(a) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the 'Water Framework Directive') and/or Regulations 4 and 5 of the European Communities Environmental Objectives (Surface Waters) Regulations 2009 because the Board did not ensure that the grant of planning permission would not cause a deterioration of the status of a body of surface water or that it would not jeopardise the attainment of good surface water status or of good ecological potential and good surface water chemical status and/ or failed to identify describe and assess the significant environmental impacts for the purposes of the EIA Directive and/or reached conclusions unsupported by the evidence and or/erred in failing to seek further submissions in relation to section 131 and/or section 137 of the 2000 Act, further particulars of which are contained below."

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

"Applicant:

10. The essential WFD issues here are the pre-existing problems with the WWTP and its impact on the Rathnew Stream (designated by the EPA as IE_EA_10R020600 or RATHNEW STREAM_010); and the fact that the capacity within the existing network was reserved for existing dwellings within the village currently served by septic tank. These issues had been identified by IFI and Wicklow in addressing a separate application; and brought to the Board's attention by the Applicant in his remittal submission on this application. The Inspector relied on the 2011 EPA licence and the EPA inspector's 2011 report and a measurement of an irrelevant factor (Q) 5 km away - while ignoring the actual measured pollution right beside the WWTP (identified in the Applicant's submission).

Respondent:

11. The evidence before the Commission did not indicate that the Proposed Development would undermine any aspect of Art.4 of the WFD – the evidence did not indicate that the Proposed Development would result in the deterioration of the status of a water body or jeopardise the attainment of good surface water status. Rather, as outlined below, it indicated that the existing wastewater network had capacity to cater for the Proposed Development. Whilst the Applicant does not seem to appreciate same, the relevancy of there being capacity in the WwTP is that the Proposed Development can connect to the public foul network which ultimately discharges to the Rathnew Stream after treatment. There was no evidence that treated discharges from the WwTP arising from this development would cause any impact on the water quality or contravene Art.4 of the WFD (which is, in substance, what the Applicant is asserting).

12. The evidence before the Commission included evidence from UE that there was capacity at the WwTP to serve the Proposed Development. As is clear from the foregoing, the Inspector noted that all surface water run off would be attenuated within the appeal site, after which it would flow to the public network under the R752 towards the Rathnew Stream, located c. 40m north of the appeal site. The Proposed Development would also connect to the public foul network which, after treatment, ultimately discharges to the Rathnew Stream. Having regard to the nature, scale and location of the Proposed Development, the information available on the EPA website and information provided in the application/appeal, the Inspector (and in turn the Commission) was satisfied (in the exercise of their expert judgment) that the Proposed Development would not cause a deterioration of the status of a body of surface water and that it would not jeopardise the attainment of good surface water status, good ecological potential or good surface water chemical status.

13. Moreover, Condition 15 requires a connection agreement to be entered into before the commencement of development (which UE must be satisfied can be lawfully done – including by reference to any obligations it has relevant to the WFD). In FoIE v Uisce Eireann [2026] IEHC 106 the Court outlined that in considering a connection agreement, like the type required by Condition 15, UE has to take 'full account' of the requirements of the WFD (§78) (referring to s.5, s.31 and s.61 of the Water services Act 2007, as amended). In this respect, as outlined above, UE is the body responsible for the WwTP infrastructure and a body which it is presumed will act/acted lawfully – Duffy v An Bord Pleanála [2025] IEHC 715 (inter alia, §51). Condition 15 ensures that no development will occur if UE consider there to be an issue with capacity at the WwTP and, as outlined above, it can be presumed that UE will act lawfully in this respect. This ensures no breach of Art.4 of the WFD.

14. The evidence before the Commission (which was accepted) did not disclose any adverse impact on any waterbody, either generally or, more importantly, from this specific development."

90. It will be useful to address this core ground by reference to the following:

(i) facts relevant to the WFD issue;
(ii) law regarding the WFD; and
(iii) issues that arise here.

I – WFD – relevant facts

91. The applicant's grounding affidavit exhibits *inter alia* the following at JS1:

"17. Applicant's further post remittal submission to the Board
...
19. Wicklow County Council further post remittal submission to the Board
20. IFI Submission (WCC ref 23/60169)
21. Wicklow County Council Environmental Scientist Report (WCC ref 23/60169)
22. Wicklow County Council Planners Report (WCC ref 23/60169)

...
25. Screenshot of EPA map showing location of water monitoring points and Glenealy WWTP
26. Screenshot of https://www.catchments.ie/data/#/waterbody/IE_EA_10R020600?_k=p5ducs [which seems to be a dead link currently]
27. Copy of certificate of authorisation for the Glenealy WWTP
28. Copy of the EPA Inspectors report to the EPA as part of the application for the Glenealy WWTP certificate of authorisation"

92. Exhibit 25, the map showing location of monitoring points relative to the WWTP is as follows:

93. The context which this confirms, all other things being equal, is that monitoring by the council at the two stations nearest to the WWTP (data which the commission did not seek to obtain) is more likely to be informative as to the effect of the WWTP on the waterbody than monitoring from a more distant station at Rathnew Bridge.

94. It will perhaps be more meaningful to go through the various relevant points in chronological order.

95. Reference to Ms Dromey's affidavit has been elided in the below as that is inadmissible or of no weight for reasons outlined above.

May 2010 – WWDA application by UÉ for Glenealy/ Ballymanus WWTP

96. The WWDA application (papers at https://leap.epa.ie/licence-profile/A0444/versions/6e2176ab-203e-e111-ab87-0050568a69e2 and application at https://leap.epa.ie/docs/090151b2803c4f53.pdf) includes the following (emphasis added):

"4. The proposed technology and other techniques for preventing or, where this is not possible, reducing emissions from the wastewater works.
All emissions involve domestic effluent and no further development will be allowed to take place which would worsen the status quo.
5. Further measures planned to comply with the general principle of the basis obligations of the operator, i.e. that no significant pollution is caused
The treated effluent at Ballymanus is sampled 6 times a year to monitor compliance with the Urban Wastewater Directive. The water quality in the case of the two river discharge points is measured 10 metres upstream off the effluent pipe (aSW1u) and 25 metres downstream of the discharge point (aSW1d).
6. Measures planned to monitor emissions to the environment

The treated effluent is sampled 6 times a year to monitor compliance with the Urban Wastewater Directive. The water quality in the case of the two river discharge points is measured 10 metres upstream off the effluent pipes (aSW1u),(aSW2u) and 25 metres downstream of the discharge point (aSW1d),(aSW2d)

...

B.8(i) Population equivalent of agglomeration

The population equivalents of the different subcatchments of the agglomeration are as follows:

Ballymanus: 86 dwellings = 256pe (capacity 400pe)
Carrigview: 34 dwellings = 102pe
Ballyfree: 13 dwellings = 39pe
Drumdangan: 6 dwellings = 18pe
Total: 149 dwellings = 447pe

The population of Glenealy has varied little in the last number of years due to planning curtailments caused by the lack of the available waste water capacity. However in the case of Ballymanus where the contributing population to the plant amounts to 256pe out of a capacity of 400pe, additional volume is being reserved to assimilate (by means of a collection system should money become available), the effluent from the existing non sewered development within the village centre. Rather than permitting new development, capacity is being reserved to transfer the discharge from the Council development at Carrigview to the new works using a collection system should funds become available. Due to the lack of assimilative capacity in the Glenealy stream no new development will be permitted for the foreseeable future. Due to the distance from the Wicklow Town Sewerage Scheme at Rathnew coupled by undulating levels there are serious technical issues (residence time, minimum pipe gradient, entrained air problems; should it be a gravity or pumped system?) with regard to future disposal of effluent away from the Glenealy stream.

...

SECTION E: MONITORING

E.1 Wastewater discharge frequency and quantities – existing and proposed:

There is no composite sampling or continuous flow monitoring at the Glenealy Ballymanus or Carrigview plants. **Only at the Ballymanus plant is the treated influent and effluent sampled six times a year by Wicklow Co. Council laboratory to ensure that the effluent complies with the Urban wastewater Directives 2001 to 2006. The water quality of the Glenealy stream is measured 25 metres downstream of the primary discharge point SW1 at monitoring point aSW1d (314348E,196190N) and 10 metres upstream at monitoring point aSW1u (314383E,196238N) of the primary discharge point** SW1 Identification code for discharge point Frequency of discharge (days/ann.) Quantity of wastewater discharge (m3/ann) SW1 365 63411

E.2 Monitoring and sampling points

The Environmental Laboratory of Wicklow Co. Council monitors the wastewater treatment plants in Co. Wicklow in accordance with the Urban Wastewater Regulations and EPA guidance. The sampling programme is reviewed every year to account for changes in population, treatment performance and legislation/EPA advice.

The wastewater (influent, effluent and mixed liquor) and receiving water (upstream and downstream river samples) are sampled at designated sampling points. The influent and effluent samples are collected by grab samples taken at any instant in time. Wicklow Co. Council is committed to providing a safe place of work at all out treatment plants including safe access to sampling points. The analysis of samples taken from the wastewater treatment plant takes place on the day of sampling. There is a documented test procedure for each analytical method used in the laboratory based on ALPHA/AWWA 'Standard methods for the examination of water and wastewaters' or UK Standing Committee of Analysts 'Methods for examination of waters and related materials'. As part of our quality control procedures, known concentrations of check standards are analysed with each sample run. The analytical equipment is maintained and calibrated in accordance with the [manufacturer's] instructions and SOP. The environmental laboratory also participates in the EPA's intercalibration programme and is included on the List of Approved Laboratories 2007 (EPA website www.epa.ie) for many tests including BOD, COD, TSS, ammonia, nitrate and phosphate

Extract from the EPA website:

'Section 66 of the Environmental Protection Agency Act 1992 provides for the establishment of an intercalibration programme for the purpose of assessing analytical performance and ensuring the validity and comparability of environmental data for laboratories, which submit data to the Agency. It also provides t=for the establishment of a register of quality-approved

laboratories, which would normally be expected to send data to the Agency. The register lists, on a parameter by parameter basis, the laboratories which performed satisfactorily in the EPA intercalibration programme for the previous year. The register is updated annually. The objective criteria for inclusion in the register are listed below.
Criteria for compliance:
44 satisfactory returns from 5 or 3 satisfactory returns in consecutive rounds or current laboratory accreditation criteria for pH require 3 returns within 0.20 pH units of reference concentration and 1 return within 0.30 units."

May 2011 – EPA inspector report re: WWDA

97. Exhibit JS1 tab 28, the EPA inspector's report states the following (emphasis added):
"Date: 19 May 2011
Re Application for a Waste Water Discharge Authorisation from Wicklow County Council, for the agglomeration named Glenealy Wastewater Treatment Works, Reg. No. A0444-01.
Re: Schedule of Discharge Authorised: Discharges from agglomerations with a population equivalent less than 500
Certificate of Authorisation Application
Received : 14 December 2010
Submission(s) Received: No
This application relates to the Glenealy Wastewater Treatment Works agglomeration in County Wicklow. The agglomeration currently has a population equivalent (p.e.) of 41 5. The agglomeration is serviced by four waste water treatment plants (WWTP).
The Ballymanus WWTP, which was constructed in 2005, provides tertiary treatment, consisting of primary and secondary settlement, aeration and a reedbed system. The plant has a design capacity of 400 p.e. and a current load of 256 p.e. The plant discharges to the Glenealy stream.
The Carrigview WWTP provides primary treatment consisting of two primary settlement tanks, which discharge to the Glenealy stream. The plant has a current load of 102 p.e.
The Ballyfree WWTP provides primary treatment consisting of a septic tank and percolation area. The plant discharges to ground and has a current load of 39 p.e. The Drumdangan WWTP provides primary treatment consisting of a septic tank and percolation area. The plant discharges to ground and has a current load of 18 p.e.
Based on the nearest EPA water quality monitoring station, 5.5 kin downstream, the biological Q-value is Q3-4 (sampled in 2009).
Based on the certificate of authorisation application submitted three of the waste water treatment plants for the agglomeration provide primary treatment. The **receiving water has been identified as being less than good status (Biological Q value <4). It is acknowledged that the discharge(s) from the agglomeration may not be the only cause of the waterbody being less than good status.** The Recommended Certificate of Authorisation (RCoA) states that within twelve months the authorisation holder shall identify appropriate improvements to the wastewater works, including a waste water treatment system necessary to ensure all discharge(s) from the agglomeration contribute towards achieving at least good status in accordance with the European Communities Environmental Objectives (Surface Waters) Regulations 2009 and/or the European Communities Environmental Objectives (Groundwater) Regulations 2010.
There is a designated bathing water located in the vicinity of the discharge(s) from the agglomeration. The RCoA includes a condition whereby the Certificate of Authorisation holder shall ensure that the discharge(s) from the agglomeration shall not cause a deterioration in the microbiological and physicochemical parameters in the bathing waters.
The certificate of authorisation applicant was required to complete a screening of the potential impact of the discharge(s) from the agglomeration on the designated European Site(s) downstream of the agglomeration. The certificate of authorisation applicant carried out a screening which identified that the discharge(s) was not likely to have a significant impact on a European site.
The discharge(s) from the agglomeration are considered not likely to have H significant impact on the receiving waterbody subject to the Certificate of Authorisation Holder complying with the conditions of the RCoA.
Recommendation
I recommend that a Filial Certificate of Authorisation be issued subject to the conditions and for the reasons as set out in the attached Recommended Certificate of Authorisation."

June 2011 – EPA WWDA

98. The final WWD authorisation is at https://leap.epa.ie/docs/beb6d6b0-90e8-4417-888e-0dcff24e7061.pdf

2020 – EPA website relied on by the inspector

99. It is not totally clear what link the inspector was relying on (in relation to 2020 quality assessment) or whether this was archived but it would appear to be incorporated into the below current information.

100. My efforts to identify the current link exhibited at Exhibit JS1 tab 26 (if I understand the file name it was accessed on 21 January 2025) were initially defeated but in the draft judgment process the applicant provided the following link - https://www.catchments.ie/data/#/waterbody/IE_EA_10R020600 - stating that "[i]t appears that the EPA website adds in a unique code when the link as accessed and this was copied into the affidavit and made the link unresponsive". The map link in the exhibited text does work: https://gis.epa.ie/EPAMaps/Water?gext=323849,191767,330548,196476&lid=EPA:WFD_RIVERWATERBODIES_CYCLE3.

101. There is a May 2024 EPA report (Cycle 3 HA 10 Ovoca-Vartry Catchment Report, May 2024) at: https://catchments.ie/wp-content/files/catchmentassessments/10%20Ovoca-Vartry%20Catchment%20Summary%20WFD%20Cycle%203.pdf (presumably potentially available to the commission in October 2024 when the decision was made) which indicates the following about Rathnew Stream:

> "Status 10-15 Good
> Status 13-18 Poor
> Status 16-21 Good
> Environmental Objective Good
> Environmental Objective Date 2021 or earlier
> WFD Risk 16-21 Not at risk"

102. Insofar as I understand the numbers involved, which may not be very far, these appear to represent years (13-15 = 2013 to 2015) and relate to the periods of assessment cycles which are alternatively presented (*e.g.* – https://www.catchments.ie/download/cycle-3-draft-catchment-assessments-published-september-2021/) as:

> "Categories
> 1st Cycle 2009-2015
> 2nd Cycle 2016-2021
> 3rd Cycle 2022-2027"

103. The exhibited screenshot indicates a somewhat limited approach to the monitoring of the water body in determining its status, as follows:

"Monitoring Stations on Programme

Code	Station	Easting	Northing
RS10R020600	Br in Rathnew Village	328784.91	195569.31

Station Details
Code: RS10R020600
Station: Br in Rathnew Village
Surveillance Monitoring: No
Operational Monitoring: Yes
Investigative Monitoring: No
Biological Monitoring: Yes
Supporting Chemistry Monitoring: No
Chemical Monitoring: No
Quantitative Monitoring: Not Applicable
Quantitative Type:
--
Planned Monitoring Frequency

Quality Element	Additional Descriptor	2019	2020	2021
Chemical Surface Water Status		0	0	0
Fish Status or Potential		0	0	0
General Conditions		0	0	0
Hydromorphological Conditions		0	0	0
Invertebrate Status or Potential	AWIC	0	0	0
Invertebrate Status or Potential	Q-Value	0	0	1
Macrophyte Status or Potential		0	0	0
Phytobenthos Status or Potential		0	0	0
Specific Pollutant Conditions		0	0	0"

104. On its face this suggests limited monitoring in terms of type and frequency, at a station some distance away.

105. The pollutant material exhibited includes the following (potentially notable points in bold):

"2016-2021

Parameter	Station Name	Period	Indicative Qua… [*sic*]	Trend	Dist to Treshold [*sic*]
Ammonia-Total (as N)	d/s Glenealy WWTP	Annual	Good	**Upwards**	Far
Ammonia-Total (as N)	u/s Gleneally WWTP	Annual	Good	Downwards	Far
Total Oxidised Nitrogen (as N)	d/s Glenealy WWTP	Annual	**Moderate**	Downwards	Far
Total Oxidised Nitrogen (as N)	u/s Gleneally WWTP	Annual	**Moderate**	Downwards	Far
ortho-Phosphate (as P) - unspecifi…	d/s Glenealy WWTP	Annual	**Poor**	Downwards	Far
ortho-Phosphate (as P) - unspecifi…	u/s Gleneally WWTP	Annual	Good	Downwards	Near

"

January 2022 – UÉ submission

106. UÉ's submission to the council dated 18 January 2022 provided as follows (emphasis added):

"18th January 2022

RE: Irish Waters Response in regard to Wicklow County Council Planning Application Ref. 21/840, regarding the provision of 19 No. dwellings and associated site works

Dear Sir/ Madam,

Please accept this submission in respect of the above-referenced planning application for development at, Ballymanus Lower & Ballyfreee [sic] East, Glenealy, Co. Wicklow

Irish Water have reviewed the proposed development and would like to make the following observations:

It is noted that the applicant has previously engaged with Irish Water through a Pre-Connection Enquiry, relating to the provision of 17 no. houses on the subject site. A response was issued by IW on 14th October 2020, confirming that the proposed water and wastewater connections could be facilitated. It is noted that the current planning application is proposing 2 no. units in excess of the previous consultation.

In addition, since the above-mentioned pre-connection response was issued, capacity issues have been identified in the Ballymanus Wastewater Treatment Plant (Glenealy). Irish Water have assessed the current available capacity at the Ballymanus Wastewater Treatment Plant and can confirm **there is existing capacity equating to c. 144pe**.

Irish Water further notes the possibility to upgrade the capacity of the Ballymanus Wastewater Treatment Plant, by adding a 3rd aeration tank. However, this would be subject to a capital investment project to upgrade the capacity of the Glenealy wwtw [*recte* WWTP] which would readily allow for the connection in of the 2 septic tanks (Ballyfree and Carrigview) when the sewerage network is being provided, thus ensuring sufficient capacity at that time.

IW, on consideration of the above and having reviewed the plans/particulars submitted with the Wicklow County Council Planning Application Ref. 21/840, raises no objection to the granting of permission for the proposed development, subject to the conditions outlined below.

IW respectfully requests any decision to grant planning permission, for Planning Application Ref. 21/840, includes the following conditions:

1. The applicant proposes to directly connect to a public water/wastewater network operated by Irish Water, the applicant must sign a connection agreement with Irish Water prior to the commencement of the development and adhere to the standards and conditions set out in that agreement.
2. The applicant proposes to connect to the public water /wastewater network, they shall ensure that there will be no negative impact to any of Irish Waters Assets and/or infrastructure which may be in proximity to the development.
3. Irish Water does not permit any build over of its assets and separation distances as per Irish Waters Standards Codes and Practices must be achieved. Any proposals by the applicant to build over or divert existing water or wastewater services subsequently occurs the applicant submit details to Irish Water for assessment of feasibility and have written confirmation of feasibility of diversion(s) from Irish Water prior to connection agreement.
4. All development shall be carried out in compliance with Irish Water Standards codes and practices.

Reason: To ensure proper planning & sustainable development

Queries relating to the observations above should be sent to ...
Signed on behalf of ... Connection & Developer Services"

January 2022 – council refusal of this application

107. In the planner's report of the council recommending refusal of this application, it was stated inter alia:

"WICKLOW COUNTY COUNCIL
PLANNING DEPARTMENT
PLANNING REPORT
BREEGE KILKENNY, DIRECTOR OF SERVICES, FERGAL KEOGH, SENIOR ENGINEER, EDEL BERMINGHAM, SENIOR EXECUTIVE PLANNER.
NICKY CASEY ASSISTANT PLANNER.
21/840
PETER KING MILL TOWN CONSTRUCTION
(A) 19 NO. DWELLINGS COMPRISING 10 NO. (113 SQ.M .) 3 BEDROOM DORMER BUNGLAOWS, 07 NO. (138 SQ.M.) 4 BEDROOM DORMER BUNGALOWS AND 02 NO. (102 SQ.M .) 3 BEDROOM DORMER BUNGALOWS.(B) NEW PEDESTRIAN LINKS. (C) NEW VEHICULAR ENTRANCE OFF R752. (D) CONNECTION TO ALL PUBLIC SERVICES. (E) ALL NECESSARY ANCILLARY AN D SITE WORKS TO FACILITATE THE ABOVE.
BALLYMANUS LOWER & BALLYFREE EAST, GLENEALY, CO. WICKLOW.
07/12/2021 & 05/01/2022

This application has been subject to a further information request. This report should be read in conjunction with the previous planning reports.

Reports:

Irish Water - Refusal: Irish Water has the following observations in respect of the proposed development: The current headroom at the Ballymanus Wastewater Treatment Plant (Glenealy) is currently to be reserved to assimilate (by means of a collection system should funds become available), the effluent from the existing non-sewered development within the village centre, as per the conditions of the relevant wastewater certificate. There are currently no plans in the Irish Water Current Investment Plan to carry out these works.

Dept of Housing, Local Government and Heritage - Suggested conditions.
CFO - No change since original report.
Housing -Awaiting report.
MDE -Awaiting report.
Roads -Awaiting report.
Water & Environmental Services - Awaiting report.
...

Issues Raised (in brief):
Boundary treatments and landscaping.
The submitted drawings are unclear and lack sufficient detail.
Impacts on existing WWTS. Public sewer capacity.
Overlooking.
Design, layout, increase in a unit, and excessive building heights.
Traffic and parking on Glenealy Main Street. Access road.
Impacts on residential amenity.

Comment:
The planning issues raised in the submissions, specific and relevant to the consideration of this application are to be considered in the assessment and making of a planning recommendation.
...

10) Concerns have been raised in relation to the treatment capacity of the Waste Water Treatment Plant in Glenealy and the effluent discharges to the receiving stream. You are therefore requested to discuss this matter with Irish Water and to submit a report in relation to the ability of the existing Waste Water Treatment Plant and the receiving waters to cater for the proposed development and the likelihood of any deficiencies to be addressed within the lifetime of permission. Any report should include written correspondence from Irish Water in this matter.

Response: The applicant has submitted a copy of a pre-connection inquiry dated 14th of October 2020 which states that both water and wastewater connections are feasible subject to upgrade works.

Assessment: The applicant's response is noted, however this pre-connection inquiry is dated October 2020. Irish Water have submitted a Report dated 14/12/2021 which recommends refusal and states 'Irish Water has the following observations in respect of the proposed development: The current headroom at the Ballymanus Wastewater Treatment Plant (Glenealy} is currently to be reserved to assimilate {by means of a collection system should funds become available}, the effluent from the existing non-sewered development within the village centre, as per the conditions of the relevant wastewater certificate. There are currently no plans in the Irish Water Current Investment Plan to carry out these works.' As there is no public wastewater capacity permission should be refused.
Conclusion: It is recommended that planning for this development be refused.
Recommendation: REFUSE
1) Having regard to the existing deficiency in public wastewater capacity in the area of the proposed development, it is considered that the proposed development would be premature by reference to the timescale within which this deficiency is likely to be made good. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.
... AP Date: 25/01/2022"

August to September 2023 – examination of related application

108. Exhibit 20, the IFI submission in the related application, states:

"Date: 15th August 2023
Planning Register Reference: 2360169
Applicant: Victoria Kelly
Development: Planning permission for the construction of 12 No. 3 Bed semi-detached dwellings, a new vehicular entrance/exit to R752 a connection to public services and all together with associated site development works. at Ballyfree East, Glenealy, Co Wicklow
Dear Sir/Madam,
Inland Fisheries Ireland (IFI) is the statutory authority responsible for inland fisheries in Ireland.
Under section 7(1) of the Inland Fisheries Act 2010 (No. 10 of 2010) the principal function of IFI is the protection, management, and conservation of the inland fisheries resource. It is important to ensure that any proposed development will not impact negatively on surface or groundwater sources.
IFI have examined the above planning application and wish to make the following observations for your consideration.
It is noted in Uisce Eireann's response to the applicants Pre-Connection enquiry for a Wastewater connection to use the existing wastewater network, that they stated that this is 'feasible without infrastructure upgrade by Irish Water'. In their application to the EPA (2011) for a Wastewater Discharge Certificate for the Glenealy agglomeration, Wicklow County Council states the following: 'additional volume is being reserved to assimilate the effluent from the existing non sewered catchment within the village centre'. IFI would contend on this basis that there is no capacity available within the existing wastewater treatment plant at Ballymanus to accept waste from the proposed development.
The Wastewater Discharge Certificate of Authorisation issued by the EPA to Wicklow Co. Co. states in Condition 1. Scope sub-condition 1.5 Treatment Capacities that 'The Certificate of Authorisation holder shall maintain such available capacity within the Wastewater works as is necessary to ensure that there is no environmental risk posed to the receiving water environment as a result of the discharge(s). The Certificate of Authorisation holder shall upgrade the wastewater works where the Certificate of Authorisation holder determines that there is inadequate treatment capacity available'.
It is further stated within Wicklow Co. Co.'s Certificate application to the EPA that 'Due to the lack of assimilative capacity in the Glenealy stream, no new development will be permitted for the foreseeable future'.
The calculations submitted by Wicklow Co. Co. in their Certificate application for the loadings to be accepted at the four separate Wastewater Treatment plants servicing the Glenealy agglomeration were based on 2011 population figures.
A contributing PE of 256 was assigned to the Ballymanus plant which theoretically allowed for a further loading of PE (146) into the plant. Based on the most up-to date ambient monitoring results collated by Wicklow Co. Co. it is apparent that the Ballymanus plant is having a negative impact on the Rathnew stream (to which it discharges treated effluent from the plant).
The ambient monitoring results show elevated levels of Orthophosphate (P04) and Ammonia (NH4) downstream of the Ballymanus WWTP discharge point into the Rathnew stream. These results exceed the river water quality standards set to achieve Good Status in

accordance with the requirements of the WFD and which are set out in the European Communities Environmental Objectives (Surface Water) Regulations, 2009 (as amended). Based on these results it is evident that the current loadings into the Ballymanus plant and the subsequent discharge of treated effluent is having an impact on water quality within the Rathnew stream and that the Ballymanus plant may already be at maximum capacity.

It is important to note that Article 5 of the 2009 Surface Water Regulations also requires that a public authority, in performance of its functions, shall not undertake those functions in a manner that knowingly causes or allows deterioration in the chemical or ecological status of a body of surface water.

In the interest of proper planning and sustainable development and given IFI's statutory responsibility to protect, conserve and manage the inland fisheries resource, IFI regards the proposed development as premature until such time that adequate Wastewater infrastructure is available within the Glenealy agglomeration. Once in place, this infrastructure should be designed and built so as not to have an impact on the environment or other Wastewater infrastructure servicing the wider area."

109. The council's executive scientist reported as follows in relation to the related application (emphasis added):

"APPLICANT NO. 23/60169
APPLICANT Kelly
LOCATION 12 Houses Ballyfree East Glenealy
REPORT DUE DATE 27/08/2023
Site inspection: No
Areas of Interest
Flooding
☐ No previous flooding on site
☐ No flood risk assessment submitted but Flood Maps indicate area is outside flood risk zones A & B
Drinking Water
☐ Public mains.
Wastewater Treatment & Disposal
☐ Connection to public foul network proposed via 500m foul sewer to Annesbrook and onto Ballymanus
WWTP.
☐ The Glenealy WWTP at Ballymanus currently impacts the receiving water (Rathnew Stream_10) due to a lack of assimilative capacity in the stream for the level of treatment provided by the WWTP. This is worrying given that the WWTP is designed for 400PE but only 256 PE is currently connected.
☐ The remaining capacity in Ballymanus WWTP is being retained to connect, at some point in the future, the existing un-sewered houses in Glenealy village in Carrig View (102PE), Ballyfree Cresent (39PE) and Drumdangan (18PE) according to information submitted with the application for a wastewater licence for the agglomeration to the EPA. This would not allow for another 12 Houses (36 PE) even if there was assimilative capacity in the Rathnew Stream_10.
☐ The 500m sewer connection proposed in this application could benefit Glenealy, as it could potentially facilitate a sewer link from the South end of Glenealy Village to the Ballymanus WWTP, but only if designed to accept wastewater from the additional un-sewered properties at Carrigview, Balyfree Cresent and Drumdangan**. However unless UE have plans to upgrade Ballymanus WWTP to provide a far higher level of treatment, there is no assimilative capacity in the Rathnew Stream for this development (or any of the un-sewered properties that could be connected).**
Surface Water Drainage
☐ Roof-water and road drainage to underground attenuation tank with flow control to interceptor before discharge to a watercourse in the corner of the site.
☐ System is designed for 100yr event with 20% for climate change.
☐ Swales have been included but it's not clear as to their function given the road has gullies and its own drainage network based on drainage drawings provided.
Construction Management
☐ No construction management plan details provided.
AA/NIS
☐ No AA Screening submitted even though site is connected via a watercourse along the southern boundary to the Rathnew Stream_10 which connects to the Murrough SAC.
Biodiversity
☐ Widespread mature tree removal along the main road and on the site proposed.

☐ Planting list proposed native tree mixes to benefit existing hedgerow on the site.
☐ No mention of wildflower areas, but the proposed ground cover mix are mostly pollinator friendly.
Conclusions
I recommend refusal due to inadequate capacity of the Rathnew Stream to accept any additional wastewater loading given the current level of treatment at the Glenealy Wastewater Treatment Plant.
If a grant is considered I would recommend looking for further information:
1. Submit an AA assessment for the proposed development given connectivity to the Murrough Wetland SAC.
2. Applicant should submit further details of surface water handling to include Nature Based Solutions as per CDP Policy CPO 13.22 & CPO 14.15 (To promote the use of green infrastructure, such as swales and wetlands, where feasible as landscape features in new development to provide storm / surface runoff storage and reduce pollutants, as well as habitat, recreation and aesthetic functions) & CPO 14.14 (underground tanks are a last resort).
3. Clarify how the proposed swales will work in conjunction the proposed road drainage network
4. Submit details of the construction environmental management plan given the risk of siltation entering the adjacent tributary of the Rathnew Stream. This plan should show the locations of pollution prevention infrastructure such as site depot, fuel stores, concrete handling areas, silt trapping and settlement ponds etc.
5. Submit further details or pollinator friendly planting throughout the development.
6. Submit plans for mature tree replacement for the mature tree removal proposed in the tree report.
... Date: **15/08/23**
Executive Scientist
Planning Development and Environment”

110. The council planner’s report on the related proposal includes the following:
“Services
Water: Public Mains
Waste: Public Sewer
Surface: Watercourse
Uisce Eireann have noted that they have no objection to the proposal. It was noted in the previous planning assessment that issues with the treatment system have been overcome in Glenealy. Under PRR: 21/840 it was indicated that capacity issues were identified in Ballymanus and there is current capacity equating to c.144pe and there is a possibility to upgrade by adding a 3rd tank subject to capital investment. An underground attenuation tank is prosed to manage surface water prior to discharge to the watercourse in the western corner. The system is designed for 100yr event with 20% for climate action, this is appropriate.
I note that concerns have been raised by the WCC Environment Section, Inland Fisheries and a third party with respect to the proposed connection to the network and the impacts of the Ballymanus WWTS on the Rathnew Stream. Inland Fisheries note that levels of Orthophosphate and Ammonia are elevated downstream of Ballymanus and it is evident that the plant is having an impact on the water quality of the Rathnew Stream. The policies of the CDP seek to protect the river basin and subbasin and to ensure the protection, improvement and sustainable use of all waters in the County. The council gives cognisance to the EU’s Common Implementation Strategy Guidance Documents No. 20 and 36 which provide guidance on exemptions to the environmental objectives of the Water Framework Directive. The policies also seek to protect natural habitats and ensure appropriate avoidance and mitigation measures are incorporated into development proposals as part of any ecological impact assessment. It is clear from the submissions by Irish Fisheries and WCC Environment Section that the Ballymanus WWTP is having a negative impact on the stream and associated biodiversity therefore to permit this development would be contrary to the polices that seek to protect water courses and the habitats within. Furthermore the Rathnew Stream is connected to the Murrough SAC and any additional wastewater loading could have a negative impact on the qualifying interests of the Natura 2000 site given the current level of treatment at the Glenealy Wastewater Treatment Plant.
...
Recommendation:
REFUSE as follows:

1. Having regard to objectives ~~CPO 17.12, CPO 17.14,~~ CPO 17.24 and CPO 17.26 of the County Wicklow Development Plan 2022-2028 which seek to support the implementation of the EU Groundwater Directive and associated Management Plans, and to restrict development likely to lead to a deterioration in water quality, ~~That~~ it is considered that given the identified evidence from river monitoring that the existing Glenealy Wastewater Treatment Plant is having a negative impact on the water quality of the Glenealy/ Rathnew Stream, that any increased discharges to this plant are likely to ~~insufficient evidence has been provided to clarify that the proposed development will not~~ negatively impact the Glenealy/ Rathnew Stream_ 10 and the ecological/ biodiversity value and habitats within the stream. Therefore to permit this development would be contrary to the ~~policies~~ objectives of the County Development Plan , to the protection of river quality, and to the proper planning and sustainable development of the area.

2. The proposed development is seeking to connect into the Ballymanus waste water treatment plan. Records show that this plant is currently impacting the receiving water (Rathnew Stream_10) due to a lack of assimilative capacity in the stream for the level of treatment provided by the WWTP. The ambient monitoring results show elevated levels of Orthophosphate (P04) and Ammonia (NH4) downstream of the Ballymanus waste water treatment plan discharge point into the Rathnew stream. In that regard, it is considered that insufficient evidence is provided to clarify if there are potential negative effects on the Murrough SAC Natura 2000 site, and on the features of interest or conservation objectives of the SAC; therefore to permit this development in the absence of such information would be contrary to the objectives of the County Development Plan 2022-2028 and the EU Habitats Directive (92/43/EEC)

...

________________________________Date: **08/09/2023**

... EP

Agreed as modified 8/9/2023"

June 2024 – submissions on this application

111. Exhibit JS1 tab 19 is a letter from the council to the commission dated 14 June 2024 which includes the following:

"It is further noted that the proposed development would not fully comply with Objective CPO 4.5, which states:

CPO 4.5 To ensure that all settlements, as far as is practicable, develop in a self sufficient manner with population growth occurring in tandem with physical and social infrastructure and economic development. Development should support a compact urban form and the integration of land use and transport.

In this regard, it is noted that the current deficiency in the wastewater capacity, would undermine the requirement for population growth to occur in tandem with physical infrastructure and hence the proposed development would not comply with that part of the objective. However, the proposed development would strongly support compact urban form and therefore would comply with the objective in that regard."

112. The applicant's replying affidavit states:

"10. I have lived in Glenealy for 31 years and am very familiar with deficiencies in the waste water treatment infrastructure in the village.

11. I confirm that there are there are 32 houses within the Carrigview housing estate connected to a standalone communal septic tank within the housing estate which is completely inadequate and not fit for purpose. This communal septic tank is emptied regularly by waste disposal contractors contracted by the local authority. I am familiar with this. Tankers originally started coming daily but local people complained about the smell and now the tankers come on a weekly basis. It was always the understanding of local people that the spare capacity in the WwTP was to be allocated to the unconnected houses in Glenealy which continued to use inadequate waste water treatment infrastructure. The Carrigview facility is explicitly referenced in planning ref. 21840 to avail of any capacity in the WWTP for connection as per the terms of the license issued by the EPA and quoted in the reason for the local authority refusing planning application.

12. In relation to my submission drawing attention to the observations from IFI and the Wicklow County Council environment section on a subsequent planning application for 12 units under ref 230169 I disagree with the Commission's response that the claim was not made by reference to competent experts. Unlike planning application ref 230169 where the local authority notified IFI of the planning application and solicited their input, the Commission did not notify IFI of the remitted planning application. I suggest it is highly likely that had IFI been notified on remittal it would have provided similar findings and recommend refusal.

13. First, the observation was made by Marston Planning Consultants on my behalf and therefore the Commission's complaint that my observation was not backed up with appropriate expertise is manifestly incorrect. Furthermore this submission referenced the basis for it and specifically drew attention to the fact, which does not appear to be disputed, that there are elevated levels of Orthophosphate and Ammonia downstream of the Ballymanus WwTP. This information is in the public domain and on the same website the Commission said that it and/or its inspector consulted during its deliberations.
14. Second, The observation was made by reference to observations provided by IFI, an expert public authority which has responsibility for the protection of water quality. It also referred to the environmental section of the relevant planning authority, Wicklow County Council and its environmental section, again an independent expert authority with statutory responsibility for waste water treatment and the protection of water quality. Again the conclusions of these bodies was notified to the Commission by myself with the detailed information available to it via the EPA website, the planning register and the planning authority's planning portal. Alternatively it could have been sought by way of a specific request to the Planning Authority and IFI.
15. It is obvious based on this that there was an issue with the WwTP and that the concerns of the Council and IFI applied equally if not more so to a much larger development. ...
16. I should add that neither the Commission nor the developer has adduced any evidence to rebut my observations. The Commission's deponent does not appear to have been involved in the decision-making process at all and in any event I am informed by my solicitors that Mr Brophy has no professional expertise or relevant experience in the area of planning, water quality or waste water treatment to support a claim of 'harmless error'."

113. The applicant's post remittal submission of 17 June 2024 (tab 17) includes the following:
"Wastewater Treatment
We note that the decision made by the County Council refused permission stating that the proposed development is premature having regard to the deficiency in the capacity of public wastewater treatment and the time scale within which the deficiency may be made good.
We note that the Board in considering this matter previously stated that Irish Water had published its investment plan 2020 to 2024 and includes four schemes in Wicklow the Arklow Wastewater Treatment Plant, the Aughrim/Annacurra Water Supply Scheme, the Avoca Wastewater Treatment Plant, and the Blessington Wastewater Treatment Plant. None of these cover Glenealy.
In a report to the planning authority Irish Water (14th December 2021) stated that the available capacity in the Glenealy WWTP was being reserved for existing but unsewered development in the village centre but that there were no plans in the Irish Water Investment Plan to lay sewers to create that connection. The planning authority refused because of a lack of capacity in the wastewater systems would be premature by reference to this deficiency and the timesaver within which it is likely to be made good.
This has remained the case, and we note that a planning application for 12 houses some 150m west of the site that is subject of the first party appeal (Planning Ref. 2360169) was withdrawn on the 12th February 2024 following a recommendation to refuse permission from the Council. The grounds of the recommended refusal cited it as being contrary to Policy CPO 4.13.
Furthermore, in considering the 2023 application, the case planner noted the concerns raised by Wicklow County Council Environment Section, Inland Fisheries and a third party with respect to the proposed connection to the network and the impacts of the Ballymanus WWTS on the Rathnew Stream. Inland Fisheries note that levels of Orthophosphate and Ammonia are elevated downstream of Ballymanus and it is evident that the plant is having an impact on the water quality of the Rathnew Stream.
The policies of the County Development Plan seek to protect the river basin and sub-basin and to ensure the protection, improvement and sustainable use of all waters in the County. The Board must give cognisance to the EU's Common Implementation Strategy Guidance Documents No. 20 and 36 which provide guidance on exemptions to the environmental objectives of the Water Framework Directive. The policies also seek to protect natural habitats and ensure appropriate avoidance and mitigation measures are incorporated into development proposals as part of any ecological impact assessment. It is clear from the submissions by Irish Fisheries and WCC Environment Section on this 2023 application, which would also apply to the first party appeal before the Board, that the Ballymanus WWTP is having a negative impact on the stream and associated biodiversity therefore to permit this development would be contrary to the polices that seek to protect water courses and the habitats within.

Furthermore the Rathnew Stream is connected to the Murrough SAC and any additional wastewater loading could have a negative impact on the qualifying interests of the Natura 2000 site given the current level of treatment at the Glenealy Wastewater Treatment Plant. We respectfully submit that the Ballymanus waste water treatment plan is currently impacting the receiving water (Rathnew Stream_10) due to a lack of assimilative capacity in the stream for the level of treatment provided by the WWTP. The ambient monitoring results show elevated levels of Orthophosphate (P04) and Ammonia(.) downstream of the Ballymanus waste water treatment plan discharge point into the Rathnew stream. In that regard, it is considered that insufficient evidence is provided to clarify if there are potential negative effects on the Murrough SAC Natura 2000 site, and on the features of interest or conservation objectives of the SAC; therefore to permit this development in the absence of such information would be contrary to the objectives of the County Development Plan 2022-2028 and the EU Habitats Directive (92/43/EEC).

...

Furthermore, as the Ballymanus waste water treatment plan is currently impacting the receiving water (Rathnew Stream_ 10) due to a lack of assimilative capacity in the stream for the level of treatment provided by the WWTP; and that due to the ambient monitoring results show elevated levels of Orthophosphate (P04) and Ammonia (NH4) downstream of the Ballymanus waste water treatment plan discharge point into the Rathnew stream must lead to a refusal of permission."

September 2024 – inspector's report in this application

114. The inspector dealt with the council's reason for refusal as follows (emphasis added):

"8.3 Wastewater

Reason for Refusal - Wastewater Capacity

8.3.1. The planning authority refused permission as it considered that due to the existing deficiency in public wastewater capacity in the area the proposed development would be premature by reference to the timescale within which this deficiency is likely to be made good.

8.3.2. The main grounds of this first party appeal are that there is capacity within the existing public network to accommodate the development and that the final correspondence from Uisce Eireann which raised no objection to a connection to the public network was not considered by the planning authority.

8.3.3. The observers support the decision of the planning authority and raised concerns regarding the lack of capacity of the wastewater treatment plant and consider that priority should be given to connecting existing dwellings and the local school currently served by septic tanks to the wastewater treatment plant.

8.3.4. Both the applicant and the third parties acknowledge the conflicting reports of Uisce Eireann. In this regard a pre-connection agreement was approved by Uisce Eireann in October 2020. A copy of this agreement was submitted by way of further information. It noted that there is no objection in principle to a connection to the public network. However, to accommodate the development it a requirement that the size of the existing sewer to the north of the appeal site be increased from 150mm to 225mm, up to the point where it meets the existing 225mm foul sewer. Uisce Eireann's submission to the planning authority on the 12th August 2021 also stated that there was no objection in principle to a connection to the public network subject to standard conditions.

8.3.6. Notwithstanding this, Uisce Eireann made a further submission to the planning authority in December 2021 stating that 'the current headroom at the Ballymanus Wastewater Treatment Plant (Glenealy) is currently to be reserved to assimilate (by means of a connection system should funds become available) the effluent from the existing non-sewered development within the village centre, as per the conditions of the relevant wastewater certificate. There are currently no plans in the Irish Water Current Investment Plan to carry out these works'. This opinion appears to relate to the information provided on the 2011 Wastewater Discharge Licence application for the Glenealy Wastewater Treatment Works (Licence no. A0444-01), which is publicly available on the EPA website (www.epa.ie). The application notes that due to the relative flatness of Glenealy it is difficult to drain. This results in only 86 no. dwellings out of the 149 no. (served) receiving treatment at the main (Ballymanus) plant which leaves a balance of approximately 250 dwellings served by septic tanks. The additional capacity at the plant is being reserved to assimilate (by means of a collection system should money become available), the effluent from the existing non sewered development within the village centre.

8.3.7. A final submission was made by Uisce Eireann to the planning authority in January 2022 acknowledging the pre-connection enquiry and confirming that the proposed water and wastewater connections could be facilitated. The report states that there is capacity equating to c. 144 pe in the existing network and that additional capacity could be provided at the Ballymanus WWTP by adding a 3rd aeration tank. It would appear that the final submission to the planning authority date 18th January 2022, was not considered in the final planner's report in this case dated 25th January 2022.

8.3.8. The wastewater treatment capacity register, available on the Uisce Eireann website (www.water.ie), also indicates that there is available capacity at the Glenealy – Ballymanus WWTP. Therefore, I am satisfied that there is capacity within the existing public network.

8.3.9. Therefore, the relevant issue is whether the capacity within the existing network should be reserved for existing dwellings within the village currently served by septic tank or for new developments. The licence for the Glenealy Wastewater Treatment Works agglomeration was approved in 2011. The Glenealy agglomeration consists of the Ballymanus WWTP, Carrigview WWTP, Ballyfree WWTP and Drumdangan WWTP. It is also noted that the Ballymanus WWTP was constructed in 2005. The wastewater licence was approved c. 13 years ago and the Ballymanus WWTP has been operating for 19 years. In this time, there has been no proposals for works to connect the existing dwellings to the public network and Uisce Eireann's Capital Investment Plan 2020-2024 does not include any works to provide that connection.

8.3.10. The final submission from Uisce Eireann also noted that additional capacity could be provided at the Ballymanus WWTP by adding a 3rd aeration tank. Therefore, it is my opinion that it is reasonable to allow for the proposed scheme to connect to the public network.

Impact on existing Wastewater Treatment Systems

8.3.11. The observers raised concerns that the proposed development could have a negative impact on the existing domestic wastewater treatment systems (DWWTS) within the appeal site, that serve houses adjacent to the appeal site.

8.3.12. The applicant's Civil Engineering Works Planning Statement notes that there are 7 no. existing residential dwellings adjacent to the appeal site and fronting onto the R752. All 7 no. dwellings are served by private DWWTS. The exact location of these systems and percolation areas is unknown. The applicant has identified which dwellings could provide a modern treatment plant within the confines for their site. Of the 7 no. sites assessed only 2 no. were identified as being unable to be upgraded within the boundary of their own site. These dwellings are indicated on a drawing included in Appendix A of the report. The layout of the proposed development has been designed to allow for the provision of revised DWWTS to serve these 2 no. dwellings within the appeal site. The applicant has stated that the legal transfer of these parcels of land to each of the respective properties would be formalised subject to agreement with the third parties.

8.3.13. As an alternative to this arrangement the applicant is also willing to provide a foul sewer within the appeal site to connect the existing 7 no. dwellings to the public network, subject to agreement. Having regard to the above, I am satisfied that there is capacity within the public network to accommodate the 7 no. additional dwellings located outside of the applicants red line boundary.

8.3.14. While the concern of the observers are noted, the placing of private DWWTS on lands outside of the site that they serve is not recommended as it results issues relating to access and maintenance. I am satisfied that the applicant has endeavoured to provide an appropriate solution to the existing situation on site. However, final details would be subject to a third-party agreement and does not form part of this application and that the proposed scheme is not reliant on the agreement of a third party.

Material Contravention - Objective CPO 4.5

8.3.15. Objective CPO 4.5 aims to ensure that all settlements, as far as is practicable, develop in a self-sufficient manner with population growth occurring in tandem with physical and social infrastructure and economic development. Development should support a compact urban form and the integration of land use and transport. The submission from the planning authority considers that the proposed development would not fully comply with Objective COP 4.5 as the current deficiency in the wastewater capacity would undermine the requirement for population growth to occur in tandem with physical infrastructure and hence the proposed development would not comply with this part of the objective. As outlined above, **I am satisfied that there is sufficient capacity within the wastewater network** to accommodate the proposed development and the 7 no. existing dwellings adjacent to the appeal site. Therefore, in my view the proposed scheme is compliant with Objective CPO 4.5."

115. The AA section of the inspector's report provides as follows (emphasis added):

"Foul Network

9.3.8. The proposed scheme would connect to the existing public foul network located under the R752. This network connects to the Ballymanus WWTP, which ultimately drains to the

Rathnew Stream. The Rathnew Stream flows to Broad Lough Estuary, which forms part of both the Murrough SPA and Murrough SAC.

9.3.9. In the further responses received from the Observers they reference a submission from Inland Fisheries Ireland (IFI) in relation to a recently withdrawn planning application in Glenealy village for 12 no. residential dwellings (Reg. Ref. 23/60169). This application was withdrawn, however, the submission from IFI is publicly available on the planning authority's website. **The submission from the IFI raises concerns that the most up-to date ambient monitoring results collated by Wicklow County Council indicate that the Ballymanus plant is having a negative impact on the Rathnew Stream**, to which it discharges treated effluent from the plant. Details of the monitoring referenced by the IFI were not provided with the submission or in any of the observations received as part of this appeal. **The most recent available data on the EPA website indicates that in 2020 the water quality of the Rathnew Stream had a Q value score of 4 and a status of Good and that the water body is 'not at risk'**.

9.3.10. A licence for the Glenealy Wastewater Treatment Works agglomeration was approved **in 2011**. The EPA's inspectors report relating to the licence application (available on the EPA website www.epa.ie) notes that the Glenealy agglomeration consists of the Ballymanus WWTP, Carrigview WWTP, Ballyfree WWTP and Drumdangan WWTP. All of which discharge to the Glenealy Stream.

9.3.11. In the interest of clarity, having regard to the information available on the EPA website and the information submitted with the application and appeal it would appear that the Rathnew Stream and the Glenealy Stream are the same waterbody, which flows in an easternly direction c.40 m north of the appeal site. This waterbody is also labelled as the Rathdrum Stream and Ann Stream in some of the applicant's documentation. However, I am satisfied that this is the same watercourse.

9.3.12. As per the EPA inspectors report, the Ballymanus WWTP was constructed in 2005 with a design capacity of 400pe to provide tertiary treatment. The plant had a load of 256 pe in 2011. It is noted that the final submission on file from Uisce Eireann notes that Ballymanus WWTP has capacity for c. 144pe. Therefore, it would appear that there have been no significant connections to the Ballymanus WWTP since 2011.

9.3.13. **The 2011 EPA inspectors report also** notes that the receiving water (Glenealy Stream) was identified as being less than good (Biological Q value less than 4) and the report acknowledged that the discharges from the Glenealy Wastewater Treatment Works agglomeration **may not be the only cause of the water body being less than good. The report concluded that the discharges from the agglomeration are not likely to have a significant impact on the receiving waterbody**.

9.3.14. The concerns of the third parties regarding the impact that the existing Ballymanus WWTP is having on the Rathnew Stream are noted. However, **having regard had to the report of the EPA's Inspector in 2011** which noted that discharges from the Glenealy agglomeration may not be the only cause of the waterbody being less than good and that the discharges from the agglomeration are not likely to have a significant impact on the receiving waterbody. I have also had regard to the information provided on the EPA website which indicates that water quality within the stream has improved from being less than good (Biological Q value less than 4) in 2011 to a status of Good (Q value score of 4) **in 2020**.

9.3.15. The subject site is identified for development through the land use policies of the Wicklow County Development Plan 2022 - 2028. This statutory plan was adopted in 2022 and was subject to AA by the planning authority, which concluded that its implementation would not result in significant adverse effects to the integrity of any Natura 2000 areas. I also note the development would not generate significant demands on the existing municipal sewers for foul water. It is my view that the foul discharge from the site would be insignificant in the context of the overall licenced discharge at The Glenealy Wastewater Treatment Works agglomeration, and thus any potential impact on the overall discharge would not be significant. It is also noted that the final submission from Uisce Eireann noted that there is capacity within the wastewater network to accommodate the proposed scheme."

116. Mr Brophy's affidavit for the commission confirms the following:

"26. On 28 May 2024, following remittal, the Commission wrote to the various parties/observers to the appeal, seeking further submissions - pursuant to s.131 of the PDA. I beg to refer to a copy of this correspondence, which I have placed behind TAB 10 of the Book of Exhibits.

27. On 14 June 2024, the Council wrote to the Commission, indicating its position on the appeal - including, inter alia, that it did not consider same to be a material contravention of the Development Plan; that the principle of the development is acceptable; and that the

Proposed Development complies with the development and design standards in the Development Plan. I beg to refer to a copy of the Council's submission, which I have placed behind TAB 11 of the Book of Exhibits.

28. The Applicant made an observation on the appeal, dated 14 June 2024, through his planning consultant (Exhibit JS1, Tab 17).

29. On 12 August 2024, the Commission wrote to the Council seeking a submission from UE, dated 18 January 2022 - which was subsequently sent to the Commission on 20 August 2022. I beg to refer to a copy of this correspondence and UE submission, which I have placed behind TAB 12 of the Book of Exhibits.

30. Following a site visit on 8 August 2024, the Commission's Inspector prepared a report, dated 25 September 2024, on the appeal and recommended that permission be granted, subject to Conditions ('the Inspector's Report'). I beg to refer to a true copy of the signed Inspector's Report, which I have placed behind TAB 13 of the Book of Exhibits (An unsigned copy is exhibited at JS1 Tab 23).

31. The Commission Direction (BD-018142-24) (ABP-319711-24), dated 11 November 2024, was made, outlining that the Commission had decided to grant permission for the Proposed Development for specified reasons and considerations, and subject to 24 Conditions (Exhibit JS1, Tab 23a).

32. The Commission Order (ABP-319711-24), dated 20 November 2024, was then made granting permission for the Proposed Development, subject to Conditions (Exhibit JS1, Tab 23b).

33. As referred to in the Inspector's Report, in considering the appeal, regard was also had to information from the EPA, and on its website including the EPA Inspector's report exhibited by the Applicant (Exhibit JS1, Tab 28)."

November 2024 - decision

117. The decision is set out above. For present purposes I can note condition 15:

"15. Prior to the commencement of development, the developer shall enter into a Connection Agreements with Uisce Eireann to provide for a service connection(s) to the public water supply and/or wastewater collection network.

Reason: In the interest of public health and to ensure adequate water/wastewater facilities."

Relevant factual conclusions under this heading

118. The critical factual conclusions under this heading are that:

(i) There was information from statutory bodies / third parties providing a reasonable basis for doubt as to whether the development consent may have an effect contrary to art. 4(1)(a) of the WFD. One can note that of course it is open to a decision-taker to dispel such doubt in principle but there may be a legal question as to the methodology for doing so.

(ii) The commission did not take any steps to seek out and obtain the most up-to-date and comprehensive relevant scientific data (including monitoring results), specifically the council monitoring information, the existence of which they were or should have been aware *via* the EPA authorisation and/or the IFI submission.

(iii) The commission relied on less comprehensive or out of date information. The inspector relied on the 2011 EPA inspector's report and 2020 EPA data rather than the 6-times-yearly council monitoring referenced by IFI which presumably would have been available for 2024. The council data was also more comprehensive (a) covering pollutants not included in the EPA data and (b) being measured closer to the WWTP.

II – WFD – relevant law

119. Article 4(1)(a) provides:

"Article 4

Environmental objectives

1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances

without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;"

120. The CJEU caselaw relied on by the parties was as follows:

(i) judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, ECLI:EU:C:2015:433 (Grand Chamber);

(ii) judgment of 31 May 2018, *European Commission v Republic of Poland*, C-526/16, ECLI:EU:C:2018:356;

(iii) judgment of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, ECLI:EU:C:2020:391;

(iv) judgment of 25 April 2024, *Peter Sweetman v An Bord Pleanála and Ireland and the Attorney General*, C-301/22, ECLI:EU:C:2024:347; and

(v) judgment of 6 March 2025, *Waltham Abbey Residents Association v An Bord Pleanála and Others*, C-41/24, ECLI:EU:C:2025:140.

121. Domestic law to which the parties wished to draw attention at this stage included s. 34(13) of the 2000 Act:

"(13) A person shall not be entitled solely by reason of a permission under this section to carry out any development."

122. In *Friends of the Irish Environment v. Uisce Éireann* [2026] IEHC 106 (Unreported, High Court, 26 February 2026), Holland J. stated at 78:

"So, as on any view a ww connection agreement is for the provision of water services (or, at very least a water service –connection to the collection Network) as defined by the WSA 2007, it is relevant to again note that s.31 requires that a ww connection agreement be made having taken full account of the public policies of sustainable development, protection of the environment and/or relevant regulations, the UWWTD, the UWWTR, the WFD, the WWDR and, via the WWDR 2007, the conditions of the WWDL and that a ww connection not be made inconsistently with those public policies. Those policies are in great part directed at the avoidance of pollution by effluent from waste water networks. Taking full account of them in making connection agreement is purposeful only in anticipation of discharge to the network via the connection in question."

III – WFD – Issues

123. The pleaded sub-grounds are as follows (emphasis added):

"44. By way of further particulars of the claim, the Inspector's Report noted that the proposed scheme would connect to the existing public foul network under the R752. The network connects to the Glenealy WWTP at Ballymanus, which ultimately discharges to the Rathnew Stream (at § 9.3.8) under licence from the EPA (Certificate of Authorisation No A0444-01).

45. The Inspector noted that in responses received from Observers, refernece [*sic*] had been made to a submission by Inland Fisheries Ireland ('IFI') dated 15 August 2023 in relation to a recently withdrawn planning application in Glenealy village for 12 no. residential dwellings (Reg. Ref. 23/60169). **The submission from the IFI raised concerns that the most up-to date ambient monitoring results collated by Wicklow County Council indicate that the Ballymanus plant is having a negative impact on the Rathnew Stream**, to which it discharges treated effluent from the plant. It made the following points:

i. In the Planning Authority's application to the EPA in 2011 for a Wastewater Discharge Certification for the Glenealy agglomaration [*sic*], the Planning Authority stated that 'additional volume is being reserved to assimiate [*sic*] the effluent from the existing non sewered catchment within the villge [*sic*] centre'. **IFI contended on that basis there is no capacity available within the existing wastewater treatment plant at Ballymanus to accept waste from the proposed development**.

ii. The calculations submitted by Wicklow County Council in their Certificate application for the loadings to be accepted at the four separate wastewater treatment plans [*sic*] servicing the Glenealy agglomeration **were based on 2011 population figures**.
iii. A contributing PE of 256 was assigned to the Ballymanus plant which theoretically allowed for a further loading of PE (146) into the plant. Based on the most up-to-date ambient monitoring results collated by Wicklow County Council, it is apparent that the **Ballymanus plant is having a negative effect on the Rathnew stream** (to which itdischarges [*sic*] treated effluent from the plant).
iv. The ambient monitoring resuls [*sic*] show **elevated levels of Orthophosphate (P04) and Ammonia (NH4) downstream of the Ballymanus plan discharge point into the Rathnew stream**. These results exceeed [*sic*] the river quality standards set to achieve Good status in accordance with the requirements of the Water Framework Directive and set out in the 2009 Regulations. Based on these results, it is evident that the current loadings into the Ballymanus plant and the subsequent **discharge of treated effluent is having an impact on water quality within the Rathnew stream and that the Ballymanus plant may already be at maximum capacity**.
46. The monitorning [*sic*] points referred to by IFI appear to be the monitoring points immediately upstream and downstream of the Glenealy WWTP identified as National Water Monitoring Stations RS10R020140 and RS10R020200 on the publicly available EPA Map. **The monitoring results from these stations does not appear to be in the public domain**.
47. **Similar concerns were raised by the Executive Environmental Scientist and the Planning Officer of Wicklow County Council with the latter recommending refusal of planning permission** based inter alia on water quality concerns and the lack of assimilative capacity in the stram [*sic*] for the level of treatment provided by the WWTP.
48. This was summarised by the Inspector at §9.3.9: et seq where the Inspector noted that the most recent available data on the EPA website indicates that in 2020 the water quality of the Rathnew Stream had a Q value score of 4 and a status of Good and that the water body is 'not at risk' (at para 9.3.9).
In the further responses received from the Observers they reference a submission from Inland Fisheries Ireland (IFI) in relation to a recently withdrawn planning application in Glenealy village for 12 no. residential dwellings (Reg. Ref. 23/60169). This application was withdrawn, however, the submission from IFI is publicly available on the planning authority's website. The submission from the IFI raises concerns that the most up-to date ambient monitoring results collated by Wicklow County Council indicate that the Ballymanus plant is having a negative impact on the Rathnew Stream, to which it discharges treated effluent from the plant. **Details of the monitoring referenced by the IFI were not provided with the submission or in any of the observations received as part of this appeal**. The most recent available data on the EPA website indicates that in 2020 the water quality of the Rathnew Stream had a Q value score of 4 and a status of Good and that the water body is 'not at risk'.
49. The monitoring information referred to by the Inspector appears to be the publicly available monitoring data published by the EPA on https://www.catchments.ie/data/#/waterbody/IE_EA_10R020600?_k=p5ducs which is from monitoring station RS10R020600 located at Rathnew Bridge more than 5km downstream from Glenealy. **This monitoring station only reports Q Values and not concentrations of Ammonia or Orthphospates which were the pollutants of concern to IFI and the planning authority**.
49A Although the Inspector consulted the EPA website referred to above and identified the Q values monitored at Rathnew Bridge, **she did not identify the results of the ambient monitoring upstream and downstream of the Glenealy WWTP which were also available on this website using the 'Chemistry Data' download button**.
50. It was noted at § 9.3.10 of the Inspector's Report that a a [*sic*] license [*sic*] for the Glenealy Wastewater Treatment Works agglomeration was approved in 2011. Ths [*sic*] agglometation [*sic*] incluces [*sic*] the WWTP at Ballymanus which it is proposed would service the proposed development in these proceedings.
51. The Inspector went on to state (at §9.3.14):
'The concerns of the third parties regarding the impact that the existing Ballymanus WWTP is having on the Rathnew Stream are noted. However, having regard had [*sic*] to the report of the EPA's Inspector in 2011 which noted that discharges from the Glenealy agglomeration may not be the only cause of the waterbody being less than good and that the discharges from the agglomeration are not likely to have a significant impact on the receiving waterbody. I have also had regard to the information provided on the EPA website which

indicates that water quality within the stream has improved from being less than good (Biological Q value less than 4) in 2011 to a status of Good (Q value score of 4) in 2020.'

52. **There is no evidence that the Board sought Wicklow County Council's file no 23/60169 or that it sought the most up to date monitoring from the nearby monitoring stations and/or the monitoring station in Rathnew**.

53. The impugned decision **contained no reference to the fact that the IFI had referenced more up to date information from the Council that discharges from the Ballymanus WWTP were having a negative effect on the WFD status of the Rathnew Stream**.

54. The Inspector's Report (at §9.3.15) states:

'The subject site is identified for development through the land use policies of the Wicklow County Development Plan 2022 - 2028. This statutory plan was adopted in 2022 and was subject to AA by the planning authority, which concluded that its implementation would not result in significant adverse effects to the integrity of any Natura 2000 areas. I also note the development would not generate significant demands on the existing municipal sewers for foul water. It is my view that the foul discharge from the site would be insignificant in the context of the overall licenced discharge at The Glenealy Wastewater Treatment Works agglomeration, and thus any potential impact on the overall discharge would not be significant. It is also noted that the final submission from Uisce Eireann noted that there is capacity within the wastewater network to accommodate the proposed scheme.'

55. There is **no assessment by the Inspector (or the Board) for the purposes of Article 4(1)(a) of the WFD** as transposed by the Surface Water Regulations S.I. 272/2009 (as amended). As identified in In Bund fur Umwelt v Germany (Weser) (Case C-461/13) the Court of Justice held (§51):

'Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required—unless a derogation is granted—**to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status** by the date laid down by the directive.'

56. The test is two-fold. It refers to both a diminution in status and the possibility of jeopardising the attainment of good water status and its subsets including chemical and ecological statu [*sic*]. There is no basis is the Inspector's Report nor the impugned decision to satisfy either limb of the test. The only evidence before the Inspector was that the Ballymanus WWTP as it is currently loaded is introducing additional pollutants into the Rathnew Stream and yet it **failed to take up the council's file identified by the observers or the most up to date monitoring data from the nearby monitoring station** which was specifically brought to its attention, **discounted the IFI evidence identified in favour of out-of-date assessment from 2011 and information on status from 2020 and monitoring results from a monitoring station more than 5km away which did not include the pollutants fo [*sic*] concen [*sic*] to IFI**.

57. There was no information as to how the proposed development would not result in the introduction of any additional pollutants or that it would not result in a deterioration. It is clear that the Board could not be satisfied that the proposed development would not entail a breach of Article 4(1)(a) of the WFD to establish that the implementation of the planning permission required under Article 11 of the Directive will not result in deterioration of the status of the body or bodies of water concerned or to jeopardise the attainment of good surface water status. The Board, via the Inspector **did not consider whether the proposed development would jeopardise the attainment of good status for the waterbody and wrongly confined its analysis to whether the proposed development would lead to a change in status taking into account irrelevant factors and not taking into account relevant factors**.

58. Further, and/or in the alternative insofar as the Board's Inspector identified uncertainity [*sic*] as to the implications on the Rathnew Stream having been raised by the observers by reference to the IFI submission on file 23/60169 the Board was under an obligation to raise that issue with Wicklow County Council in order to understand the issue/and or access the information referred to by the IFI pursuant to section 131 and/or 137 of the 2000 Act and/or refuse permission because it could not rule out a breach of Article 4(1)(a) of the WFD Directive in circumstances where there was a material uncerainity [*sic*] as to the impacts on water quality from the proposed development as a result of increased pressure on the WWTP which is already having that effect, an effect that the Board was aware of as a result of the submission from the observers referencing IFI in the other application. Further and/or in the alternative, insofar as the Board reached a conclusion that

the proposed development would not have significant impacts for the purposes of EIA and/or WFD it did so unsupported by any/or any adequate evidence. The evidence before the Board was that the WWTP was having an adverse impact on the Rathnew Stream waterbody and the Board erred in reaching a conclusion unsupported by the evidence and/or by reference to irrelevant considerations.

59. Thirdly, and in the alternative, it is the Applicant's case that the Board could not have lawfully concluded that there will be no likely significant effects on the environment for the purposes of the EIA Directive. Permission can only be granted **where it can be excluded, on the basis of objective information that there will not be likely significant effects** on the environment. A deterioration of the status or the jeopardization of the attainment of good status of a water body in breach of Article 4(1)(a) of the WFD would be in any event be significant. There can be no lacunae in the assessment. It is obvious that where there is uncertainity [*sic*] in relation to the impact on water quality given the discrepancy in the Inspector's Report and the submission of IFI the planning authority environmental scientist under planning application 2360169 (which was specifically drawn to the Board's attention by observers) that such a conclusion could not be reached and therefore the need for EIA cannot be excluded and permission cannot be granted, per the decision of the Court of Justice in IL v Land Nord-Rhein Westfallen (Case 535/18)."

124. Drawing the strands of the foregoing together, the key question that arises from the pleaded particulars is as follows:

In complying with art. 4(1)(a) of the WFD in the context of deciding whether to grant development consent, is a competent authority obliged to take reasonable steps to seek out and obtain the most up to date and comprehensive relevant scientific data (including monitoring results) and/or to rely on such data in preference to less comprehensive or out of date information, either generally or where information/submissions from a statutory body / third party provides a reasonable basis for doubt as to whether the development consent may have an effect contrary to art. 4(1)(a) and/or where the competent authority is or ought to be aware of such up to date and comprehensive data?

125. Before deciding whether to answer this question myself or refer it, I would first prefer to give the parties the opportunity to make *Eco Advocacy*-type written legal submissions.

126. I am also minded to request the parties to give notice of the question above to the relevant statutory agencies (UÉ, EPA, IFI and the council) with a view to consideration of permitting them to get involved in answering the question on a costs-neutral (*i.e.*, bearing own costs and not liable for the costs of others) *amicus* basis. If parties consider any such invitation should be extended to any other entity they can apply on the mention date.

Legislative validity or transposition issues

Core ground 5 – validity of art. 109 of the 2001 regulations

127. Core ground 5 is:

"5. Article 109(2) of the 2001 Regulations is ultra vires and invalid insofar as it contravenes and/or mis-transposes the second sentence of [article 4](3) of the EIA Directive by providing for a case-by-case examination as to whether a project need not undergo EIA screening or EIA and/or is not in accordance with and is in breach of the EIA Directive, further particulars of which are set out below."

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

"Applicant:

15. In contrast to EIA Screening, under the second sentence of Article 4(3) of the EIA Directive Member States may only provide for a determination of projects which need not undergo EIA Screening and are precluded from adopting a case-by-case assessment to exclude EIA Screening at a preliminary stage and, if they choose to transpose this element of the Directive, must do so via thresholds or criteria which take into account Annex III criteria, including cumulative impacts with other projects. Article 109(2) which provides for a case by case determination of the need for EIA Screening is therefore unlawful and in breach of the EIA Directive. The impugned decision is further unlawful since it was adopted in breach of the EIA Directive.

16. 'Nature, size and location' are not themselves criteria - but characteristics in relation to which the Member States have discretion to identify the relevant thresholds and criteria. It is the thresholds and criteria that are required but absent.

State Respondents:

17. In providing that Member States may set thresholds or criteria to determine when projects need not undergo either screening for EIA or EIA, Article 4(3), second sentence affords discretion to Member States in the setting of such thresholds or criteria and – importantly – does not preclude the setting of criteria that involve a consideration of the

particular facts and circumstances pertaining to the project in question, or (further or in the alternative) a degree of case-by-case examination.

18. The criterion set by article 109(2) of the 2001 Regulations is that sub-threshold development within the meaning of Part 10 and Schedule 5, Part 2 of the 2001 Regulations need not undergo either screening for EIA or EIA where, following a preliminary examination of at least the nature, size or location of the development, there is no real likelihood of significant effects on the environment and there is no significant or realistic doubt in regard to the likelihood of such effects.

19. The criterion so provided is entirely consistent with the requirements of Article 2(1) of the EIA Directive, and within the discretion afforded to Member States by Article 4(3), second sentence of the EIA Directive. The criterion set by Article 4(3), second sentence is consistent with the fundamental objective of the EIA Directive: C-329/17 Prenninger, §35, in C-575/21 WertInvest Hotelbetriebs GmbH, §39, C-392/96 Commission v Ireland, §75.

20. The preliminary examination procedure under article 109(2) of the 2001 Regulations is consistent with EU law: 100 Meter Tall Group v An Bord Pleanála [2025] IEHC 42, §§127–128, Ryan v An Bord Pleanála [2025] IEHC 111, §§155–156, Shadowmill v An Bord Pleanála [2023] IEHC 157, §§57,59, 62–63, 66–67, Jennings v An Bord Pleanála [2023] IEHC 14, §615.

21. The Applicant fails to establish any deficiency in the transposition of Article 4(3), second sentence of the EIA Directive and is not entitled to any relief under Core Ground 5."

129. The State's pleading objections (*per* statement of opposition) were:

"PRELIMINARY OBJECTION

8. The grounds pleaded against the State Respondents under Core Grounds E(5) and E(6) are not adequately particularised, as required by Order 84, rule 20(3) of the Rules of the Superior Courts ('RSC') and relief ought to be refused on that ground alone.

9. The Applicant has failed to identify with the requisite specificity the basis upon which it is alleged that the State has failed properly to transpose the EIA Directive into Irish law, or the basis upon which it is alleged that the 2001 Regulations are in breach of section 3 of the European Communities Act 1972 and / or Article 15.2.1° of the Constitution, which is, in any event, denied. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and the State Respondents object to the Applicant's failure to observe the requirements of Order 84, rule 20(3) RSC in respect of these pleas.

10. Should the Court determine that the Applicant is precluded from raising grounds of challenge to the Decision in these proceedings by reason of having failed to raise in the procedure before the Commission which led to the Decision, the issues now raised in the Amended Statement of Grounds in respect of preliminary examination and the EIA Directive, the State Respondents object that the grounds of challenge pleaded against the State Respondents do not properly arise for determination on the facts of this case.

11. The grounds of opposition which follow are strictly without prejudice to the foregoing preliminary objections."

130. Similarly to *Kimmage Dublin Residents Alliance Company limited by Guarantee v. An Coimisiún Pleanála* [2026] IEHC 406 (Unreported, High Court, 26 June 2026), the pleadings here are significantly flawed, using vague and imprecise concepts like "mis-transpos[ition]" which covers everything from incomplete transposition which is valid insofar as it goes, to positive invalidity. Such scattergun terminology completely disregards the required specificity of pleading under Orders 84 and 103 RSC, successive Practice Directions (currently PD HC 137 (as amended)) and the efforts made by the court in decided cases to encourage clarity.

131. That said, in the particular circumstances the point actually being made in core ground 5 is acceptably clear, which is essentially that the approach in art. 109 of the 2001 regulations is contrary to art. 4(3) of the directive on the alleged grounds that the directive requires thresholds/criteria for the preliminary examination stage.

132. The point being made in core ground 6 is not acceptably clear to the extent that there was an attempt in submissions to go beyond the two specific points that appear on the face of the grounds. This is another example of the principle that if there is ambiguity in pleadings, the pleader cannot have the benefit of it.

133. As to whether the point can be raised at all, it is not clear that the precise objection being envisaged in the State's opposition papers is actually being made by anybody (*i.e.*, that the applicant cannot raise EIA issues having regard to what he submitted or failed to submit in the process) so I do not see that objection as properly arising.

134. The State tried to unpack the applicant's point as follows but in fact I am not sure that this is a necessary exercise because all sub-points are ultimately related:

(i) are member states precluded from adopting a case-by-case assessment at preliminary stage;

(ii) what in the context of the EIA directive does "criteria" mean;
(iii) are nature size and location criteria; and
(iv) is a standard of "no real likelihood of significant effects on the environment" a criterion?

135. There was a fifth separately phrased point as to whether that standard is impermissible under art. 4(3) as either impermissibly vague or indistinguishable from the test for screening, but that is just another way of making the same point as (iii) and (iv) – the common issue is what is a criterion in the sense of the directive. As noted above, all of the issues are just sub-aspects of the basic point which is whether there is a conflict between the regulations and the directive.

136. The applicant relies on the following:

"99. In contrast to EIA Screening, Member States are precluded from adopting a case-by-case assessment at preliminary stage and, if they choose to transpose this element of the Directive, must do so via thresholds or criteria which take into account Annex III criteria, including cumulative impacts with other projects.

100. In Case C-435/97 WWF v Bozen the Court of Justice held (§70) that it was for the authorities of member states to

'Take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment'.

101. As per Marktgemeinde Straßwalchen [n47 Case C-531/13 (references omitted)] the Respondent was under a specific obligation to have regard to this serious environmental impact and was not entitled to Screen out EIA without having specific regard to that impact (§§40-42)(references omitted)

'As regards the establishment of thresholds or criteria, it must be borne in mind that, indeed, Article 4(2)(b) of Directive 85/337 confers a measure of discretion on the Member States in that regard. However, that discretion is limited by the obligation set out in Article 2(1) of the directive to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an impact assessment

Thus, the criteria and thresholds referred to in Article 4(2)(b) of Directive 85/337 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an environmental impact assessment.

It follows that the competent national authorities, when they receive a request for development consent for an Annex II project, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an environmental impact assessment should be carried out.'

102. This makes very clear that nature, size and location are not themselves criteria but characteristics in relation to which the Member States have discretion to identify the relevant thresholds and criteria. It is the thresholds and criteria that are required bit absent.

103. This is also clear from the Commission Guidance which states:

'The thresholds and/or criteria set must, thus, provide a guarantee that no Projects that, by virtue of inter alia nature, size or location, are likely to have significant effects on the environment, avoid an assessment with regards to their effects on the environment. In other words, thresholds and/or criteria must be set so that they ensure that every Project that is likely to have significant effects on the environment is subject to an EIA, and that those that are not likely to have significant effects on the environment are not subject to an EIA. One way of avoiding that Projects that may have significant effects on the environment "slip through" established criteria/thresholds, is to introduce a "catch-all provision" in legislation, one which allows the Competent Authority to decide that an EIA-procedure is required for an Annex II Project, regardless of whether criteria/thresholds have been met or not.

When establishing thresholds and/or criteria for Annex II Projects, Member States are under an obligation to take the relevant selection criteria as set out in Annex III of the Directive, and as amended by Directive 2014/52 (see the box below), into account.'

104. The Commission identified:

'Member States that have established thresholds and/or criteria that take only the size of Projects into account, without taking all relevant selection criteria listed in Annex III into consideration, exceeds the limits of discretion under Articles 2(1) and 4(2) of the EIA Directive (e.g. Case C-66/06, Commission v. Ireland) and that a Member State that has established thresholds and/or criteria at a level such that, in practice, all Projects of a certain type would be exempted from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all of the Projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (e.g. Case C-392/96, Commission v Ireland).'

105. Although both those cases relate to the setting of thresholds for mandatory EIA and Ireland had in fact set thresholds, it is instructive that the Court held it had set thresholds at a level that meant in effect no EIA would be required for projects with significant effects on the environment per §65-§67 of C-66/06:

'Furthermore, a Member State which established those thresholds and/or criteria at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would likewise exceed the limits of that discretion, unless all the projects excluded could, when viewed as a whole, be regarded as not likely to have significant effects on the environment (see Case C-392/96 Commission v Ireland, paragraph 75 and the case-law cited)

…

Under paragraph 1(a) and (b) of Part 2 of Schedule 5 to the PDR, the threshold is 100 hectares in relation to projects for the restructuring of rural land holdings and the use of uncultivated land or semi-natural areas for intensive agricultural purposes and, under paragraph 1(c), the threshold is a catchment area of 1 000 hectares, or 20 hectares of affected wetland, in relation to water management projects for agriculture.'

106. The Commission noted that a number of different Screening approaches were adopted and that:

'In general, three types of thresholds can be identified, based on: Project characteristics (e.g. size - 20 ha and over); anticipated Project capacity (e.g. 50,000 tonnes of waste generated per annum); and Project location (e.g. a designated planning zone). Threshold values adopted in the Member States are mostly technical and based on attributes of length (meters, kilometres), weight (tons), square meters and performance capacity (kilowatts), but monetary thresholds (based e.g. on investment size) also exist. Overall, as emphasised above, relevant national thresholds must consider all relevant selection criteria listed in Annex III.'

107. In conclusion the Commission noted (§2.2):

'…thresholds must take the character of the Project, location of the Project and the type/characteristics of the potential impact of the Project (the main categories of selection criteria listed in Annex III to the Directive) into account.'

108. At the risk of repetition – nature, size and location are the characteristics for which Member States are required to attach thresholds. A good example of what the State should have done is contained in Schedule 2 of the UK Town and Country Planning (Environmental Impact Assessment) Regulations 2017 with the explanation provided as follows:

'If a proposed project is listed in the first column in Schedule 2 of the 2017 Regulations and exceeds the relevant thresholds or criteria set out in the second column (sometimes referred to as 'exclusion thresholds and criteria') the proposal needs to be screened by the local planning authority to determine whether significant effects on the environment are likely and hence whether an Environmental Impact Assessment is required. Projects listed in Schedule 2 which are located in, or partly in, a sensitive area also need to be screened, even if they are below the thresholds or do not meet the criteria.

Projects which are described in the first column of Schedule 2 but which do not exceed the relevant thresholds, or meet the criteria in the second column of the Schedule, or are not at least partly in a sensitive area, are not Schedule 2 development.'"

137. As regards case-by-case for preliminary screening, art. 4(3) includes a second sentence as follows:

"Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5."

138. The State's argument is that this sentence doesn't prohibit anything. It merely constitutes an enabling provision to the effect that whether to engage in screening examination under art. 4(4) and (5) can (but doesn't have to) be done by reference to thresholds/criteria.

139. They also say that the problem with a legalistic argument that the only method available is thresholds or criteria is that that would be environmentally counterproductive. The commission guidance (https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/a9f8a19a-fba5-440f-abf2-29d3f9ed7a63/details?download=true) states:

"Each of the approaches to Screening has its advantages and disadvantages. The Screening method based on thresholds and/or criteria is relatively straightforward, but has one obvious disadvantage: a Project that comes below an inclusion threshold or criterion, and is thus not subject to an EIA, may have significant effects on the environment nevertheless. For example, such Projects may have an impact on sensitive areas (e.g. areas identified as being valuable and important to nature conservation and/or areas of particular archaeological or geomorphological interest) or the applicable legislation may fail to take account of the cumulative effect of a number of Projects which, when taken together, may have significant environmental effects. Accordingly, although Member States are allowed a measure of discretion in establishing the criteria and/or thresholds that are applicable, this discretion does have limits. These limits are to be found in the obligation set out in Article 2(1) of the EIA Directive that states that Projects likely, by virtue, inter alia, of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (C-72/95, Kraaijeveld and Others, paragraph 50; C-2/07, Abraham and Others, paragraph 37; C-75/08 Mellor, paragraph 50; C-427/07, Commission v. Ireland, paragraph 41). For further guidance regarding thresholds and criteria, see Part B of this document (Step 2). In contrast, case-by-case examinations allow for a better consideration of local ecological conditions or environmentally relevant socio-economic contexts. However, it is generally a more resource- and time-consuming Screening method."

140. Caselaw makes clear the environmental pitfalls of relying only on thresholds or criteria, because this may have the effect that significant projects fall through the net.

141. The concept of sub-threshold development comes from domestic law rather than the directive. Schedule 5 part 2 para. 15 provides for:

"Any project listed in this Part which does not exceed a quantity, area or other limit specified in this Part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7."

142. Part 2 class 10 is:

"Infrastructure projects … (b) … (i) Construction of more than 500 dwelling units."

143. Article 2(1) of the EIA directive is crucial because it defines that EIA only applies to projects covered by the directive:

"Article 2

1. Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4."

144. Article 4 of the EIA directive provides:

"Article 4

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5.

4. Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. The developer shall take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The developer may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

5. The competent authority shall make its determination, on the basis of the information provided by the developer in accordance with paragraph 4 taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the

environment carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:
(a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or
(b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.
6. Member States shall ensure that the competent authority makes its determination as soon as possible and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information required pursuant to paragraph 4. In exceptional cases, for instance relating to the nature, complexity, location or size of the project, the competent authority may extend that deadline to make its determination; in that event, the competent authority shall inform the developer in writing of the reasons justifying the extension and of the date when its determination is expected."

145. Article 109 of the 2001 regulations provides:
"CHAPTER 3
Planning Appeals Requirement to submit EIAR
109. (1) Where an appeal received by the Board relates to a planning application for a class of development specified in Schedule 5 which equals or exceeds, as the case may be, a quantity, area or other limit specified in that Schedule for that class of development, and an EIAR was not submitted to the planning authority in respect of the planning application, the Board shall require the applicant to submit an EIAR to the Board.
(2) (a) Where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry a preliminary examination of, at the least, the nature, size or location of the development.
(b) Where the Board concludes, based on such preliminary examination, that—
(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,
(ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall, by notice in writing served on the applicant, require the applicant to submit to the Board the information specified in Schedule 7A for the purposes of a screening determination unless the applicant has already provided such information, or
(iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall—
(I) conclude that the development would be likely to have such effects, and
(II) by notice in writing served on the applicant, require the applicant to submit to the Board an EIAR and to comply with the requirements of article 112.
(2A) (a) Where an applicant is submitting to the Board the information specified in Schedule 7A, the information shall be accompanied by any further relevant information on the characteristics of the proposed development and its likely significant effects on the environment, including, where relevant, information on how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account.
(b) Where the applicant is submitting to the Board the information specified in Schedule 7A, the information may be accompanied by a description of the features, if any, of the proposed development and the measures, if any, envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment of the development.
(2B) (a) Subject to paragraph (aa), where a planning application for sub-threshold development is not accompanied by an EIAR but is accompanied by the information specified in Schedule 7A and subarticle (2A), or where an applicant submits to the Board such information pursuant to a requirement issued under sub-article (2)(b)(ii), the Board shall carry out an examination of, at the least, the nature, size or location of the development for the purposes of a screening determination.
(aa) Where the proposed development is to reinforce grid infrastructure referred to in Article 15e(5) of the Renewable Energy Directive or is repowering development, the examination referred to in paragraph (a) shall be limited to the potential impact of the proposed development, arising from the change or extension compared to the original development.

(b) The Board shall make a screening determination and—

(i) if such determination is that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall determine that an EIA is not required, or

(ii) if such determination is that there is a real likelihood of significant effects on the environment arising from the proposed development, it shall—

(I) determine that the development would be likely to have such effects, and

(II) by notice in writing served on the applicant, require the applicant to submit to the Board an EIAR and to comply with the requirements of article 112.

(2C) (a) Subject to paragraph (b), any conclusion under sub-article (2)(b)(ii) or (iii) on a preliminary examination, or a screening determination under sub-article (2B)(b)(ii), shall be notified by the Board to the applicant within 8 weeks of receipt of the information specified in Schedule 7A.

(b) Subject to paragraph (c), the Board shall not be required to comply with paragraph (a) within the period specified in paragraph (a) where it appears to the Board that it would not be possible or appropriate, because of the exceptional circumstances of the proposed development (including in relation to the nature, complexity, location or size of such development) to do so.

(c) Where paragraph (b) applies, the Board shall, by notice in writing served on the applicant before the expiration of the period referred to in paragraph (a), inform him or her of the reasons why it would not be possible or appropriate to comply with paragraph (a) within that period and shall specify the date before which the Board intends that the conclusion or screening determination concerned, as the case may be, shall be reached or made, as the case may be.

(4) (a) The Board shall, in making its screening determination under sub-article (2B) whether there is no real likelihood of significant effects on the environment arising from a proposed development or there is a real likelihood of significant effects on the environment arising from the proposed development, have regard to—

(i) the criteria set out in Schedule 7,

(ii) the information submitted pursuant to Schedule 7A,

(iii) the further information, if any, referred to in sub-article (2A)(a) and the description, if any, referred to in sub-article (2A)(b),

(iv) the available results, where relevant, of preliminary verifications or assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive, and

(v) in respect of a development which would be located on, or in, or have the potential to impact on—

(I) a European site,

(II) an area the subject of a notice under section 16 (2)(b) of the Wildlife (Amendment) Act 2000 (No. 38 of 2000),

(III) an area designated as a natural heritage area under section 18 of the Wildlife (Amendment) Act 2000,

(IV) land established or recognised as a nature reserve within the meaning of section 15 or 16 of the Wildlife Act 1976 (No. 39 of 1976),

(V) land designated as a refuge for flora or as a refuge for fauna under section 17 of the Wildlife Act 1976,

(VI) a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan, draft development plan or draft local area plan, or proposed variation of a development plan, for the area in which the development is proposed, or

(VII) a place or site which has been included by the Minister for Culture, Heritage and the Gaeltacht in a list of proposed Natural Heritage Areas published on the National Parks and Wildlife Service website, the likely significant effects of the development on such site, area, land, place or feature, as appropriate.

(b) The Board's screening determination under sub-article (2B) whether there is no real likelihood of significant effects on the environment arising from a proposed development or there is a real likelihood of significant effects on the environment arising from the proposed development, as the case may be, including the main reasons and considerations, with reference to the relevant criteria listed in Schedule 7, on which that determination is based, and any notice under sub-article (2C)(c), shall be placed and kept with the documents relating to the planning application.

(5) Where the screening determination under subarticle (2B) is that the proposed development would not be likely to have significant effects on the environment and the applicant has provided, under sub-article (2A)(b), a description of the features, if any, of the proposed development and the measures, if any, envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment, the Board shall specify such features, if any, and such measures, if any, in that determination.

(6) This article shall not apply to an appeal relating to a planning application for a proposed development in respect of which a determination on a determination review or on an application referral in respect of a screening for environmental impact assessment (within the meaning of section 176A(1) of the Act) has been made by the Board pursuant to section 176C(6) of the Act."

146. There must be a significant doubt about the inclusion in the 2001 regulations of housing as a category of EIA project. The directive does not allow discretion for member states to add new types of project. Housing only comes within the EIA directive if it is urban development or within some other category. Rural housing (that is not inherently urbanising) falls outside the directive, so a generalised inclusion of housing (over 500 units, with the effect that all housing then becomes sub-threshold) seems to be an absolutely classic case of gold-plating of EU law, leading to the complications we see in the present case among others.

147. We can also note that the directive does not envisage member states providing for EIA for sub-threshold developments where the threshold is provided for in the directive itself (albeit that possibly any thresholds are in Annex I only and Annex II itself picks up the sub-threshold projects on a point-by-point basis). If the project is outside what is specified in the directive, it falls outside the Annexes and thus outside the subject-matter scope of EIA.

148. If the threshold is in domestic law for the purpose of applying the directive, the general criterion of significant effects on the environment remains (art. 2(1) of the directive). If the project is inherently within the directive (unlike housing), then there is a rationale for providing for sub-threshold consideration in domestic law, because to fail to consider minor projects could risk contravention of art. 2(1) if they have significant effects on the environment. What is "significant" is of course evaluative to a substantial extent – Ireland seems to have historically taken a much more expansive view of this than other countries. What the correct balance is is a matter for other branches of government.

149. There may however be a question mark over the appropriateness of providing that *any* project below domestic law thresholds must be subject to preliminary examination. That is only required (or put alternatively only engages EU law) if the project at that smaller scale comes within the directive in the first place. A one-off rural house does not, even though 500 units is specified in domestic law. That is an example of the effect of failure to tie the domestic definition to a specific category in Annexes I and II (*e.g.* by referring to 500 units *simpliciter* as at present, as opposed to say urban development consisting of 500 or more units).

150. Drawing the strands together, and acknowledging the difficulty that the project here may not come within the directive at all, albeit that there is a further question as to whether this is something the court can put on the table of its own motion (the point being that the parties not raising the issue of whether EU law is engaged does not mean that EU law is engaged – it is an objective public law situation, not contractual, a bit like the fact that parties cannot contract as to the outcome of statutory interpretation or artificially narrow the court's obligation to correctly interpret the law that by purported agreements), the questions that arise from the foregoing are:

Does Directive 2011/92 have the effect that, where domestic law purportedly transposing the directive includes a category of projects (such as housing) that:

(i) is not in itself a class of project listed in Annexes I or II to the directive,

(ii) is not identified by the domestic law as coming within any specific such class, or limited by the domestic law to cases falling within that class, and

(iii) includes projects capable of falling outside any of those classes either generally or in certain circumstances (such as where the project constitutes rural development and/or is a small-scale project not properly constituting urban development),

a domestic court of a Member State determining a challenge to the validity of a development consent based on breach of the domestic law concerned should proceed on the basis that the Member State is not implementing European law when providing for EIA of a project within the category concerned if the competent authority that granted the development consent does not identify any class of Annexes I or II to the directive into which the project falls and/or where the

domestic court considers that the project falls outside any such class (such as due to the housing not constituting urban development by reason of being small-scale and/or being located in a rural settlement), even if the parties do not raise this point?

Subject to the answer to the foregoing, does art. 4(3) of Directive 2011/92 preclude a Member State from adopting a case-by-case assessment at preliminary examination stage based on an examination of at least the nature, size and location of the project and subject to a requirement for screening unless there is no real likelihood of significant effects on the environment?

151. The applicant's comment on this at the draft judgment stage was as follows:
"The first part of the question is premised on an interpretation of Paragraph 10(b)(ii) of Part 2 of Schedule 5 of the 2001 Planning and Development Regulations and the purported transposition of Annex II, Paragraph 10(b) of the EIA Directive which doesn't appear to have been in dispute, i.e. that the project was one within the scope of the EIA Directive, The Court is raising this interpretation of its own motion. In the Applicant's view the domestic provision is implicitly tied to the EU provision, even if the specific wording of the EIA Directive (i.e. 'urban development') is not used in the domestic regulations given that the heading 'Infrastructure Projects' is used. In any event, the premise of the question is based on an interpretation of the EIA Directive that urban development under the EIA Directive does not include all forms of housing within the infrastructure projects/urban development category and that some housing, by reference to the size or location, may not be urban development within the category of infrastructure projects. There appears to be no decided Court of Justice case law on this interpretation and therefore the Applicant suggests that the interpretation of Annex II, Paragraph 10(b) of the EIA Directive in relation to housing be posed as a standalone question, given the significance of this issue."

152. This requires a bit of unpacking:

(i) "The first part of the question is premised on an interpretation of Paragraph 10(b)(ii) of Part 2 of Schedule 5 of the 2001 Planning and Development Regulations". This is incorrect. Class 10(b)(ii) of Part 2 of sch. 5 is about car parks. Class 10(b)(i) is: "Construction of more than 500 dwelling units". There is no issue about the interpretation of this – it speaks for itself.

(ii) "... and the purported transposition of Annex II, Paragraph 10(b) of the EIA Directive which doesn't appear to have been in dispute, i.e. that the project was one within the scope of the EIA Directive, The Court is raising this interpretation of its own motion." The applicant is absolutely right about that but this is not news because I say that in the question – it is implicit in the words "even if the parties do not raise this point". If I (or the CJEU) conclude that I should not raise this of my own motion it won't go any further. But that isn't obvious to me at this precise moment because I am not raising it for the sheer giddy hell of it, I am raising it because the parties have raised an issue which is implicitly premised on this point, a point which is by no means self-evident. Therefore the issue is in reality raised, implicitly, by the parties.

(iii) "In the Applicant's view the domestic provision is implicitly tied to the EU provision, even if the specific wording of the EIA Directive (i.e. 'urban development') is not used in the domestic regulations given that the heading 'Infrastructure Projects' is used." That is a substantive answer to the question but I am not sure where it is going to get the applicant. The concept of housing of over 500 units is not ambiguous, and the application to that of the concept of sub-threshold development means that one unit is sucked into the orbit of EIA, contrary to (or at least outside) the directive on the face of things and subject to counterargument. The fact that it could have been, but was not, conditioned by the need for a finding of urban development is an irrelevant counter-factual. Attempting to read the regulations as subject to an implicit condition of that kind appears to do far too much violence to their actual wording which is clear, obvious and unconditional – such a reading appears *contra legem*.

(iv) "In any event, the premise of the question is based on an interpretation of the EIA Directive that urban development under the EIA Directive does not include all forms of housing within the infrastructure projects/urban development category and that some housing, by reference to the size or location, may not be urban development within the category of infrastructure projects." That is absolutely correct – but no basis for doubt about that is currently apparent. It is hard to see how a single rural housing unit is urban development on any fair, rational and intellectually credible analysis. Obviously I am open to counterargument if there is to be any.

(v) "There appears to be no decided Court of Justice case law on this interpretation and therefore the Applicant suggests that the interpretation of Annex II, Paragraph 10(b) of the EIA Directive in relation to housing be posed as a standalone question, given the significance of this issue." This is misconceived on numerous levels. The fact that there is no CJEU (or other court) judgment on something does not create doubt about that something – imaginative lawyers duly remunerated could come up with hundreds of authority-free propositions over a long weekend. Lack of authority does not elevate a point to the level of substance, significance or doubt or put it into the category of a reference-worthy issue. If we stand back from the abstract legalistic terminology camouflaging the applicant's point here, the implications of the argument are, as above, that a single rural house is an EIA project because it constitutes urban development. That makes little sense (at least going on what I have at the moment – if there is a counter argument I am open to it). And it also highlights the fallacy in the argument that there is some issue about "the interpretation of Annex II, Paragraph 10(b) of the EIA Directive in relation to housing" – class 10(b) does not refer to housing. That said, if the matter does go further and if the CJEU thinks urban development has the sort of near-infinitely elastic meaning argued for by the applicant then they will undoubtedly get that across.

153. The upshot of the forgoing is that no change to the proposed questions is needed at least at this point, but I will keep an open mind depending on the answers, especially if the matter is going further.

154. Therefore, to conclude for now on this issue, *Eco Advocacy* submissions on the above questions would be helpful and appropriate.

Core ground 6 – breach of transposition requirements

155. Core ground 6 is:

"6. Article 109(2) of the 2001 Regulations was invalidly transposed in breach of section 3 of the European Communities Act 1972 and thereby in breach of Article 15.2.1 of the Constitution insofar as it purported to transpose the option given to Member States to provide for a procedure where projects are not subject to EIA Screening or EIA since this option is not necessitated by Ireland's membership of the EU, further particulars of which are set out below."

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

"Applicant:

22. Article 109(2) PDR2001 insofar as it provides for the transposition of the option under Article 4(3) EIA Directive to exclude projects from the requirement of EIA Screening and EIA constitutes a breach of Article 15.2.1 of the Constitution and constitutes an unlawful and unilateral exercise in law-making by the Minister that contravenes the exclusive law-making power of the Oireachtas.

23. There is no parent legislation which appropriately identified the principles and policies against which such delegated legislation was made. The Minister was precluded from purporting to transpose this optional element of Article 4(3) EIA Directive by way of statutory instrument that incorrectly relied upon the 1972 Act.

24. The State's Opposition Papers assert that the amendment of Art.109 was 'necessitated' by the obligations of membership of the EU - but fail to identify a valid reason for that assertion.

25. Per Simons J in FIE v Minister for Communications [2019] IEHC 646 §157 'Secondary legislation which is inconsistent with EU legislation cannot be said to give effect to the "principles and policies" contained in the EU legislation. Nor can it be said to be "incidental, supplementary and consequential" to the EU legislation or "necessitated" by the Irish State's membership of the European Union. Rather, it is contrary to EU law.'

26. Even if a provision is 'compatible with' EU law, that does not mean it is 'necessitated' by the Directive. In S.I. v Minister for Justice [2016] IEHC 112, Humphreys J considered a 'rider' which (24) 'contains an extended ground on which a need for protection may arise for an applicant'. Humphreys J observed – '63. An issue that naturally arises from the foregoing discussion is whether the rider is, in fact, intra vires the European Communities Act 1972, since it goes beyond the parameters of the qualification directive. While, of course, the rider is "compatible with" the qualification directive (as Cooke J. held in M.S.T., at para. 36), in the sense that Member States are permitted to adopt "more favourable standards" than the E.U. minimum (see art. 3 of the directive), it is not "necessitated by" the directive.'

State Respondents:

27. It is not appropriate for the Applicant to place reliance in the Statement of Case on case law not referred to in its written legal submissions delivered 6 May 2026.

28. The complaint by the Applicant under Core Ground 6 is dependent on successfully establishing under Core Ground 5 that the preliminary examination procedure under article 109(2) of the 2001 Regulations is an incorrect transposition of Article 4(3) of the EIA Directive. Core Ground 6 is no more than a technical ground of challenge to the manner in which there has been implementation of the EIA Directive by the 2001 Regulations and by S.I. No. 296/2018 – European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 Regulations (the '2018 Regulations'). For the reasons explained under Core Ground 5, there is no deficiency in the transposition of Article 4(3), second sentence of the EIA Directive.

29. Article 109(2) of the 2001 Regulations is a lawful transposition of Article 4(3), second sentence, of the EIA Directive. It is entirely consistent with the wording, context, and objectives of the EIA Directive. The 'parent legislation' for article 109(2) of the 2001 Regulations is the EIA Directive. The EIA Directive does clearly provide for principles and policies for the exercise of the 'option' under Article 4(3), second sentence of the EIA Directive: Maher v Minister for Agriculture [2001] 2 I.R. 139, Gearty v Director of Public Prosecutions [2024] IESC 45.

30. Accordingly, Core Ground 6 is misconceived."

157. The pleaded sub-grounds are:

"66. By way of further particulars of the claim, Article 69(b) of Statutory Instrument 296 of 2018 European Union (Planning and Development) (Environmental Impact Assessment) Regulations that inserted Article 109(2) into the 2001 Regulations does not benefit from the protections of Article 29.4 of the Constitution and/or section 3 of the European Communities Act 1972. Such provision and the procedure it authorises is inconsistent with and/or not authorised under the EIA Directive and therefore not necessitated by Ireland's membership of the EU and therefore reliance cannot be placed on section 3 of the European Communities Act 1972.

67. Article 109(2) of the 2001 Regulations insofar as it provides for the transposition of the option under Article 4(3) of the EIA Directive to exclude projects from the requirement of EIA Screening and EIA constitutes a breach of Article 15.2.1 of the Constitution and constitutes an unlawful and unilateral exercise in law-making by the Minister that contravenes the exclusive law making power of the Oireachtas.

68. There is no parent legislation which appropriately identified the principles and policies against which such delegated legislation was made. The Minister was precluded from purporting to transpose this optional element of Article 4(3) of the EIA Directive by way of Regulation that incorrectly relied upon the jurisdiction conferred by the 1972 Act."

158. These grounds make two points:

(i) the procedure contravenes the directive – but this is just consequential on core ground 5; and

(ii) the procedure contravenes Article 15 and/or the concept of principles and policies (the old phrasing of the law under Article 15).

159. There is no pleading that the 1972 Act does not enable the State to avail of options in EU law as opposed to doing just what is absolutely mandatory. The only reference to the 1972 Act is parasitic on the complaint under Article 15. If such a point had been made it would have been fundamentally misconceived and unstateable: *Maher v. Minister for Agriculture* [2001] IESC 32, [2001] 2 I.R. 139.

160. The Article 15 point is also of no substance by analogy with *Conway v. An Bord Pleanála* [2024] IESC 34 (Unreported, Supreme Court, 23 July 2024). The test is not principles and policies, it is whether there is an abdication of the legislative function, which there clearly is not given the detailed scheme of primary law in the planning area which requires to be given effect to by detailed secondary legislation.

161. This point therefore adds nothing under the first limb and is manifestly unfounded under the second limb. For the avoidance of doubt, the doctrine in *Nawaz* applies to challenges of this nature. Where a challenge to a measure of general application is relied on in substance to challenge an individual decision the challenge of which is subject to statutory restrictions, the challenge to the measure of general application is also subject to such restrictions: *Nawaz v. Minister for Justice, Equality and Law Reform* [2012] IESC 58, [2013] 1 I.R. 142 (Clarke J.) (Fennelly, O'Donnell, McKechnie, MacMenamin JJ. concurring).

Ground-by-ground summary

162. By way of a ground-by-ground summary:

(i) core ground 1 was withdrawn;

(ii) core ground 2 is dismissed;

(iii) core ground 3 adds nothing to core ground 5 and can therefore be dismissed save for the formal purpose that hypothetical success in core ground 5 will lead to *certiorari*;
(iv) core ground 4 will await further submissions;
(v) core ground 5 will await further submissions; and
(vi) core ground 6 is fundamentally misconceived and/or adds nothing to core ground 5 and can be dismissed.

163. As a matter of practicality, in the event that there is any delay in finalising the art. 109 issue, the commission and possibly other decision-takers might need to consider the pragmatic approach of opting for screening more liberally, in preference to preliminary examination, because to continue business as usual would be injecting the delay into any and every case capable of being subjected to judicial review in which such a point could be made in the meantime. I do not see quite the same potential for logistical problems with the WFD point but that may be a lack of foresight on my part. Any such problems with EIA may possibly be reduced (or alternatively increased) in practice depending on whether, on foot of the Public Consultation on Environmental Impact Assessments Screening Thresholds that closed on 2 June 2026, the Minister ties the domestic regulations more closely to the directive, something which is entirely a matter for him I need hardly add. Whether and if so how this would impact on the existing conceit that sub-threshold housing is in effect treated as if it were urban development, even if it is not urban development and thus falls outside the directive, will just have to remain to be seen. Nor is it totally clear (to me at any rate) whether the intention is to make changes (if there are any) immediately effective *via* amendments to the 2001 regulations, or to await regulations under the 2024 Act. As in all matters, courts will of course work with whatever is enacted and will do so on the basis that enactments are a matter for legislators, subject to the usual problems of absence, ambiguity, or conflict of norms: the court's role in interpretation, dealing with statutory lacunae, and reviewing for validity/ECHR compatibility always remains. Courts have to be fairly stoical as to the substantive content of legislation, but are allowed have a view on its practicality and workability. Certainly the hopefully not very contentious preference for adequately resourced, simple, expeditious, streamlined, efficient and consistent administrative and judicial review procedures, for law to be workable and consistent, for the provision of up-to-date and comprehensive policy guidance to inform decision-takers, for any emerging legal problems to be expeditiously legislated out of existence, and for a pathway to reach the broad sunlit uplands of stability where legislative churn is in the rear-view mirror, has been put on the record on previous occasions. The Planning & Environment Court attempts to be efficient within the resources provided, but insofar as the law gets in the way at times there will be a tendency to point that out. As Hogan J. said in *Hussein v. Labour Court* [2012] IEHC 364, [2012] I.L.R.M. 508, when sending a copy of his judgment to the Ceann Comhairle, Cathaoirleach and relevant Minister, "While fully respecting the divisions which must necessarily exist between the legislative and judicial branches, a healthy dialogue between those two branches can only serve the public interest". But the foregoing is possibly worthy of mention in passing only insofar as it impacts on the question as to how to manage things practically if the present case goes any further.

Order

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

(i) the proceedings be dismissed other than insofar as specified in the judgment;
(ii) the parties be invited to make *Eco Advocacy* submissions on the three questions identified in the judgment within such timescale as they agree;
(iii) the commission be directed to notify UÉ, EPA, IFI and the council of the first question with a view to ascertaining whether they wish to participate in answering the question on the basis of being joined as *amici curiae* on a costs-neutral basis and that if such parties wish to comment they can provide submissions within such timescale as may be agreed subject to any contrary views of any party as to their joinder;
(iv) the addition of the council as a notice party pursuant to Practice Direction HC 137 (as amended) be dispensed with pending clarification of its response to the foregoing;
(v) the parties have liberty to propose that any other relevant entity be considered as an *amicus* for the purposes of the question(s);
(vi) subject to contrary written legal submission in due course, there be no order as to the applicants' costs referable to the dismissed matters (including no order as to the applicants' costs of any application referable to such matters having regard *inter alia* to O. 103 r. 38(1)(b) and/or (c) RSC, or any reserved or adjourned costs incurred by the applicants referable to such matters not otherwise dealt with);
(vii) subject to contrary written legal submission in due course, the applicant's costs referable to the matters not dismissed be reserved;

(viii) subject to contrary written legal submission in due course, the opposing parties' costs to date be reserved;

(ix) for the avoidance of doubt, any unsuccessful application to vary any provisional order as to costs proposed in this judgment may be addressed pursuant to O. 103 r. 40(4) RSC;

(x) in accordance with O. 103 r. 32(11) RSC, the perfection of the order be postponed pending the outcome of the final Module; and

(xi) the matter be listed at 09:30 on Monday 21 September 2026 to confirm the foregoing.