[2020] IEHC 356

THE HIGH COURT

JUDICIAL REVIEW

[2020 No. 45 J.R.]

BETWEEN

RITA O'NEILL (ON BEHALF OF GLENHILL ESTATE AND PREMIER SQUARE RESIDENTS D.11)

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

RUIRSIDE DEVELOPMENTS LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 22nd July, 2020

The relief which Ms. O'Neill seeks from the court

1. The applicant, Ms. Rita O'Neill, is a resident of Glenhill Road in Dublin 11. By order made by Meenan J. on 27th January, 2020, Ms. O'Neill was given leave to apply by way of an application for judicial review for an order of *certiorari* quashing the decision made by the respondent ("*the Board*") on 15th November, 2019 to grant planning permission to Ruirside Developments Ltd, the first named notice party, ("*Ruirside*") for the construction of a strategic housing development comprising 245 apartments, a childcare facility and all associated works on part of the former Premier Dairies site, Finglas Road, Dublin 11. By the same order, Ms. O'Neill was also given leave to seek a series of declarations relating to the proposed development. Among the declarations sought by Ms. O'Neill are a declaration that both Ruirside and the second named notice party, Dublin City Council ("*the Council*") failed to comply with the European Communities (Assessment and Management of Flood Risks) Regulations, 2010 ("*the Flood Risk Regulations*"), that they failed to comply with the planning guidelines for local authorities and that they failed to apply the requirements of the Habitats Directive.

Background

2. As noted above, Ms. O'Neill lives on Glenhill Road which immediately adjoins the site of the proposed development. Glenhill Road is situated at the top of an incline and is approached by a road which runs up the incline from the junction with Finglas Road. This junction lies directly across from the roadway to the Clearwater Shopping Centre (which is a low rise warehouse type development on the opposite side of Finglas Road).

3. The development site comprises vacant brownfield land. It previously formed part of a Premier Dairies facility which replaced the old Merville Dairies operated for many years by the Craigie family. The site has an elongated configuration with a maximum depth of 70 metres. There are trees and hedgerows along the boundaries of the site with a frontage of approximately 270 metres along the Finglas Road. Development to the south of the site consists of an apartment scheme of between four and seven stories high called Premier Square. However, the lands to the north and east of the site are occupied by low density housing. In particular, the houses along Glenhill Road are typical two storey residential properties with front and back gardens.

4. The proposed development will comprise 245 apartments accommodated in three buildings ranging in height from six to ten storeys. Under the permission granted by the Board, Block 1 will range in height from six to nine storeys and will accommodate 80 apartments with a childcare facility. Block 2 will range in height from nine to ten storeys and will accommodate 102 apartments. Block 3 will range in height from six to eight storeys and will accommodate 63 apartments. There will also be a number of car parking spaces and other facilities.

5. The height of the proposed development is significantly in excess of what was permitted under any previous development proposed for the same site. Thus, for example, in October, 2005 permission was refused by the Council for a mixed retail and residential scheme comprising 104 units. In refusing permission, the Council considered that the retail element was too large. More pertinently, the Council also refused permission on the grounds that the proposed development would seriously injure the residential amenities of other property in the vicinity, in particular the houses on Glenhill Road, and also that it was contrary to the proper planning and sustainable development of the area.

6. In 2007, the Board refused permission for a proposed development of 160 apartments on the site together with 176 car parking spaces and a crèche. The height of the apartment blocks proposed at that time ran from six to seven storeys. The reason for refusal stated that the proposed residential development would, by reason of its height, massing, linear layout and proximity to the heavily trafficked Finglas Road, be "*overbearing and would have a detrimental visual impact on the residential amenities of the area. It would also result in overlooking of adjoining properties to the south and would be overbearing in relation to the residential properties to the east. The proposed development would, therefore, seriously injure the amenities of the area and/or property in the vicinity and be contrary to the proper planning and sustainable development of the area*". In the report of the Board's inspector in that case, it was stated that the height of the proposed development on the site should be a maximum of 4/5 storeys depending on the ground level adopted.

7. However, in September 2010, permission was granted by the Board for a development on the site comprising 72 apartments in a single apartment building comprising five to six storeys over basement together with a crèche. In that case, the inspector appointed by the Board had recommended refusal of permission. However, the Board decided to grant permission on the ground that the scheme was considered to be of higher quality than the proposal previously refused and that the inspector's concerns in relation to visual impact and impact on residential amenities, had been addressed in an acceptable manner by repositioning the apartment block and breaking up its length in elevation. Having regard to the number of storeys involved, the overall height of that proposed development was, very obviously, significantly less than the height of the development now proposed by Ruirside.

8. The development envisaged by the September 2010 permission did not proceed. The site was subsequently acquired by Ruirside. In August 2019, Ruirside applied for permission to

proceed with the development which is now under challenge in these proceedings. That application was the subject of a large number of objections from local residents who both individually and collectively submitted observations to the Board. While Ms. O'Neill (and other local residents) opposed the proposed development by Ruirside on a number of grounds, it is clear from the observations submitted to the Board, that concern about the height of the development was a consistent theme. Thus, for example, in the objection lodged by Ms. O'Neill and her husband on 19th September, 2019, they stated:

> *"Our objections are based on the Scale, Height, and Design of the Development which if [it] goes ahead will have an overbearing visual impact and be seriously injurious to the setting, amenity and appreciation of the neighbouring properties in Glenhill Estate. It will depreciate the value of my house in Glenhill and will thereby be contrary to the proper planning and sustainable development of the area.*
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> *The height, bulk and scale of the proposed apartments will result in visual overbearing as viewed from the front of houses in Glenhill Road, up the hill to the right. 5 floors with balconies will be visible from Glenhill Road over the rooftops. It will also result in major overshadowing leading to extreme loss of light, sun and privacy to the back of our house.*
>
> *The proposed development is not in compliance with the proper planning and sustainable development plan envisaged for the area. It will detrimentally impact on Glenhill properties and the Ardmore Care Home adjacent on the Finglas Road. It is ill thought and appears to be based on the quest for density alone. Any brownfield lands must be balanced with respect for the receiving environment of established residential properties".*

9. In her objection, Ms. O'Neill also referred to the Dublin City Development Plan, 2016-2022 under which she suggested the site is designated as low rise. She raised issues in relation to public transport capacity, streetscape, the small size of some of the proposed apartments, the quality and utility of the photomontages, and she contended that no Environmental Impact Assessment Report on existing residents of Glenhill and surrounding estates had been carried out which she suggested is necessary given the scale, height and nature of the proposed development. She also said:

> *"No photographs were taken on Glenhill Road to front of properties affected by this build depicting the 5 levels plus balconies protruding over the rooftops of houses. No 3D photographs were taken showing comparisons of heights and distance between houses and apartments and likely impact. There will be no sunshine to back of houses from 11.00 am due to massive overshadowing. My house will be almost permanently in the shade.*
>
> *There will be a balcony on level 4 directly opposite my bedroom and bathroom windows, with 6 small balconies looking directly down on my back garden/seating area. I will have absolutely no privacy to enjoy my outside space and I will have to have curtains almost permanently drawn in my bedroom and bathroom".*

10. The Glenhill Residents Association (which Ms. O'Neill explained comprises more than 140 residents) also retained Hughes Planning & Development Consultants to prepare a report which was submitted to the Board. This addressed the Dublin City Development Plan, 2016-2022 together with a number of national policy papers and ministerial guidelines (which are considered in more detail below). The report highlighted concerns in relation to loss of residential amenity, overlooking and loss of privacy, the "*overbearing*" nature of the development, visual impact, overdevelopment, and loss of light and overshadowing. The report contained a number of drawings including a striking illustration demonstrating (according to the authors of the report) the relationship between the proposed Block No. 2 and the houses along the Glenhill Road which would back on to the development and be overlooked by it. At para. 6.4.2, the report stated:

> *"A fundamental concern of our client is undoubtedly the significant degree of overbearing that will result from the proposed development. It is considered that the scale of the proposed 6-10 storey apartment blocks is excessive and oppressive for such a prominent site which abuts sensitive low-density residential development within proximity. Moreover, the overbearing effect is also evident due to the suffocating extent of the development which would result in over 300 No. windows located on the rear (north-east) elevation.*
>
> *The overall height differential is completely inappropriate with no consideration given to the adjoining residential development. The massing of the apartment blocks is of considerable concern and will significantly contribute to the development dominating the surrounding landscape. The apartment blocks substantially exceed the permitted height in this area of 16m, reaching a height of between 24.904m and 32.704m. This proposal is completely unacceptable and will result in unavoidable negative overbearing impacts and would significantly impact on the private garden space of the surrounding properties, particularly those on Glenhill Road …".*

Relevant steps in the application for planning permission

11. In circumstances where the proposed development proposes the construction of more than 100 housing units, the proposed development fell within the definition of a "*strategic housing development*" under s.3 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("*the 2016 Act*"). Under s.4(1)(a) of the 2016 Act, an application for permission for the construction of a strategic housing development must be made to the Board and not to the local planning authority. Before making an application for permission under s.4 of the 2016 Act, a prospective applicant is required, under s.5, to make a request to the Board to enter into consultations with the Board in relation to the proposed development. In addition, prior to the consultations with the Board, the prospective applicant must have consulted the local planning authority.

12. A request to the Board by a prospective applicant to enter into the necessary consultations must comply with the requirements of s.5(5) of the 2016 Act. Among the matters that must be addressed in the request are:

(a) A brief description of the nature and purpose of the development and of its possible effects on the environment must be provided;

(b) A statement must also be provided that, in the prospective applicant's opinion, the proposed development is consistent with both the relevant objectives of the development plan or local area plan and the relevant guidelines issued by the Minister for Housing, Planning, Community and Local Government ("*the Minister*") under s.28 of the Planning and Development Act, 2000 ("*the 2000 Act*").

13. In the event that the proposed development would materially contravene a relevant development plan or local area plan (other than in relation to the zoning of the land) then s.5(6) requires that the prospective applicant should state its opinion as to why permission should nonetheless be granted having regard *"to a consideration specified in section 37(2)(b) of the Act of 2000"*. The provisions of s.37(2)(b) of the 2000 Act are considered in more detail below.

14. Prior to the consultation with the Board under s.5 of the 2016 Act, Ruirside had a number of meetings with the Council. These took place on 3rd May, 2018, 23rd October, 2018, 24th January, 2019 and 7th March, 2019. A meeting subsequently took place with the Board on 4th June, 2019. At that time, Ruirside's proposal was to develop 222 apartments consisting of 49 studio units, 58 one-bedroom units, 112 two-bedroom units, and four three-bedroom units. In a report produced by Mr. Stephen J. O'Sullivan, a planning inspector appointed by the Board, it was stated that the maximum height of the development (which, in part would extend to ten storeys high) would be more than 32 metres above ground floor level. In his report, Mr. O'Sullivan noted that the height of the buildings would contravene the limit of 16 metres for this area of the city set in the Dublin City Development Plan 2016-2022. He also noted that the Council had expressed concerns due to the existing heights of neighbouring properties including the two storey houses to the rear of the development at Glenhill Estate (where Ms. O'Neill lives).

15. Mr. O'Sullivan recommended that the Board should indicate to Ruirside that the documentation submitted during the consultation phase "*requires further consideration and amendment to constitute a reasonable basis for an application for strategic housing development to An Bord Pleanála*". The relevant amendments were thereafter listed by Mr. O'Sullivan in his report. In circumstances where the height exceeded the limits in the development plan, Mr. O'Sullivan stated that a justification of the proposed height was required "*with regard to the criteria set out in the [ministerial] guidelines which should be sufficiently robust to avoid ongoing uncertainty about the appropriate height for buildings on the site which could militate against its prompt development*". Mr. O'Sullivan's report concluded with a number of recommendations which included a recommendation that the documentation to be submitted with the application for permission should be sufficient to demonstrate that the proposed development would achieve the standard of design required for a very prominent site on a major thoroughfare. He also made a number of recommendations in relation to access, parking, and the treatment of open spaces. He further indicated that both the National Transport Authority and Irish Water should be

notified of any application. In addition, he stated that specific information should be submitted with any application for permission which would deal (*inter alia*) with how the proposed apartments comply with the various requirements of the 2018 Guidelines on Design Standards for New Apartments.

16. Following the inspector's report, the Board issued a direction that an opinion pursuant to s.6(7) of the 2016 Act should issue "*generally in accordance with the Inspector's Recommendation"*. As a consequence, Ruirside was able to proceed with an application under s.4 of the 2016 Act to the Board for permission for its proposed development.

17. On 30th August, 2019 Ruirside made an application in writing to the Board for a development comprising 245 apartments rather than the 222 which had been discussed in the course of the pre-application consultation process. In addition, the apartments were now made up of 49 studio units, 73 one-bed units and 123 two-bed units. There were no longer to be any three-bed units.

18. On the same day, notice of the application was posted on the site and advertised in the Irish Daily Star. The advertisement stated that the proposed development would materially contravene the Dublin City Development Plan, 2016-2022. However, it did not specify what objectives of the Plan would be contravened.

19. In her affidavit sworn on 20th January, 2020 grounding the application made to Meenan J., Ms. O'Neill stated that a number of the Glenhill and Premier Square residents observed the site notice on 30th August, 2019 and they thereafter notified all residents of the application for permission to construct the proposed development and they proceeded to convene meetings in the Community Lodge in Glenhill to discuss their options. They also notified all the city councillors. Subsequently, as noted above, they engaged Hughes Planning and Development Consultants to prepare a report (which was submitted on behalf of more than 140 residents). In addition to that report, individual submissions were also made to the Board by 27 residents of the Glenhill Estate and of Premier Square objecting to the proposed development. As noted above, this included Ms. O'Neill and her husband. In addition, submissions were also made by three local public representatives namely Dessie Ellis T.D., Noel Rock T.D. and Ms. Róisín Shortall T.D.

20. Following receipt of the observations from objectors, a detailed report was compiled by Ms. Erika Casey, a senior planning inspector with the Board. Her report is dated 1st November, 2019 and will be addressed in more detail below. In her report, she examined the issues raised by the application and, for reasons which are outlined further below, she recommended that permission should be granted for a revised version of the development which would see the height of Block 2 reduced by the omission of two intermediate floors to a maximum height of 7 to 8 storeys. In addition, she recommended that the height of Block 1 should be reduced by the omission of the seventh floor to a maximum height of six to eight storeys.

21. Subsequently, the submissions made to the Board and the report of the inspector were considered at a meeting of the Board held on 12th November, 2019. Following that

meeting, on 15th November, 2019 the Board issued a direction recording that it had decided to grant permission "*generally in accordance with the Inspector's recommendation*". However, the Board concluded that the omission of floors as proposed by the Inspector would not be necessary for the proper planning and sustainable development of the area. In those circumstances the Board decided to grant permission for the development as proposed by Ruirside.

22. On foot of the Board direction, the Board decision issued granting permission for the development. For completeness, it should be noted that the Board order incorporating the decision of the Board does not record the reasoning contained in the Board direction explaining why the Board decided not to follow the omission of floors as proposed by the Inspector.

The present proceedings

23. On 20th January, 2020, Ms. O'Neill filed her statement required to ground the application for judicial review and her supporting affidavit. Very properly, given the terms of High Court Practice Direction PC 74 (dealing with judicial review applications in respect of Strategic Infrastructure Developments) Ms. O'Neill attended in the Central Office of the court and requested to be directed to the appropriate court that specifically dealt with such applications. This is explained in her supplemental affidavit sworn on 17th April, 2020. Regrettably, it appears that the relevant staff of the Central Office, with whom Ms. O'Neill spoke, were unaware of the terms of the Practice Direction and they advised Ms. O'Neill to attend before Meenan J. in the judicial review *ex parte* applications list on Monday 27th January, 2020. When Ms. O'Neill attended on that day, she arrived early in the Four Courts and tried again to be directed to the court specifically dealing with strategic infrastructure applications. She was given very confusing directions and ultimately, as she explains in her April 2020 affidavit, she made the application for leave before Meenan J. on that day. Having explained what had transpired in terms of the confusing directions given to Ms. O'Neill, Meenan J. apologised for the inconvenience caused. When the matter was subsequently mentioned to me in the Strategic Infrastructure List on 20th February, 2020, I reiterated that apology. It is deeply regrettable that any litigant, and in particular a litigant acting without the benefit of legal representation, would experience a difficulty of this kind in pursuing an application for leave to apply for judicial review. This is especially so in circumstances where such applications are subject to very strict time limits.

24. For completeness, it should be noted that, while both the Board and Ruirside, in their respective statements of opposition raised an issue as to compliance with the statutory time limit provided for in s.50(6) of the 2000 Act, this point was, very properly, not pursued at the hearing.

The grounds of challenge pursued by Ms. O'Neill

25. Although her statement of grounds canvassed a number of additional issues, Ms. O'Neill, in her submissions to the court, confined herself to the following areas of concern:

    (a) Flooding, flood risk and foul drainage;

(b) The pre-planning consultation with the Board (which she maintains was in respect of a different development to that subsequently pursued in the application for permission);

(c) Aerials and antennae;

(d) Height and density. These issues are raised in the context of the case Ms. O'Neill's makes that the height and density of the proposed development materially contravene the relevant Dublin City Development Plan;

(e) Shading analysis and daylight and sunlight analysis;

(f) Insufficiency of photomontages and the distortion and lack of clarity relating to photographs and other images submitted by Ruirside with the planning application;

(g) Issues with regard to flora and fauna; and

(h) A denial of fair procedures.

26. It will be necessary, in due course, to examine the case made by the applicant in relation to each of these issues and also to consider the response of the Board, Ruirside and the Council. Before doing so, it is important to bear in mind that these are judicial review proceedings. This is not an appeal and the court has no power to review the planning merits of the Board's decision.

27. Furthermore, the scope of these proceedings is confined to the matters raised in Ms. O'Neill's statement of grounds. In this context, Ruirside has drawn attention to the observations of MacGrath J. in *Harrington v. Minister for Communications, Energy and Natural Resources* [2018] IEHC 821, para. 126, where he said:

"126. I have set out the background to the current proceedings in some detail. It is clear that a multitude of issues have been addressed and canvassed through the years in the context of the Corrib project. However, it is important to reiterate that on this application for judicial review, this Court is concerned with a challenge to the legality of the decision of the first respondent to grant a consent to operate the pipeline. Further, it is clear from the authorities that this Court when considering the grounds of challenge, submissions or arguments is concerned, and concerned only, with the grounds upon which leave to apply for judicial review was granted and the matters contained in statement of grounds and supporting affidavits. Adopting dicta of Haughton J in Alen-Buckley v. An Bord Pleanála (No.2), matters that fall outside the grounds upon which such leave was granted do not come within the remit of this Court on this review and therefore despite the applicant's strongly held and passionate views on certain matters, unless they are grounds or a basis upon which leave was granted, cannot come within the Court's consideration in deciding whether the Minister acted lawfully when granting the consent ...".

28. As the submissions for Ruirside made clear, similar observations were made by Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122 where, at para. 108, having cited the decision of the Supreme Court in A.P. v. DPP [2011] 1.R. 79, Barniville J. stated:

> *"These passages from the various judgments delivered by members of the Supreme Court in AP set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review. Unless there is an application for leave to amend the statement of grounds to include an additional relief or additional grounds to support an application for existing relief, it is not open to the applicant to seek that additional relief or to advance that additional or those additional grounds. It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court."*

29. In addition, the Council has stressed that the obligations on an applicant for judicial review apply with equal vigour to a lay litigant such as Ms. O'Neill. In the written submissions delivered on behalf of the Council my attention was drawn to the observation made by Clarke J. (as he then was) in *Burke v. O'Halloran* [2009] 3 I.R. 809 at para. 83 where he said:

> *"… it does have to be noted that a party who chooses to represent themselves is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party...".*

30. Bearing those observations in mind, it will be important, in addressing each of the matters of concern raised by Ms. O'Neill in the course of her submissions, to consider those concerns in the context of the case made by her in her statement of grounds and in her verifying affidavit. In this context, it seems to me that, in identifying the boundaries of the case which Ms. O'Neill makes, I should take her verifying affidavit into account. I note that, in *Kelly v. An Bord Pleanála* [2019] IEHC 84 at para. 128, Barniville J. was prepared to excuse a breach of O. 84, r. 20 (3) in circumstances where the applicant's affidavit evidence provided additional material which assisted in clarifying the case made and where the respondent and notice parties understood that case.

31. I now turn to consider, individually, each of the issues which were debated in the course of the remote hearing which took place on 26, 27 and 28 May, 2020. I deal with them in same the order as they were addressed by Ms. O'Neill in the course of her oral submissions at the hearing. Flooding and related issues are therefore addressed at paras. 32 to 96 below; the inconsistencies between the pre-planning consultation phase and the

application submitted under s.4 are addressed in paras. 97 to 119 below; the issue relating to aerials and antennae are addressed in paras. 120 to 128 below; the complaints made about height and density (which Ms. O'Neill maintains materially contravene the relevant development plan) are considered in paras. 129 to 187 below; Ms. O'Neill's complaints in relation to the shading analysis and daylight and sunlight analysis are dealt with in paras. 188 to 191 below; the alleged insufficiency of photomontages and related issues are addressed in paras. 192 to 195; the complaints made by Ms. O'Neill with regard to flora and fauna are considered in paras. 196 to 206 below; and her complaint in relation to fair procedures is considered in paras. 207 to 210. Thereafter, I will address the question of the declaratory relief sought against the Council and Ruirside (which are covered in paras. 211 to 216). I set out a summary of my conclusions in paras. 217 to 219.

Flooding and related issues

32. In her statement of grounds, Ms. O'Neill sought the following relief in relation to flooding:

(a) A declaration that the Board acted contrary to *"OPW Flooding i.e. Planning Guidelines for Local Authorities*". This is the common name for the guidelines which, properly speaking, were issued by the Minister for the Environment, Heritage and Local Government in November 2009. They are often referred to as the OPW Guidelines in circumstances where the Office of Public Works ("*OPW*") was intimately involved in the preparation of the guidelines in its capacity as the lead agency for flood risk management in Ireland. I will refer to these guidelines in this judgment as the Flood Risk Management Guidelines;

(b) A declaration that the Board acted contrary to the European Communities (Assessment and Management of Flood Risks) Regulations 2010 (S.I. No 122 of 2010 ("*the Flood Risk Regulations*");

(c) In the alternative, a declaration that the Council and Ruirside failed to comply with the Flood Risk Regulations. In this context, it should be noted that the relief claimed in para. 4 of Part D of Ms. O'Neill's statement of grounds refers to the Council and Ruirside as "*the Second and Third Named Respondents*". However, Ms. O'Neill clarified in a letter to the Council dated 28th February, 2020 that the reference to the second and third named respondents should read the first and second named notice parties namely Ruirside and the Council;

(d) In the alternative, a declaration that Ruirside and the Council failed to comply with the Flood Risk Management Guidelines.

33. In Part E of her statement of grounds Ms. O'Neill says that a full flood risk assessment was not carried out for the site. In this context she drew attention to the application submitted by Ruirside to the Board which stated, at p.53:

> *"There is no record of flooding on the site or in the immediate vicinity of the site".*

34. In her verifying affidavit sworn on 20th January, 2020, Ms. O'Neill also drew attention to the fact that, in the application under s.4, Ruirside stated that:

> *"The site lies within Flood Zone C and there is no record of historic flooding on this site".*

Ruirside further stated that it was envisaged that the proposed development would not be vulnerable to flooding. Ms. O'Neill highlighted that, in the report of the inspector, it was stated that a preliminary flood risk assessment had been carried out with respect to the subject site and that there was no record of flooding on the site or in its vicinity. In para. 14 of her affidavit, Ms. O'Neill suggested that these statements made both by Ruirside and by the Inspector are factually incorrect. She did so on the basis that, on 24th October, 2011 the proposed development site was flooded as a consequence of an extreme pluvial flooding event following extreme rainfall that exceeded the capacity of the existing river and drainage systems within the city of Dublin. She also maintained that, at a meeting of the Council on 17th February, 2012, reference was made to Finglas Road as one of the roads affected by the flooding event of October, 2011. In support of her case, Ms. O'Neill exhibited a video of the development site (taken from a balcony of one of the apartments in Premier Square which overlooks the site) which depicts flooding on the site on 24th October, 2011. This video had not been submitted to the Board during the course of its assessment of Ruirside's application under s. 4 of the 2016 Act.

35. With regard to the Flood Risk Management Guidelines, Ms. O'Neill emphasised that the guidelines require planning authorities to incorporate flood risk assessment into the decision-making process on planning applications. The guidelines also indicate that historic records will help to identify which areas might be prone to flooding although it is always possible that areas not known to have flooding in the past (or for which no records of flooding are available) could be flooded in the future due to (*inter alia*) the occurrence of a more extreme rainfall event. Ms. O'Neill also noted in her affidavit that several of the residents of Premier Square apartments had mentioned the risk of flooding in their objections to the Board and that the video mentioned above confirmed this. In this regard, it should be noted that, in the exhibits before the court, there are a number of references to flooding and drainage problems in observations submitted by residents of Premier Square apartments. These include the observation submitted by Lesley Shoemaker who referred to "*problems with floods in Premier Square due to drainage issues on this site"*; the observations made by Ms. Barbara O'Reilly which referred to "*some significant concerns in relation to flooding in the area as there is a stream that flows underneath Premier Square that is likely to be impacted by this development"*. In addition, Mr. Barry Gallagher, a resident on Glenhill Road, stated, in his observations, that the location is at the bottom of a hill on an existing green area which "*currently acts as seepage against flooding from any excess water due to heavy rainfall that may run off from Glenhill, which could then be prone to flooding if this development was to proceed*".

36. In her affidavit, Ms. O'Neill also addressed the issue of foul drainage. She referred to the statement by the inspector in her report that foul sewage will discharge from each

apartment block to the proposed foul sewer network within the development site and then discharge to an existing 225 mm diameter foul sewer pipeline in the adjoining Premier Square complex. She stated that this is a cause of *"huge concern to the residents in Premier Square who already suffer from bad drainage and flooding. The Inspector further states that the Finglas stream was diverted away from the development site in the past and was relocated to the opposite (west) side of Finglas Road. Part of the Finglas stream is open 500 metres past Premier Square Apartments … on the same side as the site. It is covered in vegetation and you can hear the water flowing as you walk past it on the footpath."*

37. Finally, with regard to flooding concerns, Ms. O'Neill, in her affidavit, also highlights the provisions of Regulation 12 of the Flood Risk Regulations. It appears, however, that she is, in fact, relying on Regulation 7 (2) (b) which requires that a preliminary flood risk assessment should include a description of the floods which have occurred in the past and which had significant adverse impacts on human health or the environment. Ms. O'Neill complained that, contrary to the requirements of the regulations, Ruirside did not declare on their planning application form that there was a history of flooding on the site and she also contended that the observation made by the inspector that there was no history of flooding either on the site or in its vicinity was incorrect. In the circumstances, Ms. O'Neill contended that the Board, the Council and Ruirside were each in breach of the Flood Risk Management Guidelines and in breach of the Flood Risk Regulations.

38. In her written and oral submissions, Ms. O'Neill repeated the case which she made in her statement of grounds and affidavits. In addition, she quoted from the Flood Risk Management Guidelines to the effect that development in areas at risk of flooding should be avoided save where the flood risk can be reduced or managed to an acceptable level without increasing flood risk elsewhere. Ms. O'Neill also placed reliance on the statement in the guidelines that a sequential approach should be taken to flood risk management when assessing the location for new development based on avoidance, reduction and mitigation of flood risk and that flood risk assessments should be incorporated into the decision-making process in planning applications. In her oral submissions, she highlighted that, in his affidavit sworn on behalf of Ruirside, Mr. Diarmuid Cahalane had acknowledged that the site is identified as being at risk of pluvial flooding in the Dublin City Development Plan 2016-2022 Strategic Flood Risk Assessment. However, he contended that the risk is associated with inaccurate terrain information related to the culverts associated with the Finglas Stream.

39. Ms. O'Neill also contested the suggestion made by Mr. Cahalane in his affidavit (and in the materials placed before the Board by Ruirside) that the development site is located within Flood Zone C. As the Flood Risk Management guidelines make clear, lands in Flood Zone C have a low probability of flooding from rivers and the sea. In contrast, lands within Flood Zone A and B have a high and moderate risk respectively of flooding from rivers and the sea. In her oral argument, Ms. O'Neill drew attention to volume 7 of the Strategic Flood Risk Assessment ("SFRA") attached to the Dublin City Development Plan 2016-2022 and she suggested that Table 3.1 in the SFRA indicated that lands (such as

the development site in this case) within zoning objective Z1 (which is concerned with the protection, provision and improvement of residential amenities) are not only highly vulnerable to flooding but lie within either Flood Zone A or Flood Zone B.

40. In response to the case made by Ms. O'Neill in relation to flooding and flood risk, the Board objected to the attempt by Ms. O'Neill to rely on new evidence that was not before the Board (principally the video of the flooding observed on 24th October, 2011). The Board also made the case that Ms. O'Neill was, essentially, seeking to reopen the merits of the issue in relation to flooding. The Board relied significantly on the contents of the report of the inspector and the conclusions reached by her that flood risk had been satisfactorily addressed in Ruirside's application and no adverse flood impacts are likely to arise.

41. In the affidavit of Pierce Dillon sworn on behalf of the Board, Mr. Dillon said that the Board relied on the material submitted by Ruirside which showed that the site lies within Flood Zone C and that there was no record of historic flooding at the site. Mr. Dillon also referred to s. 2.6.1 of the Environmental Site Assessment Report which stated that the National Preliminary Flood Risk Assessment ('*NPFRA*') was reviewed to determine the risk of flooding of the site. Mr. Dillon also noted that, in the report of the Inspector, she recorded that no objection to the development had been raised by the Drainage Section of the Council or by Irish Water.

42. In its statement of opposition, the Board also objected that the case made by Ms. O'Neill in relation to flooding is not adequately particularised and does not comply with the requirement of O.84, r.20(3) of the Rules of the Superior Courts. This issue was reiterated in the written submissions delivered on behalf of the Board in which reference was made to the decision of Haughton J. in *People Over Wind v. An Bord Pleanála (No. 1)* [2015] IEHC 271 and *Alen-Buckley v. An Bord Pleanála (No. 1*) [2017] IEHC 541.

43. In his oral submissions, senior counsel for the Board strongly objected to the attempt by Ms. O'Neill, in the course of her submissions, to raise, for the first time, an issue as to whether the development site is within Flood Zone C or Flood Zones A or B.

44. Counsel for the Board also addressed the material on which Ms. O'Neill seeks to rely in support of this aspect of her case. This was done without prejudice to the case made by the Board in its written submission that its assessment of flooding is subject to review only on irrationality or unreasonableness grounds. Counsel relied in this context on the decision of the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 and the judgment of Fullam J. in *Carroll v. An Bord Pleanála* [2016] IEHC 90 at paras. 40-42. Having regard to the principles which emerge from those cases, it was submitted that there was evidence before the Board (including the preliminary flood risk assessment submitted by Ruirside) which enabled it to reach a decision on issues relating to flooding and that, accordingly, there was no basis to interfere with its decision insofar as the flooding issue is concerned.

45. In support of the Board's contention that Ms. O'Neill is not entitled to rely on evidence in these proceedings which was not before the Board at the time of its decision, counsel referred me to my own decision in *Sliabh Luachra against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (and the case law considered in para. 35 of that judgment).

46. Nonetheless, without prejudice to all of these objections, counsel for the Board addressed the material on which Ms. O'Neill seeks to rely. Thus, for example, he referred to the Council committee meeting which took place on 17th February, 2012 to discuss the extreme pluvial flooding event of 24th October, 2011. He highlighted that the report does not say that any flooding of property was recorded at Premier Square or on the development site itself.

47. Counsel also placed some emphasis on the fact that, in her own submission to the Board, Ms. O'Neill did not mention flooding at all. Likewise, the Hughes Report did not refer to the issue.

48. In the context of surface water drainage, foul drainage, and flood risk assessment, counsel also drew my attention to the report from T.J. O'Connor & Associates, Consulting Engineers, (of which firm Mr. Cahalane is a partner). Counsel submitted that it was evident from the report that extensive consideration was given to the issue of flooding by Ruirside in its application to the Board and that a clear rationale was put forward as to why the development site should be regarded as falling within Flood Zone C and he also highlighted that, at p.8 of the report, specific reference was made to the flood event of 24th October, 2011 (albeit in the context of suggesting that the nearest flooding which occurred was at Ballygall Crescent, 500 metres away from the site).

49. In relation to foul drainage, counsel also referred to a detailed letter dated 14th August, 2019 sent by T.J. O'Connor & Associates to the Council in which they addressed the proposed diversion of the public sewer in the context of the development works and explained why the diversion would not increase a risk of surcharging the drainage system. In that letter, the authors explained that diverting the sewer will eliminate a defective section of the sewer while providing adequate capacity and suitable longitudinal profile which, they advised, will reduce the risk of surcharge.

50. Without prejudice to the objection previously made by him, counsel also addressed the terms of the SFRA contained in Volume 7 of the Dublin City Development Plan 2016-2022. He suggested that a consideration of the SFRA showed that the development site was not within Flood Zone A or B.

51. Ruirside objected to the declaratory relief sought against it and contended that the only party against whom such relief would lie (if there was any stateable ground to support it) would be the Board. In addition, in its statement of opposition, Ruirside made the following points in relation to flooding: -

(a) Like the Board, Ruirside relied on the report of the Inspector and maintained that it is clear from that report that both the Inspector and the Board had regard to the Flood Risk Management guidelines;

(b) Ruirside relied on the fact that the site lies within Flood Zone C and that accordingly the level of detail that is required in a flood risk assessment will depend on the level of risk and scale of development. In such circumstances, Ruirside contends that the preliminary flood risk assessment that was submitted to the Board complies with the requirements under the guidelines;

(c) with regard to the case made by Ms O'Neill in relation to the Flood Risk Regulations, Ruirside highlighted that Regulation 7 relates to the obligations of the OPW and not to any obligation on the part of Ruirside or the Board.

52. As noted above, Ruirside also relied on the affidavit of Mr. Cahalane in relation to flooding. In his affidavit, he explained that pluvial flooding arises as a result of rainfall overland flows which arise before runoff enters a watercourse. Mr. Cahalane explained that pluvial flooding must be distinguished from a fluvial flood risk which is the risk of a river flooding due to heavy rain, causing the flow in the river to exceed its capacity. The relevant Flood Zones A, B and C are concerned with the latter.

53. With regard to the flooding event on 24th October, 2011, Mr. Cahalane explained that, since Ruirside was not in ownership of the site at that time, it was not aware of this flooding incident. He also explained that, in preparing the preliminary flood risk assessment report, the records of reported flooding on the www.floodmaps.ie website were inspected and that there was no record of flooding of the site in the reports contained within this archive either for the Finglas River (which is a largely culverted stream which runs principally down the west side of Finglas Road) or the wider Finglas/Glasnevin area. Mr. Cahalane, in his affidavit, also referred to a progress report on the extreme pluvial flooding event of 24th October, 2011 prepared by Seamus Lyons, Assistant City Manager which identified sixty locations of reported flooding in the northwest area of the city. No reference is made in that report to Premier Square or to the development site or to the Finglas Road in the immediate vicinity of the development site. However, Mr. Cahalane accepted that the photographs exhibited by Ms. O'Neill do show flood waters within the development site. Mr. Cahalane also addressed the February 2012 Council report which refers in broad terms to flooding of a property on the Old Finglas Road and to road flooding on the Finglas Road. Mr. Cahalane pointed out that there is nothing in the report from which it could be inferred that the road flooding on the Finglas Road was referable to the development site or to the Premier Square Apartments. He suggested that the most likely source of the flood flows observed on 24th October, 2011 arose from the surface water sewer which traverses the northern end of the site from Glenhill Road to the Finglas River culvert on the west side of the Finglas Road. He explained that the existing sewer at this location is constricted as a result of inadequate repairs which reduced the capacity of the sewer to convey flood waters. According to Mr. Cahalane, the proposed diversion and increase in size of the surface water sewer (as part

of the intended development) will eliminate the constriction on the existing sewer and will serve to reduce, if not eliminate, the risk of pluvial flooding occurring. Mr. Cahalane also referred to a number of aspects of the report of the Inspector (which are dealt with in more detail below).

54. In the written submissions delivered on behalf of Ruirside, considerable reliance was placed on the report of the Inspector. The submissions also stressed that the development site is located within Flood Zone C. The case was also made, with regard to foul sewerage, that the fact that residents of Premier Square may have concerns about the foul sewer network is not an appropriate ground for judicial review and, in effect, goes to the merits of the decision of the Board. In common with the Board's own submissions, the case was made that matters relating to the proper planning and sustainable development of the area involve the Board exercising its expert planning function and are only reviewable by the court by reference to irrationality principles.

55. Without prejudice to Ruirside's objection that the Flood Zone issue is not within the ambit of Ms. O'Neill's statement of grounds, senior counsel for Ruirside submitted, in the course of his oral argument, that Ms. O'Neill was mistaken in her interpretation of the material contained in the SFRA attached to the Dublin City Development Plan 2016-2022. For completeness, he also made clear that the document on which Ms. O'Neill relies is an interim publication but that, on the basis of a "*compare and contrast*" exercise conducted by junior counsel, there was no material difference between the final version of the SFRA and the interim publication on which Ms. O'Neill sought to rely. Counsel submitted that, on a correct reading of the SFRA, it was clear that the development site was not located within either Flood Zone A or B. Accordingly, he suggested that there was no need to carry out a justification test for the proposed development under the Flood Risk Management Guidelines. He argued that the exercise carried out by Ruirside was plainly sufficient.

56. Counsel for Ruirside also stressed that Flood Zones A, B and C, under the Flood Risk Management Guidelines, were all concerned with the probability of flooding from rivers and the sea, that is to say, fluvial flooding. The rainfall or pluvial event which occurred on 24th October, 2011 gave rise to a different form of flooding.

57. With regard to the pluvial flooding incident which occurred on 24th October, 2011, counsel for Ruirside adopted the submissions of counsel for the Board insofar as the Dublin City Council records are concerned. In any event, counsel submitted that the report from T.J. O'Connor & Associates, civil engineers, did address the issue of pluvial flooding and the issue was also addressed by the Inspector appointed by the Board.

58. Like counsel for the Board, counsel for Ruirside objected to the video evidence on the basis that it was not before the Board and accordingly the Board did not have an opportunity to consider it.

59. With regard to foul drainage, counsel for Ruirside suggested that no legal issue arises. While it was obviously a matter of concern to Ms. O'Neill and other local residents, foul

drainage is a matter which fell within the jurisdiction of the Board to consider and counsel submitted that it was therefore a matter for the expert assessment of the Board. Ultimately, the inspector and the Board determined that the arrangements proposed by Ruirside were satisfactory.

60. Insofar as the Council is concerned, it made the case in its statement of opposition that it is not appropriate to seek declaratory relief against a notice party (a position also adopted by Ruirside) and it also made the case that, in any event, nothing has been pleaded in Ms. O'Neill's statement of grounds or addressed in her affidavits which explains the factual or legal basis for the case she seeks to make against the Council. This was addressed in further detail in the written and oral submissions of counsel.

61. In response to the submissions made by counsel for the Board and counsel for Ruirside in relation to the flooding issue, Ms. O'Neill emphasised that, in her statement of grounds and verifying affidavit, she had highlighted that both the inspector appointed by the Board and Ruirside itself had proceeded on the basis that there was no history of flooding on the development site or in the vicinity of the site. She referred in particular to paras. 12 to 19 of her affidavit sworn on 20th January, 2020. She highlighted, in particular, that she had made the case that a full risk assessment was not carried out on the site and that, as a consequence, the Council, the Board and Ruirside were in breach of the Flood Risk Management Guidelines and the Flood Risk Regulations. She also submitted that the Board and its inspector had been pre-warned of historic flooding on the site by objectors from the Premier Square apartments which are situated in direct proximity to the site.

62. Insofar as the SFRA is concerned, Ms. O'Neill suggested that the map contained in Appendix 6 to the SFRA (depicting pluvial flood hazard in respect of a 1% AEP Event) shows that the site is at a high to extreme risk of flooding. While it is difficult to pinpoint the development site on the map in question, when one looks at the electronic version of the map, it does appear to show that the area of the Finglas Road on which the site is located is subject to pluvial flooding in a "*1% AEP Event*" which I understand to mean a one in 100 year flood or a flood that has a 1% chance of occurring or being exceeded in any one year.

63. In light of the fact that the pluvial flood hazard map had not previously been mentioned in argument, I asked counsel for the Board and for Ruirside to address the map in question on which Ms. O'Neill had placed some reliance during the course of her reply. Counsel for the Board submitted that the pluvial flood hazard map was not the relevant map for the purposes of designating flood zones. The relevant map for that purpose is the map contained in Appendix 5 to the SFRA which specifically depicts Flood Zones A, B and C for the City of Dublin. Counsel for Ruirside agreed with this submission.

Discussion and analysis in relation to the flooding issue

64. Before addressing the detail of the concerns raised by Ms. O'Neill, it is important to keep in mind that the role of the court in judicial review proceedings is quite limited. Essentially, the court is concerned with the legality of the decision of the Board. The court has no power or jurisdiction to review the merits of the Board's decision.

Understandably, Ms. O'Neill and many local residents may feel very aggrieved that their observations and submissions have not led to the rejection by the Board of the application by Ruirside for permission to proceed with what is clearly considered to be an unwelcome development in the immediate locality. However, under the 2000 and 2016 Acts, the Board is the body which is entrusted with the expert assessment of planning applications of this kind and the court has no ability to interfere with its decisions so long as they have been lawfully arrived at. In particular, the court has no power to review the planning merits of the Board's decisions.

65. That said, if an applicant in judicial review proceedings is able to demonstrate a failure on the part of the Board to comply with its legal requirements, such a failure may provide a ground on which the court can interfere with the decision of the Board. Thus, for example, if an applicant for judicial review can demonstrate that a planning authority such as the Board had failed to have regard to ministerial guidelines issued under s.28(1) of the 2000 Act, this might provide a basis on which the legality of the planning decision could be attacked. Section 28(1) expressly provides that:

"(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions." (Emphasis added).

66. In the present case, Ms. O'Neill, in her statement of grounds has expressly made the case that the Board, in dealing with the application for permission by Ruirside, has failed to comply with what she describes as the OPW Flood Risk Management Guidelines. As noted previously, these guidelines were issued pursuant to s.28(1) of the 2000 Act by the Minister for the Environment, Heritage and Local Government. They are accordingly guidelines to which the Board was required, by law, to have regard in considering the application made by Ruirside for planning permission. Similarly, if Ms. O'Neill was in a position to demonstrate that the Board is subject to obligations under the Flood Risk Regulations and is in breach of those obligations, this might provide a ground on which she could rely to mount a challenge to the legal validity of the Board's decision.

67. Insofar as factual issues are concerned, the court has a very limited role. In this context, I agree with the submissions made by the Board that the only avenue of attack, in a factual context, is the irrationality test established in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. In that case, Finlay C.J., in the Supreme Court explained the relevant approach as follows at pp. 71-72:

"The Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that

(a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or

(b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.

These considerations described by Counsel … are of particular importance in relation to questions of the decisions of planning authorities.

Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the Planning Authorities and the Board which are expected to have special skill, competence and experience in planning questions. The Court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.

I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally … so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.

As was indicated by this Court in the case of Sharpe v. The Dublin City and County Manager [1989] I.R. 701, the onus of establishing all that material is on the applicant for judicial review, and if he fails in that onus he must fail in his claim for review…".

68. Notwithstanding the subsequent decision of the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, it has been held by Fullam J. in *Carroll v. An Bord Pleanála* [2016] IEHC 90 (at paras. 40-42) that the *O'Keeffe* irrationality test (set out above) continues to apply in planning matters.

69. Another constraint on the role of the court in judicial review proceedings is that, generally speaking, there is no scope to introduce evidence which was not before the decision-maker. This is clear from the decision of Haughton J. in *People over Wind v. An Bord Pleanála* [2015] IEHC 271 and from the decision of Murphy J. in *Hennessy v. An Bord Pleanála* [2018] IEHC 678. The underlying rationale is that the court is not engaged in a re-hearing of the matter. As outlined above, the role of the court is limited. For the court to entertain material that was not placed before the Board would run the risk of turning the hearing before the court into a re-hearing of the merits which would be inconsistent with the function of the court in judicial review proceedings. In these circumstances, it does not seem to me that, Ms. O'Neill would be entitled to rely, in these proceedings, on the video of the flooding on the development site taken from a balcony of the Premier Square apartments on 24th October, 2011. That was material which should properly have been placed before the Board if it was to be relied upon. No explanation has been put forward to address why it was not put before the Board.

70. Bearing the principles outlined above in mind, I now turn to the specific complaints made by Ms. O'Neill. In considering those complaints, I must do so by reference to the contents of the statement of grounds and the verifying affidavit sworn by Ms. O'Neill. It is clear from the case law cited in paras. 27 to 28 above that Ms. O'Neill is not entitled to raise

concerns or make arguments that are not within the four walls of the statement of grounds and verifying affidavit. Thus, Ms. O'Neill is not entitled to pursue the contention made by her in the course of the hearing that the development site is not within Flood Zone C. Nonetheless, for completeness, since the matter was argued before me, I set out my conclusion in relation to that issue below. I do so without prejudice to the correct legal position which is that Ms. O'Neill is not entitled to make that case since it goes beyond the case made by her in her statement of grounds and therefore goes beyond the ambit of the leave granted by Meenan J. in January 2020.

71. Both the Board and Ruirside have sought to suggest that the case made by Ms. O'Neill in relation to flooding is not sufficiently particularised. Save in respect of the case made with regard to the Flood Risk Regulations, I do not accept this suggestion on the part of the Board and Ruirside. It seems to me that, when the statement of grounds is read in conjunction with the verifying affidavit sworn by Ms. O'Neill on 29th January, 2020, her case against the Board in relation to flooding is clear and has been sufficiently particularised to comply with the requirements of O.84 r.20(3). Indeed, it is noteworthy that both the Board and Ruirside were in a position to fully address the case made by Ms. O'Neill. This would not have been possible had she failed to properly put forward her case.

72. The case made by Ms. O'Neill in her statement of grounds and affidavit has been summarised by me in paras. 32 to 37 above. Essentially, Ms. O'Neill makes the following complaints:

(a) In the first place, she contends that the Board acted in breach of the Flood Risk Management Guidelines. In her statement of grounds, she expressly says that a full flood risk assessment was not carried out. In her affidavit, she provides further detail and highlights, in particular, that, contrary to the materials placed by Ruirside before the Board, there was at least one episode of flooding on the site.

(b) Secondly, she complains that, as a consequence of the failure to declare the history of flooding on the site in the application form, there was a breach of Regulation 12 of the Flood Risk Regulations.

(c) Thirdly, she complains about the foul sewage arrangements and contends that the inspector (and thereby the Board) was wrong to suggest that the Finglas Stream had, in the past, been diverted away from the development site and relocated to the opposite (i.e. west) side of Finglas Road.

73. With regard to Ms. O'Neill's case that there was a breach of the Flood Risk Management Guidelines, it is necessary to consider a number of matters. In the first place, it necessary to have regard to Chapter 5 of the Guidelines which deals with the requirement for flood risk assessment in the context of an application for planning permission. Paragraph 5.8 specifies that any known stream on or affecting the development site must be declared on the application form as required by regulations. It also makes clear that an application for permission in an area at risk from flooding should be accompanied if

necessary, by an appropriate site-specific flood risk assessment. For this purpose, applicants for permission are referred to the sources of information listed in Appendix A to the guidelines.

74. Paragraph 5.8 also specifies that flood risk assessment at the site-specific level in areas at risk of flooding is required for all planning applications, even developments appropriate to the particular flood zone. This is a reference to Zones A, B and C. These zones are explained in para. 2.23 of the guidelines. Flood Zone A covers land where the probability of flooding from rivers and the sea is highest (greater than 1% or one in 100 years for river flooding or 0.5% or 1 in 200 years for coastal flooding). Flood Zone B covers land where the probability of flooding from rivers and the sea is moderate (between 0.1% or one in 1,000 years and 1% or one in 100 years for river flooding and between 0.1% or one in 1,000 years and 0.5% or one in 200 years for coastal flooding). Flood Zone C covers land where the probability of flooding from rivers and the sea is low (less than 0.1% or 1 in 1000 years for both river and coastal flooding). The guidelines explain that Flood Zone C covers all areas which are not in Zones A or B. Under the guidelines, planning authorities are to adopt a sequential approach. Thus, most types of development would be considered inappropriate in Zone A. At para. 3.5, the guidelines provide that development in Zone A should be avoided and only considered in exceptional circumstances and where the Justification Test (explained below) has been applied. In the case of Zone B, highly vulnerable development such as hospitals, care homes, Garda stations, residential developments and utilities infrastructure would be considered inappropriate in this zone unless the requirements of the Justification Test can be met. Less vulnerable development, such as retail, commercial and industrial uses might be considered appropriate in this zone. In the case of Zone C, all types of development would be considered.

75. Paragraph 5.8 of the Guidelines also explains that the scope of the flood risk assessment for any development will depend on the type and scale of the development and the sensitivity of the area. It will also depend on whether an SFRA has been carried out by the planning authority on its development plan in accordance with the Guidelines.

76. Under para. 5.9, a site-specific flood risk assessment should provide the information detailed in Appendix A to the Guidelines. In general, this should include (inter alia) assessments of all potential sources of flooding, flood alleviation measures already in place, the potential impact of flooding on the site, how the layout and form of the development can reduce those impacts, proposals for surface water management according to sustainable drainage principles the effectiveness of any mitigation measures and residual risks to the site.

77. In the case of any development in Flood Zones A or B, a Justification Test must be passed. The requirements of such a test are set out in para. 5.15 of the Guidelines which state that the following criteria must be satisfied:

(a) The site must be zoned or otherwise designated for the particular use or form of development in the local authority development plan which has been adopted or varied taking account of the Guidelines.

(b) The proposal has been subject to an appropriate flood risk assessment that demonstrates:

(i.) The development will not increase flood risk elsewhere and, if practicable, will reduce overall flood risk;

(ii.) The development proposal includes measures to minimise flood risk to people, property, the economy and the environment as far as reasonably possible;

(iii.) The development proposed includes measures to ensure that residual risks to the area and/or development can be managed to an acceptable level as regards the adequacy of existing flood protection measures or the design, implementation and funding of any future flood risk management measures and provisions for emergency services access; and

(iv.) The proposed development must address the above in a manner that is compatible with the achievement of wider planning objectives in relation to development of good urban design and vibrant and active streetscapes.

78. Thus, in the present case, if the development site was located within Flood Zone A or B, it would mean that a very detailed and comprehensive flood risk assessment would have been required which would demonstrate that the requirements of the Justification Test could be met. While I make this finding without prejudice to the correct legal position (which is that Ms. O'Neill is not entitled to make the case that the site is not within Flood Zone C) I believe that, it is clear, on the basis of the SFRA, that the site is within Flood Zone C and that, accordingly, it was not necessary in this case to apply the Justification Test. I have formed that view by reference to the maps attached to the SFRA. While the map in Appendix 6 to the Dublin City SFRA suggests that the relevant stretch of the Finglas Road may be at a moderate or even high risk in terms of pluvial flooding (i.e. flooding caused by extreme rainfall events) it is quite clear, in my view, from the map contained in Appendix 5 to the SFRA that the development site is not within either Flood Zone A or Flood Zone B. In this context, it is important to keep in mind that Flood Zones A, B and C are all concerned with the risk of fluvial flooding rather than pluvial flooding. In fact, very little of the City of Dublin is within those Flood Zones. The vast majority of the city (including this area of the Finglas Road) is within Flood Zone C.

79. In my view, Ms. O'Neill has misread Table 3.1 of the SFRA. While I appreciate that the Table is somewhat confusing, I do not believe that it is intended to suggest that all lands in the City of Dublin which have been zoned within Zone 1 for planning purposes fall within Flood Zone A or Flood Zone B. While I appreciate that the Table might give that impression, I believe the correct way to read the Table is that the Justification Test is required in respect of any element of lands Zoned Z1 which are situated within Flood Zone A or B. As the relevant flood zone map (in Appendix 5 to the SFRA) makes clear,

there are in fact very few residential areas within the city confines which are in Flood Zones A or B.

80. My view is confirmed by the terms of para. 3.2 of the SFRA (which immediately follows Table 3.1). Paragraph 3.2 of the SFRA explains that the relevant Justification Test assessments for areas of the city at risk of fluvial flooding are included in Appendix 3 to the SFRA. Appendix 3 then addresses areas of the city which are in Flood Zone A or Flood Zone B. Most of the areas concerned are in close proximity to either Dublin Bay or one of the rivers (including the Tolka) which pass through the city. In the case of the Tolka, Appendix 3 includes a consideration of lands adjoining the stretch of the river running from Drumcondra Road to the Dean Swift Bridge on St. Mobhi Road, the stretch of the river running from the Dean Swift Bridge to Glasnevin Hill (known more widely as the Washerwoman's Hill) (incorrectly designated on the map as "*Glasnevin Road Bridge*") and the stretch of the river that runs from there to Tolka Bridge on the Finglas Road. These are areas where there has been historical river flooding. Crucially, no equivalent assessment is carried out with regard to the lands to the north of Tolka Bridge on the Finglas Road (including the lands where the development site is situated).

81. In these circumstances, even if Ms. O'Neill had made a case in her statement of grounds that the development site was not within Flood Zone C, I believe that any such case would be misconceived. In my view, it is clear from all of the evidence that the site is in Flood Zone C. The fact that it may have suffered pluvial flooding in the past does not affect that conclusion. As noted above, the flood zones are based on the risk of fluvial flooding (i.e. flooding to land from sea or river). That is not, however, the end of the analysis. As outlined above, Ms. O'Neill also makes the case that, in any event, the flood risk assessment here was deficient in that it incorrectly suggested that the development site had never suffered flooding in the past. That case encounters a further evidential difficulty for Ms. O'Neill. For the reasons already explained, I do not believe that I am at liberty to have regard to the video evidence of a flood on the site as a consequence of the extreme rainfall event of 24th October, 2011. Since that material was not placed by any of the objectors before the Board, I cannot have regard to it in the context of these proceedings. Ms. O'Neill has also referred to Dublin City Council records (which are exhibited) and which were available to the Board which she suggests shows that there was flooding on the site in October 2011. However, an examination of the relevant Dublin City record does not, in my view, support this aspect of Ms. O'Neill's case. In this context, Ms. O'Neill has sought to rely on a document prepared for a meeting of the Northwest Area Committee of the Council on 17th February, 2012. The document in question appears to have been prepared by the Environment and Engineering Department of the Council. In that report, there is a reference to road flooding on the Finglas Road at the time of the extreme rainfall event in October 2011. There is a handwritten notation on the report which states "*Premier Dairies site on Finglas Road which also includes Premier Square apartments*". However, there is no indication as to who created this handwritten note. In particular, there is no evidence that it originated within the Council. The report states that, where road flooding occurred on main roads, significant traffic delays were experienced. It also states that, in the majority of the locations of road

flooding mentioned, the flooding was due to surcharged mains and that, once the rain stopped, the surface water sewers started to empty and the flooding quickly subsided. The same report also refers to property flooding having been recorded at a number of locations. However, none of the properties in question are adjacent to the development site.

82. Thus, when the Board came to consider the application for permission made by Ruirside, there was no evidence before it of any historic flooding on the proposed development site. In this regard, it is necessary to bear in mind why the law imposes an obligation on applicants for planning permission to advertise the making of an application. The reason why there is a requirement to advertise is to ensure that all persons who are concerned about the proposed development can bring relevant matters to the attention of the planning authority (in this case the Board). While concerns were expressed by a number of observers (principally from Premier Square) about the risk of flooding, no material was placed before the Board which established that there had been historical flooding on the development site itself. There was reference to floods in Premier Square. There was also a reference to a concern expressed by a resident of Glenhill Estate about the impact of the loss of seepage on the development site. However, crucially, there was no evidence of historic flooding on the site itself. Given the role entrusted to the Board under the 2000 and 2016 Acts, the appropriate time for observers to refer to evidence (such as the video taken on 24th October, 2011) is while the proceedings before the Board were ongoing. This would have allowed the Board to take that evidence into account. For the reasons previously explained, I do not believe that Ms. O'Neill is entitled to rely in these proceedings on evidence which was not placed before the Board at the appropriate time.

83. With regard to Ms. O'Neill's suggestion that more extensive flood risk assessment should have been carried out, I have already explained why, in my view, there was no requirement to carry out a Justification Test in this case. For the reasons outlined above, I believe that it is clear that the development site is located within Flood Zone C. Of course, there was a requirement to have a flood risk assessment which complied with the requirements of Appendix A to the Flood Risk Management Guidelines. Appendix A requires (*inter alia*) that flood risk assessment should be undertaken by a competent person such as a suitably qualified hydrologist, a flood risk management professional or a specialist water engineer. It also requires that the assessment be supported by appropriate data and information including historical information on previous events but also focusing on predictive assessment of less frequent and more extreme events. There are a significant number of other requirements but I do not believe that it is necessary or appropriate to consider them in detail. No case has been made that the flood risk assessment here did not comply with the requirements of Appendix A.

84. The flood risk assessment undertaken on behalf of Ruirside in this case is contained in the report of T.J. O'Connor & Associates Civil and Structural Consulting Engineers. The report was therefore prepared by a competent professional person. It is clear from para. 5.1 of the report that, in preparing it, the Flood Risk Management Guidelines were taken into account together with the SFRA contained in volume 7 of the Dublin City Development

Plan 2016-2022. It is also clear from para. 5.2 of the report, that T.J. O'Connor & Associates sought to establish whether there was any record of flooding on the site or in its immediate vicinity. They consulted the OPW website www.floods.ie. As noted previously, the OPW is the lead agency for flood risk management in Ireland. It was therefore a very appropriate source of any relevant historical data. The information available from the OPW website contained records of pluvial flooding arising from the extreme rain event of 24th October, 2011. However, while flooding was identified in Ballygall Crescent (which is 500 metres away from the site), there was no record of any flooding in the immediate vicinity of the site. In para. 5.2 of the report, the authors also noted that, as Ms. O'Neill herself has pointed out, the site is identified as being at risk of pluvial flooding in the map attached at Appendix 6 to the SFRA contained in volume 7 of the Dublin City Development Plan 2016-2022.

85. Thus, the report took into account the available information relating to the risk of flooding on the site. The engineers expressed a professional view that the risk of pluvial flooding was associated with inaccurate terrain information relating to the culverts associated with the Finglas Stream. It identified that the western side of the development site is level with the adjacent Finglas Road where the culvert is located. In order to address this risk, the engineers referred to the fact that the proposed finished floor levels for the three apartment blocks will be higher than the road level. The report also drew attention to the way in which the entrances and access to the apartment blocks would be from the eastern part of the site which has a higher ground level and they concluded that these features "*will reduce the risk of pluvial flooding impacting on the development*". They also pointed out that the longitudinal gradient along the Finglas Road is of the order of 1:40 which they advised *"means that the probability of ponding occurring on the road in the event of a culvert blockage or exceedance event is remote*".

86. Finally, T.J. O'Connor also addressed the zoning of the site for flood assessment purposes and they identified that it lies within Flood Zone C.

87. As noted above, Ms. O'Neill's complaint in relation to the flood risk assessment is that it is factually inaccurate. She does not make any other complaint in relation to it by reference to the criteria set out in Appendix A to the Flood Risk Management Guidelines. Crucially, there is no suggestion that Ruirside or its engineers knowingly failed to disclose a relevant fact relating to the history of the site. In fact, there is no evidence that any record existed of the flooding of the site until the video evidence was produced in the course of these proceedings. For the reasons outlined above, it seems to me that this video evidence has arrived too late and cannot be used now to suggest that the flood risk assessment (by reference to which the Board based its decision insofar as flood risk is concerned) is defective.

88. In my view, there is no ground for complaint in relation to how the Board addressed the issue in relation to flood risk. In this regard, it is clear from para. 12.6.4 of the report of the Inspector that she had regard to the preliminary flood risk assessment carried out by T.J. O'Connor & Associates. It is equally clear that she understood that the Dublin City

SFRA identified a risk to the site from pluvial flooding and she identified how that risk would be mitigated by the proposed finished floor level (as described above) and the way in which the entrances and access to the apartment blocks would be situated at the eastern end of the site which has a higher ground level. In these circumstances, I cannot see any basis upon which the flood risk assessment carried out in this case can be attacked on any of the grounds advanced by Ms. O'Neill. For completeness, I should add that, in my view, even if the footage of the flood event in October 2001 had been brought to the attention of the Board, it is unlikely that this would have made any material difference to the outcome of the flood risk assessment. This seems to me to follow from the fact that, as outlined above, the Inspector was conscious of the risk of pluvial flooding and did not discount that risk. The video would have done no more than to confirm the existence of the risk. For present purposes what is important is that the Inspector took the risk into account and that she was satisfied by the mitigation measures which were built into the design of the development. Her report was, in turn, endorsed by the Board. In such circumstances, I can see no basis upon which the court could properly interfere with the expert determination of that issue by the Board.

89. The second issue raised by Ms. O'Neill relates to foul drainage. As Ms. O'Neill stated in the course of her oral argument, this issue is clearly of great concern to the residents of Premier Square and the ongoing problems encountered by them with the drainage of the existing Premier Square development which were addressed in several of the observations submitted by them to the Board in opposition to the proposed development by Ruirside.

90. The foul drainage issue was addressed by Ruirside in the report of T.J. O'Connor & Associates (discussed above) and in the letter of 14th August, 2019 which specifically dealt with the proposed diversion of the public sewer. The material contained in the letter of 14th August, 2019 described a CCTV and manhole survey that was carried out of the surface water sewers within the vicinity of the proposed development including a particular sewer which Ruirside proposes to divert. The survey showed that the capacity of the existing sewer pipeline was adversely affected by a defective section of the sewer. According to the information contained in the letter from T.J. O'Connor & Associates, the diversion of the sewer will eliminate the defective section of sewer and will provide an adequate capacity and suitable longitudinal profile which will reduce the risk of surcharge.

91. Against the backdrop of the T.J. O'Connor & Associates report and their letter of 14th August, 2019, it seems to me that there was substantial material before the Board to justify the conclusion reached by the Inspector at para. 12.6.5 of her report in which she said:

> *"Concerns have been raised by a number of the observers that capacity in the existing networks is constrained and that the development will have an adverse impact on existing infrastructure. I note that no objection to the proposals has been made by Dublin City Council. The report from Drainage Planning states that there are no objections to the development subject to conditions. The submission*

by Irish Water also raised no objection to the water supply and foul drainage proposal. I consider the proposed site services and surface water proposal satisfactory in this regard and I am satisfied that the site can be adequately serviced…."

92. In circumstances where the Council, as the relevant local authority, and also Irish Water, as the water authority, had no objection and in circumstances where the developer, Ruirside, was proposing measures which, according to T.J. O'Connor & Associates, will improve the flow of sewage in the existing sewers, as a consequence of the proposed diversion, it seems to me that there was ample evidence on which the inspector could reach that conclusion. Thus, having regard to the principles established by the Supreme Court in *O'Keeffe v. An Bord Pleanála* (by which I am bound) I do not believe that there is any basis upon which the court could quash the decision of the Board on this ground. The foul drainage issue was a matter to be determined by the Board in the exercise of its expert judgment and I can see no basis to interfere with its decision on the issue.

93. The remaining issue raised by Ms. O'Neill in respect of this part of her case is the allegation that she makes in her statement of grounds that there was a failure to comply with the Flood Risk Regulations. The case made by her in para. 19 of her affidavit of 20th January, 2020 is that there was a failure to comply with Regulation 12 of the Flood Risk Regulations. The relevant regulations are contained in S.I. No. 122 of 2010. It appears to me that the reference to Regulation 12 in Ms. O'Neill's affidavit is in error. The relevant passage which is quoted by her in that paragraph appears in Regulation 7(2)(b) which provides that the preliminary flood risk assessment required by Regulation 7(1) of the same regulations must contain a description of any floods which have occurred in the past and which have had significant adverse impacts on human health, the environment, cultural heritage and economic activity. However, Regulation 7(1) makes clear that the relevant obligation to carry out such an assessment (containing the relevant description of floods in the past) falls not on a planning authority but on the OPW. Regulation 7(1) provides as follows:

> *"The Commissioners shall, for each river basin district, or unit of management referred to in Section 4(2)(a), or the portion of an international river basin district lying within the territory of the State, undertake or cause to be undertaken, a preliminary flood risk assessment in accordance with paragraph 2 of this section."*

94. In the circumstances, the relevant regulation appears to me to be inapplicable in the present case. It is concerned with the obligation placed on the OPW (as the competent authority in Ireland under Directive 2007/60/EC on the assessment and management of flood risks) to carry out a flood risk assessment of river basins. It should be noted, in passing, that this obligation placed on the OPW is a very important one and it has led to a collation of very extensive information in relation to historic flooding and flood risks throughout the State. In turn, that information should generally be available on the www.floods.ie website to which T.J. O'Connor & Associates had regard in preparing their report of August 2019 and associated flood risk assessment.

95. In circumstances where the relevant regulation invoked by Ms. O'Neill does not impose an obligation on planning authorities or on applicants for planning permission, I do not believe that the regulation is relevant to the decision of the Board in this case and, accordingly, does not require further consideration by me.

96. For all of the reasons discussed in paras. 72-95 above, I have concluded that Ms. O'Neill's complaints in relation to the flooding and foul drainage issues must be rejected.

Inconsistencies between the pre-planning consultation with the Board and the subsequent application for permission

97. Ms. O'Neill makes the case that there was no pre-planning consultation meeting with the Board in relation to the specific development in respect of which the Board has now granted permission. Any pre-planning consultation that took place between the Board and Ruirside was in respect of a different development consisting of 222 apartments (comprising studio, one-, two- and three-bedroom apartments) and not the development of 245 apartments (with no three-bedroom units) that was the subject of the application for permission. Ms. O'Neill highlights that, in all of the documents relating to the pre-planning consultation process, the development under discussion, was the 222 apartment development and not the 245 apartment development which was subsequently the subject of the application for permission.

98. The Board has argued that this issue does not fall within the ambit of the statement of grounds. I reject that suggestion. Paragraph 5 of the statement of grounds specifically alleges that there were no statutory pre-planning consultation meetings with the Board in relation to the application. If there was any doubt about what was intended by para. 5 of the statement of grounds, the matter is made quite clear in paras. 20-24 of Ms. O'Neill's affidavit. Furthermore, it is clear that both the Board and Ruirside have understood the case made by Ms. O'Neill and that they have been in a position to address it in detail. Accordingly, I propose to take a similar approach to that adopted by Barniville J. in *Kelly v. An Bord Pleanála* (as summarised in para. 30 above).

Discussion and analysis

99. In order to consider this aspect of Ms. O'Neill's case, it is necessary to have regard to the relevant provisions of the 2016 Act. Section 5(1) of the 2016 Act imposes an obligation on a prospective applicant, before making any application for permission under s.4(1), to make a request to the Board "*to enter into consultations with the Board in relation to the proposed strategic housing development and any such requests shall comply with subsection (7)".*

100. Section 5(5) requires that the request to enter into consultations with the Board must be in writing and must include a number of matters. It is clear from s.5(5)(a) that, at the consultation stage, the applicant is not required to provide definitive plans and drawings of the proposed development. Thus, for example, s.5(5)(a)(iii) obliges the applicant to provide *"a brief description of the nature and purpose of the development and of its possible effects on the environment*". Furthermore, under s.5(5)(a)(iv), a "*draft layout plan of the proposal*" is all that is required to be provided. In addition, s.5(5)(a)(vii) simply permits the prospective applicant to provide *"such other information, drawings or*

representations as the prospective applicant may wish to provide or make available". In my view, it is clear from these provisions that the prospective applicant is not required, at the consultation stage, to have a fully formulated plan in place for the proposed development.

101. It is true that s.5(5)(a)(vi) requires the prospective applicant to provide the Board with *"such further information as may be prescribed".* The Planning and Development Regulations 2001-2019 ("*the Planning Regulations*") require more detail to be provided. However, in the context of the interpretation of the 2016 Act, I do not believe that the Planning Regulations (which are a form of secondary legislation) can be used as an aid to the interpretation of the primary legislative provisions contained in the 2016 Act. Nonetheless, even if one does have regard to the Planning Regulations, it is clear that they do not envisage that, at the consultation stage, a prospective applicant must provide anything like the same level of detail that is required to be provided in the context of an application under s.4 of the 2016 Act. Thus, Regulation 285 (2) requires that a request should be accompanied by (*inter alia*) the following:

   (a) a brief description of the proposed numbers and types of houses including "*proposed gross floor spaces, housing density, plot ratio, site coverage, building heights, proposed layout and aspect";*

   (b) a brief description of proposed public and private open space provision landscaping and access;

   (c) a brief description of the proposed provision of ancillary services (including childcare facilities);

   (d) a brief description of any proposals to address or, where relevant, integrate the proposed development with surrounding land uses;

   (e) a brief description of any proposals to provide for water services or other services infrastructure.

102. While the provisions of Regulation 285 are more prescriptive than the provisions of s.5(5)(a) of the 2016 Act, it is striking that all that is required in each case is a brief description of the relevant material. In keeping with s.5(5)(a), the Regulation does not require the same level of detail as would be required in the case of a planning application.

103. Section 6 of the 2016 Act deals with the consideration by the Board of a request or consultation. Not all of s.6 is relevant for present purposes. Under s.6(1) - (4), the Board must revert to the prospective applicant within specified time limits as to whether it is prepared to entertain the request. Where the Board agrees to entertain the request, it must notify the prospective applicant and any relevant planning authority and must convene a consultation meeting between the prospective applicant, the planning authority concerned and the Board itself.

104. Section 6(7) is relevant to the present case. It provides that, within three weeks of the holding of the consultation meeting, the Board must form an opinion as to whether the documents referred to in s.5(5):

"(i) Constitute a reasonable basis for an application under section 4, or

(ii) require further consideration and amendment in order to constitute a reasonable basis for an application under section 4".

105. In the present case, the Board, on the basis of the recommendation made by the inspector, Mr. O'Sullivan, formed the opinion that amendments were required to the proposals in order to constitute a reasonable basis for an application under s.4. The approach taken by Mr. O'Sullivan and the Board in relation to the outcome of the consultation phase under ss. 5 and 6 is described in more detail in paras. 14 to 15 above.

106. In my view, the provisions of s.6(7) are of particular relevance to the issue which Ms. O'Neill has raised with regard to the differences between the proposed development discussed during the pre-planning consultation phase under s.5 of the 2016 Act and the development described in the subsequent application for permission made to the Board under s.4 of the Act. Section 6(7) clearly envisages that differences will exist where the Board issues an opinion under s.6(7)(a)(ii) to the effect that further consideration and amendment is required in order to constitute a reasonable basis for an application under s.4. In the present case, the Board issued an opinion in that form. It is true that the opinion did not require (or even contemplate) that the application to be made under s.4 could be for a greater number of apartments than had been discussed in the pre-planning phase under s.5. However, in my view, it is significant that s.6(7) expressly envisages that there may well be differences between the development as originally proposed at the time of the pre-planning consultation and the development which is subsequently pursued by way of an application under s.4. When one has regard to s.6(7) and the other provisions discussed above (which clearly do not require that the Board would be furnished with final documents describing the proposed development in final detail), there appears to me to be strong grounds to conclude that the development described in an application under s.4 of the 2016 Act does not have to coincide in every respect with the brief description of that development previously given at the pre-planning stage.

107. Furthermore, there is no express provision in the 2016 Act which states that the description of the development in the documents submitted to the Board for consultation under ss. 5 and 6 must correspond in all respects with the description of the development in the documents ultimately submitted as part of the application under s.4 for permission. This is confirmed by a consideration of s. 6 (8) which provides that, following receipt by a prospective applicant of the relevant notice and opinion from the Board, the prospective applicant may –

"(i) Subject to complying with section 8(1) proceed to apply for permission under section 4(1), or

(ii) seek a further pre-application consultation with the Board pursuant to the provisions of this section".

108. Had it been the intention of the Oireachtas to require that the application subsequently made under s.4 should comply in all respects with the development as proposed in the pre-planning consultation phase, one would expect that s.6(8) would expressly so provide save in circumstances where amendments were required in order to address the opinion formed by the Board under s.6(7)(a)(ii).

109. That is not to say that the Board, in an individual case, would not be entitled to refuse to consider an application under s.4 where the development proposed was, in the view of the Board, materially different to the development as described in the pre-planning phase under ss. 5 and 6. I make no determination to that effect since it is not a matter which directly arises here. I merely observe that this would appear to me to follow from the provisions of s.4(1)(a)(ii) which expressly states that an application under s.4 can only be made where s.6(7)(b) applies. Under s.6(7)(b), the Board is required to issue a notice to the prospective applicant (and to the relevant planning authority) of the opinion reached by it under s.6(7)(a). If, in any individual case, the Board was of opinion that the development proposed in the application under s.4 was significantly different to the proposed development, the subject of the opinion formed by the Board under s.6(7), it would appear to me that the Board must have the power, in an appropriate case, to refuse to accept the relevant application under s.4. This would appear to me to follow notwithstanding the provisions of s.6(9) which are considered in more detail below. Section 6(9) must be read in context. Part of the relevant context is s.4 itself. If the Board is to be in a position to satisfy itself that all of the requirements of s.4 have been met in a particular case, it seems to me that the Board must, of necessity, be in a position to satisfy itself that the requirements of s.4(1)(a) have been satisfied. That seems to me to inevitably require the Board to consider whether s.6(7)(b) applies. However, all of these questions seem to me to be academic in the context of the present case. The Board entertained the application under s.4. It must therefore have considered that the application made under s.4 was not inconsistent with the pre-planning process and in particular the outcome of that process.

110. I fully appreciate that Ms. O'Neill takes a different view. She has significant concerns about the increased density inherent in a development of 245 units rather than 222 units. In para. 23 of her affidavit sworn on 20th January, 2020, she says that the documents presented to the Board during the pre-planning phase relate: *"to a materially different planning application by way of numbers of apartments, type of apartments, car parking spaces or bicycle spaces*" and on that basis she contends that no statutory pre-planning consultation was carried out in respect of a development comprising 245 apartments. Ms. O'Neill is undoubtedly correct that there are differences between the proposed development discussed at the pre-planning consultation phase and the development as described in the application for permission under s.4. It is also the case that the changes about which Ms. O'Neill has concerns, were not necessitated as a consequence of any of the matters identified in the opinion formed by the Board under s.6(7).

111. Nevertheless, as explained at an earlier point in this judgment, the role of the court in an application for judicial review of a decision of the Board is limited. The court is not in a position to substitute its own view for that of the Board. The court must bear in mind that it is the Board which is the expert body entrusted by the Oireachtas with the task of considering applications under s.4. Having regard to the test (binding on this court) set out in *O'Keeffe v. An Bord Pleanála*, I do not believe that it is possible to say that there was no basis upon which the Board could have proceeded with the application under s.4. While the *O'Keeffe* test allows a court to interfere in cases where it can be shown that no reasonable decision-making authority could ever have entertained the application under s.4, I do not believe that there is any basis upon which the court could reach that conclusion in this case. The differences between the proposed development discussed during the pre-planning consultation phase and the development as described in the application made under s.4 are not so significant or fundamental to allow a court to interfere with the decision of the Board to accept the application under s.4. As Finlay C.J. made clear in *O'Keeffe* (in the passage quoted in para. 67 above) the court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that, on the facts as found, it would have reached a different conclusion or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it. The Board is the statutory decision-maker in cases of this kind. The Board has the relevant expertise to make the necessary decision. The court cannot interfere unless there was no material before the Board to support the position taken by it or, to put it another way to support a case that the acceptance of the application under s.4 was "*fundamentally at variance with reason and common sense*" or "*indefensible for being in the teeth of plain reason and common sense*" to quote from Henchy J. in the Supreme Court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 cited by Finlay C.J. in *O'Keeffe* at p.70. In this respect, I believe that counsel for the Board was correct in characterising the changes as being marginal in an overall context. As he suggested, in the course of his oral argument:

> *"This is recognisably the same scheme that was the subject of the pre-application consultation process. Yes, it is different in certain respects, but it still constitutes an apartment development scheme comprising three blocks of apartments with varying heights, with open ground to the rear, with under croft car parking, all of these aspects of the scheme are basically consistent".*

112. In these circumstances, I have come to the conclusion that this aspect of Ms. O'Neill's challenge to the Board's decision cannot succeed. However, before concluding this part of the judgment in relation to the pre-application process, it is necessary to also consider a further issue raised by counsel for the Board. This relates to the effect of s.6(9) of the 2016 Act which is in the following terms:

> *"Neither—*
>
> *(a) the holding of a consultation under this section, nor*

> *(b) the forming of an opinion under this section,*
>
> *shall prejudice the performance by the Board, or the planning authority or authorities in whose area or areas the proposed strategic housing development would be situated, of any other of their respective functions under the Planning and Development Acts 2000 to 2016, or any other enactment and cannot be relied upon in the formal planning process or in legal proceedings."*

113. Counsel for the Board argued that this subsection has the effect that Ms. O'Neill is not entitled to rely on the material generated during the pre-application process under ss. 5 and 6 for the purposes of the case which she makes in these proceedings. If counsel is correct in that submission, it would mean that Ms. O'Neill would not be entitled to even raise and argue the issue of concern to her relating to the differences between the development as described in the pre-application process and the development for which permission was subsequently sought under s.4.

114. The provisions of s.6(9) of the 2016 Act were considered recently by Simons J. in *Dempsey v. An Bord Pleanála* [2020] IEHC 188. In that case, at para. 34 of his judgment, Simons J. noted that an almost identical statutory prohibition is to be found, in the context of strategic infrastructure development, in s.37C of the 2000 Act and, in the case of pre-application consultations with a planning authority, in s.247 of the 2000 Act. Simons J. referred, in turn, to the guidance given by Haughton J. in relation to the operation of s.247 in his judgment in *O'Flynn Capital Partners v. Dun Laoghaire Rathdown County Council* [2016] IEHC 480. Like s.6(9) of the 2016 Act, s.247(3) of the 2000 Act provides that the carrying out of pre-planning consultations with a planning authority under s.247(1):

> *"shall not prejudice the performance by a planning authority of any other of its functions under this Act, … and cannot be relied upon in the formal planning process or in legal proceedings".*

115. In the O'Flynn case, Haughton J. explained the operation of s.247 at paras. 28-32 of his judgment as follows:

> *"28. Section 247 puts upon a statutory footing a practice that had been ongoing for a number of years between local planning authorities and planning permission applicants/their advisors. It is clearly designed to encourage pre-planning consultation to facilitate the planning process and it is not hard to see its advantages. It avoids the making of many applications for planning that would materially breach the development plan or other principles of good planning and development and probably leads to more refined planning applications which thereby saves time and expense for applicants/developers and the making and consideration of planning applications that are bound to fail or at least necessitate requests for further information.*
>
> *29. …*

30. When subsection (3) is considered in the context of the section as a whole it is clear that the legislature intended to facilitate the widest possible discussion of planning matters at such consultations and sought to achieve this by stipulating that neither side could rely on the content of such discussions either in the planning process or in any judicial review. It does not discriminate between the parties – it applies equally to applicants and planning authorities. Thus, a commitment given by an applicant at such a consultation which was not carried into the subsequent planning application could not of itself be the basis for a request for further information or a refusal of the application. But that is not to say that for bona fide reasons consistent with good planning and development the planning authority could not request further information or refuse permission on the basis of the same facts that underpinned the commitment. Equally an applicant could not rely of itself on a statement or verbal commitment made by planning officials at such a consultation, either in the planning process, or in a judicial review, although that statement or commitment might inform the nature and content of the application.

31. It follows that, in general, reports and recommendations from planning or other local authority officials prepared in the course of the formal planning process in response to a planning application should not rely upon advice given or received at any statutory pre-planning consultation, and in turn should not be relied upon by the decision maker(s) when considering or determining the application.

32. There will be some circumstances in which it may be permissible for reference to be made to pre-planning consultations. For instance, it is difficult to see how an applicant could realistically object to a simple listing in a planner's report of the pre-planning consultations. It may be that documentation furnished at such a meeting, if furnished with the intention that it would [be] used in a planning application, would not be covered by the s. 247(3) prohibition. It must also be open to an applicant for judicial review who asserts that there was improper reliance by a planning authority on the content of pre-planning consultations in 'the formal planning process' to refer to sufficient material to support a case for breach of s. 247(3). There may be other exceptional circumstances in which evidence from a pre-planning consultation may be admissible, for example, where an egregious comment at such a meeting gives rise to an allegation of actual bias." (emphasis in original).

116. In his judgment in *O'Flynn*, Haughton J. also referred to the judgment of Hedigan J. in *Westwood Club Ltd v. An Bord Pleanála* [2010] IEHC 16 at para. 70 where, with reference to s.247(3) of the 2000 Act, Hedigan J. said:

"70. The above provisions make it clear that the pre-planning consultations are precluded from being relied upon in the planning process. They serve mainly to advise an applicant of the relevant procedures in the planning sphere and the aspects of the development plan relevant to their application. In circumstances where they cannot be relied on in the planning process it is difficult to see how a

failure to comply with any requirements in relation thereto could invalidate the decision reached at the end of that process. The applicant must be refused leave on this ground".

117. There are two aspects of the judgments in Westwood and *O'Flynn* which are noteworthy for present purposes:

(a) In the first place, in both of those cases, the party seeking to rely on material generated during the pre-planning process was the applicant for permission itself. In each case, the relevant party had therefore participated in that process. The observations of Hedigan J. and Haughton J. must be seen in that specific context.

(b) Even as between the applicant for permission and the planning authority, the judgment of Haughton J. envisages that s.247(3) (which is in very similar terms to s.6(9) of the 2016 Act) does not amount to an absolute prohibition, in all circumstances, on reliance on the material generated during the pre-planning phase. As Haughton J. explained in para. 32 of his judgment there could be exceptional circumstances in which evidence from a pre-planning consultation might be admissible in subsequent judicial review proceedings.

118. It is true that, in *Dempsey*, the parties seeking to rely on the material generated during the s.6 consultation phase had not themselves been involved in the pre-planning process. They were challenging the decision of the Board to grant permission to Ardstone Homes Ltd, the notice party, in relation to a strategic housing development. In that case, the notice party had initially proposed, as part of its pre-application consultation with the Board, that the development project would comprise 322 dwellings. However, in the subsequent application for permission under s.4 of the 2016 Act, the housing density was increased and the notice party sought permission to construct a development comprising 366 dwellings. As Simons J. noted, at para. 15 of his judgment, this increase appears to have been made in response to the opinion issued by the Board under s.6. However, no point was taken by the applicants in *Dempsey* that there was an impermissible difference between the development discussed during the pre-application consultation phase and the development in respect of which permission was subsequently sought under s.4. The issue which the applicants sought to raise was that the material generated during the pre-application consultation phase demonstrated pre-judgment or pre-determination by the Board in respect of the subsequent application for permission. However, that case was not pleaded in the applicants' statement of grounds. In those circumstances, Simons J. indicated, in para. 40 of his judgment, that *"there is no question of this court purporting to decide any issue in respect of prejudgment or predetermination*". He explained that if the case was to proceed after the reference that he proposed to make to the CJEU under Article 267, the task of the court would be "*confined to the case as set out in the pleadings*". In those circumstances, Simons J. did not have to consider the effect of s.6(9). Likewise, Simons J. did not have to consider whether the difference between 322 units and 366 units created any difficulty insofar as the validity of the application under

s.4 was concerned. That issue does not appear to have been raised by any party in the course of the arguments made to Simons J.

119. In circumstances where I have come to the conclusion, for the reasons outlined in paras. 99 to 111 above, that Ms. O'Neill cannot succeed in relation to this aspect of her case, I do not believe that it is necessary or appropriate that I should set out a final view in relation to s.6(9). However, I would observe that it may well be the case that s.6(9) is intended to apply solely as between the prospective applicant for permission and the Board. Like any other statutory provision, s.6(9) must be read in context. The specific context of the subsection is the pre-application consultation process which is outlined in s.6(1) to s.6(8). While that process also involves the local planning authority, it is essentially a private process which takes place between the applicant for permission and the Board, with input from the local planning authority. It does not involve any third parties. It would seem logical in those circumstances that s.6(9) should be confined, in its application, to the parties who participated in the pre-application consultation process. As Haughton J. suggested in para. 30 of his judgment in *O'Flynn*, the intention underlying the equivalent provision contained in s.247(3) is to facilitate the widest possible discussion of planning matters at such consultations. For that reason, the provision stipulates that *"neither side could rely on the content of such discussions either in the planning process or in any judicial review. It does not discriminate between the parties – it applies equally to applicants and planning authorities*."(emphasis added). In order to facilitate the widest possible discussion during the pre-application consultation phase, it is understandable that the legislature should impose a restriction on subsequent reliance by either side on such discussions in any subsequent planning application or judicial review. However, it would be a far-reaching proposition to suggest that a third party (who never chose to participate in any such process and had no opportunity to do so) would equally be prohibited from referring to material which was generated during that phase even where that material demonstrated, for example, that the application pursued under s.4 was wholly different to the application discussed (and in respect of which an opinion was issued) under s.6 and where the difference was not attributable to a recommendation made by the Board during the consultation process. It seems to me that a prohibition of this kind (which interferes with the right to place evidence before a court) should be narrowly construed. I find it difficult to see that s.6(9) could have been intended to operate to prevent a third party raising such an issue. Had that been the intention, one would expect that clear language to that effect would have been used to expressly prohibit any party (i.e. not just the parties to the pre-application consultation process) from relying in legal proceedings on material generated during that process. However, as noted above, I reach no final determination on this issue. It seems to me that it would be inappropriate to reach any such determination in circumstances where the issue has not been argued fully and where the issue is essentially moot in light of my finding that Ms. O'Neill is not, in any event, entitled to succeed in respect of this aspect of her case.

Aerials and antennae

120. This issue is canvassed very briefly in para. 7 of Part E of the statement of grounds in the following terms:

> *"7. It is stated that residents and local businesses broadband, telecommunications, and mobile signals will be impacted due to height of 10 storey block".*

121. The issue is, however, explored in more detail in the verifying affidavit sworn by Ms. O'Neill on 20th January, 2020 in particular at paras. 27-31. In those paragraphs, Ms. O'Neill highlights, that in the drawings submitted by Ruirside, as part of its application for permission, aerials and antennae are shown on the rooftops of the proposed apartment buildings. Ms. O'Neill explains that, at present, the relevant antennae for Vodafone, Three and Eir are located on the rooftop of the Carechoice Nursing Home on the opposite side of the Finglas Road from the proposed development. These provide transmission links, mobile voice and broadband services to businesses and homes in the surrounding Finglas area. She explains that the nursing home is much lower in height than the proposed development and she says that residents and businesses will be negatively impacted due to the height of the proposed block of apartments. In this context, she refers to a report prepared by Vilicom on behalf of Ruirside (which was submitted to the Board in support of the application under s.4) in which it is stated that, in order to mitigate the impact on existing telecoms routes and links, mobile network operators may need to engage in re-routing which may include moving some of the infrastructure. In their report, Vilicom propose that the rooftop of the apartment buildings would be a possible replacement site for the necessary equipment. However, Ms. O'Neill complains that no plans, details or drawings were issued regarding the size, make or model of the necessary aerials and antennae. Notwithstanding the lack of any detail in relation to the aerials and antennae, Ms. O'Neill submits, in her written submissions, that the planning permission granted by the Board includes a blanket permission for the aerials and antennae. In her oral submissions, Ms. O'Neill said that, in the absence of any detail with regard to the aerials and antennae proposed for the development, it leaves it open to Ruirside to install any aerials or antennae they wish on the proposed apartment buildings without the need for planning permission.

122. In its statement of opposition and submissions, Ruirside complained that para. 7 of Part E of Ms. O'Neill's statement of grounds does not comply with the requirements of O.84 r.20(3). However, both Ruirside and the Board nonetheless address the substance of Ms. O'Neill's complaint in relation to aerials and antennae. While I accept that Ruirside is correct in its contention that para. 7 of Part E of the statement of grounds does not comply with the requirements of O.84 r.20(3), I nonetheless believe that it is appropriate that I should deal with this aspect of Ms. O'Neill's complaints. In my view, the case which she seeks to make is sufficiently made out in her affidavit sworn on 20th January, 2020 (which was served at the same time of the statement of grounds) to allow all parties to know the nature and extent of the case which she proposed to make in relation to aerials and antennae. I therefore propose to address this aspect of Ms. O'Neill's case.

Discussion and analysis

123. In my view, Ms. O'Neill is not correct in her characterisation of the decision of the Board in relation to the issue of aerials and antennae. For the reasons explained in paras. 124 to 128 below, I do not believe that there is any basis upon which the decision of the

Board can be read as providing some form of blanket authorisation to Ruirside to erect aerials and antennae on the roof of any of the proposed apartment blocks. On the contrary, it seems to me that the decision of the Board cannot be read as giving Ruirside any basis on which to erect aerials or antennae on the roof of the proposed apartments. In my opinion, it is clear from the decision of the Board (when read in conjunction with the report of the Inspector) that a fresh application for planning permission will be required in the event that Ruirside proposes to erect any antennae or aerials on the rooftop of any of the proposed apartments. Thus, in the event that Ruirside proposes to allow the erection of aerials or antennae on the rooftop of the proposed apartments, there will be an opportunity for Ms. O'Neill or any other concerned persons, to make submissions to the relevant planning authority and to participate in the planning process in relation to any application in respect of the aerials and antennae.

124. The position in relation to aerials and antennae is addressed in paras. 12.8.9 to 12.8.10 of the Inspector's report. In para. 12.8.9, the Inspector referred to the Vilicom report addressing the anticipated potential for impacts on telecommunications channels arising from the proposed development. The Inspector noted that this report accepted that telecommunications in the vicinity "*may be affected by the proposed buildings*". In the same paragraph, the Inspector highlighted that Ruirside was applying for permission for the construction of antennae/telecoms equipment as part of the application and that drawings showing proposed indicative locations of the telecoms antennae had been submitted with the application. However, she also noted that the drawings were subject to "*detailed design from the supplier as required*" and that Ruirside had invited the Board to attach a condition to any grant of permission in respect of the proposed development under which Ruirside would be required to agree with the planning authority (the Council) the details and specific locations of the relevant antennae. It should be noted that such a process would not ordinarily involve any opportunity for participation by third parties who might be concerned about the planning consequences of the installation of any such antennae or ancillary equipment. Ruirside's proposed approach was rejected by the Inspector who said in para. 12.8.10 of her report:

> *"I do not concur that it would be appropriate for the Board to attach a condition requiring the details of the size and location of such telecoms antennae to be addressed by way of compliance. Should permission be required for such structures, separate permission should be sought from the Planning Authority where the detailed design and potential visual impact of such structures and antennae can be fully assessed in accordance with the proper planning and sustainable development of the area".*

125. It is crucially important that para. 12.8.10 of the Inspector's report should be read in conjunction with condition 4 proposed by her which puts it beyond doubt that a separate planning permission will be required for the erection of any telecommunication aerials or antennae on the roof of the proposed development. Condition 4 is in the following terms:

"4. No additional development shall take place above roof parapet level, including lift motor enclosures, air handling equipment, storage tanks, ducts or other external plant, telecommunication aerials, antennas or equipment, unless authorised by a further grant of planning permission.

Reason:

To protect the residential amenities of property in the vicinity and the visual amenities of the area, and to allow the planning authority to assess the impact of any such development through the planning process".

126. In turn, condition 4 is replicated in the Board direction and in the Board order granting permission. In those circumstances, I have come to the conclusion that Ms. O'Neill is not correct in suggesting that the permission granted by the Board permits the erection of aerials or antennae on the roof of any proposed apartments by Ruirside. If Ruirside wishes to put equipment of that kind on the roof of any of the apartments, it will be necessary for it to apply to the Council for permission to do so. At that point, Ms. O'Neill will have the ability to make all appropriate observations to the Council in relation to any concerns she may have about the erection of such equipment.

127. I appreciate that Ms. O'Neill (and many other residents) may have concerns about the impact of the development on the quality of telecommunications reception in the area. However, subject to what I say below in relation to material contravention, that is an issue that goes to the merits of the decision of the Board to grant permission in this case. For the reasons explained at an earlier point in this judgment, the court has no role in reviewing the planning merits of any decision by the Board.

128. In all of these circumstances, I must reject this element of the case made by Ms. O'Neill. Nonetheless, for the reasons explained in the next section of this judgment, the approach taken by the Board in relation to aerials and antennae is relevant to the material contravention issue.

Material contravention of the Dublin City Development Plan 2016-2022 (height and density)

129. In para. 1 of Part D of her statement of grounds, Ms. O'Neill, in seeking an order of *certiorari*, alleges that the development materially contravenes the Dublin City Development Plan 2016-2022. In para. 2 of Part E, she highlights that, under the Development Plan, the development site is zoned Zone 1 Low Rise Outer Suburban with a maximum height of 16 metres.

130. In its statement of opposition, the Board contends that, under the Building Height Guidelines (discussed in more detail below), the principle has been established that height limits may be re-examined on a site-specific contextual basis and that this allows the Board to grant permission for an extended building height (even if this breaches the limit set in the Development Plan) where this is justified.

131. Similarly, Ruirside, in its statement of opposition contends that under the Building Height Guidelines (examined in detail below) there is a specific provision (referred to below as SPPR 3(A)) under which an applicant for permission can establish compliance with certain criteria set out in the Guidelines. Where the applicant proceeds in this way, this permits the Board to grant approval for a development even where the specific objectives of the relevant Development Plan indicate otherwise. Ruirside identifies that an architect's design statement (namely the O'Mahony Pike report discussed below) was submitted with the planning application which addressed the requirements of SPPR 3(A) and Ruirside contends that, pursuant to s.9(3)(b) of the 2016 Act, SPPR 3(A) now applies instead of the relevant provisions of the Dublin City Development Plan. Ruirside therefore submits that any issue of material contravention of the height provisions of the Development Plan either did not arise at all or that it can be justified by reference to SPPR 3(A).

132. In addition to her case that the height and density materially contravene the Development Plan, Ms. O'Neill, in para. 11 of Part D of her statement of grounds, seeks a declaration that the Board acted contrary to s.34(10) of the 2000 Act by *"failing to state main reasons and considerations for contravening materially the Dublin City Development Plan 2016-2022 in relation to this development"*.

133. Both the Board and Ruirside have pointed out that s.34(10) of the 2000 Act is not applicable to a strategic housing development. The relevant provision that is applicable is s.10(3) of the 2016 Act. Under s.10(3)(a), a decision of the Board under s.9 must state: *"the main reasons and considerations on which the decision is based*". Furthermore, under s.10(3)(b), the Board must state, where permission is granted in material contravention of a development plan or local area plan, *"the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be*".

134. I will accordingly consider this aspect of Ms. O'Neill's case by reference to the provisions of the 2016 Act. Both the Board and Ruirside addressed this aspect of Ms. O'Neill's case on that basis.

135. In its statement of opposition, Ruirside complains that the relief claimed at para. 11 of Part D of the statement of grounds is not supported by any ground set out in Part E of the statement. However, Ruirside notes that, at para. 41 of her verifying affidavit sworn on 20th January, 2020, Ms. O'Neill avers that no detailed reasons were provided by the Board for the material contravention of the Dublin City Development Plan 2016-2022. In my view, when the verifying affidavit is read in conjunction with the statement of grounds, the case made by Ms. O'Neill in relation to this issue is clear. Moreover, it seems to me that the relief claimed must also be read in conjunction with para. 8 of Part E of the statement of grounds where Ms. O'Neill complains that the development is monolithic in size, overbearing and oppressive, out of kilter with surrounding buildings and the streetscape and that the justification for a ten-storey block has not been made out. This is addressed not only in para. 41 of her affidavit but also in paras. 34-36 where

she draws attention, *inter alia*, to the justification given by Ruirside for the retention of a ten-storey block in its Material Contravention Statement.

136. In her written submissions, Ms. O'Neill makes the case that the scale, height and density of the proposed development constitutes a material contravention of the Dublin City Development Plan 2016-2022. She rejects the case made by Ruirside in its Material Contravention Statement that Finglas should be regarded as an inner suburb and she argues that the proposed development, in terms of its height and density, is in breach of the Urban Development and Building Heights (December 2018) Guidelines, the Sustainable Urban Housing Design Standards for New Apartments (2018) Guidelines and the Sustainable Residential Development in Urban Areas and Urban Design Manual. While Ms. O'Neill strongly contests any suggestion that the site is located in the "*inner city*", I do not believe that anything turns on this for the purposes of these proceedings. For completeness, it should be noted that the Material Contravention Statement (prepared by Stephen Little & Associates) refers to the development as located within *"the inner suburbs"*. It does not describe the location as "*inner city".* Whether the Material Contravention Statement was correct to describe Finglas as being within the "*inner suburbs*" is ultimately not material. There is no doubt that the site is located in the "*outer city*" for the purposes of the Dublin City Development Plan 2016-2022 and that it was so characterised by the Board.

137. In her written and oral submissions, Ms. O'Neill also maintained that the Board did not address all the submissions made to it including those made by the residents of Glenhill Estate and Premier Square and she sought to rely in this context on the decision of the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90. However, the Board and Ruirside correctly contend that this complaint does not fall within the ambit of Ms. O'Neill's case as set out in her statement of grounds and verifying affidavit sworn on 20th January, 2020.

138. Both the Board and Ruirside make the case that the Board was entitled to grant permission for the proposed development notwithstanding any inconsistency with the Dublin City Development Plan 2016-2022. Furthermore, they make the case that the reasons for the Board's decision to permit the development notwithstanding any inconsistency with the 2016-2022 Development Plan emerge from a consideration of the Inspector's report and the Board's direction and they argue that there was nothing precluding the Board from granting permission in this case.

Discussion and analysis

139. In order to understand the arguments of the parties in relation to this issue, it is necessary to consider the relevant provisions of the 2016 and 2000 Acts, the provisions of the relevant Guidelines and the material before the Board, in particular the relevant paragraphs of the Inspector's report and the Board's direction.

140. Insofar as the statutory context is concerned, it is necessary to consider, in the first instance, s.9 of the 2016 Act. Section 9 imposes a number of obligations on the Board in considering an application for permission under s.4 of the 2016 Act. Under s.9(2), the

Board is required, in considering the likely consequences for proper planning and sustainable development in the area in which the proposed strategic housing development is situated, to have regard to (*inter alia*) the provisions of the development plan and any guidelines issued by the Minister under s.28 of the 2000 Act.

141. The obligation to have regard to guidelines issued by the Minister under s.28 of the 2000 Act is reinforced by the provisions of s.9(3). Under s.9(3)(a), the Board, in making its decision in relation to the s.4 application, is required to apply, where relevant, specific planning policy requirements contained in any guidelines issued by the Minister under s.28 of the 2000 Act. This is a specific statutory requirement emphasised by the use of mandatory language. Section 9(3)(a) is in the following terms:

> "*When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000."* (emphasis added).

142. Moreover, s.9(3)(b) provides that where specific planning policy requirements are contained in guidelines issued by the Minister then those requirements will apply (to the extent that they are different to any provision of the Development Plan) instead of the relevant provisions of the Development Plan. Section 9(3)(b) is in the following terms:

> *"Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan …, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan."*

143. Section 9(3)(c) explains what is meant by the words *"specific planning policy requirements". Those words mean: "such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development."*

144. Section 9(3) of the 2016 Act must be read together with s.28 of the 2000 Act. Insofar as ministerial guidelines are concerned, s.28(1) of the 2000 Act provides that the Minister may, at any time, issue guidelines to planning authorities regarding their functions under the Act and, in such cases, s.28(1) provides that:

> *"planning authorities shall have regard to those guidelines in the performance of their functions."*

That language suggests that the planning authorities (which would include the Board) must take the guidelines into account but they are not necessarily obliged to follow them. In contrast, s.28(1C) provides as follows:

"(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning

authorities … and the Board shall, in the performance of their functions, comply". (emphasis added).

145. The difference between the requirement to have regard to ministerial guidelines (containing s.28(1) of the 2000 Act) and the requirement to comply with specific planning policy requirements (contained in s.28(1C) of the Act) is obvious. Section 28(1C) imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with. It is not sufficient merely to have regard to them (which is a relevant requirement in relation to other aspects of the guidelines).

146. Section 9(6) of the 2016 Act is also relevant. The effect of s.9(6)(a) and (b) is that, save in cases where the proposed development contravenes materially the development plan or local area plan insofar as the zoning of the land is concerned, the Board may decide to grant permission for a proposed strategic housing development on foot of an application under s.4 even where the proposed development (or a part of it) materially contravenes the development plan or local area plan in issue. However, this is subject to s.9(6)(c) which provides as follows:

"(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, … other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development".

147. Having regard to the provisions of s.9(6)(c), s.9 of the 2016 Act must be read in conjunction with s.37 of the 2000 Act of which the relevant sub-s., in this context, is s.37(2)(b). It is made relevant to the present application by s.9(6)(c) of the 2016 Act which, as outlined above, provides that the Board may only grant permission for a strategic housing development that would materially contravene the development plan where the Board considers that, if s.37(2)(b) of the 2000 Act were to apply, it would nonetheless grant permission for the proposed development. Section 37(2)(b) usually only applies where a planning authority, at first instance, has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan but where the Board, on appeal, decides that permission should be granted for the development. Section 37(2)(b) provides that the Board might only grant permission where it considers that:

"(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28 , policy directives under section 29 , the statutory obligations of any local authority in

the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan".

148. In the present case, there is no dispute that the development is inconsistent with the Dublin City Development Plan 2016-2022. Under that plan, the site of the proposed development is zoned objective Z1: *"to protect and provide and improve residential amenities*". Section 16.7 of the plan establishes a building height limit of sixteen metres in this location which is designated as "*outer city*". The heights proposed for this development exceed this limitation. Block 1 ranges from six to nine storeys and varies in height from circa 19.28 metres to circa 28.28 metres. Block 2 ranges from nine to ten storeys with heights from circa 29.55 metres to circa 32.7 metres. Block 1 ranges from six to eight storeys with heights from circa 18.9 metres to circa 24.9 metres.

149. In addition to the height of the proposed development, Ms. O'Neill, in her written and oral submissions, suggested that the density of the proposed development was also in contravention of the Dublin City Development Plan 2016-2022. However, in this context, Ms. O'Neill referred to a document described as "*Housing Supply Capacity in Dublin's Urban Settlements 2014-2018"*. This document is not part of the 2016-2022 development plan and I therefore do not believe that it provides a basis to support this element of Ms. O'Neill's case. In those circumstances I do not believe that there is any scope for Ms. O'Neill to make a case that the density of the proposed development is inconsistent with the development plan save in one respect. As noted in the report of the Inspector, in para. 12.4.5 of her report, s.16.10.1 of the Development Plan sets out specific requirements regarding dwelling mix including that a minimum of 15% of units should have three bedrooms. As outlined above, the development ultimately proposed in the application made under s.4 has no three-bedroom units. While this case is not explicitly made in those terms in Ms. O'Neill's statement of grounds, it is clear that, at a more general level, she has complained about the density of the development and the lack of any three-bedroom units seems to me to fall within the density rubric. In this judgment, I therefore propose to deal, in the context of this aspect of Ms. O'Neill's case, with both the issue that arises in relation to the height of the development (when measured against the Dublin City Development Plan 2016-2022) and with the lack of any three bedroomed units (against the backdrop of s.16.10.1 of the Development Plan). On their face, both aspects of the development would appear to materially contravene the Development Plan.

150. Both the Board and Ruirside maintain that, when the requirements of the Ministerial Guidelines issued under s.28 of the 2000 Act are taken into account, the Board was entitled to grant permission for the development notwithstanding the inconsistencies with the Development Plan and that the reasons given for doing so satisfy the requirements of s.10(3)(b) of the 2016 Act. It is, accordingly, necessary to consider the relevant

guidelines and the reasons given for the decision in this case with reference to material contravention of the Development Plan. In the Board Direction, it is recorded that the Board, in taking its decision, had regard to the location of the site "*within the built up area of Dublin in proximity to a range of services and facilities including the bus corridor along the Finglas Road"*, the policies and objectives in the Dublin City Development Plan 2016-2022 (including the zoning under objective Z1), the Rebuilding Ireland Action Plan for Housing and Homelessness 2016, the Design Manual for Urban Roads and Streets, the Guidelines for Sustainable Residential Developments in Urban Areas and the accompanying Urban Design Manual 2019 and a number of other documents and guidelines including the following (which are of critical importance to the material contravention issue):

(a) The Sustainable Urban Housing: Design Standards for New Apartments issued in March 2018 ("*the Design Standard Guidelines*");

(b) The Guidelines for Planning Authorities on Urban Development and Building Heights issued in December 2018 *("the Building Height Guidelines*").

151. In making its application under s.4 of the 2016 Act for permission for the proposed development, Ruirside relied on both the Design Standard Guidelines and Building Height Guidelines to justify the application notwithstanding the inconsistency with the Dublin City Development Plan 2016-2022 in relation to height and in relation to the lack of any three-bed units. The Building Height Guidelines are relevant in respect of the proposed height of the development while the Design Standard Guidelines are relevant in respect of the lack of any three-bed units. In turn, the inspector and the Board also relied on the same guidelines. In their respective legal submissions, counsel for the Board and Ruirside took different approaches in justifying the decision of the Board. Counsel for the Board, in his submissions, followed the approach taken by the Inspector in her report (examined in more detail below). Essentially, the Inspector took the view that, having regard to the ministerial guidelines (in particular SPPR 3 of the Building Height Guidelines), the Board was entitled under s.37(2)(b)(iii) of the 2000 Act to grant permission for the development notwithstanding that it contravened the Dublin City Development Plan 2016-2022. In contrast, counsel for Ruirside submitted that the relevant provisions of the guidelines constituted specific planning policy requirements within the meaning of s.28(1C) of the 2000 Act and that, accordingly, the Board was not only obliged by s.28(1C) to comply with them but also, having regard to s.9(3)(b) of the 2016 Act, those guidelines, to the extent that they differed from the provisions of the Development Plan, applied in place of the Development Plan such that there could be no material contravention of it. Counsel for the Board acknowledged that such an argument was capable of being advanced but he submitted that he did not believe it was necessary to make that argument in the present case and, for that reason the Board proposed to reserve its position in relation to this argument to a case in which it expressly arises. Instead, counsel for the Board proposed to follow the approach taken by the Inspector.

152. In order to properly address the arguments that are made, it is therefore necessary to consider the relevant provisions of the guidelines, the evidence placed before the Board which was relevant to those guidelines and the approach taken by the Inspector (and by the Board itself) with reference to the guidelines. The issue in relation to three-bed units and the Design Standard Guidelines can be dealt with very briefly and I will therefore address it first. I will then consider the relevant requirements of the Building Height Guidelines which require more extensive analysis and evaluation.

153. Insofar as the omission of three-bed units is concerned, this is addressed in the Design Standard Guidelines which were issued in March 2018. In para. 2.17 of the Guidelines, it is stated that it has become practice for some development plans to specify a minimum requirement on the proportion of two or three-bedroom units to be included in apartment schemes. The guidelines continue in para. 2.18 to say that, in the context of sustainably increasing housing supply and targeting a greater proportion of urban housing development, there is a need for greater flexibility. With that in mind, the guidelines impose two specific planning policy requirements which are relevant to this case namely:

(a) Specific Planning Policy Requirement 1 ("*SPPR1*") under which apartment developments may include up to 50% one-bedroom or studio type units (with no more than 20-25% comprising studios) with no minimum requirement for apartments with three or more bedrooms.

(b) Specific Planning Policy Requirement 2 ("*SPPR2*") which applies to, inter alia, urban infill schemes on sites of up to 0.25 hectares (which includes the development site here). It limits the application of SPPR1 save in the case of schemes of 50 or more units. In the case of such schemes (which include the proposed development here) SPPR2 states that SPPR1 "*shall apply to the entire development".* This therefore has the effect that it is no longer necessary in a development of this scale to include a minimum number of (or any) three-bedroom units.

154. In the Stephen Little report, reliance was placed on SPPR1 of the Design Standard Guidelines and, on that basis, Ruirside proposed that there was no necessity to include any three-bedroom units notwithstanding the stipulation to the contrary in the Dublin City Development Plan 2016-2022. The proposed development complies with SPPR1 in circumstances where not more than 50% of the proposed apartment units are one bedroom or studio units and the studio units represent 20% of the total which is below the maximum standard of 25%. In those circumstances, it is unsurprising that, in her report, the Inspector came to the conclusion that the development complied with SPPR1 and, insofar as the lack of three-bedroomed units contravened the Development Plan, she concluded, by reference to s. 37 (2) (b) (iii) of the 2000 Act, that the Board could grant permission for the development. That element of the Inspector's finding was adopted by the Board in its Board direction and decision. In my view, having regard to the terms of SPPR1 and SPPR2 in the Design Standard Guidelines, the Board was fully entitled to come to that view and I therefore do not believe that any sustainable case can be made by Ms. O'Neill that there was any infirmity in the Board's decision in relation to this aspect of the

material contravention issue or any failure to state main reasons and considerations for contravening the Development Plan insofar as the lack of any three-bedroom units is concerned. In the circumstances, no further consideration requires to be given to that element of Ms. O'Neill's case. However, her complaint that there has been a material contravention of the Development Plan in relation to the height of the development requires more extensive consideration.

155. As noted above, the Building Height Guidelines were published in December 2018. According to para. 1.4 of the Guidelines, local authorities, through their development and local area plan processes, have begun to set "*generic maximum height limits across their functional areas"*. The same para. suggests that such limits, if inflexibly or unreasonably applied, can undermine wider national policy objectives to provide more compact forms of urban development as outlined in the National Planning Framework and lead to an unsustainable pattern of outward development rather than *"consolidating and strengthening the existing built up area".*

156. Paragraph 1.13 of the Guidelines makes clear that they are issued pursuant to s.28 and that planning authorities and the Board are required to apply any specific planning policy requirements specified in the Guidelines. Paragraph 1.14, consistent with the provisions of s.28(1C) of the 2000 Act and also s.9(3)(b) of the 2016 Act, states that such specific planning policy requirements take precedence over any conflicting policies and objectives of development plans. The relevant specific planning policy requirement relied upon by Ruirside in its application to the Board in this case is SPPR 3(A). It provides as follows:

> *"SPPR 3*
>
> *It is a specific planning policy requirement that where:*
>
> *(A) 1 An applicant for planning permission sets out how a development proposal complies with the criteria above; and*
>
> *2. The assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;*
>
> *then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."*

157. It is clear from the text of SPPR 3(A) that its application is dependent upon (a) an applicant for planning permission setting out how a development proposal complies with the "*criteria above*" and (b) an assessment by the Board concurring with that conclusion. The relevant criteria for this purpose are set out in para.3.2 of the Building Height Guidelines. Paragraph 3.2 requires that an applicant *"shall demonstrate to the satisfaction of the [the Board] that the proposed development*" satisfies a number of

criteria which are set out over the next three pages of the Guidelines. These criteria are broken down into four distinct categories namely:

(a) Criteria which are applicable "*at the scale of the relevant city/town";*

(b) Criteria which are applicable "*at the scale of district/neighbourhood/street;*

(c) Criteria which are applicable "*at the site/building";* and

(d) Specific assessments which "*may be required*". A non-exhaustive list of such assessments is set out in the Guidelines.

158. In the case of the criteria applicable at the scale of the relevant city or town, the Guidelines provide that the applicant must satisfy the Board that the proposed development satisfies the following criteria:

(a) The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport;

(b) In the case of development proposals incorporating increased building height, there is a requirement that these should "*successfully integrate into/ enhance the character and public realm of the area, having regard to topography, its cultural context, setting of key landmarks, protection of key views. Such development proposals shall undertake a landscape and visual assessment, by a suitably qualified practitioner such as a chartered landscape architect.*";

(c) On larger urban redevelopment sites, proposed developments should make a positive contribution to *"place-making, incorporating new streets and public spaces, using massing and height to achieve the required densities but with sufficient variety in scale and form to respond to the scale of adjoining developments and create visual interest in the streetscape*".

159. With regard to the criteria applicable at the scale of the district/neighbourhood/street, the following criteria must be satisfied:

(a) The proposal must respond to its overall natural and built environment and make a positive contribution to the urban neighbourhood and streetscape;

(b) The proposal must not be monolithic and must avoid long, uninterrupted walls of building in the form of slab blocks with materials / building fabric well considered;

(c) The proposal must enhance the urban design context for public spaces and key thoroughfares thereby enabling additional height and development form to be favourably considered in terms of enhancing a sense of scale and enclosure while being in line with the requirements of "The Flood Risk Management Guidelines";

(d) The proposal must make a positive contribution to the improvement of legibility through the site or wider urban area;

(e) The proposal must positively contribute to the mix of uses and/ or building/ dwelling typologies available in the neighbourhood.

160. The applicable criteria in the immediate context of the scale of the site/building are:

(a) The form, massing and height of proposed developments should be carefully modulated so as to *"maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light*";

(b) Where a proposal may not be able to fully meet all the requirements of the daylight provisions set out at (a), this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out.

161. There are also a number of criteria which may arise in the context of specific assessments. As noted above, the Guidelines state that specific assessments "*may be required*" and that these may include a number of matters including the following (which is of potential relevance to the issue of aerials and antennae) namely:

> *"an assessment that the proposal allows for the retention of important telecommunication channels, such as microwave links".*

162. It is clear from a consideration of the text of the Guidelines (in particular from the passage quoted in para. 157 above) that these criteria must be satisfied if SPPR 3(A) is to apply. This is reinforced by the concluding sentence of para. 3.2 is in the following terms:

> *"Where … [the Board] considers that such criteria are appropriately incorporated into development proposals, the relevant authority shall apply the following Strategic Planning Policy Requirement under Section 28 (1C) of the Planning and Development Act 2000 (as amended)".*

163. In support of its application under s.4, Ruirside submitted a report from Stephen Little & Associates, Chartered Town Planners and Development Consultants to address matters that might be considered to constitute material contraventions of the Dublin City Development Plan 2016-2022. In that report, the criteria necessary to trigger the application of SPPR 3 were addressed with the exception of those applicable at the scale of the site/building. That issue is addressed separately in an Architects Design Statement prepared by O'Mahony Pike Architects who also addressed a number of the other criteria. As noted above, the criteria applicable to the scale of the site/building include issues relating to natural daylight and overshadowing. The latter issues were separately addressed in a report from IN2 Engineering and Design Partnership ("IN2").

164. As outlined above, one of the criteria applicable at the scale of the relevant city/town is the requirement that the site should be well served by public transport with high capacity, frequent service and good links to other modes of public transport. The Stephen Little report suggests that it is well served in this way. The report states:

> *"This site is currently on a high frequency serviced bus route with a bus stop directly adjacent the site. It is served by the following bus routes: 40, 40b, 40d & the 140.*
>
> *It is also part of the Busconnects initiative for Finglas to Phibsborough to City Centre providing an upgraded high-quality Bus Corridor with associated cycle lane. The development is also located adjacent to the Finglas Road with clear access to the M50 and the national road network. It is also within 1.2km of the Broombridge LUAS and Rail Station."*

165. As further noted above, one of the criteria applicable at the scale of the relevant city/town is that the development proposal should successfully integrate into or enhance the character of the area and include the landscape and visual assessment by a suitably qualified practitioner. As I understand it, the report of O'Mahony Pike is principally relied upon in this context. This issue is addressed at p. 72 of the O'Mahony Pike report in a significant level of detail. One aspect of this criterion is that the development should *"successfully integrate into/enhance the character and public realm of the area"* having regard, *inter alia*, to topography and the setting of key landmarks. This is also addressed in the Stephen Little report as follows:

> *"The proposed development has gone through a number of iterations to develop a height profile that both achieves a satisfactory density for the location adjacent to Finglas Village centre and achieves a proper landmark/wayfinding function at this location marking the junction and entrance to the Clearwater Shopping centre opposite. It also has been modified to respond to the adjacent Premier Square apartment complex to the south and to the housing to the north on Glenhill Road and around the junction. The three main blocks have been further broken up to provide a further variety of form and materials and interest along the Finglas Road Streetscape".*

166. Both the Stephen Little report and the O'Mahony Pike report provide significant detail in relation to the criteria applicable at the scale of the district/neighbourhood/street. In the Stephen Little report, reliance is again placed on the proximity of the proposed development to the Clearwater Shopping centre and on its ability to function as a landmark or wayfinding feature. It is stated that:

> *"While providing a level of enclosure to the Finglas Road, the proposed development also sits on a key route into and out of the city centre and is adjacent to an important junction into the Clearwater Shopping centre and the Glenhill residential estate to the East. In such a context, the proposed development would assist in achieving a clear landmark/wayfinding feature for the surrounding area".*

167. In the case of the scale of site/building criterion, this is addressed, as previously noted, in the report from O'Mahony Pike and also in the IN2 report.

168. Finally, the Stephen Little report also deals with the "specific assessments" criterion. This addresses a number of matters including the potential impact on birds and bats (which are dealt with at a later point in this judgment in connection with a further aspect of Ms. O'Neill's case). In addition, in this context, the Stephen Little report deals with telecommunication channels. With regard to this issue, the Stephen Little report states:

> *"We refer the Board to the accompanying RF Impact Analysis … for further details in relation to the anticipated potential for impacts on telecommunication channels. This report identifies that telecoms may be affected by the proposed buildings. On foot of this, the report identifies possible mitigation measures, including the relocation of certain existing proximate antennae to the roof of the proposed development".*

169. The issue in relation to the height of the proposed development is addressed in two separate sections of the Inspector's report. Insofar as the material contravention issue is concerned, this is addressed in s.12.4. However, the Inspector also addresses the height of the development in s.12.3 (where the main focus of the Inspector is on the impact of its height). While the Inspector came to the conclusion in s.12.4 that it was permissible for the Board to accede to Ruirside's application under s.4 of the 2016 Act notwithstanding the material contravention of the Development Plan, she nonetheless came to the conclusion, in s.12.3 of her report, that the development as proposed by Ruirside would have an overbearing impact on the homes along Glenhill Road (where Ms. O'Neill resides). This resulted in her recommendation that there should be a reduction in the overall height of the development. In his submissions to the court, counsel for the Board argued that these are two quite separate and distinct elements of the Inspector's report. He submitted that the Inspector was entitled to conclude that, having regard to the Building Height Guidelines, permission for the development could be granted notwithstanding that it breached the maximum height permitted under the Development Plan while, at the same time, holding that, as a matter of good planning, the height should be reduced. In turn, he argued that the Board was entitled to adopt the view of the Inspector in relation to material contravention of the Development Plan while, at the same time, differing, for the reasons set out in the note to the Board Direction, from the Inspector's recommendation in relation to the reduction in height of the development.

170. While I fully understand why counsel for the Board should approach the matter in that way, I believe it is important to bear in mind that, as noted above, SPPR 3(A) of the Building Height Guidelines requires an applicant for permission to demonstrate compliance with the criteria set out in para. 3.2 of those guidelines. It also requires that the Board must consider that such criteria have been "*appropriately incorporated into*" the development proposals. The obligation on the Board to apply SPPR 3(A) will only arise where the Board considers that the criteria have been appropriately incorporated. This is reinforced by a consideration of the terms of SPPR 3(A) itself which make clear that the Board must concur that the development proposal complies with the criteria set out in para. 3.2. In turn, it would appear to follow that the Board's conclusions to that effect should be reflected in the main reasons and considerations for granting permission. That

said, there is a measure of latitude given to a body such as the Board in relation to its obligation to state reasons and in relation to the extent of the reasoning to be given and as to the location of the reasons. It is clear from a number of authorities (including *Mulholland v. An Bord Pleanála (No.2)* [2006] 1 I.R. 453, *O'Neill v. An Bord Pleanála* [2009] IEHC 202, *Stack Shannon v. An Bord Pleanála* [2012] IEHC 571, *Nee v. An Bord Pleanála* [2012] IEHC 532 and *Harten v. An Bord Pleanála* [2018] IEHC 40) that there is generally no requirement for the Board to give a discursive decision and that the reasons given for a decision by the Board can be terse. Moreover, as a consequence of the decision of the Supreme Court in *Connelly v. An Bord Pleanála* (addressed further below) the reasons can be found in a variety of documents and it is not necessary that they should all be stated in the body of the Board's decision (or in the Inspector's report).

171. In so far as height is concerned, material contravention is addressed in quite brief terms in s.12.4 of the Inspector's report. Having cited s.37(2)(b) of the 2000 Act, the Inspector then referred to s.16.7 of the development plan which, as noted above, fixes a maximum height of 16 metres. At para. 12.4.3 the Inspector referred to the Building Height Guidelines and correctly stated that the guidelines provide *"the ability through SPPR3 for the Board to grant permission for a building height (notwithstanding where this breaches a cap set by a Development Plan) where this is justified"* (emphasis added). In my view, the Inspector was correct to observe that justification was required. While that word is not used in the context of SPPR3 in the Building Height Guidelines, that is the effect of the closing sentence in para. 3.2 (addressed by me at para. 162 above). The criteria set out in para. 3.2 of the guidelines must be appropriately incorporated into any development proposal.

172. In para. 12.4.4 of her report, the Inspector referred to the "*detailed assessment"* provided by Ruirside as to how the development complies with the criteria for assessing building height at the scale of the city/town, district/neighbourhood/street and scale of the site/building. The Inspector was, of course, entitled to cross refer to documents of that kind. What she clearly had in mind was the Stephen Little report (discussed above) together with the O'Mahony Pike report and the IN2 report. The decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 confirms that the Board can proceed in this way. In that case, Clarke C.J. explained, at para. 9.2 of his judgment:

> *"Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned. In that regard, it seems to me that the trial judge has, put the matter much too far. The trial judge was clearly correct to state that a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters*

contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear".

173. In my view, it is reasonably clear that the Inspector, in para. 12.4. of her report was referring to the Stephen Little report together with the associated O'Mahony Pike report and the IN2 report. Having addressed the lack of any three-bedroom units in para. 12.4.5 of her report, the Inspector then continued at para. 12.4.6 in the following terms:

> *"I note the Material Contravention statement and the arguments put forward by the applicant in favour of the development. I conclude that the Board can grant permission for the development having regard to both … [the Building Height Guidelines] and [the Design Standard Guidelines]. I am satisfied that the Board is not precluded from granting permission in this instance with regard to the provisions of s.37(2)(b)(iii)."*

174. Considered on its own, that reasoning on the part of the Inspector in paras. 12.4.4 and 12.4.6 of her report may appear to be quite sparse and lacking in detail. However, when read in conjunction with the reports of Stephen Little, O'Mahony Pike and IN2, it seems to me that the reasoning might arguably be sufficient to pass the *Connelly* test but for the next matter which I address in paras. 175 to 178 below. That said, I would question whether, in a case involving satisfaction of the criteria set out in s.3.2 of the Building Height Guidelines, it is sufficient to approach the matter in such general terms. As noted above, SPPR 3(A) clearly requires that, if it is to apply, the specific criteria set out in para. 3.2 of the Guidelines must be complied with. It would, in my view, be advisable accordingly that, in any report of an inspector (or, in the absence of such report, in a decision of the Board) that an analysis should be carried out as to how the proposed development complies with the criteria set out in para. 3.2 of the Guidelines. At the very least, it seems to me that the Board or planning authority should specifically state that, on the basis of the relevant reports submitted, it considers that the criteria set out in para. 3.2 of the Guidelines have been appropriately incorporated into the development proposal. That seems to me to be a precondition before SPPR3 can be said to apply. That language does not appear in the report of the Inspector in this case or in the direction or order made by the Board itself. Ultimately, however, I do not believe that it is necessary to set out any definitive view on that issue in circumstances where, for the reason set out below, it seems to me that there is a fundamental inconsistency between the findings made by the Inspector in s.12.4 of her report and the findings made by her elsewhere in her report. Given the existence of this inconsistency, I cannot see how the Board could reach the conclusion that SPPR 3(A) can be said to apply.

175. The difficulty with the reasoning contained in para. 12.4.4 and 12.4.6 of the report is that these paragraphs are at variance with a number of findings made by the Inspector in s.12.3 and other paragraphs of her report. While I fully accept that the Inspector, in s.12.3 of her report, was addressing issues relating to proper planning and design, the conclusions which she sets out there are inconsistent in a number of important respects with the contents of the Stephen Little report and the O'Mahony Pike report on which she

relies in s.12.4 of her own report. In this context, it must be recalled that, among the many criteria that must be appropriately addressed if SPPR3 is to apply, are the following:

(a) The site must be well served by public transport with high capacity, frequent servers and good links to other modes of public transport. As discussed further below, this requirement in the guidelines is expressed in the present tense which clearly requires that the site is currently well served by public transport. A plan for improving the public transport service in the future is not sufficient to satisfy this criterion;

(b) The development proposals must successfully integrate into or enhance the character and public realm of the area;

(c) The form, massing and height of the proposed development should be carefully modulated so as to maximise access to natural daylight ventilation and views and minimise overshadowing and loss of light.

(d) In terms of specific assessments, para. 3.2 of the Guidelines also identifies that specific assessments may be required which may include an assessment that the proposal allows for the retention of important telecommunications channels, such as microwave links.

176. It must also be recalled that, as set out above, in relation to those elements of the criteria, the Stephen Little report suggested the following:

(a) It was suggested that the site is currently on a high frequency service bus route; that it was part of the Busconnects initiative from Finglas to the city centre providing an upgraded high-quality bus corridor with associated cycle lane and that the development is also located (*inter alia*) within 1.2km of the Broombridge LUAS and rail station;

(b) In terms of integration into the "public realm" having regard to (*inter alia*) the setting of key landmarks, it was suggested that the development achieved a proper landmark/wayfinding function marking the junction and the entrance to the Clearwater Shopping centre on the opposite side of the Finglas Road;

(c) With regard to the form, massing and height of the proposed development and the requirement that it should be modulated so as to maximise access to natural daylight, ventilation and views, the IN2 report was furnished. Insofar as views are concerned, Ruirside also submitted a number of photomontages which addressed the views of the development from adjoining locations including Glenhill Road.

(d) With regard to telecommunications channels, the Stephen Little report referred to the RF Impact Analysis which was carried out by Vilicom on behalf of Ruirside which concluded that there is a risk that the development will have a negative impact on the Vodafone, Three and Eir networks. The report predicted that the new buildings

will block some of the signal coming from the telecoms equipment situated on top of the Ardmore Nursing Home (formerly the Ardmore Hotel). With that in mind, Vilicom recommended that, in order to mitigate the impact on telecoms routes/links, the proposed development might be used as a possible replacement site for the operators' equipment as an alternative to a re-route around the proposed development.

177. Each of the matters identified in para. 176 above were relevant to the satisfaction of the criteria contained in para. 3.2 of the Building Height Guidelines. Yet, in her report, there are findings made by the Inspector which call into question whether the Board could be satisfied that the development complies with a number of those criteria. This emerges from the following:

(a) In para. 12.3.13 of her report, the Inspector notes that much emphasis was placed by Ruirside on the proximity of the development to public transport connections. This is an express requirement that must be fulfilled if the criteria set out in para. 3.2 of the Guidelines are to be satisfied. However, Ruirside's evidence in relation to this issue was questioned by the Inspector in para. 12.3.14 of her report where she said:

> *"Notwithstanding the assertion of the applicants, the site is not located proximate to any major employment hub. Public transport at present is largely limited to public bus and the submissions from observers would suggest that capacity is poor. The site is not particularly accessible by rail. …".* (emphasis added).

This observation by the Inspector is strongly supported by the extensive evidence provided by a number of local objectors to the proposed development. This is evident, for example, in the observation submitted by Lesley Shoemaker who stated that she has to be on the bus by 7.30 a.m. to get into work for 9 a.m. because, if she leaves it any later, the buses travelling into the city centre are already full by the time they pass the entrance to the Glenhill Estate on Finglas Road. A similar point is made by Ms. Barbara O'Reilly, Ms. Caroline Green, Ms. Linda Sheridan, Ms. O'Neill herself, Ms. Nicola Kelly, Avril and Brian Murray, Andy Canning, Barry Gallagher, Derek Reynolds, Justin Vogelsang and Ciara McCaffrey, Lucy Leiriao, Morven Connelly, Niamh Delaney and Noel Masterson. While, at a later point in her report (namely para. 12.7.7), the Inspector suggests that the concerns of local residents in relation to the existing quality and availability of the bus service were outweighed by the perceived need to further "*densify*" a brownfield site of this nature, the fact remains that, if this element of the para. 3.2 criteria is to be satisfied, the site must currently be well served by public transport. The relevant criterion in para. 3.2 is expressed in the present tense. The Inspector has accepted in para. 12.3.14 of her report that the present capacity of the bus service is poor, so it is difficult to fathom how this criterion can be said to be satisfied.

(b) Of relevance to the "*public realm*" criterion and the setting of key landmarks, the Inspector was not persuaded by what was said by Ruirside in relation to that issue insofar as the nearby Clearwater Shopping centre is concerned. At para. 12.3.14 of her report she said:

> *"It is also questionable as to whether the entrance to a local shopping centre requires a landmark building in order to promote legibility and wayfinding".*

This observation should be read in conjunction with the earlier description given by the Inspector of the shopping centre at para. 2.2 of her report where she described it as being comprised of "*retail warehouses*". In light of the view expressed by the Inspector on this issue, a question arises as to how the Inspector (and, in turn, the Board) can have concluded that the public realm requirements of para. 3.2 of the Guidelines were satisfied. There may be a straightforward answer to that question but it is not apparent from the Inspector's report or from the subsequent Board direction or decision.

(c) Of relevance to the criterion relating to making a positive contribution to the urban neighbourhood and the criterion addressing the form, massing and height of the proposed development being modulated so as to maximise access to (inter alia) natural daylight and views, the inspector observed in para. 12.3.15 of her report as follows:

> *"… I consider the proposed heights of 9 to 10 storeys, particularly of Block 2 which is a building of considerable bulk and mass will have an overbearing impact and would be visually obtrusive when viewed from the dwellings along Glenhill Road. I note there is a paucity of photomontages/CGI's submitted with the application to demonstrate the potential impact to Glenhill Road…".*
> (emphasis added)

It is true that the Inspector went on to say that the relationship between the proposed development and the houses on Glenhill Road was clearly shown on section drawings submitted. However, the fact remains that the Inspector found the proposed building to have an overbearing impact on the houses on Glenhill Road and to be visually obtrusive when viewed from the dwellings along Glenhill Road. No justification is subsequently offered either by the Inspector or by the Board as to why, notwithstanding this finding, the development as proposed by Ruirside can be said to make a positive contribution to the urban neighbourhood as required by para. 3.2 of the Guidelines. Equally, no explanation is given as to how, notwithstanding this finding, the form, massing and height of the proposed development has been sufficiently modulated so as to maximise access to (inter alia) views from Glenhill Road. There may well be a straightforward answer to this but, if so, the answer is not apparent from either the Inspector's report or from the subsequent Board direction or decision. In addition, the Inspector does not explain (nor does the Board) how it can be said that, notwithstanding the "*paucity*" of photomontages, there was sufficient information available to reach a conclusion

that the form, massing and height of the proposed development had been carefully modulated so as to maximise views from other areas. If the photomontages were inadequate, it is difficult to see how this aspect of the criteria for the application of SPPR 3(A) can be said to have been satisfied. I appreciate fully that there is no requirement that views cannot be interfered with. However, the real question is whether, in light of the paucity of photomontages, a conclusion could have been reached on the issue insofar as this aspect of the criteria set out in para. 3.2 of the Guidelines is concerned.

(d) With regard to the retention of important telecommunication channels, it is clear from the RF report prepared by Vilicom that it is predicted that the development will block some of the signals coming from the telecoms equipment currently situated on the roof of the Carechoice nursing home limiting the coverage spread to the north of the proposed development. In order to mitigate this loss of connectivity, the Stephen Little report (as an express part of its justification for coming within SPPR 3(A)) indicated that Ruirside was "*therefore applying for permission for the construction of antennae/telecoms equipment, as part of this application*." However, as noted earlier in this judgment, the Board has decided, as a condition of the grant of permission, that no additional development can take place above roof parapet level unless authorised by a further grant of planning permission. As a consequence, this element of the justification for the application of SPPR 3(A) falls away. If the development is constructed, it will interfere with telecommunications and there is no guarantee that planning permission will be granted in the future for new aerials and antennae on top of the development to compensate for the predicted loss of signal from the antennae and related infrastructure currently mounted on the roof of the nearby nursing home on the opposite side of Finglas Road.

178. Accordingly, it seems to me that there is a fundamental inconsistency between the approach taken in s.12.4 of the report and other findings made by the Inspector in other sections of her report (namely those summarised in para. 177 above). In these circumstances, I cannot see any basis upon which it could be suggested by the Inspector that SPPR 3(A) could be successfully invoked to justify or override the material contravention of the Dublin City Development Plan 2016-2022 in so far as the height of the proposed development is concerned. The reasons given in the Inspector's report do not support the conclusion that exceeding the maximum height of 16 metres can either be permitted under s.37(2)(b) of the 2000 Act or overridden under s.9(3)(b) of the 2016 Act.

179. I appreciate that the reasoning given by the Board does not stop at the Inspector's report. In fact, the Board did not accept the Inspector's recommendation (motivated by the reasons set out in s.12.3 of her report) to reduce the height of certain elements of the proposed development. Instead, as outlined at an earlier point in this judgment, the Board, in a note to its Direction dated 15th November, 2019, stated that it had regard to the existing pattern of development and character of Finglas Road, the orientation and

separating distances to existing buildings and the difference in level between the Finglas Road and Glenhill Road and considered that *"the height of the proposed development would be acceptable and would not have a material adverse impact on adjoining dwellings, and that the omission of floors as proposed by the Inspector would not be necessary for the proper planning and sustainable development of the area*". I should observe that I find it difficult to accept that the Board could, in such a broad-brush way, dismiss the detailed reasons given by the Inspector in s.12.3 of her report as to why the development should be reduced in height by two storeys. The Board would do well to bear in mind the observations of O'Donnell J. in the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90 at para. 57 where he said:

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

While the failure to address submissions is not an issue raised by Ms. O'Neill in her statement of grounds, the underlying rationale of *Balz* is still relevant given that those living next to the development site are very directly and materially affected by the proposed development and may have to live with the consequences of the Board's decision for the rest of their lives. In my view, those facts are relevant to the issue of the extent to which the Board is obliged to give reasons for its decision on material contravention.

180. In this regard, the height of the proposed development was obviously of acute concern to a large number of local residents; rational and detailed reasons were given by the Inspector as to why the height of certain elements of the development should be reduced and, therefore, if the Board was to take a contrary view to the Inspector, it would seem to be a fairly basic requirement that, in those very particular circumstances, the Board would spell out in an appropriate level of detail why, notwithstanding the extent of concern expressed by local residents (which was reflected in the findings made by the Inspector to the extent set out in s.12.3 of her report), it was justifiable to permit the development to proceed without any reduction in height. This is especially so in the context of an application under the 2016 Act which gave the local residents only one opportunity to have their concerns and objections considered by an expert planning body. As previously noted, the Board is given a significant measure of latitude in the way in which it expresses itself and is not required to give reasons in the same detailed way as a court might be expected to do. Nonetheless, given the significance of the issue and the detailed reasons given by the Inspector for taking the contrary view, it is difficult to understand or accept that the Board could properly adopt such a broad-brush approach without spelling out, in some level of detail, the basis upon which it concluded that the views of the Inspector should be rejected. As Clarke C.J. observed in *Connelly*, at para.

9.7, where the Board differs from its inspector "*then there is clearly an obligation for the Board to set out reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there is any basis for suggesting that the Board's decision is thereby not sustainable*". At the very least, in circumstances where the reasons for the Board's view are not readily apparent from the contemporaneous documents before the court, one would expect that the Board would refer, in its direction or decision, to the relevant passages in any specific documents relied upon by it for the purposes of forming a different view to that set out, in detail, by the Inspector in her report. I stress that I make this observation solely with reference to the facts of the present case. Every case would have to be judged on its own facts and the extent of the reasons to be given by the Board will therefore vary from case to case.

181. I am conscious that Ms. O'Neill in these proceeding has confined this element of her challenge to the material contravention issue and she has not challenged the adequacy of reasons in any other context. I am also conscious that the note to the Board's direction rejecting the Inspector's recommendation in s. 12. 3 of her report is not stated to relate to material contravention of the Development Plan. However, the note is, nonetheless, directly relevant to the material contravention issue because it is the only section of the Board's direction that purports to explain why the Board has rejected the relevant conclusions in s. 12. 3 of the Inspector's report which, for the reasons discussed in para. 177 above, are germane to the key question as to whether the criteria in para. 3.2 of the Building Height Guidelines have been satisfied.

182. In my view, the note appended to the end of the Board direction in this case does nothing to explain why the requirements of SPPR 3(A) have been satisfactorily addressed in Ruirside's application notwithstanding the views expressed in those aspects of s. 12.3 of the Inspector's report highlighted by me in para. 177 above. In this context, it would, of course, have been open to the Board, assuming that there was appropriate material before it, to reach a different conclusion to that reached by the Inspector in relation to these matters. However, the note does not explain how the Board could have reached such a conclusion. In particular, it does not explain how, notwithstanding the view expressed by the Inspector about poor capacity on the existing public bus route and the lack of a readily accessible rail link, the requirement contained in para. 3.2 of the Building Height Guidelines that: "*the site is well served by public transport with high capacity, frequent service and good links to other modes of public transport*" (emphasis added) could be said to be satisfied. It will be seen in this context that this criterion in the guidelines is expressed in the present tense. Thus, the site must, currently, be well served by public transport with high capacity and must, currently, have good links to another form of transport.

183. Equally, in the absence of an explanation from the Board, it is difficult to see how the decision of the Board in any way overcomes the finding of the Inspector that it is questionable whether the entrance to the warehouse style Clearwater shopping centre requires a landmark building. This is especially so given that this was expressly relied

upon by Stephen Little & Associates in the Material Contravention Statement as a basis for suggesting that the proposed development met the criteria set out in para. 3.2 of the Guidelines with regard to the issue of the "*public realm*". The same difficulty arises in relation to the finding of the Inspector that the development (as proposed by Ruirside) will have an overbearing impact on the homes on Glenhill Road and will be visually obtrusive when viewed from the homes along that road. In this context, it must be borne in mind that para. 3.2 of the Guidelines expressly requires that a proposed development seeking to avail of increased height over and above the maximum fixed by the relevant development plan or local area plan, must make a positive contribution to the urban neighbourhood. If, as found by the Inspector, it will have an overbearing impact on the nearest urban neighbourhood along Glenhill Road, then it is difficult to see how, in the absence of some plausible explanation, this element of the para. 3.2 criteria has been satisfied. While the note to the Board direction refers, in extremely general terms, to the existing pattern of development, the orientation and separation distances to "*existing buildings*" and the difference in level between Finglas Road and Glenhill Road, no detail is given as to how these factors individually or collectively address the Inspector's specific finding that the development, as proposed, will have an overbearing impact on Glenhill Road. This is especially puzzling given that the Inspector expressly stated in para. 12.13.17 of her report that, notwithstanding the separation distance, the block will appear as a 6 to 7 storey development and will, as a consequence, have an overbearing impact.

184. Furthermore, with regard to the criteria applicable in respect of the *"scale of the site/building*", a development must be carefully modulated so as to maximise (*inter alia*) views. In the absence of some explanation from the Board, it is impossible to see how the Board could conclude that this criterion was satisfied in circumstances where the Inspector has found that there was a "*paucity*" of photomontages/CGIs submitted with the application.

185. It is also impossible to understand, on the basis of the Board direction, how the Board came to the conclusion that the requirements of para. 3.2 of the Guidelines were satisfied in circumstances where, on the basis of the materials before the Board, there was a predicted interference with telecommunication channels and where, as a decision of the Board itself, the mitigation measures proposed by Ruirside (namely the erection of aerials and antennae on the roof of the proposed development) would have to be made subject to a future application for planning permission (in respect of which there could be no guarantee that planning permission would be granted). In those circumstances, I fail to see how the Board could have been satisfied that the proposal allows for "*the retention of important telecommunication channels*". In turn, that makes it difficult to identify a basis on which the Board could have reached the conclusion that the requirements of para. 3.2 of the guidelines had been satisfied.

186. SPPR 3(A) will not apply unless the requirements of para. 3.2 have been satisfied. In light of the considerations discussed in paras. 179 to 185 above, I do not believe that the Board direction (and the subsequent Board order) can be said to successfully explain why the requirements of SPPR3 (A) have been satisfied notwithstanding the issues identified in

para. 177 above. In the circumstances, on the basis of the material before the court, I am not satisfied that the Board was lawfully entitled to grant permission for the proposed development which materially contravened the Dublin City Development Plan 2016-2022 in so far as it will exceed the maximum height of 16 metres permitted under that Plan. The case made to the contrary both by the Board and Ruirside in their respective statements of opposition must fail and Ms. O'Neill must succeed in her case that the development materially contravenes the Development Plan.

187. In addition, for all of the reasons set out in paras. 177 to 185 above, I am of the view that there has been a failure on the part of the Board to set out the main reasons and considerations to justify a departure from the terms of the Dublin City Development Plan 2016-2022. In light of my conclusions as set out in those paras., it is clear that no sufficient reasons have been given which justify or explain the material contravention. In my view, Ms. O'Neill must succeed on this ground also.

Shading analysis and daylight and sunlight analysis

188. In para. 6 of Part E of her statement of grounds, Ms. O'Neill complains that there was no winter sun analysis carried out and furthermore that there was no internal light analysis survey carried out for residents materially affected by the proposed development. This appears to relate to the relief claimed at para. 8 of Part D of the statement of grounds where Ms. O'Neill claims a declaration that the Board acted contrary to the Building Height Guidelines. In her written submissions, the issue is dealt with at paras. 7.11 to 7.13 which is in the section of her submissions dealing with height and density.

189. In the context of the Building Height Guidelines, it will be recalled that, one of the criteria applicable at the scale of the site/building is that the "*form, massing and height of proposed developments should be carefully modulated so as to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light*". It is to be noted that there was no requirement that a development should not overshadow other property or give rise to a loss of light. What is required is that the form, massing and height of the proposed development should be designed to minimise overshadowing and loss of light. As previously noted, that is an issue that was specifically addressed in the IN2 report. In that report, the authors considered the impact of the proposed development (in terms of access to daylight and sunlight) on properties on Glenhill Road and in Premier Square. Applying Building Research Establishment ("*BRE*") guidance, the authors concluded that, while the development would have an impact on the amount of daylight and sunlight available to the properties on Glenhill Road, the impact was within the recommended BRE limits and was therefore acceptable.

190. While Ms. O'Neill has complained that the analysis carried out was wholly inadequate and is not in accordance with the Urban Design Manual, she has not explained, by reference to that manual, where such a failure has occurred. She has also complained that there was no assessment done of the impact of the development on the internal light within the Glenhill Road premises. However, she has not identified any requirement that such a study should be carried out. In the circumstances, I am unable to conclude that there has been any breach of the Building Height Guidelines on this basis. Ms. O'Neill has failed

to put forward sufficient detail to sustain a case on this ground. Given that conclusion on my part, I do not believe that it is necessary to consider whether a failure to comply with the Building Height guidelines would give rise to a separate basis on which to attack the Board's decision independently of the requirements referable to SPPR 3(A).

191. While I fully appreciate that Ms. O'Neill (and many of the residents in the Glenhill estate) have genuine concerns about the loss of daylight, there was clearly relevant material before the Board in the form of the IN2 report which provided a basis for the Board to be satisfied that the proposed development would not unduly interfere with access to daylight and sunlight in the Glenhill Road properties. On the basis of the IN2 report, it appears to me that the Inspector (and, in turn, the Board) was fully entitled to reach the view expressed by the Inspector in paras. 12.3.19 to 12.3.22 of her report where she stated that she was satisfied that the development was unlikely to have a material adverse impact on existing dwellings in terms of overshadowing or sunlight and daylight impacts. This conclusion appears to me to clearly relate to the development as originally proposed. This seems to me to be clear in light of what the inspector said in the next sentence of the same paragraph namely:

> "*The proposed modifications to reduce the height of the blocks will further reduce any potential impacts"* (emphasis added).

Thus, while acknowledging the genuine concerns of Ms. O'Neill and other residents in relation to this issue, I must reject this element of Ms. O'Neill's case.

Insufficiency of photomontages and related issues

192. In para. 6 of Part E of her statement of grounds, Ms. O'Neill contends that the photomontages submitted with the planning application are distorted and do not adequately depict the close proximity of the development to existing two storey houses or to the Premier Square apartment block. In addition, she complains that some of the photographs used shroud the development by the inclusion of trees with leaves. She also says that no photographs were taken from the front of houses in Glenhill which would show the height of the development towering over the rooftops. This concern is also addressed in para. 25 of her affidavit sworn on 20th January, 2020. The relevant photomontages are contained in Appendix 1.1 to the Landscape and Visual Impact Assessment report of Doyle & Ó Troithigh, landscape architects.

193. In the replying affidavit of Pierce Dillon sworn on behalf of the Board on 12th March, 2020, Mr. Dillon accepts that, in the report of the Inspector, it was acknowledged that there was a paucity of photomontages submitted with the application to demonstrate the potential impact on Glenhill Road but Mr. Dillon drew attention to the fact that, as noted by the Inspector, the relationship between the development and the houses on Glenhill Road was clearly shown on section drawings submitted. These drawings appear at pp. 37-40 of the O'Mahony Pike report.

194. I do not believe that it is necessary to separately address this element of Ms. O'Neill's case. I have already considered the issues which flow from the findings of the Inspector

(summarised in para. 177 (c) above) in relation to the paucity of photomontages. To that extent, the concerns of Ms. O'Neill in relation to the adequacy and veracity of the photomontages give rise to a basis to challenge the validity of the Board's decision. However, in all other respects the question of the adequacy of matters such as the photomontages seem to me to be matters that fall to be determined by the Board by reference to its expertise and I am not satisfied that there is any other basis (beyond that discussed above) on which to challenge the validity of the Board's decision by reference to the perceived inadequacy of the photomontages.

195. In the circumstances, I propose to make no order in respect of this element of Ms. O'Neill's case.

Flora and fauna

196. In para. 10 of Part D of her statement of grounds, Ms. O'Neill seeks a declaration that the Board acted contrary to the Habitats Directive. In the alternative, she seeks a declaration that the City Council and Ruirside failed to adequately transpose that Directive. The latter aspect of Ms. O'Neill's case is addressed in more detail below. In this section of this judgment, I will consider the case that Ms. O'Neill makes that the Board acted in breach of the Habitats Directive.

197. In para. 10 of Part E of her statement of grounds, Ms. O'Neill draws attention to the evidence that there are four species of bat recorded within two km of the proposed development site and that four red-listed species of birds were returned within two km of the site. In addition, seventeen amber-listed species of bird were also returned within two km of the site.

198. In para. 39 of her affidavit, Ms. O'Neill says that the "*woodland*" within the proposed development site together with the hedgerows and trees in the surrounding area are considered to be suitable foraging and commuting habitat for bats. She draws attention to the fact that the development site is 525 metres north of the River Tolka which is an important foraging and communing area for bats in north Dublin. In the same paragraph of her affidavit she draws attention to the fact that the black-headed gull, the grey wagtail, the herring gull and the tufted duck (all of which are red-listed) were found within two km of the development site.

199. In para. 40 of her affidavit she refers to the relevant sections of the Inspector's report dealing with bats and birds but she does not explain in her affidavit how she contends that the Board breached the Habitats Directive in relation to any of the bat or bird species in issue. Nor does she explain how the development will put any red listed species of bird at risk. Given that they have only been sighted within 2 km of the development site, it is difficult to see how they might be put at risk. However, in her written submissions, she made the case that the Inspector was incorrect in her report when she stated that there were no amber listed birds recorded during the surveys undertaken prior to Ruirside making its application under s.4 of the 2016 Act.

200. In her oral submissions, Ms. O'Neill drew attention to the Scott Cawley Ecological Impact Assessment Report prepared on behalf of Ruirside which identified the species of bat and birds in issue. Ms. O'Neill again highlighted that the Inspector had wrongly stated in her report that there were no amber listed birds recorded during the surveys undertaken by Scott Cawley. Ms. O'Neill also drew my attention to the fact that, in the written submissions delivered on behalf of Ruirside, this error on the part of the Inspector is acknowledged.

201. Save in relation to the presence of one amber listed species on the site (namely the robin) Ms. O'Neill does not identify any specific deficiencies which might arguably amount to a breach of the Habitats Directive.

202. In their written submissions, counsel for the Board have drawn attention to the findings made in the Inspector's report at paras. 12.8.4 to 12.8.8 in which she acknowledged that one bat species (namely Leisler's bat) was recorded several times within the proposed development site. However, no bats were observed foraging on the site. The Inspector noted that there might be some temporary impacts to bats arising from the loss of foraging and commuting habitat (when the site is cleared to facilitate the development). However, the Inspector noted that the proposed landscape plan involves extensive native tree and shrub planting which will provide some suitable commuting and foraging habitat.

Discussion and analysis

203. In my view, Ms. O'Neill has not established that there has been any breach of the Habitats Directive. All she has done is to identify that the Inspector was in error in saying that there were no amber listed species of bird on the site and she has also identified that bats and red-listed species of birds have been seen in the locality and, furthermore, that one species of bat was observed on the site during the relevant surveys. In my view, this does not establish that there has been a breach of the Habitats Directive.

204. The Board had available to it a detailed report from Scott Cawley which found that, at no point during the surveys, were bats observed foraging within the development site and likewise established that no trees within the site were considered to have potential roost features that could support bats. Insofar as birds are concerned, while amber and red-listed species of birds were found in the locality, the birds recorded within the site are typical garden and suburban species which are considered to tolerate increased levels of disturbance providing suitable habitat remains. The report identified that suitable breeding and feeding bird habitat is available in the vicinity of the proposed development including nearby GAA club grounds, Johnstown Park and Tolka Valley Park. The report proposed a series of mitigation measures both for bats and for birds and concluded that any impact on the bats and birds would be of a temporary nature during the construction phase. Furthermore, in order to avoid disturbance of breeding birds, no works involving the removal of trees or hedgerows will be undertaken outside the nesting season.

205. It is unsurprising in those circumstances that the Inspector was able to conclude that there will be no long-term negative impacts to the biodiversity of the site and that the proposed landscaping (which includes the use of trees and shrubs) will minimise any

potential negative impacts. In this context, condition 26 of the permission in this case reinforces the conclusion reached by the Inspector in that it requires that all of the mitigation measures contained in the ecological assessment should be implemented in full.

206. In these circumstances, I can see no scope for reaching any conclusion that there was any breach of the Habitats Directive. While Article 12 of the Habitats Directive imposes very stringent safeguards in respect of bats, no activity of the kind prohibited by Article 12 is envisaged in this case. Article 12 protects (*inter alia*) bats against deliberate capture or killing, deliberate disturbance of the species or deterioration or destruction of breeding sites or resting places. In light of the Scott Cawley report, there is no suggestion that any of these activities will occur. Similarly, I can see no scope for the application of Article 6 of the Directive. That issue was addressed in s.11 of the Inspector's report where she concluded that there was no possibility of the proposed development undermining the conservation objectives of any of the qualifying interests or special conservation interests of the nearest Natura sites (namely the sites associated with Dublin Bay). In all of these circumstances, I have come to the conclusion that Ms. O'Neill has failed to establish that there will be any breach of the Habitats Directive. The error of the Inspector in failing to refer to the presence of the robin, an amber listed species, on site does not establish a breach of the Habitats Directive. In my view, that error is not material. On the contrary, it seems to me that the Inspector was, most likely, including the robin within the "*range of typical garden and woodland species"* mentioned by her in para. 12.8.5 of her report where she said that the site contains a range of those species common in an urban setting.

Denial of fair procedures

207. In para. 11 of Part E of her statement of grounds, Ms. O'Neill complains that, under the 2016 Act, interested parties are denied "*an appeal in the first instance*". She expands upon this in para. 42 of her affidavit sworn on 20th January, 2020 where she says:

> *"I say and believe that myself and the residents of Glenhill were denied fair procedures in circumstances where, given the New Procedures for SHD Planning Applications which materially contravene Dublin City Development Plan 2016-2022 interested parties were denied an appeal in the first instance. This means that people in my position, who are without the means to afford proper legal representation, find themselves in the High Court, facing respondents who can afford specialised legal representation. This inequality is in breach of the rights of the people of Ireland to have access to the Courts".*

208. A similar point is made by Ms. O'Neill in para. 9.4 of her written submissions where she suggested that the procedures force people like herself, without the means to afford proper legal representation, to "*face the Respondents in an inequality of arms. This inequality is a breach of the fundamental Constitutional right of access to the Courts".*

209. I acknowledge that this creates a difficulty for Ms. O'Neill. The procedures introduced by the 2016 Act mean that those who are concerned about development which falls within

the ambit of the 2016 Act have only one opportunity to voice their concerns – namely in the course of the very short timeframe the matter is before the Board. In cases which do not fall within the ambit of the 2016 Act (or the related strategic infrastructure legislation) those who are concerned about proposed developments normally have an opportunity to voice their concerns (and develop their arguments) in a two stage process beginning, at first instance, with the process before the relevant local authority and, if they are unhappy with the outcome of that process, at an appeal stage before the Board. In contrast, under the 2016 Act, if a party is unhappy with the first instance decision of the Board, the only route of challenge is by way of judicial review proceedings in the High Court with all of the significant costs that such a process entails. Ms. O'Neill is to be commended for the very skilful and targeted way in which she has pursued the challenge in the High Court but, obviously, because these are judicial review proceedings, her scope for challenging the decision of the Board is limited to legal grounds. As noted at an earlier point in this judgment, the court has no role in assessing the planning merits of the Board's decision.

210. Although I acknowledge Ms. O'Neill's concerns, there is nothing that the court can do to address this element of her claim. The 2016 Act has been enacted by the Oireachtas and, in the absence of a constitutional challenge, the court is as bound by the provisions of the 2016 Act as the Board. The court has no scope to dissapply any of its provisions or to create new procedures to remedy any perceived faults in the system created by the 2016 Act. If the system created by the 2016 Act is to be attacked, the only way of doing so would be to seek relief (against appropriate respondents) challenging the constitutionality of the Act. That would require the State and the Attorney General to be named as parties to any such proceedings. The present judicial review proceedings do not go that far and, accordingly, there is no basis upon which I can adjudicate on this element of Ms. O'Neill's claim.

The position of the Council

211. As noted above, Ms. O'Neill seeks declaratory relief as against the Council and also as against Ruirside notwithstanding that they are named merely as notice parties to the proceedings. Very detailed and helpful written submissions were delivered on behalf of the Council which examined the criteria applicable to the court's jurisdiction to grant (or withhold) declaratory relief. In addition, the Council submitted that no cause of action was disclosed as against it in Ms. O'Neill's statement of grounds. The submissions contain a very helpful analysis of the claims made in the statement of grounds and highlight that no breach or alleged breach by the Council of the Flood Risk Regulations or the Flood Risk Management Guidelines has been identified by Ms. O'Neill in her statement of grounds, her affidavits or in her written submissions. Similarly, no breach or alleged breach by the Council of the requirements of the Habitats Directive has been identified by Ms. O'Neill in any of those documents.

212. In his admirably succinct oral submissions, counsel for the Council explained that the Council has deliberately confined its participation in these proceedings to the declaratory relief set out at paras. 4 and 6 of Part D of Ms. O'Neill's statement of grounds and the

second sentence of para. 10 of Part D of the statement. Counsel submitted that, in the course of her oral submissions, Ms. O'Neill did not identify or allege any legal infirmity on the part of the Council. All of the issues raised by Ms. O'Neill related to the Board and the application for permission made by Ruirside. He also drew attention to the fact that Ms. O'Neill, in the course of her oral submissions, did not refute or controvert or respond to the points raised by the Council in its statement of opposition or in its written legal submissions.

213. In my view, counsel correctly analysed the statement of grounds, affidavit and submissions made by Ms. O'Neill. The truth is that she did not identify any legal basis for the relief sought by her as against the Council. In the circumstances, I do not believe that it is necessary to consider the principles (discussed in the Council's written submissions) applicable to the grant of declaratory relief by the court. It seems to me that Ms. O'Neill's claim against the Council must be dismissed on the basis that she has failed to make any case to support the grant of declaratory relief as against the Council.

The position of Ruirside

214. In its statement of opposition, Ruirside also objected to the grant of declaratory relief as against it. Ruirside made the case that declaratory relief cannot be sought in respect of notice parties and that the judicial review proceedings brought by Ms. O'Neill are directed against the decision of the Board to grant permission for the proposed development. In its written submissions, Ruirside also made the argument, by reference to O.84 r.18(2), that an applicant for judicial review cannot seek declaratory relief against a private party such as Ruirside.

215. In my view, Ruirside is correct in suggesting that it is inappropriate to grant declaratory relief as against a notice party. If such relief is to be sought, Ruirside would have to be named as a respondent. In the circumstances, it seems to me to be unnecessary to consider the further issue raised by Ruirside as to whether relief in judicial review proceedings can be sought as against a private party.

216. In circumstances where it is inappropriate to seek declaratory relief against a notice party, I will formally make an order dismissing Ms. O'Neill's claim for relief as against Ruirside. However, Ruirside, in contrast to the Council, was obviously a party with a real interest in contesting the claim made in these proceedings against the Board. It was therefore entirely appropriate and necessary that Ms. O'Neill should have named Ruirside as a notice party to the proceedings. Furthermore, Ruirside, in its capacity as a notice party, has vigorously contested every element of Ms. O'Neill's case and has sought to defend and stand over the decision of the Board to grant permission to it for the proposed development. It was, of course entitled to do so but, for the reasons outlined above, I have rejected its submissions (in common with those made on behalf of the Board) in relation to the application of SPPR 3(A) of the Building Height Guidelines. To that extent, Ms. O'Neill has succeeded not only as against the Board but has also succeeded in defeating the case made by Ruirside as to the application of SPPR 3(A).

Conclusion

217. For all of the reasons discussed above, it seems to me that Ms. O'Neill is entitled to the following relief:

(a) An order of *certiorari* quashing the decision of the Board to grant planning permission to Ruirside for the proposed development. This relief is granted on the ground that, as pleaded in para. 1 of Part D of Ms. O'Neill's statement of grounds, the proposed development materially contravenes the Dublin City Development Plan 2016-2022 and, as pleaded in para. 2 of Part E of the statement of grounds, the height of the proposed development exceeds the maximum height of 16 metres permissible under the said Development Plan and on the basis that, contrary to the contention made in paras. 17-18 of the Board's statement of opposition and in para. 34 of Ruirside's statement of opposition, the materials before the court do not disclose that SPPR 3(A) applies to the proposed development such as to permit the Board to grant permission notwithstanding the material contravention of the said Development Plan; and

(b) I will also grant the declaration sought by Ms. O'Neill in para. 11 of her statement of grounds namely a declaration that the Board failed to state main reasons and considerations for contravening materially the Dublin City Development Plan 2016-2022 and therefore acted contrary to the requirements of s.10(3) of the 2016 Act. This seems to me to be the relevant statutory provision rather than s.34(10) of the 2000 Act which has been invoked by Ms. O'Neill in para. 11 of Part D of her statement of grounds. I make this declaration on the grounds stated in para. 11 of Part E of Ms. O'Neill's statement of grounds.

218. For the reasons discussed in paras. 194 and 195, I make no order in relation to that part of Ms. O'Neill's case dealing with photomontages. Save to that extent and to the extent set out in para. 217 above, I refuse Ms. O'Neill's application in respect of the balance of the relief claimed by her as against the Board. In so far as the Council and Ruirside are concerned, I will dismiss Ms. O'Neill's application in so far as she seeks relief directly against them or either of them.

219. I will give the parties an appropriate period of time (given the court recess in August) in which to make written submissions as to any other consequential orders that may be required including orders for costs. Those submissions should be made in writing addressed to the registrar and forwarded to the registrar by email not later than 7 September, 2020, following which I will issue a ruling in writing or, should I consider it necessary to do so, I will hold a short remote oral hearing for the purposes of addressing the issues (or any one or more of them) raised by the parties.