THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 529
2020 No. 470 JR

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)
AND IN THE MATTER OF SECTION 37(2)(b)(iii) OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)
AND IN THE MATTER OF SECTION 4(1) OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT, 2016

BETWEEN:

CHRISTIAN MORRIS

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

ATLAS GP LIMITED

FIRST NAMED NOTICE PARTY

AND

FINGAL COUNTY COUNCIL

SECOND NAMED NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 22 October 2020

Introduction

1. By these proceedings the applicant, Mr. Morris, who represented himself, seeks to challenge by way of judicial review under s. 50 of the Planning and Development Act 2000, as amended (the "2000 Act") the decision of the respondent, An Bord Pleanála (the "Board"), of 3 April 2020 granting the notice party planning permission for a development consisting of*, inter alia*, the demolition of existing structures, construction of 512 apartments, 2 shops, a café and a restaurant on lands at the former Techrete manufacturing facility, former Beshoff's car showroom, and former Howth Garden Centre, Claremont, Howth Road, Howth, County Dublin (Reg. Ref. ABP-306102-19) (the "proposed development"). Being a development for more than 100 housing units, it 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 the local planning authority, in this case Fingal County Council (the "Council").

2. The proposed development has been the subject of 85 objections to the Board, and there is obviously significant opposition to it at local level. The applicant, Mr. Morris, is one of those objectors. His submission objecting to the development was made to the Board on 17 December 2019.

3. Before addressing the points raised by the applicant, it is important to understand the function of this Court in adjudicating upon these proceedings. I am not considering the merits of the development or whether it is desirable or not having regard to the various matters raised in the objections lodged, including that of the applicant. The Board is the body entrusted with the expert assessment of planning applications of this kind. As

observed in *Rita v. O'Neill v. An Bord Pleanála* [2020] IEHC 356, the court has no ability to interfere with its decisions as long as they have been lawfully arrived at and has no power to review the planning merits of the Board's decisions. Rather I am limited to considering whether the Board has complied with the law in arriving at its decision to grant permission.

4. Further, I am not given the power to conduct a general inquiry into whether the Board has complied with the law. Instead, the adversarial system of litigation applicable in these proceedings, i.e. judicial review proceedings, means that I am limited to considering whether the specific legal arguments that Mr. Morris raises are correct or not: I have neither an obligation nor indeed an entitlement to investigate matters not raised by Mr. Morris in the proceedings. Thus, the mere invocation of a topic by the applicant, for example the traffic implications of the development, without any identification of a legal argument in respect of traffic, does not mean that I can investigate of my own motion whether there is any legal flaw in the conclusion of the Board in relation to traffic. Therefore, where the applicant has not raised arguments that identify a legal issue in respect of a given topic, that ends my consideration of that topic.

5. For the reasons set out in this judgment, I did not find that the arguments raised by the applicant demonstrate any legal error in the decision of the Board granting permission for the development. I therefore refuse the relief sought, including an application to quash the decision of the Board.

Application process leading to Decision of the Board

6. The application for permission to the Board was made by the predecessor to the Notice Party, being Crevak Trading GP Limited, on 9 December 2019 for a development described by the Inspector in his Report as follows:

> *"The proposed development would provide 512 apartments, 2 shops, a creche, a restaurant and a café. The proposed housing mix would be as follows:*

	Studio	*1-bedroom*	*2-bedroom*	*3-bedroom*	*Total*
Apartments	*4*	*222*	*276*	*10*	*512*

> *The gross floor area of the residential development would be 45,379m2 including 708m2 of shared amenity space. The floor area of the creche would be 236m2. One shop would be 1,705m2, the other 603m2. The restaurant would be 243m2, the café 86m2. The restaurant would be 243m2, the café 86m2.*
>
> *The development would include the demolition and removal of the industrial and commercial structures on the site and excavation of a basement. Four buildings would be erected up to 8 storeys high. Blocks A and B at the western end of the site would be U-shaped with the open end towards the sea. They would have parking and plant rooms at the ground floor level with communal open space at a*

podium level equivalent to the lowest floor of apartments. That level would accommodate shared amenities including a gym in Block A and the creche in Block B. Public open space would be provided to the west of Block A up to the site boundary. An open space would be provided between Blocks A and B through which the Bloody Stream would be diverted into a new open channel. Blocks C and D at the eastern end of the site would have the shops, restaurant and café at ground floor level facing the Howth Road and a plaza between them. A pedestrian path would be provided along the northern side of the site at the podium level with access from the street at both ends. The paring areas at ground and basement level would be served by 2 vehicular accesses from the Howth Road. 439 car parking spaces would be provided, 80 of which are designated to serve the commercial premises. 1,335 bike spaces are proposed, 49 of which would serve the commercial premises and the creche" (paragraph 3.1).

7. The Inspector reported to the Board on 20 March 2020, recommending that permission should be granted subject to conditions. The Board considered the submissions on file and the Inspector's Report at a Board meeting on 25 March 2020. In its Direction of 25 March 2020, it decided to grant permission in accordance with the Inspector's recommendation for identified reasons and considerations and subject to conditions. By Order of 3 April 2020, the Board granted permission for the proposed development in accordance with the plans and particulars, based on the reasons and considerations in its Order and subject to conditions.

The applicant's proceedings

8. The applicant sought leave before McDonald J. to challenge the decision of the Board on 16 July 2020. The applicant was refused leave in respect of the reliefs sought at paragraphs 3, 4, 9, 14, 15 and 16 of the Statement of Grounds. Accordingly, this judgment does not address the reliefs and related grounds where leave was not granted.

9. The applicant was granted leave on grounds 1, 2, 5, 6, 7, 8, 10, 11, 12, 13, 17, 18, 19 and 20 of the Statement of Grounds. His statement of grounds alleged the following breaches:

- The fact that Fingal County Council (the "Council") displayed on their website an Archaeological Report that was not in fact the correct report;

- A breach of the Fingal County Development Plan 2017 – 2023 (the "Fingal CDP") by reason of an impermissible material contravention and failure to take into account submissions on this issue;

- A failure to take into account that fact that certain of the defences identified in the Flood Risk Assessment belonged to Iarnrod Eireann, or were situated on the lands of Iarnrod Eireann;

- A breach of the Howth Urban Centre Strategy;

- A breach of the Howth Special Amenity Order;

- The impact of the proposed development on traffic;

- The impact of the proposed development on policing, including concerns around public order;

- The location of the application site; and

- The argument that the proposed development was not a strategic housing development ("SHD").

By Order of 30 July 2020, the applicant was given liberty to substitute the words Atlas GP Limited for Crevak Trading GP Limited in the title of the proceedings.

Failure to Comply with Order 84, Rule 20(3) of the Rules of the Superior Courts

10. Both the Notice Party and the Board have identified the applicant's failure to particularise his complaints in respect of various grounds set out above. I agree that in respect of many of the grounds advanced, the applicant failed to particularise his case either in the pleadings or in his affidavits. In fairness to the applicant, he did not attempt to address this deficiency by seeking to provide additional particulars by way of oral argument. I will address the failure to particularise in the context of my treatment of individual grounds.

11. However, I note that there is a clear obligation in judicial review generally to provide full particulars of the case by virtue of Order 84, rule 20(3) of the Rules of the Superior Courts, as recently considered by Barniville J.in *Rushe v. An Bord Pleanala* [2020] IEHC 122. As noted by Barniville J., this sub-rule was inserted by way of an amendment to Order 84 by the Rules of the Superior Court (Judicial Review) 2012 (S.I. 691 of 2011) and gave effect to the views expressed by Murray C.J. in *AP v. Director of Public Prosecutions* [2011] 1 I.R. 729 at [5]:

> *"In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."*

12. Barniville J. observed as follows:

> *"108. 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…*

> *"113. In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in*

those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in AP, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court".

13. In dealing with a lack of particulars in respect of the various grounds, I have approached the matter bearing in mind these principles. I turn now to consider the individual grounds raised.

The Council's Archaeological Report

14. The applicant alleges that the Council furnished the wrong archaeological report to the Board and that this has the effect of invalidating the decision of the Board (see paragraph D2 of the Statement of Grounds). This allegation is made on the basis that the file maintained in respect of the subject application on the Council website contains a report prepared by the Council's archaeologist that relates to a different application in a different location.

15. The factual position in this respect is set out at paragraphs 26 and 27 of John Spain's Affidavit sworn on 21 September 2020, filed on behalf of the Notice Party. As a matter of fact, it is accepted by the Notice Party that the file maintained in respect of the subject application on the Council website contains an archaeological report which relates to a different site. The Board in their submissions noted that this was a matter for the Council and that it did not have any knowledge of the acts of the Council in this respect and was not responsible for same. I will therefore proceed on the basis that the wrong archaeological report appears on the Council website, as alleged by the applicant.

16. I must next consider whether this impacts upon the legality of the decision the subject of these proceedings. The applicant contended that the presence of the erroneous report impacted upon his ability to make submissions effectively, although did not specify why this was so. In this respect, I note that his submission of 17 December 2019 did not raise architectural issues at all. I am satisfied that the erroneous report did not impact upon the applicant's ability to make submissions and does not affect the legality of the Board's decision for the following reasons.

17. First, the Council are not required by way of the 2016 Act to place their reports prepared in respect of a strategic housing application on its website. The Council has chosen to do so but is not obliged to do so.

18. Second, the erroneous archaeological report uploaded to the Council website has a 'document date' of 3 February 2020, being the date that the document was uploaded to the website. This was outside of the 5 week period provided for public consultation and therefore the applicant could not have been prejudiced by the Council placing the wrong

archaeology report on its website since, by the time this took place, the time for submissions had expired. As noted above, the applicant's submission was made to the Board on 17 December 2019.

19. Moreover, the applicant was able to access the correct archaeological report. The correct archaeological report was placed on the Council's website, albeit in the Chief Executive's Report that had been submitted to the Board on 11 February 2020 as part of the application file. That Report included a report prepared by the community archaeologist, Ms Christine Baker, relating to the application site.

20. Further, it is clear when one goes to the erroneous report that it did not relate to the proposed development, given that the site address on it was Ravens Mill, Church Road, Rowlestown East, Co. Dublin, and it referred to the demolition of two existing derelict houses and associated outbuildings and the construction of 130 houses. Therefore, it would have been apparent to any reader, including the applicant, that the report in question was the wrong one. The applicant could have made inquiries with the Council and/or found the correct report in the Chief Executive's report referred to above, although it is difficult to see why he would have done so given that the time for submissions had expired by the time the wrong notice was put up. The applicant did not take any of those steps. In particular, I am struck by his failure to contact either the Council or the Board when he saw that the wrong report was on the Council's website to seek a copy of the correct report.

21. For the sake of completeness, I note that it is evident from the Inspector's Report that the Inspector, and the Board, considered the correct archaeology report (see section 8 of the Inspector's Report where he summarises the report and refers to the requirements of the community archaeologist at paragraph 8.6 of his Report).

22. Having regard to the above, I find that the presence of the erroneous architectural report on the website of the Council has no impact upon the legality of the decision of the Board.
Fingal County Development Plan 2017 – 2023

23. The Applicant has been granted leave to seek Declarations that (i) the proposed development is not consistent with the zoning of the site as per the Fingal CDP (relief sought at D5 of the Statement of Grounds); (ii) the Board erred in law in that it did not comply with its obligation to "have regard to" the numerous objections that specifically cited the Fingal CDP (relief sought at D6 of the Statement of Grounds); and (iii) the Board erred in law in granting permission for the proposed development without having due regard, adequately or at all, to the specific requirements of the Fingal CDP (relief sought at D7 of the Statement of Grounds).

Proposed Development is not consistent with the zoning of the site

24. In the instant case, the planning application site is zoned "*Objective TC – Town and District Centre*". The objective of this zoning is to "*protect and enhance the special physical and social character of town and district centres and provide and / or improve urban facilities*." Residential, retail, childcare facilities, and restaurant / café uses are all

permitted in principle within the "TC" zoning. Accordingly, the uses proposed for the site the subject of the application are consistent with the uses permitted in principle in the "TC" zoning.

25. In assessing the proposed development, the Inspector noted at Section 12.2.4 of his Report that the proposed residential, retail, café, restaurant and childcare uses are in keeping with or consistent with the zoning of the site for town centre uses under the Development Plan.

26. The Board's Order also specifically records that the Board had regard to "*the site's location within the built-up area in Howth on lands zoned for town centre development under the Fingal Development Plan 2017-2023.*"

27. Having regard to the foregoing, there is no basis for an argument that there has been a breach of the zoning requirements and the applicant has not identified any basis for same.

Alleged failure to "have regard to" objections raising Fingal CDP

28. 85 submissions were received in respect of the proposed development by the Board, as identified by the Inspector at pages 2-4 of his Report, including that of the applicant, Mr. Morris. At paragraph 7.1, under the heading "Third Party Submissions", over 4 pages, the Inspector summarises the content of the 85 submissions made, noting that they raise the following issues:

- The proposed height and density are excessive;
- The scale and form of the proposal would materially contravene the county development plan including its core strategy which places a limit of 498 on the number of homes to be provided in Howth;
- The area does not have adequate facilities to support the development at the scale proposed;
- The proposed development would give rise to traffic congestion and hazard;
- The proposed development would require extensive demolition and excavation and the removal of a large amount of material from the site including contaminated soil and asbestos;
- The proposed development would be at risk of flooding due to its coastal location and rising sea levels;
- The proposed development should provide the cycle facilities along the Howth Road planned under the Cycle Network Strategy for the GDA and objectives of the Development Plan;
- The proposed apartments would not meet the demand for housing for families and downsizers in the local community;

- The proposed development has too much commercial development for a level 4 centre according to the development plan;
- The proposed development would prejudice the reopening of the tram at Howth;
- The proposed development is a threat to SACs and SPAs in the area;
- The place name Claremont does not apply to the site and the proposal to use it is misleading and pretentious;
- The strategic housing development procedure excludes the public from pre-application consultations and is contrary to the Aarhus Convention and the directive implementing it and is unconstitutional.

29. The submissions were exhibited by the applicant and I have considered them all. The applicant argues that the Board did not have regard to those submissions, specifically those relating to compliance with the Fingal County Development Plan ("CDP"). He said in his oral submissions that it was incumbent upon the Board to refute the notion or perception that they "rattled" through the submissions too quickly. However, he does not explain the basis for this assertion. He did not for example identify any given submission and assert that there had been a failure to have regard to the points raised in it. Nor does he identify any specific provisions of the Fingal CDP to which the Board failed to have regard. The Board followed the Inspector's Report and can be taken to have adopted its summary of the submissions and the considerations of same. As set out below, the Inspector and Board engaged extensively with the question of the material contravention of the Fingal CDP, which was a core issue for many of the persons making submissions, as they were required to do. The Inspector explicitly identifies that the proposed development materially contravenes the CDP, including its core strategy placing a limit of 498 homes in Howth and the height restriction of 3-5 storeys. As discussed below, the Board expressly identified the basis upon which it decided to permit a material contravention of the CDP.

30. In those circumstances the applicant has failed to raise an identifiable issue in respect of an alleged failure to have regard to the submissions made and I do not need to consider his plea in this respect any further.

31. However, for the sake of completeness I should add that, had the applicant's argument been that the Inspector failed to individually address each and every submission relating to Fingal CDP, the obligation of a decision maker to address submissions made is clear. In the recent decision of *Friends of the Irish Environment v. the Government of Ireland* [2020] IEHC 225, Barr J. addressed the extent of the duty on a decision maker to take into account submissions made by members of the public in response to a consultation, in that case in respect of the proposed National Planning Framework as follows:

> *"122. The Court is satisfied on the basis of the decisions in O'Brien v. An Bord Pleanala and Sliabh Luachra v. An Bord Pleanala that it is not necessary for a decision maker*

to give an individual response to every submission received from a member of the public. This is particularly so where a large number of submissions are received from members of the public and where there may be a large element of overlap between the various submissions. As long as these submissions are addressed in a comprehensive and fair manner, it is appropriate for the decision maker to group them thematically and address them on an issue by issue basis.

32. This approach does not of course undermine the basic obligation in relation to submissions identified in *Balz v. An Bord Pleanala* [2019] IESC 90 where O'Donnell J. identified that relevant submissions must be addressed and an explanation given as to why they are not to be accepted, if this is the case.

33. In this case, there was a large element of overlap between the submissions in respect of the material contravention of the Fingal CDP in respect of height and number of houses in Howth. There is no evidence before the court that the Inspector and/or the Board failed to have adequate regard to the submissions on that point – quite the contrary, having regard to the explicit reasons given by both the Inspector and the Board for permitting a material contravention. It is true of course that the Board permitted a material contravention and granted permission, contrary to the views of the vast majority of persons who made submissions. However, the obligation to have regard is not an obligation of outcome: rather it is precisely as described i.e. an obligation to consider submissions, with the decision maker being free to either reject or accept them. The Board's decision to grant permission does not amount to a failure to have regard to submissions that a material contravention ought not to be permitted. Accordingly, I reject this ground of objection.

Material Contravention of CDP

34. It is important to identify precisely the nature of the applicant's complaint in respect of material contravention. He was granted relief to argue that the Board erred in law in granting permission for the proposed development without having due regard, adequately or at all to the specific requirements of the Fingal CDP. In oral argument his main complaint appeared to be that there had been a material contravention of the CDP. But he did not identify any legal error with same: rather he explained his argument as being that there was a balance in the overall decision which should have been towards a conservative rather than a very liberal approach. The decision of the Board is entitled to a presumption of legality and the applicant has not identified any legal flaw in respect of its treatment of the CDP. The 2016 Act expressly allows the Board to grant permission for SHD which is in material contravention of the relevant Development Plan. The proposed development was in material contravention having regard to the height and number of apartments, but the Board, having regard to the statutory requirements for permission in such circumstances, granted permission.

35. The applicant has not identified any flaw in the Board's approach in this respect. Indeed, the applicant in oral submissions expressly stated in respect of the CDP that the Board was "legally and within statute at liberty" to, as he described it, countermand and nullify the CDP, although he indicated that to do so required greater justification than the Board

had provided. However, he did not explain why the justification given by the Board by reference to s.37(2)(b) was insufficient.

36. For that reason, I am going to explain briefly the approach of the Board to the CDP and material contravention; but I do not intend to carry out an in-depth review of the Board's approach in this respect where no argument has been raised identifying any flaw in the approach. Whether a litigant is legally represented or not, it is not sufficient simply to identify an aspect of a planning decision that he or she is unhappy with and then leave it to the respondent and developer to explain the legality of that aspect of the decision. As noted above, judicial review is an adversarial process that requires an applicant to identify its objection, grounded in law, to the decision. The respondent replies to that targeted objection. The court is not charged with carrying out an inquiry into the decision of the planning authority.

Explanation of the statutory scheme and the Board's approach

37. Section 8(1)(a)(iv) of the 2016 Act requires the applicant making an application for permission for SHD to state that the application contains a statement setting out how the proposal will be consistent with the objectives of the relevant development plan or local area plan, and where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in s. 37(2)(b) of the Planning and Development Act 2000 (the "2000 Act"). This is known as a Statement of Consistency/Material Contravention Statement.

38. Section 9(3) of the 2016 Act provides that:

    (a) 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.

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

39. Section 9(6) of the 2016 Act states that the Board may decide to grant a permission for a proposed SHD even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned. This is subject to the proviso that the Board is not permitted to grant permission where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

40. As noted above, although there was an allegation of breach of zoning made by the applicant, he did not identify any breach and the uses of the proposed development are permitted by the zoning.

41. Section 9(6)(c) of the 2016 Act also provides that where the proposed SHD would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission where it considers that, if s. 37(2)(b) of the 2000 Act were to apply, it would grant permission for the proposed development.

42. Section 37(2)(b) provides that the Board may 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 of the 2000 Act, policy directives under section 29 of the 2000 Act, 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".

43. Section 10(3)(a) of the 2016 Act requires the Board to state the main reasons and considerations for contravening materially the development plan.

44. 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 (see *O'Neill v. An Bord Pleanala* in this respect).

Material Contravention

45. The Core Strategy as contained in the Fingal CDP at Chapter 2 entitled "Core Strategy and Settlement Strategy" sets out a residential capacity of 498 residential units in Howth (see p.38 of the CDP) based on the extent of undeveloped zoned land at the time the Fingal CDP was prepared.

46. At Appendix 6 to the CDP, identifying local objectives, no. 108 identifies as an objective for Howth that "*Development shall be between three and five storeys. The three storey aspect of the development shall be on the western side of the site and a maximum of 30% of the overall development shall be five storeys*".

47. The CDP also includes 21 Objectives in chapter 2. Objective SS01 is as follows: *Consolidate the vast majority of the County's future growth into the strong and dynamic urban centres of the Metropolitan Area while directing development in the hinterland to towns and villages, as advocated by national and regional planning guidance. Objective SS15 is as follows: Strengthen and consolidate existing urban areas adjoining Dublin City through infill and appropriate brownfield redevelopment in order to maximise the efficient*

use of existing infrastructure and services. The introduction to SS15 identifies Howth as a consolidation area within the Gateway, with the policy approach in respect of those areas to gain maximum benefit from existing transport, social and community infrastructure through the continued consolidation of the city and its suburbs.

48. The Government published the National Planning Framework in February 2018. Objective 13 is that in urban areas, planning and related standards including those on building height and car parking will be based on performance criteria. Objective 35 is to increase residential density in settlements by various means including infill development.

49. The Minister issued Guidelines for Planning Authorities on Urban Development and Building Heights in December 2018. SPPR 1 restates public policy in favour of increased building height and density in locations with good public transport accessibility. Section 3.2 sets out development management criteria at the scale of the city/town, district/neighbourhood/street and the site/building. SPPR 3 provides that a planning authority may grant permission for higher buildings where compliance with the criteria in section 3.2 has been demonstrated even if a development plan would indicate otherwise.

Proposed Development

50. The proposed development consists of 512 apartment units and on its own would exceed the figure of 498 units in the core strategy. Moreover, it goes up to 8 stories in height and therefore also contravenes local objective no. 108. Accordingly, the first named Notice Party submitted a Statement of Consistency and Material Contravention Statement in accordance with the 2016 Act and the Planning and Development (Strategic Housing Development) Regulations 2017 (the "2017 Regulations").

51. The Material Contravention Statement is summarised at section 6.5 of the Inspector's Report which noted that:

> *"The statement says that the board might consider the proposed development to be a material contravention of the core settlement strategy set out in the development plan because it would provide more housing than the target of 498 units for Howth in that strategy, especially if the Balscadden development is included. The height of the proposed development, at 8 storeys, would materially contravene local objective 108 which states that development on this site should be between 3 and 5 storeys.*

52. The Inspector's conclusions in this regard are set out under the heading "*Assessment of other issues"* at paragraph 12.1 to 12.3.3 of his Report. The Inspector notes the site is part of the continuous built up area of Dublin city. He notes the proposed development would consolidate development in a brownfield site in the metropolitan area and so would be in keeping with objectives SS01 and SS15 of the CDP. He refers to the number of apartments exceeding the core strategy that the 16ha zoned for development in Howth could accommodate 498 new homes. He notes the proposed material contravention of the CDP is justified by objectives 3a, 3b, 10,11 and 35 of the National Planning Framework, as well as other guidelines and policy documents including SPPR1 of the 2018 guidelines

on building height, all of which support denser residential development, thus permitting a grant of permission under s.37(2)(b)(ii) of the Planning and Development Act. He notes that the proposed development is supported by objectives SS01 and SS15 of the CDP, so would be justified by reference to s.37(2)(b)(i) and (ii) of the Act.

53. The Board followed the Inspector's approach in deciding that a material contravention was permissible. It identified the material contravention in relation to height and number of units and concludes same would be justified in accordance with s.37(2)(b)(i)(ii) and (iii) of the Act as follows:

> *"The Board considered that a grant of permission that could materially contravene the allocation of 498 homes to Howth under the core strategy and settlement strategy set out in section 2 of the Fingal Development Plan 2017-2023 and the restriction on height set out in local objective 108 of the plan would be justified in accordance with sections 37(2)(b)(i),(ii) and (iii) of the Planning and Development Act 2000, as amended, having regard to:*
>
> *(a) the Government's policy to ramp up delivery of housing from its current under-supply set out in Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016;*
>
> *(b) objectives 3a, 3b, 10, 11 and 35 of the National Planning Framework;*
>
> *(c) section 5.8 of the Guidelines for Sustainable Residential Developments in Urban Areas issued in 2009;*
>
> *(d) section 2.4 of the Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities issued in March 2018;*
>
> *(e) SPPR1 of the Guidelines for Planning Authorities on Urban Development and Building Height issued in December 2018;*
>
> *(f) objective RPO 4.3 of the Regional Spatial and Economic Strategy for the Eastern and Midlands Region 2019-2031, and*
>
> *(g) objectives SS01 and SS15 of the county development plan,*
>
> *all of which support denser residential development consisting of apartments on public transport corridors within the built-up area of Dublin City and its suburbs, as is proposed in this case."*

54. The Board Order also expressly records that the proposed development would materially contravene local objective 108 of the Fingal CDP but could be justified in accordance with sections 37(2)(b)(i) and (iii) of the 2000 Act and includes the Board's reasons for so concluding:

"The Board considered that a grant of permission that would materially contravene the specific local objective 108 of the Fingal Development Plan 2017-2023, which applies to the site, would be justified in accordance with sections 37(2)(b)(i) and (iii) of the Planning and Development Act 2000, as amended, having regard to:

(i) objective 13 of the National Planning Framework 2018-2040;

(ii) SPPR 1, SPPR 3 and section 3.2 of the Guidelines for Planning Authorities on Urban Development and Building Height issued in December 2018;

which state policy in favour of greater density and height at central accessible locations such as the current application site, subject to performance and development management criteria with which the proposed development would comply."

55. In summary, the Order expressly records that the Board considered that the proposed development would be a material contravention of the CDP but that it could be justified in accordance with s.37(2)(b)(i), (ii) and (iii) of the 2000 Act and records the Board's reasons for so concluding. As such, the Board Order complies with the requirements of section 10(3) of the 2016 Act. Accordingly, the Board was entitled to grant permission pursuant to the provisions in s.9(6) of the 2016 Act, having invoked s.37(2)(b)(i), (ii) and (iii) of the 2000 Act.

Flood Risk Assessment

122. The next argument of the applicant is that the Board erred in law in granting permission for the proposed development on a site known to be subject to flooding (paragraph D8 of the Statement of Grounds).

123. The complaint of the applicant in this respect is twofold. First, he says that the flood risk assessment relied upon infrastructure owned by Iarnrod Eireann outside the development site, namely the DART sea defence walls at the Dart station in Howth and that this was not appropriate given that the developer did not have any control over that wall. Second, in oral submissions (but not pleaded nor averred to in his affidavits) he submitted that the Bloody Stream, a stream that runs through the development lands, often floods, and that issue had been insufficiently addressed in the flood risk assessment. No expert evidence of any kind was adduced by the applicant in this respect.

124. By way of background, the planning application site is located in Flood Zone C as defined in the "The Planning System and Flood Risk Management Guidelines" (the "Flood Risk Management Guidelines"). Lands included in Flood Zone C have a low probability of flooding and the Flood Risk Management Guidelines state at paragraph 3.5 that "*development in this zone is appropriate from a flood risk perspective (subject to assessment of flood hazard from sources other than rivers and the coast) but would need to meet the normal range of other proper planning and sustainable development considerations*".

125. 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. In the case of Zone C, all types of development would be considered. 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 a strategic flood risk assessment ("SFRA") has been carried out by the planning authority on its development plan in accordance with the Guidelines.

126. The Environmental Impact Assessment Report ("EIAR") included a site-specific flood risk assessment report prepared by Barrett Mahony Consulting Engineers (the "Barrett Mahony Report"). That report, and other information in the EIAR identified*, inter alia:*

- The site is beside the Irish Sea but protected due to the existing DART sea defence wall and the promenade. However, additional precautions are taken to protect the occupants and the development, in the event that the existing defences are overcome (p.34 of Chapter 6)

- The prospect of flood defence failure (p.17 in Chapter 12).

- That additional precaution includes a sea wall to be installed at 4.5m OD providing additional sea flood defence after the Dart sea defence wall (5.1m OD), which provides adequate defence (p.42 of Chapter 5 and p.9 of Chapter 12).

127. The Barrett Mahony Report also states (at p.16) that historical records show there has never been a sea breach at this site. The sea level for 1 in 1000 years (0.1% AEP) from the Office of Public Works ("OPW") website is 3.340m OD. Currently the site has protection from the sea via the DART sea defence wall and the promenade. To assess for the worse-case scenario the flood risk assessment was carried out for the situation where the current sea defences are removed (my emphasis) and the site is exposed. In that scenario, it was acknowledged that both proposed carparks are below the 0.1% annual exceedance probability ("AEP") and would be susceptible to flooding.

128. To mitigate this risk, it is planned to do the following:

- Living and sleeping quarters are set at 5.2m OD, nearly 3 metres above 1 in 1000 year event

- The Northern boundary line will have a sea wall at 4.5m OD, forming the third line of defence after the DART sea wall and the promenade

- All openings for the basement or lower ground carpark will be set at 4.5m or above

- Access points to the carparks are ramped to 4.3m OD to prevent water entry from Howth road. Excess water from the riparian strip is diverted to Howth road before it reaches carpark entrances, therefore 4.3m is sufficient

- The riparian strip is landscaped to contain excess water in times of extreme hightide
- A water grate is to be positioned at the end of the open channel to prevent blockages
- An overflow drain to be provided in the riparian strip in the event the channel does get blocked
- The surrounding area is to be landscaped to divert excess water away from the development such as Baltray Park, the riparian strip and Howth Road
- The management team servicing the development, will implement maintenance practices to ensure surface drainage, manholes, settlement chamber and the riparian strip are serviced regularly.

129. Barrett Mahony indicated that those measures would ensure the risk of flooding is reduced and measures had been incorporated to ensure excess water is handled correctly and diverted away from the development. The likelihood of flooding on site is low from either tidal, fluvial, pluvial surface water or groundwater. It was concluded by Barrett Mahony that the above will prevent water entering the lower areas and reduce the possibility of flooding to "very unlikely".

130. At Section 11.7.5 of the Inspector's Report, the Inspector considered the issue of flood risk and noted that the fluvial and coastal flood risk mapping issued by the second named Notice Party and the OPW respectively indicate that the probability of flooding of the site from those sources is less than the 0.1% annual event probability and therefore the site of the proposed development is in flood zone C under the 2009 flood risk management guidelines. Accordingly, it was concluded that residential development in this zone is acceptable in principle.

131. The Inspector considers the risk of flooding at paragraph 11.7.5 as follows:

> *"…Recorded flood events on the site are attributed to blockages in the culverted stream which the proposed development would remove. The floor level of the proposed habitable accommodation would at least 1.86m above the 1 in 1000 year coastal flood level of 3.34m OD estimated by the OPW. The proposed development would not be at an undue risk of flooding, therefore".*

132. Turning now to the applicant's specific complaints, insofar as the applicant's complaint about reliance upon the DART sea wall is concerned, in fact it may be seen from the above summary that an assessment was done on the hypothesis that neither the promenade or sea wall were present to assess for the worst-case scenario. In that scenario, the proposed car parks are below the 0.1% annual exceedance probability and would be susceptible to flooding. To mitigate this risk, the plans for the development identify that a sea defence wall along the coastal perimeter to 4.5m OD will be constructed which will form a third line of defence within the planning application site.

133. Therefore, contrary to what is asserted by the applicant, there is no issue with the reliance upon flood defences constructed on Iarnrod Eireann's lands and maintained by them since the proposal has been evaluated on the assumption that such defences are not in existence. This means that irrespective of the fate of the DART sea wall – and the applicant has put forward no hypothesis explaining why same might be removed – the development will have its own sea wall. That disposes of the argument relating to Iarnrod Eireann's ownership of relevant infrastructure.

134. Insofar as the argument in relation to the Bloody Stream on the development lands is concerned, it was not pleaded and only raised at the oral hearing so the applicant is not entitled to advance this argument. However, because it is easily addressed I will explain why, had it been appropriately raised, I would have dismissed it. The applicant's complaint was that the flooding of the lands due to the Bloody Stream was insufficiently addressed in the flood risk assessment. A consideration of the Barrett Mahony report and the Inspector's Report does not bear that assertion out. The Barrett Mahony report identifies that flood events on the site have indeed been attributable to blockages in the Bloody Stream which is culverted as it traverses the site in a 750mm and 900mm diameter pipe. The proposed development includes for the improved configuration of the outfall of the Bloody Stream within the planning application site. This includes the proposal to deculvert the stream for much of its passage through the site together with the installation of a water grill at the end of the proposed open channel to stop large debris from entering the underground outfall system and a backup drain providing an alternative means of escape (Barrett Mahony Report, page 14).

135. The Inspector specifically addresses the Bloody Stream issue as follows:

> Para 11.7.3
>
> *"… The Bloody Stream would flow along a concrete channel through the site before joining the existing surface water sewer on the northern part of the site that runs to a culvert underneath the railway and thence to the sea"*
>
> Para 11.7.5
>
> *"The site in its current condition does not allow for the retention of flood water runoff. It does convey surface water runoff from other lands to the sea through the covered Bloody Stream. The site would continue to fulfil this function after the proposed development. The open channel is an appropriate means to achieve this. The maintenance of the channel and its infall and outfall would not be beyond the resources of a management company for 512 apartments. Assertions to the contrary in several of the submissions on the application are not well founded. It is therefore concluded that the proposed development would not give rise to an undue risk of flooding on other land".*

136. The Board Order records that the "*Board decided to grant permission generally in accordance with the Inspector's recommendation*".

137. Thus, contrary to the applicant's argument, the flooding issue involving the Bloody Stream was specifically addressed. The Inspector concluded that there was not an undue risk of flooding of the development and nor would the development give rise to an undue risk of flooding on other land. The Board clearly accepted the Inspector's flood risk assessment identified above. The applicant has put no evidence whatsoever before the court, expert or other, to displace the Inspector's conclusions in this respect.

138. In the circumstances, I conclude that the applicant has not demonstrated that his concerns in relation to an inadequate flood risk assessment are well founded.

Howth Urban Centre Strategy

139. The next argument raised by the applicant is that the Board erred in law as it did not have due regard to the Howth Urban Centre Strategy ("HUCS") (paragraph D10 of the Statement of Grounds). The applicant asserted that the size and scale of the development was a city-type development whereas the HUCS dealt with a fishing village at the northeast end of the Liffey estuary, namely Howth.

140. The HUCS was published in December 2008 in accordance with Objective U02 of the Fingal County Development Plan 2005 – 2011. The HUCS is not referred to in the current Fingal CDP and has no statutory basis. Notwithstanding this, the HUCS was referred to in the Chief Executive's Report submitted on behalf of the Council. That Report notes that the HUCS is a non-statutory document and states that: "*The proposed development generally accords with this document in terms of the key principles relating to the site and the Map Based Objectives.*"

141. The Statement of Consistency, submitted with the application for permission, refers to the fact that the HUCS included a Site Specific Development Brief for the application site. The key principles of the indicative built form on the planning application site included finger blocks, well defined edges, high quality landscaping and a permeable urban grain. The key principles of the indicative public realm include active frontages, a new focal area, access across the rail line to the water's edge and a high quality public realm. Heights of seven storeys are indicated.

142. The Inspector considered the HUCS at paragraph 8.4 and stated as follows:

> *"The proposed development generally accords with the non—statutory Howth Urban Centre Strategy in relation to uses, design, layout and landscaping by providing active frontage, permeability, a high quality public realm, views towards Ireland Eye's and reduced height to the eastern side of the site. The provision of a bridge over the railway to the beach was discussed with the applicant but has not been included in the proposed development. It is recommended that a contribution towards the installation of such a public bridge should be required by condition."*

143. Condition 22 of the Board's Order requires the developer to pay a financial contribution towards the construction of a pedestrian bridge over the railway from the site towards Claremont Strand.

144. The Board decided to "*grant permission generally in accordance with the Inspector's recommendation*", thus implicitly accepting the Inspector's assessment of the proposed development and its potential impact on the HUCS. Having regard to the above, the Inspector, and the Board, had regard to the HUCS in considering the application for permission.

145. In those circumstances I can see no basis for the applicant's argument that there was a failure to have regard to the HUCS or that HUCS was breached in that it only permitted developments suitable to a village. The summary of HUCS above demonstrates that this was not the case, in particular given that it envisages heights of up to 7 storeys. The applicant has not put forward any basis upon which the decision of the Board may be criticised on the ground of failure to observe the approach identified in HUCS.

Howth Special Amenity Order

146. The applicant has made a similar argument in respect of the Howth Special Amenity Order, arguing that the Board failed to show evidence of having due regard to the Howth Special Amenity Order (paragraph D11 of the Statement of Grounds).

147. Section 34(2)(a)(ii) of the 2000 Act requires a planning authority to have regard to the provisions of any special amenity area order relating to the area. It is not entirely clear to me the extent to which this obligation falls on the Board on a SHD application. However, I will assume for the purposes of this judgment that a similar obligation falls on the Board.

148. There is an explicit reference to the Howth Special Amenity Order in the Inspector's Report. He notes at Section 11.11.2 that the proposed development would be outside the Special Amenity Area designated for Howth and would be c. 850m from the closest point of the special amenity area designated by the order to the south at Muck Rock and c. 900m from the part of the area to the west at Howth Harbour. The Inspector also notes that the proposed development would be outside the buffer zone around the special amenity area and that the buffer zone extends to the opposite side of the Howth Road from the site. It was concluded that, as the proposed development would be set back from the special amenity area and outside the buffer zone around it and because it would be built on brownfield industrial land, it would not have a significant adverse effect on the character or landscape of the special amenity area either directly or indirectly. Para.11.11.2 of the Inspector's Report contains a typo, insofar as it states that the proposed development would have a significant adverse effect on the character or landscape of the special amenity area either directly or indirectly. However, I am satisfied that when read in the conjunction with the entirety of the paragraph, it was intended to mean, as submitted by the Board, that the proposed development would not have a significant adverse effect.

149. The Inspector also noted that most of the city is visible from some parts of the special amenity area, so the mere fact that the apartment buildings would be visible from the area does not imply that it would have an adverse effect on its landscape, and therefore the proposed development would not contravene the special amenity area order for Howth or the provisions of the Development Plan which protect it.

150. As already noted above, the Board "*decided to grant permission generally in accordance with the Inspector's recommendation*" and as such, according to the well settled principle that the Inspector's Report is taken to be accepted unless the Board expressly departs from it , the Inspector's assessment on the Howth Special Amenity Order was taken into account and accepted by the Board.

151. In the premises, there is no basis for the applicant's argument that the Howth Special Amenity Order was not taken into account and I reject his argument in this respect.

Impact of the Proposed Development on Traffic

152. The applicant obtained leave to seek a declaration to the effect that the Board erred in law as it did not comply with its obligation to have regard to the overall implications of the proposed development on traffic (paragraph D12 of the Statement of Grounds). The applicant conceded at the oral hearing that this was a merits-based argument and did not advance any factual or legal arguments in respect of this ground. Accordingly, I do not propose to further consider this ground.

Impact of the Proposed Development on Policing/Public Order

153. The applicant was also granted leave to seek a declaration to the effect that the Board erred in law as it did not comply with its obligation to have regard to the overall implications of the proposed development on policing including concerns around public order such as anti-social behaviour (D13 of the Statement of Grounds).

154. As with the traffic issue, the applicant accepted at the oral hearing this was a merits-based objection and could not be raised in the context of a judicial review of the Board's decision. For that reason, I do not need to further consider it.

Jurisdictional Area

155. The applicant has been granted leave to seek a Declaration to the effect that the Board erred in law in granting permission for the proposed development in circumstances where the Inspector's Report refers to the planning application site as being within "Dublin City and its suburbs" when it is in the functional area of Fingal County Council (paragraph D17 of the Statement of Grounds).

156. This objection appears to be based entirely on the reference by the Inspector in his Report at paragraph 6.4.3 to the application site being within "Dublin City and County". Paragraph 6.4.3 of the Inspector's Report states as follows:

> "*The site is in Dublin city and its suburbs. The RSES supports the consolidation of Dublin and aims to provide 50% of population growth within its built up area. The strategy notes that the may not be an ideal fit between some development plans and the NFP and that the zoning of land and granting of permission may not always leads to housing delivery.*"

157. The reference to RSES is a reference to the Regional Spatial and Economic Strategy 2018 of the Eastern and Midlands Region. The Eastern and Midlands Region includes all of the local authorities in Dublin (Dublin City Council; Fingal County Council; Dun Laoghaire-

Rathdown County Council and South Dublin County Council) as well as the local authorities for Counties Meath, Kildare, Wicklow, Louth, Longford, Westmeath, Offaly and Laois.

158. Fingal straddles three areas in the Eastern and Midlands Region RSES 2018 – Dublin City and Suburbs; Metropolitan and Hinterland areas. Howth is located within what is described in the Eastern and Midlands Region RSES 2018 as "Dublin City and Suburbs".

159. The Inspector, at paragraph 6.4.3 of his Report, refers to the application site as being located within "Dublin City and Suburbs" as defined in the Eastern and Midlands Region RSES 2018. This is factually correct and the statement made by the Inspector at paragraph 6.4.3 is accurate.

160. The fact that the Inspector refers to the planning application site as being located within "Dublin City and Suburbs" as defined in the Eastern and Midlands Region RSES 2018 does not however imply, or suggest, that the application site is located within the functional area of Dublin City Council or that the Inspector and/or the Board considered that the application site was located within Dublin City Council's functional area.

161. Moreover, it is quite clear from the entirety of the Inspector's Report, and indeed the Board decision, that the development site was based within the jurisdictional area of Fingal County Council. Indeed, the applicant is well aware of this as one of his key complaints was that the permission was in material contravention of the Fingal CDP. The applicant has identified one reference to the site being in Dublin city and its suburbs as the basis for a ground of challenge, where a careful reading of the paragraph in context, as set out above, makes it clear that this was an entirely factually accurate description. Moreover, even taking the paragraph at face value, it did not state that the planning application site was within the functional area of Dublin City Council for planning purposes. This ground is wholly without merit and I reject it in its entirety.

Proposed Development is not a "Strategic Housing Development"

162. Finally, the applicant contends that the Board erred in law in granting permission for the proposed development which was fundamentally different from and / or bigger in nature than the original proposal and/or that the application for the proposed development is in breach of s. 4(1) of the 2016 Act, which requires an application for a strategic housing development to be made to the Board (see Paragraph D (18) of the Statement of Grounds).

163. The core of the applicant's objection here is that the development permitted a supermarket as part of the ancillary buildings i.e. an "*other use*" in the words of section 3 of the 2016 Act, and that this took the development outside the definition of SHD. The import of this argument is that the application should not have been determined under the 2016 Act and should not have been made directly to the Board. The applicant argued that the 2016 Act allowed people applying for planning permission to bypass the local authority with the primary aim of alleviating the housing crisis. It was not intended as a back-door route for a supermarket, given that the legislation was aimed to address the

housing crisis, not what he described as a "shops crisis". He submitted the proper construction of the statute did not allow the building of a supermarket.

164. As discussed below, this argument ignores the specific wording of the relevant statutory provisions, which impose only two limitations on "*other uses*" – first that they are otherwise permissible under the relevant zoning and second, that they do not exceed 15% of the total area.

165. The definition of "strategic housing development", contained in s. 3 of the 2016 Act, expressly provides that the development:

> *"…may include other uses on the land, the zoning of which facilitates such use, but only if-*
>
> *(i) the cumulative gross floor space of the houses, student accommodation units, shared accommodation units or any combination thereof comprises not less than 85%, or such other percentage as may be prescribed, of the gross floor space of the proposed development or the number of houses or proposed bed spaces within student accommodation or shared accommodation to which the proposed alteration of a planning permission so granted relates, and*
>
> *(ii) the other uses cumulatively do not exceed-*
>
> *(I) 15 square metres gross floor space for each house or 7.5 square metres gross floor space for each bed space in student accommodation or shared accommodation in the proposed development or to which the proposed alteration of a planning permission so granted relates, subject to a maximum of 4,500 square metres gross floor space for such other uses in any development, or*
>
> *(II) Such other area as may be prescribed, by reference to the number of houses or bed spaces in student accommodation or shared accommodation within the proposed development or to which the proposed alteration of a planning permission so granted relates, which other area shall be subject to such other maximum area in the development as may be prescribed".*

166. Here, the development is for 512 apartments and exceeds the threshold in s.3 of the 2016 Act, namely the "*development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses*". While the definition of SHD in the 2016 Act refers to 'houses', the definition of 'house' in the 2000 Act is "*building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building" (my emphasis).*

167. The above definition of SHD envisages that the application may include other uses on the land, the zoning of which facilitates such use, but only if the other uses cumulatively do not exceed the thresholds in the definition. The affidavit of Mr. Spaine sworn 21 September 2020 on behalf of the Notice Party sets out that as the proposed development is for 512 apartments and the definition allows for 15 square metres gross floor space of 'other use' for each house, the statutory definition in the 2016 Act would allow for a maximum of 7,680 square metres for 'other use' with the proposed development. However, this is subject to the maximum statutory cap of 4,500 square metres gross floor space for such other uses in any development.

168. Here, the proposed retail or supermarket unit objected to by the applicant is an ancillary part of the overall proposed development which meets the requirements for SHD in the 2016 Act. The area of the proposed supermarket is 1,705 square metres and the total area of 'other uses' envisaged for the site is 2,873 square metres, being made up as follows – creche of 236 square metres; supermarket of 1,705 square metres; shop of 603 square metres; restaurant of 243 square metres and café of 86 square metres. The total of "other uses" being 2,873 square metres is therefore comfortably below the cap of 4,500 square metres and complies with the definition in the Act.

169. The applicant asserts at paragraph 34 of his written submissions that "other uses" "*should be strictly concomitant to and restricted to the intended use of proposed housing development rather than from any wider purpose, say a laundry room for the residents, a gym, a meeting room or such like*". But there is no statutory basis for this approach. There is no definition of "other uses" in the 2016 Act. The only requirements contained in the 2016 Act in respect of "other uses" are as identified above i.e. that the zoning of the land must facilitate the "other uses"; and the restrictions on the scale of the "other uses" relative to the residential element of the development. The applicant's case is that "other uses" are restricted to housing development use. But he puts forward no basis to substantiate this argument and it flies in the face of the express wording in the statute.

170. As noted above, the proposed uses are consistent with the zoning. The planning application site is zoned "*Objective TC – Town and District Centre*" in the Fingal CDP. All of the proposed "other uses" (creche, retail, restaurant and café) are permitted in principle within the "TC" zoning".

171. Nor is there any statutory requirement that the "other uses" in the development are intended to serve solely the residents of the apartment development as suggested by Mr Morris at paragraph 34 of his submissions.

172. For those reasons, I am of the view that the argument of the applicant is misconceived in that the other uses identified in the application for the proposed development come within the definition of other uses in s.3 and therefore the development is indeed within the definition of strategic housing development. As such, the Board correctly determined same under the provisions of the 2016 Act.

Conclusion

173. For all the reasons set out above, I conclude that the applicant is not entitled to any of the reliefs sought.