

**THE HIGH COURT
JUDICIAL REVIEW**

**[2020 No. 74 JR]
[2022] IEHC 83**

BETWEEN
**JAMES BERNARD FLANNERY, JIM NOLAN AND PATSY KEARNS AS TRUSTEES OF
KEVIN'S GAA**
AND
AN BORD PLEANÁLA
AND
TEMPELOGUE SYNGE STREET GAA CLUB, DUBLIN CITY COUNCIL AND BARRY CARROLL
(NO. 2)
AND
**THE HIGH COURT
JUDICIAL REVIEW**

APPLICANTS
RESPONDENT
NOTICE PARTIES

[2020 No. 75 JR]

BETWEEN
DAVID O'SULLIVAN
AND
AN BORD PLEANÁLA
AND
TEMPELOGUE SYNGE STREET GAA CLUB
AND
**THE HIGH COURT
JUDICIAL REVIEW**

APPLICANT
RESPONDENT
NOTICE PARTY

[2020 No. 66 JR]

BETWEEN
BARRY CARROLL AND BPAC PROPERTY HOLDINGS (IRELAND) LIMITED
AND
AN BORD PLEANÁLA
AND
TEMPELOGUE SYNGE STREET GAA CLUB

APPLICANTS
RESPONDENT
NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 25th day of February, 2022

1. These three judicial reviews challenging a development on recreational open space lands in Crumlin involve a record-breaking cumulative total of 209 pleaded grounds, in statements of grounds running to 24,593 words.
2. That embarrassment of material necessitated an attempt to summarise the issues in a Scott Schedule which endeavoured to encapsulate the points discussed at the hearing. Any specific headings suggested by the parties during the formulation of the Scott Schedule were included in one form or another. But, not content with that, some of the applicants also attempted to launch generalised complaints that they wanted to be taken as relying

on everything in their papers, in a matter where there were thousands of pages of materials before the court. Ultimately, however, parties do have to assist the court if they want their issues addressed, and asking for headings is a reasonable requirement in such circumstances. As I say, any specific suggestions were incorporated in one shape or form. If a party can't even come up with a heading for any particular point then virtually by definition such a point can't be a main issue with which a decision-maker (the court in this instance) is obliged to expressly engage.

3. The 45 points in the Scott Schedule broke down as follows:
 - (i). 9 points which were either not ultimately sought to be made or pursued, or were the subject of a pleading objection;
 - (ii). 24 domestic law points; and
 - (iii). 12 European law points.

4. The final version of the Scott Schedule is as follows:

Points not made/pursued or that were objected to

	O'Sullivan Ground no. if any	Flannery Ground no. if any	Carroll Ground no. if any
1. That developer lacks title to the laneway	N/A	N/A	N/A
2. That the developer is not in a position to carry out the works that envisage alterations in footpaths	N/A	N/A	N/A
3. That there was a lack of clarity as to what documents are before the board	N/A	Not pursued	N/A
4. That the correction of the error regarding reference to the wrong European site was legally flawed	N/A	Not pursued	N/A
5. That the inspector's report is contradictory insofar as it states the lane is approximately 7m	N/A	N/A	E.59

wide but accommodates a development of up to 7.4m wide			
6. That there is not in fact room in the laneway to deliver the proposed width of the carriageway and footpath	N/A	N/A	E.59
7. That the drawings do not comply with art. 22 of the 2001 regs. in that part of the works envisaged (curving the footpath) lies outside the red lined area	N/A	N/A	N/A
8. That the inspector's report was unduly vague on the dimensions of the laneway or failed to deal with the applicants' measurements	N/A	N/A	E.54, 55, 59. Relies on O'Sullivan submission to ABP re 6.8 metre width at access junction with Crumlin Road
9. That if the Development Plan requirement regarding legal agreement to development on Z9 lands means that a condition to that effect should be imposed, then the decision is invalid because there was no such condition	N/A	Consequential on para 89, but not directly raised.	N/A

Other points (domestic law nos. 1-24, EU law nos. 25-36)

	O'Sullivan Ground no. if any	Flannery Ground no. if any	Carroll Ground no. if any
1. That the inspector/ board misunderstood that the entrance is not a funnel shape	N/A	N/A	E.54, 55

2. That the drawings regarding a funnel entrance are inaccurate/ misrepresentative insofar as they imply a curved entrance and/or an encroachment on neighbouring properties	N/A	N/A	E.54, 55, (supported by Aff. Of Barry Carroll §22)
3. That the developer's sightline calculations are incorrect due to obstructions	N/A	N/A	E.54, 55, 59
4. That the developer's sightline information is contrary to DMURS	N/A	N/A	E.51, 54, 55, 58, 59
5. That the developer's proposal on the width of the carriageway and footpath is contrary to DMURS	N/A	N/A	E.51,
6. That condition 3 is inoperable	N/A	N/A	E.56 - 59
7. That in relation to Z9 the board failed to address or satisfy the requirement for highly exceptional circumstances	N/A	N/A	E.25, E.30
8. That in relation to Z9 the board failed to address or satisfy the requirement for "need"	N/A	49, 85-104 (except struck through paragraphs.)	E.29, 31, 32, 33
9. That in relation to Z9 the board failed to address or satisfy the requirement that the development would serve the long term retention of the sporting use	N/A	49, 85-104 (except struck through paragraphs.)	E.31, 32
10. That in relation to Z9 the board failed to address or satisfy the requirement that	N/A	N/A	E.26, 29, 30, 32

only ancillary development is permitted			
11. That in relation to Z9 the board failed to address or satisfy the requirement that it is the development that must consolidate or retain the sporting nature of the lands	N/A	49, 85-104 (except struck through paragraphs.)	E.29, 30, 31, 32, 33.
12. That in relation to Z9 the board incorrectly considered the developer's financial situation	N/A	49, 85-104 (except struck through paragraphs.)	E.26, 28, 29, 30.
13. That in relation to Z9 the board failed to address or satisfy the requirement for the development to be limited	N/A	49, 99, 100, 101, 102	E.20, 23, 26, 30,31, 32, 33.
14. That in relation to Z9 the board failed to address or satisfy the requirement for the development to be one of in the sense of not setting a precedent that undermines the status of open space lands more widely	N/A	N/A	E.14, 15, 16, 23 (first sentence), 26, "open space" is an <i>overarching</i> issue – the title of 14.8.9
15. That in relation to Z9 the board applied the wrong test of facilitation	N/A	49, 85-104, especially 102	E.30 - 33
16. That in relation to Z9 the board failed to address or satisfy the requirement for a prior legal agreement with the planning authority	N/A	49, 85-104, especially 89	N/A
17. That the board failed to address or satisfy the objectives of Chapter 10 of the Plan	N/A	49, 85-104, especially 91-97	E.43 - 47

18. That the board erred in relation to the zone classification of parking provision	N/A	52, 105-121,	N/A
19. That the board failed to give reasons in relation to impact on existing access arrangements including garage door opening	E4, E8, E19	N/A	E.52
20. That the decision involves an error of fact in relation to the issue of 17% loss of open space	N/A	43, 53, 68, 101, 102, 104	N/A
21. That the decision fails to give reasons re ball impacts on the apartments	N/A	13, 51	N/A
22. That the decision fails to give reasons more generally and/or adequately engage with submissions	E8, E16, E17, E19	38-51 re Irish law (except excluded grounds), 54, 64-84 re Habitats (except excluded grounds)	E.31, 32, 33, 38, 39, 53, 55, 61.
23. That the decision fails to give reasons for disagreeing with the Council in particular on the issue of setting a precedent	E8, E16, E17	N/A	N/A
24. That insofar as reasons are advanced the decision is irrational	15, 17, 19	N/A	E.15, 23, 24, 25, 27, 30, 32, 38, 39, 42, 55, 58, 59, 61
25. That the process was flawed due to a failure to lodge an application for EIA screening	N/A	Not pursued	N/A

26. That EIA preliminary examination was improperly recorded	E8, E9, E11, E15	N/A	N/A
27. That the EIA preliminary examination wrongly failed to consider Annex III matters	E8, E9, E15 [However O'Sullivan applicant relying on Flannery pleas with Board agreement]	Not pursued	N/A
28. That there was a lack of reasons for the EIA preliminary examination decision	E8, E9, E11, E15	Not pursued	N/A
29. That there was a lack of reasons for disagreeing with the council on the need for EIA screening	E8, E15, E17	N/A	N/A
30. That the EIA preliminary examination decision was irrational	E8, E11, E15	Not pursued	N/A
31. That the decision fails to remove scientific doubt for AA purposes by reference to relocation of geese / ex situ habitats	E11, E13, E14	54, 55, 57, 64-84, especially 64-77	E.39, 40, 41
32. That the decision fails to remove scientific doubt for AA purposes by reference to lacunae regarding construction details	N/A	54, 55, 57, 64-84, especially 78-79	E.39, 40
33. That the decision fails to remove scientific doubt for AA purposes by reference to failure to address the Birdwatch submission	E13, E14	38-44 re Irish law, 64-84 re Habitats, especially 65, 69, 70, 80.	E.46.

34. That the AA was flawed by reason of failure to assess the pathway to the Ringsend wastewater treatment plant	N/A	64-84, especially 73-81,	N/A
35. That the AA was inaccurate because the inspector understated the loss of grassland	N/A	53, 64-84 (especially 53, 67, 68, 74),	N/A
36. That nets and poles were a compensatory rather than mitigatory measure that is impermissible for AA purposes.	N/A	64-84, especially 79	N/A

Facts

5. The matter concerns the proposed development of residential and sporting facilities at Templeogue Synge Street GAA club grounds, Dolphin Park. The lands are accessed by a gated laneway between 57 and 59 Crumlin Road, Crumlin, Dublin 12 (formerly known as 2 and 3 Rhandoon Villas).
6. The overall site is approximately 55 hectares of which 9.35 hectares (17%) would be devoted to the housing development. A further significant percentage of the lands will be removed from open space use and turned into car parking for example, meaning about a third of the site will be lost to its current open space use.
7. As is common in urban development in Ireland, our story begins in the Victorian era. According to a submission by Clerkin Lynch Solicitors for the applicant in Carroll, the houses in Crumlin Road were built in 1875, long predating the use of Dolphin Park as sports grounds. The laneway in question was part of the construction serving the purpose of providing access to the rear of the adjoining houses. It continues to serve that function today, supporting, if anything, a suggestion that the house owners are the ones with the superior, or at least equal, claim of title to the laneway should that become an issue.
8. The submission from Kevin's GAA Club to the board gave further historical details. The applicants in Flannery are trustees of Kevin's, founded in 1902, one of Dublin's oldest GAA clubs that has been associated with the south inner city. Founding members of the club included Harry and Gerry Boland, the latter having fought in 1916 and the War of Independence, becoming a founding member of Fianna Fáil and in due course a cabinet Minister. The submission states that W.T. Cosgrave, first President of the Executive Council, also played for Kevin's.

9. The club says that it has an unbroken record of playing in Dolphin Park since 1970, but has an association with the Dolphin's Barn area in general dating back to 1909 when the Gaelic League organised cultural events (Aeríochtaí) on Rutland Avenue on the site in question.
10. Solicitors for the applicant in Carroll have produced a lease dated 18th July, 1933 granted to one of the trustees of the Dolphin Association Football Club of lands "which said plot of ground and pavilion were entered from Crumlin Road by a passage situate between No. 2 & 3 Rhandoon Villas", implying that the laneway, crucial to the whole proposed development, was not itself the subject of the lease to the developer's predecessor in title.
11. The submission from Kevin's notes that as of 1937 Kevin's was playing in Synge Street Park, which was compulsorily purchased by the City Council in the 1940s. With those funds, the Christian Brothers of Synge Street purchased Dolphin Park shortly afterwards. The use of Dolphin Park as an active sports facility has remained unbroken ever since.
12. Kevin's state that they have been at the heart of this activity since then, serving a catchment area involving the eight parishes of Meath Street, Francis Street, James' Street, Whitefriars Street, Harrington Street, Donore Avenue, and Dolphin's Barn, Rialto. That area overall is home to in excess of 6,000 children and a total population of more than 50,000 people.
13. Kevin's use of the sports grounds provides sports for numerous schools including DEIS schools (Delivering Equality of Opportunity in Schools) that do not have sports fields. Large areas of the club's catchment are areas of disadvantage.
14. Kevin's describe themselves as the primary user and leading tenant of the sports grounds and say that the development proposal will jeopardise the use of the park as a sporting facility and would involve a permanent loss of a significant extent of green space. The effect of the development would be to cover a third of Dolphin Park with concrete and tarmac and to impact on other sports groups using the park.
15. According to the submission made by the applicant in Carroll, Kevin's "liaises with ten local schools to provide them with greenspace for games and training. These schools have no greenspace of their own. The developers and Templeogue [and Synge Street] GAA wish to profit financially from the exclusion of Kevin's Club by severely restricting their members, all children, use of the playing fields – purely for profit". I can note here that the notice party did claim that it was not seeking to make a profit for individuals within the club as result of the development. However an alleviation of the club's debts will presumably reduce personal financial jeopardy for the club's members and trustees, but whether one wants to call that personal profit may be a matter of taste.
16. In 2003, the notice party purchased the site from the Christian Brothers, but subject to a covenant to make payments out of any future sale.

17. A gate was relatively recently erected towards the back of the lane, but that does not prove very much. The gate was erected near the junction with the sports grounds themselves rather than at the junction with the road.
18. A planning permission was granted for a development on the site in 2006. That permission expired and the board refused an extension of time application in 2011.
19. According to the applicants, the notice party incurred massive debt as a result of the failed attempt to develop the site in the order of €1 million. The current development application is, therefore, tied into the notice party's attempt to pay off its debts.
20. Pre-planning meetings took place with Dublin City Council on 2nd July, 2018 and 26th October, 2018.
21. The formal planning application was made to the council on 9th April, 2019 involving 161 residential units, replacement of the clubhouse with a two storey building, car and bicycle parking, improvements to pitches including floodlighting, netting structures, a crèche and an ESB substation.
22. The developer stated in the application that it was the owner of the site. As noted above, insofar as that assertion includes the crucial laneway, it seems highly likely to be wrong on the basis of the materials that I have seen (maybe there are other materials to the contrary – but I haven't had my attention drawn to any such matters because the notice party decided not to defend these judicial reviews).
23. The developer also ticked "no" to the question of whether the works required an environmental impact statement or related to works within or close to a European site. In that regard I note that the form provided by Dublin City Council does not refer to "impact" on a European site, which is possibly a *lacuna* in the wording of that particular form that the council might perhaps consider rectifying.
24. The applicants all made submissions to the council. A submission was also made by Ms Oonagh Duggan on behalf of Birdwatch Ireland on 15th May, 2019 which dealt with, among other subjects, the impact on Light-bellied Brent Geese.
25. A planning report was prepared on 13th May, 2019 which recommended refusal.
26. The reasons for the refusal are instructive and it is probably worth quoting the conclusion section. Hopefully I can be forgiven a long quotation simply because it illustrates why the development was seen as problematic in a clearer way than I could attempt to achieve by paraphrase or summary.

"Overall the Planning Authority's main concern is the protection of the Z9 land bank. The lands in this particular location provide a valuable recreational facility for a wide catchment area and is the home to two GAA clubs the Templeogue and Synge Street GAA Club, and also widely used by other clubs and schools, including St. Kevin's Hurling and Camogie Club.

Parks Department in their report acknowledge that "the district in which the site of the proposed development already has deficits of green space, and this is acknowledged in DCC policies - including the Dublin City Development Plan and the City Parks Strategy." "The site is in an area of deficits of access to 'flagship' parks (distance is greater than 1 km), according to the analysis in the DCC Parks Strategy (p. 54)". In summary Parks Department recommend a refusal on grounds of protection of the City's green infrastructure.

The applicant has stated in their planning report that to fund the upgrades the Club is seeking permission for a once-off limited residential development on a small portion of the site, equating to only 17% of the site'. This figure however does not account for the other proposed uses on this site, including the club house with its associated 80 surface car parking spaces, and the crèche use. These uses together with the residential uses on the site would exceed the 17% stated in the report.

The Z9 zoning for these lands seeks 'to preserve, provide and improve recreational amenity and open space and green networks'. This is considered reasonable. Our Z9 zoned lands are a finite resource, and it is Dublin City's obligation to ensure that this resource is protected from unwanted urban encroachment. This would also represent a loss of our natural and semi-natural habitats in the city.

The Dublin City Biodiversity Action Plan 2015-2020 has as an overarching aim in the conservation of biodiversity within the city. Dublin City has a network of over 300 public parks, including North Bull Island and the Phoenix Park, which cover an area of 2000 ha. Many of these are multifunctional, and have historical, recreational and amenity uses.

As outlined in the Biodiversity Plan, Dublin City Council is the sole local authority for Dublin City, and has responsibility for a wide range of services, including business, community, housing, planning, roads, transport, recreation, culture, waste, water and environmental services. As such Dublin City Council must continue to create opportunities for communication and co-operation across its departments, and ensure that all decision-makers take cognisance in the first instance, of the City's biodiversity, and the statutory requirements for its protection.

Green spaces in a city provide great benefits to the environment. They filter pollutants and dust from the air, they provide shade and lower temperatures in urban areas. Urban Green spaces reduce the urban heat island (UHI) by providing shade and by cooling the air through the process of evapotranspiration. The amount of carbon dioxide in the atmosphere has increased by approximately 40% since humans began industrialising, resulting in a gradual warming of the planet over the past century. Trees and plants take carbon from the atmosphere, known as carbon sequestration. Green spaces also intercept and store water, reducing the amount of rainwater runoff.

Flooding is also a problem which the city experiences on a regular basis, both from coastal waters and during high rainfall periods. Impermeable surfaces, which are extensive within built up areas (roof, roads, pavements, surface car parking) produce unwanted water which is directed towards the sewer system. The volume of water runoff during high rainfall periods can exceed the capacity of the system to drain it effectively, resulting in flooding. Dublin's green spaces, such as the lands zoned Z9 help to alleviate the problem by providing permeable surfaces, thus allowing natural drainage as well as providing spaces to alleviate both coastal flooding and river flooding. One of the major contributory elements to the 'liveable' city is the quality and quantity of parks and open spaces. The City landscape being the accumulation of our entire open spaces, gardens and tree canopy, is a precious asset to Dublin, particularly in economic terms.

It is also noted from some of the submissions that Dolphin Park is used by Light Bellied Brent Geese which is a protected species, as their winter feeding grounds. No mention of this has been made in the information submitted with this application and no AA screening report has been submitted. This is not acceptable and in the absence of this information it is recommended that a precautionary approach should be taken. Parks in their report note that the landscape design strategy makes no reference to the geese or any acknowledgment of their usage of the site, and no accommodation for them is afforded.

Chapter 14 of the Dublin City Development Plan, Section 14.8.9 allows "*in highly exceptional circumstances, in order to serve the long term retention and consolidation of the sporting land use on the site, some limited once off development is open for consideration. Specifically, residential development shall not be permitted on public or privately owned open space unless exceptional circumstances are demonstrated.*"

It goes on to say '*where it has been demonstrated to the satisfaction that there is a need for ancillary development to take place in order to consolidate or retain the sporting and amenity nature of Z9 lands or an existing facility in a local area, some limited degree of (residential/retail) development may be permitted on a once-off basis and subject to the primary use of the site being retained for sporting or amenity uses.*'

The applicants have quoted the precedent set by the previous application over 13 years ago, under Reg.6255/04 which was granted by An Bord Pleanála PL29S 214318 in 2006. This comprised a scheme of 106 apartments, clubhouse, sports grounds and crèche. As part of Condition 2 of this permission the Board reduced the number of units to 100.

This planning permission was never implemented and should be noted that this was two previous development plans ago. It should also be noted that planning permission was refused for an extension of time in 2011 to extend application No. 6255/04X1 due to significant changes in the development objectives and standards

in the Dublin City Development Plan 2011-2017, the proposed development was considered inconsistent with the adopted height standard, where 4 storeys residential floors or below 13 metres is permitted. The grant of planning permission permits four 5 storey blocks and one 6/7 storey block which is inconsistent with the proper planning and sustainable development of the area. It was therefore recommended that the application for the extension of duration of Planning Permission be refused.

Having said this, Dublin City Council also recognises that there is a significant housing crisis within Dublin City which needs to be addressed. Appendix 2A of the Dublin City Development Plan 2016-2022 sets out the Housing Strategy for the City. Section 2.5.6 of Appendix 2A sets out the trends in zoned land. The 2012 Housing land availability return examined the amount of undeveloped land in Dublin City. It concluded that there were 440.01 hectares of land zoned and available for residential development. Based on a density level of 120 units per hectare, these 440.01 hectares of zoned land hold development potential for a total of 51,801 residential dwelling units. The total projected demand for residential dwelling units over the lifetime of the Dublin Housing Strategy is 29,517. Therefore in line with the statutory requirement from the Department of Environment, Communities and Local Government guidance document Development Plans — Guidelines for Planning Authorities there is sufficient land zoned to provide for housing for the period of the strategy and for more than the equivalent three years beyond the date on which the current plan ceases to have effect.

Having regard to the above, there is enough zoned land within Dublin City to provide for the amount of housing units required to provide for housing for the period of the strategy. Dublin City Council should be actively seeking to retain and protect its Z9 land bank in areas deficient of green space. It is considered that the development of 161 units or 17% of the Z9 Green land bank, in an area already deficient in open space, when taken together with the other uses on this site, would not constitute limited once off development and the applicant has not demonstrated 'highly exceptional circumstances'. This taken together with the other uses on the site for sporting uses and the crèche facility is considered excessive and would contravene the Z9 zoning objective for the site which is "to preserve, provide and improve recreational amenity and open space and green networks". The proposed development having regard to the mix and scale of the uses proposed at this location, and the reduction of green network at this location which already has deficits of green space, it is considered that the proposed development would seriously injure the residential amenities of property in the vicinity would not comply with development plan standards in relation to the zoning and Policy GI1 which seeks to develop green infrastructure networks through the city, and would be contrary to the proper planning and sustainable development of the area. The proposed development and the precedent this would set for similar Z9 lands would lead to the gradual erosion of the green network in the city which would seriously injure the residential amenities of future populations and be contrary to the proper planning and sustainable development of the area.

There is also concerns about the proximity of the residential blocks to the playing pitches, in terms of noise, light spill and also potential damage that could be done to windows, balconies, and people from hurling balls & sliotars etc. There is some netting indicated in front of the blocks which is 12 metres high but I am not convinced that this would be sufficient, or whether sufficient space has been allocated around the proposed pitches for visitors and spectators watching the games.

Roads and Traffic Division in their report also had a number of concerns with regards to the proposed development and recommended a refusal.

A large number of objections have been submitted from local residents in the area, as well as residents groups, and also from members of the teams and clubs that use these grounds, and also from the nearby schools. A wide variety of issues were raised, including biodiversity and the presence of Light Bellied Brent Geese who use Dolphin Park for winter feeding grounds, the lack of sufficient information submitted with the application with regards to an AA screening report, the importance of these pitches to the wider community including all the schools and clubs that use these grounds on a regular basis. A large number of the objections also had concerns with regards to traffic related issues and the inadequacy of the entrance to facilitate the traffic generated from this development. Issues were also raised in relation to the impacts on property from construction related works and how the existing pitches will remain open during construction. Drainage and Flooding issues were also raised, and also the scale and bulk of the apartments proposed, and the incompatibility of the two uses in close proximity to each other. The observations were summarised in greater detail above. The Planning Authority has had regard to these observations. It should also be noted that there were very few submissions in favour of this development.

The Planning Authority would actively encourage the sporting uses on this site, and in this regard the Planning Authority would support the provision of the upgrading the pitches and a new clubhouse at this location, subject to the protection of the residential amenities of surrounding properties being protected.

However in light of the reservations expressed above it is recommended that planning permission be refused.

13) Recommendation

It is recommended that planning permission be refused for the following reasons:

1. The applicant has not adequately demonstrated to the satisfaction of the Planning Authority that a development comprising of 161 residential units or 17% of the site area on lands zoned Z9, taken together with associated creche facility, new club house and associated car parking, would constitute some limited once off development. The proposed development by reason of the scale and mix of the uses proposed at this site, and the loss of the City's green infrastructure, in an area already

deficient in green space, would be contrary to development Plan Policy GI1, and would result in an increased amount hard standing in this Z9 landbank. This by the precedent which it would set for similar Z9 lands around the City would be at variance with the Z9 zoning objective which seeks preserve, provide and improve recreational amenity and open space and green networks. The proposed development would thereby seriously injure the residential amenities of property in the vicinity and would be contrary to the proper planning and sustainable development the area.

2. The proposed development, having regard the scale and mix of uses on the site accessed via a narrow substandard laneway would give to serious conflict between vehicles, pedestrians and cyclists. As such, the proposed development would endanger public safety by reason of traffic hazard and would therefore be contrary to the proper planning and sustainable development of the area.

3. The proposed development which makes inadequate parking provision for the scale mix of uses proposed on site would generate overspill parking onto a heavily trafficked road and would adversely impact the operation of the existing bus lane and the future operation of Bus Connects Services and would therefore be contrary to the proper planning and sustainable development of the area.”

27. The planners’ position regarding environmental impact assessment (“EIA”) was that there should have been EIA screening. However, the planning department did not recommend pausing the process to seek such screening, presumably because refusal was being recommended anyway.
28. The council agreed with that recommendation and refused permission on 5th June, 2019, the reasons given reflecting those in the planning report set out above.
29. The notice party appealed on 28th June, 2019 and the applicants again made submissions as did Birdwatch Ireland.
30. The developer then responded to those submissions on 20th August, 2019 *via* a report prepared by Stephen Little & Associates.
31. In September 2019, the inspector prepared an EIA preliminary examination document indicating that screening was not required. A number of points were made about this, although not specifically the point that it was prepared prior to the receipt of all submissions.
32. The applicant in Carroll replied to the Stephen Little document on 1st October, 2019.
33. The inspector then prepared a report dated 8th October, 2019. EIA as noted above was ruled out at the preliminary examination stage so we did not even get the screening stage. Appropriate assessment (“AA”) was ruled in because of impacts that would be caused by unmitigated effects. However, following consideration of mitigation, the inspector concluded that the development would not adversely affect any European site in view of the sites’ conservation objectives.

34. In the inspector's report, grant of permission was recommended subject to 15 proposed conditions.
35. The board directed on 22nd November, 2019 that permission should be granted generally in accordance with the inspector's recommendation.
36. The formal board order issued on 26th November, 2019. That incorrectly referred to the wrong European site in that it mentions the Rye Water Valley/Carton SAC (Special Area of Conservation).
37. Pursuant to s. 146A of the Planning and Development Act 2000 the board amended its order on 4th December, 2019 by deleting reference to the wrong SAC on the basis that this was a clerical error. No submissions were invited in relation to this process.
38. The statements of grounds were filed in January 2020 and Meenan J. granted leave on 3rd February, 2020 in all three cases.
39. The notice party brought a motion on 8th September, 2020 to enter the cases in the Commercial List, which was granted.
40. Three other notable events occurred prior to the hearing.
41. Firstly, in *Flannery v. An Bord Pleanála (No. 1)* [2021] IEHC 140, [2021] 3 JIC 1216 (Unreported, High Court, 12th March, 2021), I dismissed an application to compel replies to interrogatories.
42. Secondly, the applicants in Flannery claimed on behalf of Kevin's Club that they were being penalised contrary to art. 9 of the Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (Denmark) on 25th June, 1998), for bringing the case, due to having their available hours in the sports grounds allegedly restricted by the notice party.
43. Any such penalisation, if established, would naturally be a matter of very serious concern, which isn't particularly alleviated by the context where a broader pattern has been emerging in association with a number of cases in recent times where applicants are apparently being subjected to unwarranted criticisms or even incitement to penalisation, merely for the legitimate exercise of legal rights in a *bona fide* manner.
44. The Aarhus Convention is not some abstract document of interest only to academics and international lawyers. The Convention is an integral part of EU law, and any attempt to penalise or incite the penalisation of applicants for exercising their legal rights raises justiciable issues that would be of concern not just to the Irish courts but to European institutions. That latter aspect is demonstrated by the recent views expressed by the European Commission (Environment Ireland Conference, 18 January, 2022, remarks of Aurel Ciobanu-Dordea), which to an extent reflect some general concerns I have previously articulated that have arisen out of a number of recent cases, albeit that the specifics are of course very much subject to submission and debate in any given case.

45. Fortunately, however, I did not have to resolve the question of whether Kevin's were being unlawfully penalised because the parties managed to settle their differences on that particular issue.
46. The third notable development was, as mentioned above, that the notice party decided not to proceed further with the development and withdrew from the proceedings. However, that did not render the proceedings moot because the permission, if unchallenged, would stand and enure for the benefit of any successor in title. On that basis the actions proceeded anyway, albeit without the notice party being there to dispute the applicants' contentions.
47. One further point worth making at this juncture is that in the proceedings considerable after-the-fact expert evidence was introduced by the applicants regarding points that were not specifically made to the board at the time. In accordance with *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021), I have generally not regarded any new expert evidence as permissible, save insofar as it comes within a recognised category such as by drawing attention to matters that it is contended should have been evident to the board on the face of the material.

Points not made or pursued or subject to a pleading objection

48. Working through the Scott Schedule, I will start with the first category of points that were not ultimately sought to be made, or that were made and objected to on pleading grounds.

Lack of title

49. No issue regarding the developer's lack of title to the laneway was raised in the proceedings save as was relevant to other headings.
50. While the title of an applicant for permission is normally not something that an officious bystander can require a decision-maker such as the board to investigate (*Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 450 para. 185), the position of a person who claims an equal or greater interest in the land is quite different and that is certainly a point that such owner is entitled to make and pursue with a planning decision-maker.
51. On the basis of the title history identified, it seems highly unlikely that the developer has title to the lane or at least any greater rights than the other adjoining landowners. On that basis this is a development that could never be carried out, because the whole scheme is totally dependent on a significant reconfiguration of the lane.
52. One co-owner or co-user of a property is not entitled to take it over and redesign it over the objections of other co-owners. In such a situation it seems puzzling that the matter has got this far, based on an (apparently incorrect) assertion in the planning application that the notice party was the owner. That would have been a legitimate matter for the board to have been concerned about and for these proceedings to have encompassed had the matter been pleaded. However, the fact that it was not pleaded possibly does not matter ultimately because in the event of any permission being granted, the title problem would be a fatal objection to the works ever being carried out and such works could be

enjoined by separate civil proceedings (assuming the notice party can't demonstrate title by that stage).

The developer is not in a position to carry out the works

53. The development envisages a significant alteration of the footpath by the creation of a raised table and a kerbed footpath for access. Much of that is outside the red-lined area of the application and outside the control of the applicant for permission.
54. Insofar as the question of incorrect drawings is concerned, that issue is pleaded, but the broader issue of principle as to making a proposal for development which the developer is not in a position to carry out as it falls outside its lands, falls outside this plea.

Lack of clarity as to what documents were before the board

55. The applicant in Flannery did raise an issue in pleadings complaining that there was a lack of clarification about what was before the board, but this issue was not pursued.

Correction of error in board order

56. The applicant in Flannery also complained about a legally flawed operation of s. 146A of the 2000 Act in correcting the clerical error in the original board order, but this point was also withdrawn.
57. A suggestion was made in submissions of this error being indicative of a lack of care taken by the board generally, though I wouldn't read too much into that. Everybody makes typographical errors from time to time, and the more you write the more errors you are going to make.

Contradiction in inspector's report

58. At para. 7.7.1, the inspector's report says that the laneway is "approximately 7m wide" whereas it also recommends a development which is up to 7.4m wide. This was in the context of a specific submission that the laneway, at its entrance, was only 6.8m wide.
59. In the context of discussion involving measurements to one-tenth of a metre, the reference to the laneway being "approximately" 7m wide can only mean something approximately between 6.9m and 7.1m. It is very hard to see how a finding that a 7.4m development can be fitted into a fixed space that is "approximately" 7m wide is not contradictory. However, this point was not specifically pleaded.
60. The applicant in Carroll says that this is included in ground 59, but I am afraid I don't agree. The question one has to ask oneself is whether the point is acceptably clear from what is pleaded, and I don't think so here, although that does not take away from the other points regarding the laneway that *are* pleaded.

Argument that there is not as a matter of fact room for the development in the laneway

61. Nobody has specifically pleaded that there is not as a matter of fact room in the laneway to deliver the promised width of the carriageway and footpath coming to between 7m and 7.4m.

62. The complaints made centre on the board's reasoning on the issue and breach of relevant design standards. It is not specifically pleaded that the inspector erred on the facts in impliedly finding that there was room for the development to be constructed in the laneway.
63. Insofar as the applicant in Carroll contends that this is covered by ground 59, I'm afraid that I don't think the point is acceptably clear from that ground.

Non-compliance with Planning and Development Regulations 2001

64. In the drawings submitted, part of the works envisaged, namely the kerbing of the footpath, lies outside the red-lined area. It was not specifically pleaded that this involves a breach of art. 22 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). Article 22 on one view implies that the works must be within the red-lined area so that drawings beyond that area must be purely representative of the current situation rather than the current situation as modified by further works. However, I don't need to get into that in the circumstances.

Unduly vague inspector's report

65. The issue of whether this development can actually be accommodated within the laneway was a crucial one before the board but the arguable lack of clear findings in the inspector's report was not specifically pleaded.
66. One can certainly see an argument that the inspector's report was unacceptably vague on the crucial issue of the dimensions of the laneway in that it failed to specifically deal with the submission made to the board by the applicant in O'Sullivan that the width of the laneway at the access point with the footpath at Crumlin Road was only 6.8m, whereas the minimum width of the development proposed is 7m.
67. In addition, the relevant design standard DMURS (Design Manual for Urban Roads and Streets), envisages that the width of footpaths should not be shortened at access points, implying, therefore, that the minimum standard should be kept throughout the whole of the constructed paths. While the applicant in Carroll says that the vagueness of the report or its failure to deal with submissions on the measurements in particular is pleaded at grounds 54, 55 and 59. I'm afraid I don't agree. Those grounds deal with a basically different point, which is the funnel shape of the entrance. Hence, I'm afraid that this point falls outside the scope of the pleadings, although perhaps that's something of a line call. Still, it highlights the point that quantity of grounds doesn't equate to covering all key issues, which need to be identified to a level at which they are acceptably clear to respondents and indeed the court.

Lack of a condition requiring a legal agreement with the council

68. The wording of the Z9 zoning, which applies to the lands in question, refers to the need for a legal agreement with the planning authority. The centre of gravity of the applicant's submission in Flannery was that such an agreement was a prior condition for the grant of permission. The alternative reading to that argument would be that a legal agreement would not be a prior condition for the grant of permission, but would be a necessary condition in the event of permission being granted.

69. When the issue was raised as to whether this alternative argument was part of the applicants' case, the applicant in Flannery submitted that this was consequential on ground 89, but accepted that it was not directly raised. Unfortunately, I don't think it is consequential on ground 89, which pins all the applicants' colours to the mast of this being a precondition. The alternative argument, that it envisages a necessary condition in the event of permission being granted, simply wasn't pleaded.

Domestic law issues

70. As the foregoing is sufficient to dispose of the first nine points in the Scott Schedule, I now turn to the balance of the domestic law points, which essentially fall into two broad categories: firstly, material contravention of, or misinterpretation of, the development plan in its various aspects, particularly chapter 8 regarding movement and transport, chapter 14 regarding land use zoning, chapter 10 regarding green infrastructure and chapter 16 regarding development standards; and secondly, general administrative law points, particularly reasons, errors of fact and irrationality.
71. There is considerable cross-over between these various headings, and lawyers will be familiar with the phenomenon that any one point can be viewed from multiple angles. That concept can have a tendency to lead to parties unhelpfully making the same point in various reformulations. So in order to avoid that, I have assigned the various points to the heading that seems most appropriate to me, although it can be taken that in considering a point under any one heading I have also considered such other aspects of it, such as its general administrative law dimensions, as seem appropriate.
72. I turn then to the specific headings, but I might note at the outset that while the board has power to override a development plan on certain conditions under s. 37 of the 2000 Act, that power was not exercised here. The board's case is really dependent on having correctly interpreted the development plan.

Inspector's alleged misunderstanding of traffic issues regarding entrance to development

73. Chapter 8 of the development plan lays down policies in relation to movement and transport. Objectives MTO44 and MTO45 are particularly relevant. The latter objective sets out a requirement to implement best practice in road design as contained in statutory guidance and in the DMURS "the use of which is mandatory".
74. In grounds 54 and 55 of Carroll, it is in effect suggested that the inspector misunderstood the fact that the existing entrance is not funnel shaped, and calls this a "substantial error of fact". The error is said to derive from "incorrect and misleading information" in the drawings submitted by the developer.
75. If the allegation is that the inspector did not understand that the existing entrance is at a right angle, I am afraid there is no evidence for that. The inspector had the benefit not just of photographs, but also of a personal visit to the site, and it seems a stretch to think that there was a misunderstanding as to what the current access arrangement was.

Inaccurate or misrepresentative drawings

76. Insofar as the applicant in Carroll pleads that the drawings regarding a funnel entrance are inaccurate or misrepresentative insofar as they imply a curved entrance or an encroachment on neighbouring properties, it is true that Mr Carroll did complain about the funnel shape of the laneway on the developer's drawings in his submission to the board, although the wording of his submission possibly overstates the degree of impact on adjoining lands as the developer's reply pointed out.
77. Overall, in the light of the totality of the material I think it was open to the board to read the developer's drawings as representing the final completed state of the works, including the works they envisaged to footpaths and to a raised table at the junction with the footpath, rather than as representing the *de facto* situation on the ground at the moment. That is of course assuming rather than deciding that the developer was legally entitled to submit drawings that did not represent the *de facto* situation, but as noted above I don't think that that point comes within the pleadings.

Incorrect sightline calculations

78. The developer submitted that there were sightlines of 49m in both easterly and westerly directions when emerging from the laneway onto Crumlin Road. In contrast to that, plate D3 of appendix D to the Kevin's submission of 13th May, 2019 shows virtually no visibility to the left where a car is parked in line with the post at the entrance to the lane. Furthermore, that sightline is not assisted by the utilities pole at the left-hand pillar. The implication is that a car would have to poke well out into the footpath to gain any visibility.
79. Leaving aside the fact that a photograph of the current situation does not take into account the enhanced visibility of the raised table to be constructed at the junction, it seems to me that the applicants' argument is based on the false premise that the sightlines are to be calculated from a position where the front of a vehicle is in line with the pillars at the entrance to the gateway.
80. The developer's calculations are based on sightlines from a slightly further forward position, albeit one where the vehicle then encroaches into the footpath. Whether that is acceptable mode of calculation is dealt with under the next heading. But insofar as the allegation is that the calculations are inaccurate or misrepresentative, I don't think that they are, on their own terms.

Allegation that sightline information is contrary to DMURS

81. At para. 4.4.5, DMURS sets out how, what are called, "visibility splays" are to be calculated. These depend on what is called "X distance", which is "the distance along the minor arm from which visibility is measured". The maximum X distance is 2.4m, but "in difficult circumstances this may be reduced to 2.0 m where vehicle speeds are slow and flows on the minor arm are low."
82. Essentially the developer's material is premised on the argument that it was entitled to use an X distance of 2.0m, thus providing the 49m visibility in either direction while at the same time complying with DMURS.

83. Admittedly, the developer did not spell out in material exactly how the exception to the 2.4m X distance was satisfied; but, as against that, the applicants in their submissions, while objecting to the sightlines calculations, did not specifically say how or why the DMURS standard *was not* complied with. Therefore, there simply wasn't anything making that particular sentence in para. 4.4.5 of DMURS an issue requiring specific board reasoning.
84. The board referred in submissions to *Weston Ltd. v. An Bord Pleanála* [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010) at para. 11. Insofar as it might have been submitted that that judgment supports the argument that if there is *any* material on the file that could justify the decision, then that is sufficient to dispose of a challenge, I would not accept that as an entirely accurate interpretation of the particular judgment or indeed of the current state of the law. It is only a presumption that if there is something before the decision-maker that justifies the decision then the decision-maker relied on that something. Such a presumption can be displaced, although it is not necessarily displaced just because the decision-maker does not specify by way of detailed reasons exactly what it did consider under each heading.
85. If an applicant thinks that there are grounds to displace such a presumption, then there are mechanisms to do so, including seeking to enforce the duty on public bodies to assist the court by giving a full and frank account of the decision-making process. If an applicant fails to activate those procedures, it may be deprived of a basis for making the complaint.
86. On the one hand, one would not want to incentivise cross-examination and discovery and so forth, but that cannot be anything remotely like an automatic option because certain hurdles would have to be overcome first, and cross-examination and discovery would be unlikely to be the first port of call in the event of a dispute.
87. But ultimately if it can be established that the decision-maker *in fact* adopted an incorrect reasoning process, whether factually or legally, the outcome will not normally be upheld just because the decision-maker *could have* adopted a different and lawful reasoning process but didn't actually do so (unless perhaps there could only have been one outcome anyway – although that happens less often than one might expect).
88. *Weston* is only about situations where there is nothing to the contrary. At the risk of stating the obvious, simply because Charleton J. only mentioned decisions being quashed for improper purposes or bad faith, an applicant is not confined to such grounds if she can show that the reasoning was otherwise legally or factually erroneous. Administrative law has moved on a lot in recent decades, and improper purpose and lack of good faith are among but by no means the only grounds of modern judicial review (see for example *Efe (A Minor) and Others v. Minister for Justice, Equality and Law Reform and Others* [2011] IEHC 214, [2011] 2 I.R. 798). In fairness, the board accepted that.

Alleged breach of DMURS regarding width of the carriageway and footpath

89. It was also argued that the actual approved widths of the carriageway and footpath contravened the standards in DMURS. The required width of the footpath depends on the

classification of the level of footpath as being low or moderate, and in relation to the road as to whether it is to be described as a local road.

90. According to the board, the applicable DMURS standard is 1.8m for the footpath and 5m for the carriageway, totalling 6.8m, which as a matter of fact could be accommodated even assuming that the mouth of the laneway is only 6.8 m.
91. According to the developer what they will deliver is 5m to 5.2m of carriageway and 2m to 2.2m of footpath, so a final outcome of between 7m and 7.4m wide, which therefore could not be accommodated if the mouth of the lane is 6.8m.
92. Leaving aside the question of whether there is actually space for this development, which I have addressed above, everything under this heading then turns on whether this is a local road with a low level of footfall. On one view, the board's approach was slightly contradictory in that it justified reduced parking provision on the site on the basis that the site was not car-dependent. That does not necessarily support the conclusion that there would be low footfall.
93. The response to Mr Carroll's observations by DBFL Consultants says specifically that the laneway has been classified as a "local street". Insofar as it is to that extent explicit or otherwise implicit in the developer's material that the correct standard is for a local street and a lower activity of pedestrians, and despite the board's views on parking, that is not so manifestly flawed on its face that the board could not have accepted it if uncontradicted, so it would have been incumbent on the applicants or somebody else to challenge the developer's methodology in a more granular way.
94. As with the sightlines issue, the applicant just did not do that at the relevant time, being the time the appeal was before the board. Thus, it again becomes an *ex post facto* point at this stage and not one on which the applicants can succeed in judicial review.

Alleged inoperable condition 3

95. A subsidiary point is made as to the inoperability of condition 3, which requires compliance with DMURS. However, I don't think that that arises as a separate point having regard to the foregoing.

Z9 zoning

96. At the risk of stating the obvious, the different zonings in the Dublin City Development Plan involve a spectrum of permissibility in relation to residential development, ranging from the highly permissive to the exceptional or precluded. In that context, the Z9 zoning for "Amenity/Open Space Lands/Green Network" involves a very high level of protection against applications for residential development as compared to other zonings. Hence the City Council's concerns that the development would set a precedent.
97. The wording of the Z9 zoning is as follows as set out at para. 14.8.9 of the development plan:

"Land-Use Zoning Objective Z9:

To preserve, provide and improve recreational amenity and open space and green networks.

This zoning includes all amenity open space lands which can be divided into three broad categories as follows: Public open space Private open space Sports facilities in private ownership.

This zoning includes all amenity open space lands which can be divided into three broad categories as follows:

- Public open space
- Private open space
- Sports facilities in private ownership

The provision of public open space is essential to the development of a strategic green network. The chapters detailing the policies and objectives for landscape, biodiversity, open space and recreation and standards respectively, should be consulted to inform any proposed development (see Chapter 10 – Green Infrastructure, Open Space and Recreation, and Section 16.2 – Design, principles and standards). Generally, the only new development allowed in these areas, other than the amenity/recreational uses, are those associated with the open space use.

The continuation of sports clubs and facilities to enhance sustainable city living is recognised. In highly exceptional circumstances, in order to serve the long term retention and consolidation of the sporting facility in a locality and to secure the primary sporting land use on the site, some limited once off development is open to consideration. Specifically, residential development shall not be permitted on public or privately owned open space unless exceptional circumstances are demonstrated.

In certain specific circumstances where it has been demonstrated to the satisfaction of the planning authority that there is a need for ancillary development to take place in order to consolidate or retain the sporting and amenity nature of Z9 lands or an existing facility in a local area, some limited degree of (residential/retail) development may be permitted on a once-off basis and subject to the primary use of the site being retained for sporting or amenity uses.

In all cases height shall relate to the prevailing height in the vicinity. In all cases the applicant shall submit a statement, as part of a legal agreement under the Planning Acts, demonstrating how the sports facility will be retained long term on site.

In all cases the applicant shall be the sports club owner/occupier.

Open space is any land (active or passive use), including water, whether enclosed or not, on which there are no buildings (or not more than 5% is covered with buildings), and the remainder of which is laid out as a garden/ community garden or for the purposes of recreation, or lies vacant, waste or unoccupied. It also includes school

playing fields, playgrounds, urban farms, forests, allotments, and outdoor civic spaces.”

98. This wording involves a number of specific requirements to be satisfied before residential development on Z9 lands could be considered, and the crux of the applicants’ case is that such requirements were either not addressed or not satisfied, or both.

Failure to address or satisfy the requirement for highly exceptional circumstances

99. The development plan is clear that development on the Z9 lands could be open to consideration only “in highly exceptional circumstances”. The board submits (conveniently from its point of view) that “highly exceptional circumstances” is not a legal test, just a description of what follows. I don’t accept that argument. It is manifest from the development plan that Z9 lands warrant a high degree of protection. In that context, the much more natural reading is that the requirement that development can only be open to consideration in highly exceptional circumstances is indeed a legal test. There is no language making that somehow non-justiciable or merely descriptive.
100. Repeated emphasis was placed by the board in submissions on the existing facilities being sixty years old and there being a lack of dedicated facilities for women. But the reference to the lack of dedicated *women’s* facilities is tendentious. There are no dedicated facilities for men either. As the applicant in Flannery points out, that is not equivalent to saying that there are no facilities for women or that women do not use the grounds, simply that women’s teams and men’s teams use the facilities sequentially as opposed to simultaneously. (This is the fallacy of selective presentation – anything can be made to look unacceptable if only some of its aspects are mentioned. Instances of alleged “weird laws” often fall into this category. For example – it can be said that Ireland has a law that obliges women to wear masks in hospitals on Tuesdays. The absurdity is provided by the selectivity, not the law itself, which also contains equal obligations for men and for other days of the week. The “no women’s facilities” argument here is at the same intellectual level.)
101. All that said though, a development to upgrade the sports facilities might in principle be permissible under Z9, but that is in no way relevant to the question of selling off part of the open space for the commercial development of apartment blocks.
102. The inspector here and the board simply did not engage with the highly exceptional circumstances test and demonstrated no such highly exceptional circumstances. The fact that the developer is in financial difficulties having spent approximately €1m on a previous housing planning application that it was not allowed to extend does not make this a case of highly exceptional circumstances. The highly exceptional circumstances have to relate objectively to the planning situation on the ground, not to the finances of any particular developer. We will discuss that further below. Anyway even if it was relevant, a developer being in financial difficulty is not in itself exceptional, let alone highly exceptional.

Failure to address or satisfy the requirement for need for the development

103. The development plan is clear that there must be “a need” for the development. Need involves a requirement and again that means an objective planning requirement, not a

particular financial want on the part of a particular planning applicant who has got themselves into debt or has insufficient funds. As with the need for highly exceptional circumstances, this legal obligation to address and be satisfied with their being a "need" in the planning sense simply was not properly addressed let alone satisfied by the board.

Failure to address or satisfy the requirement for serving the long term retention and consolidation of the sporting facility

104. The standard in the development plan is that the development must be to "serve the long term retention and consolidation of the sporting facility in a locality and to secure the primary sporting land use on the site" as well as "to consolidate or retain the sporting and amenity nature of Z9 lands or an existing facility in a local area".

105. The board's interpretation is that if the development secures the future of a particular applicant club, that satisfies the requirement. But that is a misreading and misinterpretation of the plan. The condition for development imposed by the Z9 zoning is that the development in planning terms serves the long term retention and consolidation of the sporting facility, not secures the future of a particular club or sporting organisation that might have inadequate funds. The board fundamentally misinterpreted the plan under this heading and failed to address or satisfy the precondition for development as set out in the plan.

Failure to address or comply with the requirement that only ancillary development is permitted

106. As is clear from the wording of the plan, it is only "ancillary development" that is envisaged in Z9 lands. The board failed to address, still less, comply with this requirement. The selling off of part of lands for a commercial housing development does not constitute development ancillary to sporting, amenity or green network uses if the lands to be removed from such sporting uses constitute a significant percentage of the site. To construct housing on 17% of the site as well as to remove something around a third of the site overall from existing sporting uses goes so far beyond the concept of ancillary development as to manifestly fall outside the provision for ancillary development in the plan.

Misinterpretation of the requirement that it is the development that must consolidate or retain the sporting and amenity nature of the lands

107. It is clear that the board misunderstood the requirement of the plan that it is *the development itself* that must consolidate or retain the sporting and amenity nature of the lands or an existing facility, as opposed to the monies raised by the sale of land. The wording of the plan, particularly in the context of its clear intention to protect Z9 lands, is that the development itself must serve the purposes of consolidating or retaining the use of lands - not the profits generated by the development or the enhanced value of the land with the permission being applied for.

108. The board in effect incorrectly took into account the notice party's intended use of the money, which in effect involved irrelevantly considering the financial circumstances of the particular applicant for permission. That takes us to the next heading of considering irrelevant circumstances.

Incorrectly considering the irrelevant circumstances of the notice party's financial situation

109. The financial situation of a developer is irrelevant to the objective process of the grant of planning permission that enures with the land. That principle applies to Z9 lands as it applies to any lands. Thus, the developer's information regarding its financial situation should have been rejected out of hand. That was not done. The inspector said that the "detailed" financial status of applicants is not a planning consideration, but it is inescapable from his actual approach and the board's interpretation of the Z9 zoning that the financial situation of the developer was considered at a broad level.
110. The planning application report submitted by Stephen Little & Associates on behalf of the developer includes extensive material on the financial context. This contaminated the process overall. The developer's intention was to sell the area on which a permission for 161 apartments was to be granted and to use the proceeds, net of payment to the Christian Brothers, in order to pay off its debts and fund its activities.
111. The planning application report says that the final sale price will depend on the number of apartments which the planning decision-maker permits. If that was relevant, which it wasn't, the board would have had to know the terms of that agreement before granting permission.
112. Unfortunately, the inspector's report and the board's approach were contaminated by a legally inappropriate consideration that the permission would facilitate the development of the lands for sporting purposes, a facilitation that could only arise through a proposed sale that was tied in to the developer's financial situation.
113. Overall, it was illogical for the board to have taken into account the club's financial strategy or land sale plan, even at the broad level. The flaw in that approach was pithily pointed out by the applicant in Carroll as meaning that an impecunious mismanaged club that ran into debt would get permission, whereas a prudently managed club without debt and with sufficient resources would not. That would be a nullification of the objectivity that must be inherent in the concept of proper planning and sustainable development. Mr Bumble's analysis in Charles Dickens' *Oliver Twist* (London, Richard Bentley, 1838) comes to mind: "if the law supposes that, ... the law is an ass".
114. Contrary to some views, that is not a mission statement for judges. Rather it is the job of the courts to prove such sentiments wrong. The board's approach leads to absurdity anyway but what takes it to the level of the perverse is the information indicating that the debts which the developer is seeking to pay off arose from the self-inflicted financial difficulty of having attempted to organise a previous sell-off of lands with a permission that it couldn't extend. To endorse the board's logic here would be to create a situation where the own-goal of a failed planning exercise effectively creates an entitlement to a positive grant of a new permission in order to replenish the coffers or maybe even to save the club or its trustees from bankruptcy. A court that went down that road would need to propose Mr Bumble's elevation to the Pantheon of Jurisprudence alongside Aristotle, Aquinas, Rawls, Dworkin and Posner.

Incorrect consideration of and failure to satisfy the requirement that the development be limited

115. The development plan only permits "some limited degree" of development on Z9 lands. By no stretch of the imagination could three six-storey apartment blocks involving 161 units be deemed to be limited development. Unlike the "ancillary" requirement which is judged by reference to the relative degree of impact on the particular lands, the "limited" requirement is something that is to be determined objectively in itself and not by reference to the percentage of the total site area taken up.
116. The inspector thought that density and height were irrelevant, which had the logical effect that if height restrictions in the area were more permissive, one could simply build tower blocks as high as the height restrictions allowed and continue to call that "limited". But the correct way to interpret "limited" is limited to something modest in scale.
117. The inspector also misconstrued the plan by translating "some limited degree" of development into something that was "limited in the degree of impact it has on the primary recreational use". Like the inspector's test of considering only the percentage of site area involved, none of this is to be found in the development plan.
118. Thus the inspector and board misunderstood the plan by adopting a relative rather than an objective interpretation of the term "limited".

Failure to address or satisfy the requirement that the development be "on a once off basis"

119. The Z9 zoning is clear that a development on Z9 lands can only be permitted "on a once off basis". From the City Council's decision, what was of primary concern to them was the development setting a precedent, and I think that where the development plan speaks of development "on a once off basis", it means development that, by reason of one-off and non-reproducible circumstances, is one-off in an overall sense and cannot be deemed to set a precedent in other locations.
120. If it simply means that permission is to be granted just for the particular application concerned, then unfortunately it means nothing because every application for planning permission is an application for particular development on a once-off basis (at least insofar as the development involves works rather than uses). I don't think that the development plan should be construed on such an important matter (or on any matter) in a way that renders it effectively meaningless.
121. The logical meaning of one-off in this context means a development that by reason of the particular planning circumstances in a particular site is not something that will trigger copycat applications in other green spaces or that could be relied on as a precedent in such other green spaces. The reality is, however, that if this development is permissible, it would be a precedent that could rapidly erode the city's green network. The logic being that the owner of the site needs money, the money (or some of the money) will be used to improve sporting facilities, the grant of permission for residential development will give the owner money, and therefore, permission for residential development should be granted. That logic (if I can be forgiven for simplifying by omitting any possible legalistic qualifications

that don't fundamentally change the dynamic here) would apply to virtually every privately owned piece of green space. Thus, if this particular decision is allowed to stand then the city's green network is potentially under mortal threat.

122. It seems to me that that is not what the council envisaged when they referred to the development on a once-off basis. In failing to understand and appreciate that, the board has fundamentally misinterpreted the development plan. The question of setting a precedent is also relevant under the heading of reasons, and I will return to that later.

The board adopted the wrong test

123. As noted above the inspector (inspector's report para. 7.2.4) and necessarily the board adopted the incorrect test of whether the development "facilitates" the improvements to the sporting facilities. But facilitation is not the test in the development plan. Therefore, approaching the issue from an alternative point of view, the board erred in law by asking itself the wrong question.

Alleged requirement for prior legal agreement with the planning authority

124. I have noted above that in the event of permission being granted on Z9 lands, the development plan also involves a statement as part of a legal agreement demonstrating how the sports facility will be retained long term on site. The board argued that that legal agreement did not mean an agreement under s. 47 of the 2000 Act, but it cannot have meant anything else because covenants with the Christian Brothers, for example, would not be enforceable in planning terms or otherwise at the suit of the council. However, the requirement in the development plan for legal agreement does not mean a precondition before permission, because the latter interpretation would render the grant of permission unworkable.
125. What the Z9 zoning does envisage is that if a permission is granted then it would be a condition of such permission that legal agreement would be entered into with the planning authority. That does not create any institutional problem *vis-à-vis* the respective roles of the council and the board, as I understood the board to ultimately accept. Thus the decision is not invalid because of a lack of a prior legal agreement. The decision might have been challenged due to the lack of a condition requiring such a subsequent agreement, but as noted above that was not pleaded.

Alleged breach of chapter 10 of the development plan regarding green infrastructure, open space and recreation

126. Insofar as reliance is placed on the objectives in chapter 10 regarding green infrastructure, particularly GIO23, GIO24 and GIO26, these protections are baked in to the strict conditions for a development on Z9 zoning, so chapter 10 in itself doesn't add a freestanding basis to challenge the decision.
127. *Generalia specialibus non derogant* applies here. General language regarding green infrastructure does not take away from the specific conditions for allowing development in open space land, provided those conditions are satisfied, which they clearly weren't.

Alleged breach of chapter 16 regarding development standards and parking requirements

128. It was alleged that the site was incorrectly classified for car parking allocations and that the board provided for an inadequate number of car parking spaces.
129. Table 16.1 in the development plan shows the maximum car parking allocation, allowing one car per dwelling in zones 1 and 2, and 1.5 per dwelling in zone 3. Map J in the development plan shows the zones. The inspector states expressly at paras. 7.7.3 and 7.7.4 that the maximum parking allocation for the 160 apartments is 160 spaces. The site is in zone 3, but the entrance is on Crumlin Road which is in zone 2.
130. Where a site is on the boundary, para. 16.38 of the development plan gives a discretion to decide the appropriate level of car parking having regard to the location of the site and its accessibility to existing and proposed public transport facilities.
131. Where the development plan refers to a "potential development site" that "falls on the boundary of two or more parking zones" it seems to me that this must mean a situation where any part of the site falls on the boundary. That is the ordinary meaning of "boundary" because (leaving aside the unusual situation of an enclave or exclave) where two areas bound each other, it is never the case that the totality of the boundary of one particular area is equivalent to the totality of the boundary of the other area.
132. Thus generally when one speaks of two sites being adjoining or neighbouring or having a boundary, one means that part of the site has a boundary with part of the other site. In this case a part of the site has a boundary with zone 2, namely the entrance, and although that is an extremely small part of the site overall, only 6.8m or 7m depending on how one wants to view it, that is sufficient to enable the board to invoke the discretion conferred by para. 16.38 of the development plan.

Administrative law points

133. I can turn now to the points that are more readily classified under the general heading of administrative law points.

Lack of reasons regarding impact on existing access

134. The first of these is the lack of reasons regarding the impact on existing access, particularly the established uses and parking uses on the laneway and off the laneway to the rears of numbers 59 and 61 Crumlin Road, and the fact that the double-doors of a garage open out directly onto the proposed roadway, which is only 0.3m away from the neighbouring property. Thus, rather than being able to open garage doors as at the moment, there will only be about a foot of leeway and after that the door would impact into the path of traffic.
135. The duty to give reasons is limited to the main reasons on the main issues: see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020). So we need to ask whether this is a main issue.
136. The board said it was concerned about alleged tension in the caselaw on reasons, referring particularly to *Ballyboden Tidy Towns v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001

(Unreported, High Court, Holland J., 10th January, 2022) at para. 236, but I think that concern is exaggerated. Holland J. in that paragraph says that “one, though not at all the only, yardstick of what is a “main” issue is whether it is an issue “upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests””.

137. That seems perfectly reasonable if I may respectfully say so but it does not mean that merely because something is in a submission it has to be expressly dealt with by a decision-maker. The point must still be one of the main issues for it to require express reasons. Admittedly also, it is not always totally self-evident as to what are the main issues, but aside from identifying issues where the board disagreed with the inspector or (as discussed further below) the council, this may become somewhat fact-specific. Here, it seems to me that the impact of the development on existing actual *de facto* uses on the grounds of the sites concerned was a sufficiently major point to require the provision of reasons.
138. The board accepts that reasons were not provided on this point. The fact that the inspector is presumed to have considered submissions, and that he considered traffic and access, and the fact that the decision impliedly involves rejecting any contrary submissions, unfortunately does not do anything to answer the reasons complaint.
139. There is an analogy with *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021), where the board failed to give reasons that addressed the submission that the development would impact on the existing use of the lands, or in effect the actual use of the site on the ground. In the light of the foregoing, the decision is infirm under this heading due to the board’s failure to provide reasons for rejecting the submissions in relation to the impact on existing uses.

Error of fact regarding 17% reduction in open space

140. I would be prepared to assume on the materials that the inspector did understand that where reference was made to 17% of the land being taken up with the housing development, that this was merely the section specifically dedicated to the residential provision and was not the totality of a reduction of open space. However, there was a further significant amount of the open space which would be taken up with parking for example, resulting overall in a reduction of the open space lands by about a third.
141. Even assuming that the inspector did understand the situation correctly, the board’s direction departs from his wording and refers explicitly to “the reduction in open space by 17%”. Particularly where this is the board’s own innovation and is not something relying on the inspector’s wording, I cannot assume that they intended by this something different to what it says. What it says is totally incorrect and erroneous on its face. The clear implication which there is nothing tangible to contradict is that the board has misunderstood the inspector’s finding.
142. If the board adopts an inspector’s wording it can generally be assumed to have adopted her logic as well. If it thinks it can improve upon that wording, it owns the alteration; and if that alteration is lacking in accuracy, logic or reasons, then the board is on its own. Having rearranged the inspector’s text, the outcome stands or falls on its own terms and

can't be saved by any phone-a-friend manoeuvre that implies that the inspector had the correct answer after all.

143. There is no analogy with *Dublin City Council v. An Bord Pleanála* [2022] IEHC 5, [2022] 1 JIC 0702 (Unreported, High Court, 7th January, 2022) as submitted by the board here. *Dublin City Council* was a case where the board produced a decision in line with the wording of the inspector's recommendation albeit not reproducing the screening analysis in full. The two factors that are different from this case are firstly that that was a mere omission of part of the wording, not positive new wording, and secondly that the statutory scheme was such that by proceeding to public consultation on the matter, the board was impliedly determining the screening situation, and that could only imply a determination in accordance with the inspector's position. Here, however, the board has departed from the inspector's text and come up with its own wording which is clearly and manifestly erroneous. In the circumstances, that is a fatal objection to the legal validity of the board's decision.

Failure to give reasons regarding ball impacts on windows of proposed new development

144. An argument was made in Flannery regarding nuisance, but it really boiled down to a failure to give reasons regarding the ball impacts on the windows of the proposed new development.
145. Netting insofar as it related to existing houses was a major issue and is expressly dealt with in the inspector's report at para. 7.6.1. However, that only relates to pre-existing properties and there is no reference to ball-netting to protect the new apartments. There was provision for such netting in the developer's planning application report at para. 7.
146. Kevin's disputed this in their submission at para. 6.9 to say that the nets would not protect against sliotars. The developer replied that the pitches were for youth use so there would be less velocity in terms of ball impacts, although this was again further disputed by Kevin's.
147. The question then is whether this is a main issue requiring the express giving of main reasons. On balance I think that it is a main issue is because it creates a legal liability for the applicants in Flannery, which self-evidently could pose severe problems for them in future if the netting turns out to be inadequate.
148. It was submitted that there was an analogy with a point made in submissions in *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] IESC 18, [2003] 2 I.R. 114, where counsel suggested that developing a walking route beside a golf course was "like a candlelit procession in a gunpowder factory". Unfortunately, that phrase is not quoted in the judgment, but is worth recording now. Putting windows and balconies of apartment blocks behind the goalposts of sports pitches creates a similar issue.
149. The applicants in Flannery referred to Lord Denning M.R.'s judgment in *Miller v. Jackson* [1977] QB 966, [1977] 3 All ER 338. While the first paragraph of that judgment is much quoted, the second paragraph is perhaps slightly more relevant here: "I must say that I am surprised that the developers of the housing estate were allowed to build the houses so

close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to reckon with the consequences”.

150. What this all boils down to here is that if the board were going to allow the construction of apartment balconies and windows immediately adjacent to and behind goalposts of playing pitches, then the predictable impacts and the dispute about the potential for such impacts was a major issue which required express reasons. In the absence of reasons being provided, there was a legal infirmity in the board’s decision.
151. A reinforcing aspect is that this point is expressly dealt with by the council in its planning report as a negative factor weighing against the application. That can’t simply be ignored without a *lacuna* in the board’s reasoning being created as a result – a point I discuss further below.

Reasons generally

152. In this judgment I have attempted to identify a number of specific areas where the reasons argument has particularly resonance, in particular the lack of reasons for rejecting the submission on the existing use of the laneway, for rejecting the submissions regarding the impact of balls on the proposed new apartments, and for disagreeing with the council, which is the issue I will turn to next.
153. There is also the problem of a lack of reasons for disagreeing with the council on the need for EIA screening, but that could best be considered under the heading of EU law issues if they were to arise.
154. I think these headings suffice for the discussion of reasons, albeit that the applicants formulated their objections about reasons as a kind of permeating complaint across most of the issues here. Where they have raised reasons arguments about other aspects of the decision I have attempted to deal with the substance of the matter under some other heading.

Reasons for disagreeing with the council

155. It is true that caselaw has identified an enhanced duty on the board to give reasons where it is disagreeing with the inspector, and it is also true that there is no statutory requirement and thus far no explicit requirement in caselaw that they also give reasons where disagreeing with the planning authority. Furthermore, it is true that the interpretation of a planning authority of the plan does not carry specific weight with the board because this is a legal issue the board has to form its own view: see *Cicol Ltd. v. An Bord Pleanála* [2008] IEHC 146, [2008] 5 JIC 0810 (Unreported, High Court, Irvine J., 8th May, 2008).
156. That follows from the fact that the interpretation of the development plan is a matter of law and therefore is ultimately a matter for the court. Indeed, the board’s interpretation of the development plan does not commend deference either, any more than the interpretation of a legal matter by a first instance court demands deference when the point is brought before

an appellate court: see *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, Court of Appeal, 29th March, 2021) para. 100.

157. All that said, there is no need to create a stand-alone bespoke doctrine that the board has to give enhanced reasons for disagreeing with the council, or more generally that an appellate decision-making body has to give reasons when disagreeing with the first instance decision-making body. Such a result normally follows logically from the doctrine that the decision-maker must give the main reasons on the main issues.
158. Typically, a reason given by the first instance decision-maker will be a main issue on appeal, and particularly so if the appellate decision-maker disagrees with that decision. In such a context it will be virtually automatic that the law will impose a requirement to give reasons for such disagreement because that would simply be a practical aspect of the duty to give the main reasons on the main issues.
159. Bearing that context in mind and bearing in mind the detailed rationale of the council for rejecting the planning application, which I have taken the liberty of setting out at length above, the board clearly did not properly engage with the council's reasoning.
160. The standout section of the council's decision is that the development would set an undesirable precedent, and the gist of the council position is that to protect the city's open spaces, the bar for development on Z9 lands must be set fairly high. Applying the development plan in the permissive manner adopted by the board obviously has the capacity to seriously degrade the city's network of open spaces. This point was simply not engaged with by way of reasons in any meaningful way.
161. The board seizes on the use of the word "precedent" in para. 7.7.6 of the inspector's report, but that was in the context of a completely different point, which was the question of the previous development on the particular site being the 2006 application, not the question of knock-on precedent for other open spaces. Consequently, it seems to me that the board has failed to give reasons where required under this heading.
162. At an even more fundamental level, there is no engagement with the point made by the council that there is already enough land zoned for housing in the city council area to meet projected needs. Defining the high level of current housing demand as a crisis does not nullify the need to take into account the substantial amount of land already zoned as suitable for housing (rather than housing merely not being precluded), or the substantial level of permissions already granted and not acted upon, or elevate any given developer-led application into an urgent imperative that overrides all other considerations, such as the desirability of a plan-led approach to development. In the particular circumstances here, this issue goes to the board's lack of articulated rationale for finding that the conditions for housing on public open space lands zoned Z9 had been satisfied.

Irrationality

163. It is alleged generally that the decision is irrational, but I don't think that any decisive point arises under that heading that is not best dealt with under some other heading set out above.

European law issues

164. Having regard to the fact that the applicants succeed on the domestic law points, the European issues do not need to be decided.

165. A distinct argument came up in reply as to whether art. 6(3) of EIA directive 2011/92/EU, as amended by directive 2014/52/EU, had been correctly transposed in Ireland due to the lack of specified criteria for the process of preliminary examination. However, I wouldn't have been prepared to consider that point if it was going to become decisive without hearing from the State, and the State might well have complained that a specific relief in relation to transposition should have been sought. But I don't need to consider that issue in the circumstances.

Order

166. Accordingly, the order will be as follows:

- (i). there will be an order of *certiorari* in each of the three cases quashing the decision of the board; and
- (ii). the cases will be listed on Monday the 7th day of March, 2022 for any consequential orders.