



**THE HIGH COURT
PLANNING AND ENVIRONMENT**

**IN THE MATTER OF SECTION 50, 50A, 50B OF THE PLANNING AND
DEVELOPMENT ACT, 2000**

[2024] IEHC 554

Record No.: 2023/ 748 JR

BETWEEN/

GOCE LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

**CORK COUNTY COUNCIL AND SHANE WILLIAMSON AND EVA
WILLIAMSON AND DENIS HEALY AND MICHAEL O'MAHONY AND LUCY
O'MAHONY AND MARK GINN AND BILLY BERMINGHAM AND JACKIE
BERMINGHAM**

NOTICE PARTIES

JUDGMENT of Ms. Justice Emily Farrell delivered the 25th day of September 2024

Introduction

1. The Applicant applied to Cork County Council for planning permission for eight semi-detached houses, 16 apartments and associated works on its site of approximately 0.7

hectares at Kilnagleary, Carrigaline, Co. Cork on 29th March 2018. The application was granted by the Council but was refused by An Bord Pleanála on appeal. The Applicant seeks an order of *certiorari* to quash the decision of An Bord Pleanála dated 5th May 2023, (Reference ABP 312342 – 21), and ancillary orders.

2. The Applicant had previously been granted planning permission authorising the development of eight detached houses on the same site (Reg. Ref. 18/4779 & ABP 302379-18). That permission was granted on 5th February 2019. No development was carried out on foot of that permission, which has expired since the institution of the proceedings.
3. Five appeals were lodged on 12th January 2022 against the decision of Cork County Council dated 6th December 2021. A response to each of these appeals was submitted by CEA Architects on behalf of the Applicant on 2nd February 2022. The Inspector recommended that permission be granted subject to 17 conditions proposed in the dated 30th May 2022.
4. The application was made and determined by the planning authority during the life of the Cork County Development Plan 2014 – 2022. That Plan was also in force when the Inspector’s Report was prepared. The County Development Plan 2022 – 2028 was adopted on 25th of April 2022 and came into force on 6th June 2022, in accordance with section 12(17) of the Planning and Development Act 2000. As the latter Plan had been adopted by the Council it was considered by the Inspector in her Report in addition to addressing the older Plan which was in force. The Inspector concluded:

“Accordingly, under the provisions of the existing development plan and the Ballincollig Carrigaline District Local Area Plan 2017 I am satisfied that the proposed development is accordance with the existing zoning provision. In respect of the provisions of the Cork County Development Plan 2022 – 2028 which will come into force on the 6th of June 2022, I consider that the proposed residential development of the site can be considered appropriate in the context of the existing residential development which is the primary using in the vicinity of the site.”

5. The Board considered the appeals at its meeting on 2nd May 2023 and an Order was made on 5th May 2023 refusing permission for the proposed development. In the Board Direction, the Board stated that the submissions on file and the Inspector’s Report had been considered

at the Board meeting. The Board Order gave the following reasons and considerations for its decision to refuse the proposed development:

“The proposed development is located in an area where the land use zoning objective ZU18 – 10 applies, as indicated in the Board County Development Plan 2022 to 2028. This objective seeks to facilitate development that supports in general the employment uses of existing mixed/general business/industrial areas. Development that does not support, or threatens, vitality or integrity of the employment uses of these areas shall not be permitted. This objective is considered reasonable. Residential uses not listed as an appropriate use such zoned lands in the said development plan. The proposed development would therefore, contravene Objective ZU18 – 10 and be contrary to, proper planning and sustainable development of the area.

In deciding not to Accept the Inspector’s recommendation to grant permission, the Board considered the proposed residential use at this location would contravene the land use zoning objective for the development site as indicated in the recently adopted statutory plan for the area.”

6. The terms of the Board Direction are slightly, but not materially, different.
7. The Applicant was granted leave to challenge the Board’s decision and other ancillary orders on the grounds set out in its Amended Statement of Grounds on 17th July 2023. Leave was granted on five grounds, or four main issues, namely:
 1. & 2. The interpretation and application of the Cork County Development Plan 2022-2028, specifically Objective ZU18-10;
 3. The Board failed to have regard to the Development Plans and Guidelines published under Section 28 of the Planning and Development Act 2000 (as amended);
 4. The Impugned Decision is invalid in circumstances where the Board failed to give adequate reasons, and in particular for its departure from the Inspector’s recommendation to grant planning permission dated 30th May 2022;

5. The Impugned Decision is irrational and/or unreasonable and therefore invalid insofar as it fails to take in account relevant considerations in refusing to grant the permission sought.

8. Two main questions fall to be considered. Firstly, whether the Board interpreted the Development Plan correctly and secondly, whether adequate reasons were given by the Board for its decision to refuse permission and for departing from the recommendation of the Inspector.

9. The 2019 permission, which authorised the development of eight detached houses and associated works on the site, expired after these proceedings had been commenced. The court was informed that an application to extend that permission had been refused in 2024. No details of the application to extend that permission are before the court. However, in my view what is relevant is that, at the time the Board made the decision there was a grant of planning permission in existence authorising development on the site. That permission was described by the Inspector as active until September 2022, but it is not disputed that this permission did not expire until after the Board had made its decision.

10. It is not in doubt that the onus of proof is on the Applicant and that the Board's decision is presumed to be valid. Those principles do not alter the obligation of the Board to provide adequate reasons for its decision on the appeal, including in this case its departure from the recommendation of its Inspector.

Interpretation of the Development Plan

11. It is common case that the Development Plan must be interpreted in accordance with the principles in *In re XJS Investments Limited* [1986] IR 750. This was confirmed by the Supreme Court in *Sherwin v. An Bord Pleanála* [2024] IESC 13, per. Woulfe J.:

“96. It is well established that the interpretation of a development plan is ultimately a matter for the courts. Any misinterpretation of the development plan by the relevant planning authority is an error of law which goes to jurisdiction. It is also well established that the development plan is not to be treated as if it were a piece of primary or secondary legislation emanating from

skilled draughtsmen, and inviting the exceptive canons of construction applicable to such material. Instead, a development plan falls to be construed in its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless the document, read as a whole, necessarily indicates some other meaning.”

12. The interpretation of a development plan is a matter of law, to which deference is not due to the Board. However, the nature of the review by way of judicial review depends on the degree of flexibility, discretion and/or planning judgement which the development plan leaves to the decision-maker: *Jennings v. An Bord Pleanála* [2023] IEHC 14 (paras. 112 - 113); *Sherwin* (paras. 90 - 105).

13. The crucial starting point is, as found by Woulfe J., to consider the nature of the determination made by the decision-maker, if any, as to whether or not the proposed development, as a matter of law and fact, would materially contravene the development plan as properly interpreted. At this point it is sufficient to note, that no finding was made of material contravention, but the Board found the application contravened Objective ZU18 – 10.

14. At Section 8.22.1, the Development Plan explains that the appropriate uses for each land use zoning objective is set out at Chapter 18.

15. Section 18.1.1 states that:

“The purpose of zoning is to indicate the land use objectives for all the lands within the County. Zoning aspires to promote the orderly development of the County by eliminating potential conflicts between incompatible land uses and to establish an efficient basis for investment in public infrastructure and facilities.”

16. The Development Plan introduced a different approach to the zoning of existing built-up areas to that in the previous plan; this is explained at Section 18.3.1 – 2. Whilst it is not appropriate to interpret a development plan by comparing it to an earlier plan (*Redmond v. An Bord Pleanála* [2020] IEHC 151, para. 20; *Murphy & Ors v. An Bord Pleanála* [2024] IEHC 186, para.40), it is appropriate to have regard to what is said *in a development plan*

about a prior plan. The 2022 Plan provides for two zones - Existing Residential/Mixed Residential and Other Uses (ER) which are lands which are predominantly used for residential purposes and those which are predominantly employment uses - Existing Mixed/General Business/Industrial Uses (MGB). The site the subject of these proceedings is zoned MGB.

17. Section 18.3.3 – 9 sets out the Policy for Existing Residential/Mixed Residential and Other Uses (ER) for main towns and key villages with a population, or projected population, of over 1500.(*). This includes Objective ZU 18-9 which provides:

“Existing Residential/Mixed Residential and Other Uses*

The scale of new residential and mixed residential developments within the Existing Residential/Mixed Residential and Other Uses within the settlement network should normally respect the pattern and grain of existing urban development in the surrounding area. ...

Other uses/non-residential uses should protect and/or improve residential amenity and uses that do not support, or threatens the vitality or integrity of, the primary use of these existing residential/mixed residential and other uses areas will not be encouraged.”

18. As the Board points out, the planning authority chose not to apply this zoning to the site in question.

19. Section 18.3.10 of the Development Plan, which includes Policy ZU18-10, provides:

“Existing Mixed/General Business/Industrial Uses (MGB)

18.3.10 The areas identified as Existing Mixed/General Business/Industrial Uses consists of a mix of employment uses generally including long term establishments. These areas include (but not exhaustively) a large range of uses including general warehousing, manufacturing, storage, builders provider/yard, food processing facility, logistics, vehicle sales outlets, high technology manufacturing, plant and tool hire, public services, service station, vehicle servicing/maintenance garage. This zoning will protect existing uses and support expansion where appropriate of existing uses while not permitting

uses that would threaten the vitality and integrity of the primary use of these areas.

County Development Plan Objective

ZU 18-10: Existing Mixed/General Business/Industrial Uses

Facilitate development that supports in general the employment uses of the Existing Mixed/General Business/ Industrial Areas. Development that does not support, or threatens the vitality or integrity of the employment uses of these areas shall not be permitted.

Appropriate Uses in Existing Mixed/ General Business/Industrial Uses

General warehousing, trade warehousing and distribution, manufacturing and repairs, storage, builders provider/ yard, food processing facility, logistics, fitting and business to business activity, wholesaling, vehicle sales outlets, high technology manufacturing plant and tool hire, public services, service station, vehicle servicing/maintenance garage, incubator units, childcare facilities, commercial film studio facilities.”

20. It is the Applicant’s case that the Board misinterpreted the Plan by finding that a use other than one included in the list of appropriate uses may not be permitted. It argues that the Board was not entitled to refuse the application simply on the basis that residential development was not included in the list of appropriate uses in Objective ZU18-10 Existing Mixed/General Business/Industrial Uses (MGB) which appears at paragraph 18.3.10 of the Development Plan.

21. In its written submissions, the Board relies on the sentence “*Development that does not support, or threatens the vitality or integrity of the employment uses of these areas shall not be permitted*” to contend that the list of “*Appropriate Uses*” within MGB zoned lands is exhaustive. It submits, correctly in my view, that this sentence “*is a restriction/preclusion provision, setting out types of development that “shall not be permitted” on lands that are subject to this land use zoning objective.*” However, that statement sets out the planning authority’s intention and is relevant to the question whether a proposed development is consistent with proper planning and development; but it does not, and cannot, curb the

jurisdiction of the Board to grant permission in material contravention, subject to the provisions of the 2000 Act and the overriding consideration of proper planning and development of the area.

22. The Plan requires the decision maker to assess whether a particular development would fail to support or would threaten the vitality or integrity of employment uses, as only such developments are stated to be impermissible. In effect, the Board asks the court to read “*Appropriate Uses*” as “*Only Appropriate Uses*”. The Plan does not state that the list of appropriate uses is exhaustive either expressly or by inference, nor does it define what it intends by “*Appropriate Uses*”. Phrases such as “permitted in principle” or “open for consideration” are commonly used and explained in other development plans. It is, of course, open to each planning authority to choose how to describe its policies and objectives, but the interpretation of the Development Plan as adopted is a matter of law.
23. This list of appropriate uses is not described as an exhaustive list of the types of development which support, or which do not threaten the vitality or integrity of the employment uses of the lands zoned MGB, nor does the Plan state that any use which is not listed is considered by the planning authority to undermine or threaten employment uses.
24. Section 18.3.10 states that the areas identified as Existing Mixed/General Business/Industrial Uses consist of a mix of employment uses generally and it specifies certain existing uses “*(but not exhaustively)*”. Other non-employment uses are in existence in those areas also, including residential developments close to the site. It is not possible to ascertain from the Development Plan, including the Map, whether there are any other existing uses, employment or otherwise, within the areas zoned MGB which are excluded from the list of Appropriate Uses in ZU18-10. Section 18.3.10 states that “*This zoning will protect existing uses and support expansion where appropriate of existing uses while not permitting uses that would threaten the vitality and integrity of the primary use of these areas.*” Even if existing uses in that context is confined to existing employment uses, interpreting the list as exhaustive would exclude non-specified employment uses from the protection afforded to existing uses and from the support of expansion of existing uses, even where those uses do not undermine the vitality and integrity of the primary use, namely employment.

25. The list of Appropriate Uses in ZU18-10 is somewhat broader. It includes vehicle sales outlets and plant and tool hire, but not the hire of vehicles or sale of such plant and tools. The Applicant submits that interpreting the Plan as prohibiting the hire of vehicles or sale of plant and tools would be absurd. Whilst a café or grocery shop is not listed, it is difficult to see how such a development could be regarded as failing to support or threatening the vitality or integrity of the employment use of an area.

26. The Board's position is that even if a proposed residential development supports rather than threatens the vitality and integrity of employment uses, it will contravene the Plan as it is not included in the list of appropriate uses. It is conceivable, at least, that a residential development might support employment. The Board submits, in its written submissions:

“Contrary to the Applicant’s contention, it [Objective ZU18-10] does not comprise a provision of the Development Plan that confers flexibility or a discretion on the Board whereby a land use (such as residential use) – which is not specified as an appropriate use under zoning objective ZU 18-10 – can nonetheless be determined by the Board to comprise an appropriate use (that is thus in accordance with and/or not a contravention of the Development Plan).”

27. However, in response to the Applicant's submission that the Board's interpretation of ZU18-10 precludes residential developments in all circumstances, the Board pointed to Section 18.2.4 and submitted that, regardless of zoning, permission may be granted for developments which are ancillary to the parent use and that this may include residential. Section 18.2.4 states:

“Planning permission sought for developments which are ancillary to the parent use, i.e. they rely on the permitted parent use for their existence and rationale, should be considered on their merits irrespective of what category the ancillary development is listed in the ‘Land Use Zoning Categories’ section of this Chapter.

County Development Plan Objective ZU 18-7: Ancillary Uses

The Ensure that developments ancillary to the parent use of a site are considered on their merits.”

28. It is difficult to reconcile these two submissions.

29. In effect, the Board accepts that the Development Plan allows for the grant of permission for an ancillary residential development despite residential not being included in the list – therefore it accepts that the list is not exhaustive if another provision of the Plan applies; no such exception appears within ZU18-10 or Section 18.3.10. The Plan also envisages that permission may be granted for the intensification of, extensions to, and improvement of, premises accommodating non-conforming uses subject to normal planning criteria. (Section 18.2.3 and ZU18-6). Non-conforming uses include pre-1963 Act uses, those with valid planning permission and unauthorised uses which cannot be enforced due to the passage of time.

30. I am satisfied that Objective ZU18-10 must be interpreted in context and, in particular, having regard to Section 18.3.10. The list of Appropriate Uses is not exhaustive. Objective ZU18-10 provides for development which supports and does not undermine the integrity and vitality of existing employment uses and provides that it uses which fail to achieve that which “*shall not be permitted*”. Inclusion in the list of Appropriate Uses is not necessary for a proposed development to conform with Objective ZU18-10 and Section 18.3.10 of the Development Plan. I am satisfied that to interpret the list as exhaustive would be absurd; uses such as vehicle hire, plant and tool sales, a café or convenience shop would not be permitted. The provisions of the Development Plan provide no rationale for excluding such uses within areas zoned MGB. In setting out the list of appropriate uses, the Development Plan does not specify that it is to be read exhaustively, nor that uses other than those specified are incapable of supporting the employment uses of the area, much less that they would threaten the vitality or integrity of those uses.

31. Therefore, I find that the Board has misinterpreted the Development Plan, in particular Objective ZU18-10. This amounts to an error of law which goes to jurisdiction. The Board is obliged, under section 37(2) and 34(2)(a) of the 2000 Act, to have regard to the Development Plan and in so doing, it must interpret it correctly.

Existing use

32. The Applicant also contends that the Board erred by failing to have regard to the existing use of the site in applying Objective ZU18-10. The Applicant submits that the existing use of the site is residential, having regard to the use of surroundings lands and the planning permission which was granted in 2019.

33. There is no question of the site forming part of a larger planning unit, which includes completed developments in residential use. The Applicant submits that, as the use of lands which abut or are close to the site includes residential use, this is an existing use for the purposes of applying Objective ZU18-10. There are numerous houses close to the site. The Inspector referred to the row of seven detached dwellings (single storey and dormer properties) on the northern side of the road which is adjacent to the site and to the pre-school to the East of the site. There is also a badminton club and small business premises at the end of the lane adjacent to the site. The Inspector refers to the *“prevailing pattern of low-density development in the immediate surrounds which is predominantly characterised by detached housing.”* At para. 7.1.6 the Inspector found that, having regard to the objective of the Plan which was then in force, but which had expired when the Board made its decision, *“the proposed residential use of the appeal site would represent a continuation of the primary use of the immediately surrounding lands to the north and west of the site which is residential”*.

34. I am satisfied that the reference to existing use in Objective ZU18-10 and Section 18.3.10 of the Development Plan refers to specific existing uses of specific sites. Nothing in the Development Plan supports an interpretation that would permit the grant of permission on any site for a use which exists in a different part of the lands zoned Existing Mixed/General Business/Industrial Uses (MGB) simply on that basis. As Section 18.3.10 states, the purpose of that zoning is to *“protect existing uses and support expansion where appropriate of existing uses while not permitting uses that would threaten the vitality and integrity of the primary use of these areas.”* ZU18-10 specifically provides for development which supports, in general, the employment uses of such areas and not development which fails to support, or which threatens the vitality or integrity of the employment uses of the area. I am satisfied that the fact that other lands close to the site are in residential use does not, of itself, mean that residential use is an existing use of the site. However, the use of such lands is a matter to which the Board is entitled to have regard in considering the proper planning and sustainable development of the area.

35. The Applicant also relies on the planning permission which was granted in respect of the site in February 2019, and which remained valid at the time the Board made its decision. That permission authorised a housing scheme of eight detached houses and associated site

development i.e. residential use, but no works were carried out in accordance with that permission. This permission was referred to by the Inspector at para. 7.1.11 of her Report. At para. 7.1.9, the Inspector suggested that the site “*which has a zoning which includes existing mixed.*” She concluded that:

“the proposed residential development of the site can be considered appropriate in the context of the existing residential development which is the primary use in the vicinity of site.” (para. 7.1.12)

36. It is clear from the authorities that an existing use ceases upon the grant of permission for a conflicting use. In *Redmond v. An Bord Pleanála* [2020] IEHC 151 (para. 56), Simons J. stated:

“established use and designation is not lost by dint of a transfer of ownership. Rather, it remains until such time as planning permission is granted for an alternative use, such as, for example, residential use. The relevant development plan policies are precisely intended to regulate the circumstances in which such a change in use might be authorised.”

37. This judgment was cited by Humphreys J. in *Clonres v. An Bord Pleanála* [2021] IEHC 303 in which case he said:

“37. On the first point, it seems to me that where the Z15 zoning is speaking of an existing use or “existing functional open space” it is talking about existing uses in the sense that Simons J. is referring to in Redmond v. An Bord Pleanála, namely a previously established use which enures for the benefit of the land until such time as a planning permission for a new use is granted. Even the non-expert reader could appreciate that point. There is a fundamental distinction between cessation of a use in practice at a particular time and the formal abandonment of a use on a permanent basis, which in a situation like this would normally arise where planning permission for some inconsistent use or development was granted. Thus, it seems to me that the inspector had erroneously had regard to the simple de facto situation on the ground which in my view is incorrect as a matter of law.”

38. The question when a use comes into existence has not been expressly considered by the Superior Courts. As I have found that the Board misinterpreted Objective ZU18-10 and erred in considering that the non-inclusion of a use from the list of appropriate uses means

that permission may not be granted, any such finding would be *obiter*. Therefore, I do not consider it necessary to decide when an existing use comes into existence, in particular whether the development authorised by the grant of permission is actually carried out for that use to be an existing use. Whilst it is not in evidence, the court was informed that that permission has expired since the Board determined the appeal, and that an application for an extension of that permission has been refused. The sole relevance of that permission to the within application for judicial review is that, at the time of the Board's decision, residential use was authorised on the site in accordance with that permission.

Materiality of contravention

39. The Board found that the proposed development would contravene the Development Plan, but it did not state that it considered such contravention to be material. Unlike *Nee v. Bord Pleanála* [2012] IEHC 532 there is no question of section 37(2)(b) of the 2000 Act applying as the planning authority had recommended that permission be granted for the proposed development. The fact that that recommendation was made during the lifetime of the previous plan is not material to the application of section 37(2).
40. The Board submits that its decision had left the question open or was equivocal as to whether the contravention was material. It was contended that this is so as the question of materiality was not a live issue before the Board. Notwithstanding that submission, the Board also criticised the Applicant for not seeking to justify the grant of permission despite the contravention of the Development Plan and pointed to the appeal by Mr. Ginn against the grant of permission. Mr Ginn referred to the provisions of the 2022 – 2028 Draft Development Plan and observed that residential development was not contained in the list of appropriate uses. He did not make a submission to the effect that the proposed development would materially contravene the Development Plan in that regard. In the Applicant's response to that appeal, and the other four appeals, it did not proffer a basis on which the Board could justify granting permission in material contravention of the draft plan.
41. The thrust of its submission was that the appeals should be determined under the plan which was then in force, and which remained in force for a further four months. The consultation period for the Draft Development Plan had not closed. The Applicant's response to Mr. Ginn's appeal, dated 2nd February 2022, stated:

“the planning application should more properly be adjudicated against the prevailing development and local area plan is in place during the lodgement and life of the planning application.

It should be noted that the 2022 to 2028 development plan has not been ratified and is currently (at the time of writing) in public consultation having issued a draft copy revised copy of the additional referred to by the observant.”

42. The 2022 – 2028 Plan was not adopted until 25th April 2022 and it came into force on 6th June 2022. The Applicant’s response was made on 2nd February 2022; it did not engage with the terms of Section 18.3.10 or Objective ZU18-10, although the Applicant did have the opportunity to make a submission in relation to the draft plan. The Applicant had no opportunity to make any further submissions after the adoption of the new plan or its coming into force. As noted above, the Inspector’s Report was dated 30th May 2022 and the Board Order was made on 5th May 2023, almost a year later.

43. As I have found that the Board has misinterpreted Objective ZU18-10, which must be interpreted in light of Section 18.3.10 of the Development Plan, the question whether the contravention found by the Board is in fact material is not relevant to the challenge to the substance of the Board’s decision in this case. Its significance to the validity of the reasons given by the Board is considered below.

Reasons

44. The obligation to provide reasons is a fundamental requirement of a valid administrative decision. Its purpose is to achieve fairness and to enable the High Court to exercise its supervisory jurisdiction over administrative decisionmakers: *Mallak v. Minister for Justice* [2012] IESC 59 (para. 66); *Mulholland v. An Bord Pleanála* [2005] IEHC 306, [2006] 1 IR 453 (para. 34, pp. 464 and 465); *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 IRLM 453 (para. 6.1 et seq.); *Grafton Group Limited v. An Bord Pleanála* [2023] IEHC 725 (para. 94 et seq.).

45. In *Balz v. An Bord Pleanála* [2019] IESC 90; [2020] 1 ILRM 367 (para. 57), O’Donnell J. (as he then was) stated:

“It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted,

if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.”

46. This applies equally to the substance of an appeal to the Board – sufficient reasons must be given including for decisions on appeal which result in refusal of planning permission to enable the developer to understand why permission was refused. This leads to public trust, and the reasons given inform the options of a disappointed applicant for permission, whether to make a fresh application for permission or seek to quash an adverse decision, and if so, on what grounds. Unsuccessful applicants for permission are expected to accept decisions with which they may profoundly disagree and to live with the refusal of permission to develop their lands in the manner proposed. The significance of reasons to the decision whether to make a fresh application for permission was emphasised by Simons J. in *Damer v. An Bord Pleanála* [2019] IEHC 505 (para. 8 and 43).

47. At paras. 6.15 – 6.16 of *Connelly*, while emphasising that the duty to give reasons depends on the nature of the decision, Clarke C.J. summarised the requirement to give reasons in the following way:

“any person affected by a decision is at least entitled to know in general terms why the decision was made.... a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.”

48. Clarke C.J. also held, at para. 10.2:

“Decision makers are normally afforded a significant margin of appreciation within the parameters of the legal framework within which a particular decision has to be taken. Courts will not second guess sustainable conclusions of fact. As noted earlier, many decisions involve the exercise of a broad judgment and here again the courts will not second guess the decision maker on whom the law has conferred the power to make

the decision in question. Giving an explanation as to why the decision maker has concluded one way or the other does not affect that position. What may, however, lead to a successful challenge is if a court concludes that it is not possible either for interested parties or, indeed, the court itself, to know why the decision fell the way it did.”

49. Although an administrative decision does not require a discursive determination, “*the reasoning cannot be so anodyne that it is impossible to know why the decision went one way or another*” (Connelly, para. 10.1). In contrast, a decision maker is not required to provide reasons for what is obvious or to articulate a rationale which is clear from the circumstances: *Killegland v. Meath County Council* [2022] IEHC 393 (para. 83). I adopt the summary of the principles in relation to the requirement to give reasons by Humphreys J. at para. 99 of his judgment in *Killegland*. The adequacy of the Board’s reasons must be assessed from the standpoint of an intelligent person who has participated in the process and who is appraised of the broad issues. If the Applicant is aware of the reasons for the Board’s decision, it would not be appropriate to grant *certiorari* by reason of a formalistic error. Furthermore, an applicant is not entitled to micro-reasons for the Board’s decision: *Balscadden Road v. An Bord Pleanála* [2020] IEHC 586 (para. 40); *Save Roscam (No. 6) v. An Bord Pleanála* [2024] IEHC 335 (para. 87).

50. The Board also points to para. 138 of the judgment of Humphreys J. in *Jones v. An Bord Pleanála* [2024] IEHC 301 in which he accepted it was obvious that “*judicial review is not an invitation to the Court to embark on a merits-based assessment of the rights or wrongs of the impugned decision.*” This is indeed obvious.

51. Having considered the authorities, Phelan J. summarised the way in which an administrative decision should be analysed in *St. Margaret’s Recycling v. An Bord Pleanála* [2024] IEHC 94 (para. 57). It is well established, as Phelan J. stated, that it is inappropriate to engage in a legalistic over-analysis of decisions and that decisions should be read holistically. One must not lose sight of the presumption of validity.

52. Section 34(10) of the 2000 Act requires the Board to give “*the main reasons and considerations on which the decision is based*” and where the Board departs from the

recommendation of its Inspector, to “*indicate the main reasons for not accepting the recommendation in the report... to grant or refuse permission*”.

57. It is not in dispute that the reasons for the Board’s decision may be gleaned from its Inspector’s Report. As Clarke C.J. held in *Connelly* (para.7.6) “*where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision.*”
53. I am satisfied that the Board’s decision must be read holistically and that its decision to depart from the Inspector’s Report must be read in conjunction with its earlier finding that the proposed development would be contrary to proper planning and development of the area.
54. In the instant case, the Applicant had applied to Cork County Council for permission for 24 residential units. That application was granted subject to conditions. Five appeals were brought against that decision and those appeals came before the Board. It is significant that while there was a change in the Development Plan between the date of the Inspector’s Report and the Board’s decision, the Inspector did consider the 2022 – 2028 Plan, which had been adopted but was yet to come into force. Quite correctly, the Board considered the appeals under the 2022-2028 Plan which was in force when they were determined.
55. In determining the appeals, the Board was restricted to considering the proper planning and sustainable development of the area, regard being had to the matters listed at section 34(2)(a) of the 2000 Act, by virtue of section 37(1)(b). Paragraph 10 of the Board’s Statement of Opposition states “*whether a particular development is in accordance with proper planning and sustainable development is a matter within particular competence and expertise of the Board.*” This is clear from the authorities. However, this does not absolve the Board from explaining its decision adequately. The question is whether the Board has given sufficient reasons for its finding that the proposed development would not be in accordance with the proper planning and sustainable development of the area.
56. The provisions of the relevant development plan are identified as one of the matters to which the Board was required to have regard and it has been found to be the primary point of reference for the consideration of a planning application: *Spencer Place Development*

Co. Ltd v. Dublin City Council [2020] IECA 268 (para. 10). The importance of the development plan was also considered in *Sherwin v. An Bord Pleanála* [2024] IESC 13 in which case Woulfe J. stated:

“90. The development plan is a very important statement of planning policy which each planning authority is required to adopt, generally every six years. It regulates the future development of property by setting out, inter alia, policy objectives which indicate the parameters within which permission may be granted or refused. The development plan informs the public of the approach that will be followed by the planning authority (and the Board) in decision-making, unless there is good reason to depart from it as may be permitted by the planning legislation, subject to particular procedures being followed.

91. In Attorney General (McGarry) v. Sligo County Council [1991] 1 I.R. 99, this Court, per McCarthy J., described the development plan as follows (at 113):

‘The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objections. When adopted it forms an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially. The private citizen, refused permission for development on such grounds based upon such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself.’”

58. Section 37(2)(a) provides that even where there is a material contravention of the development plan, the Board may grant permission for a proposed development. It is only where the local authority has refused planning permission for the proposed development on the grounds of material contravention of the development plan, that there is any restriction on the Board in granting permission sought. The Act makes no special provision for a decision to grant permission for a development which contravenes a development plan in a non-material way. The fundamental matter to be determined by the Board is whether

the proposed development is consistent with proper planning and sustainable development of the area.

59. The Board maintains that it provided sufficient reasons for refusing permission and for departing from the recommendation of the Inspector. Para. 10 of the Board's Statement of Opposition states: "*The Board Order (at page 2) records that the Board considered that the proposed development would "be contrary to the proper planning and sustainable development of the area". Whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the Board.*" The statement is correct, but it does not absolve the Board from giving adequate reasons for its decision.

60. The entire operative part of the Board's Order is set out at para. 5 above. As appears therefrom, the sole reason given for finding that the proposed development was not in accordance with proper planning and sustainable development was that the development contravened the Development Plan as residential was not on the list of appropriate uses in Objective ZU18-10. The Board Order states "*The proposed development would therefore, contravene Objective ZU18 – 10 and be contrary to, proper planning and sustainable development of the area.*" No finding was made as to whether or not the proposed development would support or threaten the vitality or integrity of the employment uses of the area. No such finding can be inferred, nor does the Board contend that it should be.

61. Compliance with, or contravention of, the provisions the Development Plan is an important factor to which the Board was required to have regard, but the statutory scheme does not provide that it is determinative of the application. The statutory scheme is entirely silent in relation to non-material contraventions, but the Board may grant permission in material contravention of the applicable plan if it considers the proposed development to be consistent with proper planning and sustainable development of the area. In contrast, the Board has no jurisdiction to grant permission for a strategic housing development in material contravention of a plan in relation to zoning of land: section 9(6)(b). Despite this, the scheme does not prevent a developer from applying for, or being granted, permission for a similar scheme under the 2000 Act if it would accord with the proper planning and development of the area.

62. The question at issue in these proceedings is whether it was sufficient for the Board to rely on the contravention of Objective ZU18-10 as the sole reason for finding that the proposed development was contrary to the proper planning and sustainable development of the area. It was the simple fact of a contravention of the Development Plan, which was not found to be a material contravention, that was relied upon by the Board.
63. Whilst in law, the contravention of a zoning objective may well be a material contravention, this is not relevant to the adequacy of the reasons given, unless the reasons given can be interpreted as having relied on the materiality of the contravention. In circumstances where the Board has not referred to the contravention as material, and now contends that materiality of contravention of Objective ZU18-10 was not a live issue before the Board, it is not reasonable to infer a finding of materiality into the Board's decision.
64. The Board had considered the Inspector's Report and recommendation. The Inspector had found as a fact that the proposed development was residential and was in an area which had primarily residential use (para. 7.1.12): no contrary finding was made by the Board.
65. In light of the wording of Objective ZU18-10 and the Board's recitation thereof, the Board cannot rely on the reasons given in the Inspector's Report as the Inspector found that the proposed development would not contravene the Plan and would be consistent with the proper planning of the area. Clearly the Board disagreed. There is a heightened duty to explain why the proposed development is considered not to accord with proper planning and development in circumstances where the Inspector had found that it was appropriate for the area, having regard to the 2022 – 2028 Plan. The Inspector also found that the proposed development accorded with the proper planning and sustainable development of the area, having regard to factors including the earlier plan which was in force at the time. The Board interpreted Objective ZU18-10 differently to the Inspector and relied solely on the contravention of that objective to find that the proposed development was not consistent with the proper planning and sustainable development of the area.
66. Unless contravening a single objective of a development plan leads inexorably to a proposed development being contrary to the proper planning and development of the area, the Board must provide a reason why it does so in the particular case. Unless it gives a reason, the decision merely states the conclusion. Although the development plan is the

primary starting point, it is clear from the statutory scheme that the Board may find a proposed development accords with the proper planning and sustainable development of the area, and may grant permission even where there is a material contravention is found to exist.

67. It would be difficult to envisage any planning application, particularly any complex application, which does not contravene at least one objective of a development plan. As acknowledged by section 37(2)(b)(ii), a development plan may include conflicting objectives. The scheme of the Act requires a planning authority, or the Board, to have regard to the provisions of the relevant development plan together with other relevant factors. The question is whether, in the Board's opinion, the proposed development accords with the proper planning and development of the area, not whether it complies with every objective in the relevant development plan.

68. There are many cases in which inconsistency with an objective or objectives of a development plan may lead the decision maker to find that the proposed development is not in accordance with the proper planning and development of the area, particularly where the contravention is material, and that the application should be refused. The basis on which the Board exercised its planning judgment and found that this was such a case is not evident from its decision, particularly having regard to the contents of the Inspector's report.

69. Requiring the Board to explain why it found that a simple contravention led to the conclusion that the application was not in accordance with proper planning and sustainable development of the area, is not to require micro-reasons. Nor does it impose an obligation on the Board to explain why it opted not to exercise its discretion to grant permission under section 37(2) despite finding that the application was inconsistent with the proper planning and sustainable development of the area.

70. The argument that the Board was required to expressly consider whether to exercise its power to grant permission in material contravention of a development plan or LAP where it had found the proposed development was inconsistent with proper planning and sustainable development of the area was rejected by the High Court in *Keshmore v. An Bord Pleanála* [2023] IEHC 369, *Kenny v. An Bord Pleanála* [2020] IEHC 290 and *Cicol v. An Bord Pleanála* [2008] IEHC 146.

71. In distinction to those authorities, the issue in this case is whether adequate reasons have been given for finding that the proposed development is contrary to the proper planning and development of the area. Furthermore, in each of those cases the Board had found there to be a material contravention of the development plan and that the proposed development did not accord with the proper planning and sustainable development of the area. In *Cicol* Irvine J. held that the proposed development went against the “*crystal clear guidance*” of the development plan. In *Keshmore* and *Kenny* the Board’s power to grant permission was restricted by section 37(2)(b). In *Kenny*, which was followed in *Keshmore*, and *Cicol*, it was held that requiring the Board to consider granting permission, having found that the permission sought was not in accordance with the proper planning and development of the area, would be inconsistent with the scheme of the Act.

72. Whilst Irvine J. held, in *Cicol*, that the tenor of the 2000 Act was to circumscribe development in contravention of a development plan, she referred only to provisions which related to material contraventions. I do not consider that *Cicol* is authority for the proposition that the Board is not required to consider whether the proposed development is in accordance with the proper planning and sustainable development of the area once a contravention is found to exist, even in relation to zoning, particularly if the Board has not found that contravention to be material. The scheme of the Act does not restrict the power of planning authorities to grant permission in contravention of development plans, nor does it prescribe specific procedures to be applied in such cases.

73. The significance of the distinction between the instant case and *Kenny*, *Cicol* and *Keshmore* is clear from para. 123 of the judgment of McGrath J. in *Kenny*. He stated:

“... *The overriding principle which governs the planning authority, and the Board on appeal, is that which is set out in s. 34. The manner in which that section is worded is not without significance. Section 34 expressly provides that the planning authority, or the Board on appeal, in arriving at a decision as to whether planning permission ought to be granted is restricted to considering the proper planning and sustainable development of the area. There are various factors which it is obliged to have regard to, but in my view, it would be inconsistent with the framework of the Act to impose on the Board an obligation to consider the exercise of discretion under s. 37(2), where it*

has formed the view that the proposed development, as here, is not in accordance with the proper planning and development of the area. This is altogether a separate issue from whether, although in material contravention of the relevant plan, the Board is nevertheless of the view that the proposed development accords with the proper planning and sustainable development of the area. This is the overriding consideration.”

74. The Inspector had recommended that permission be granted on the basis of the earlier plan and she found that the proposed development was in accordance with the proper planning and sustainable development of the area for the reasons set out in her Report. She also considered that the proposed development could be considered appropriate under the 2022-2028 Plan which had been adopted and was due to come into force on 6th June 2022. That plan came into force before the Board considered and determined the appeals.

75. There is no derogation from the requirement that the Board give the main reasons for not following a recommendation of its Inspector to grant permission if a new development plan is adopted before the Board makes its decision. Depending on the circumstances, that fact may be sufficiently obvious not to require the Board to spell out the reason for its departure, but the question which must be answered, and the answer be sufficiently reasoned, is whether the proposed development is consistent with or contrary to proper planning and sustainable development of the area, having regard to relevant matters including the provisions of the development plan.

76. The Board complains that the Applicant seeks to rely on issues raised in the Inspector’s Report to argue that inadequate reasons had been provided, despite the Applicant not having attempted to justify the grant of permission if there was a material contravention of the 2022-2028 Plan. This argument is misconceived. Although no justification was put forward to justify a grant of permission in material contravention of the Plan, the Board is also required to give sufficient reasons for not following the recommendation of its Inspector, in this case to grant permission. The Applicant’s complaint is not that its submission was not considered, but rather that “*the Respondent failed to give adequate reasons and in particular the reasons for departing from the Respondent’s own Inspector’s recommendation to grant planning permission....*” As appears from the Inspector’s Report, there were many grounds to commend the proposed development and multiple factors relied upon by the Inspector to

find it to be a suitable development for the area. The sole basis on which the Board found that the application was inconsistent with proper planning and sustainable development of the area was the contravention of Objective ZU18-10. The reason given by the Board did not disclose a balancing of factors or show how that it exercised planning judgement: it did not disclose why the contravention (not found to be material) rendered the proposed development incompatible with the proper planning and sustainable development of the area.

77. In the circumstances, I find that the Board has not provided adequate reasons for refusing the permission sought.

78. The question whether the proposed development supports the existing uses of the area or threatens the vitality or integrity of the employment uses is a question which involves the exercise of planning judgment. I do not claim to have the jurisdiction or expertise to seek to determine that issue. Despite the Inspector having raised that as a question to be determined by the Board in considering Objective ZU18-10, it did not do make such a determination. It is one which I find ought to have been answered by the Board in light of my finding as to the proper interpretation of Objective ZU18-10.

Other grounds

79. As I have found for the Applicant on each of the two main issues in this case, it is not necessary to consider the remaining two grounds advanced.

Conclusion

80. In interpreting Objective ZU18-10 as only permitting uses specified in the list of appropriate uses therein, the Board misinterpreted the Development Plan, in particular Section 18.3.10 and Objective ZU18-10. This amounts to an error of law which goes to jurisdiction. The Board is obliged, under section 37(2) and 34(2)(a) of the 2000 Act, to have regard to the Development Plan and in so doing, it must interpret it correctly.

81. The Board did not provide adequate reasons for its refusal to grant the permission sought, in particular for finding that the proposed development would be contrary to the proper planning and sustainable development of the area. It was not open to the Board to conclude, solely by virtue of the contravention of Objective ZU18-10, which was not considered to be

a material contravention, that the proposed development would be contrary to the proper planning and sustainable development of the area.

82. As this judgment is being delivered electronically, I express the provisional view that the Applicant should be entitled to an order for its costs as against the Respondent, such costs to be adjudicated in default of agreement. I will list the matter before me to address any arguments that may be required about the form of final orders. I would, however, invite the parties to seek to come to an agreement in advance of that date on those matters.

Emily Farrell