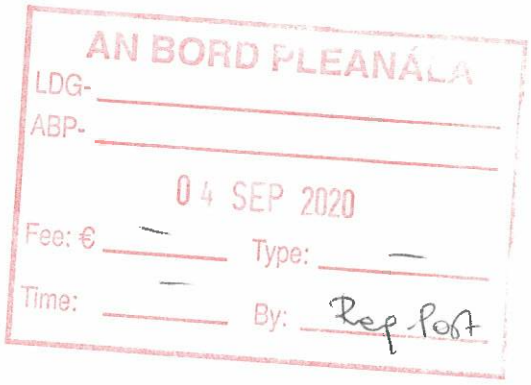
SUBMISSION - SUBSTITUTE CONSENT

To: The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1.
D01 V902



From: Con Lehane,
Gort na Rea,
South Lake Road,
Inchigeelagh,
Macroom,
Co. Cork.

Date: 01/09/2020

Ref: Case Reference PL04.307939
Substitute consent for the Cleanrath Windfarm development Townlands of Reananerree, Cloontycarthy, Cleanrath North, Derrineanig, Cleanrath South, Milmorane, Coombilane, Rathgaskig, Augeris, Gorteenakilla, Carrignadoura, Gurteenowen, Gurteenflugh, Lyrenageeha and Lackabaun, Co. Cork ()

A Chara,

The purpose of this submission is to put on record the fact that this application for substitute consent is a travesty of the fundamentals of not only natural justice, but the law of the European Union and Ireland as set out in recent Supreme Court judgements.

It is one thing for an applicant to look for retention to regularise an unauthorised development such as an extension to a house or an additional farm building, and quite another thing for a developer who should know better to take a calculated risk on constructing a development while the planning permission for it was the subject of a Supreme Court case.

FIRST PLANNING APPLICATION (QUASHED)

The proposed development of this site has been a long-running attempt to construct a wind farm in this most inappropriate of locations, and one which has been opposed by the community at every turn. Cleanrath Windfarm Ltd. applied for planning permission on this site from Cork County Council on 09/06/2011 under Cork County Council planning reference 11/5245.

The proposal was for:
"Construction of a wind farm consisting of 11no. wind turbines with a maximum ground to top blade tip height of up to 126m with ancillary structures, 1 no. permanent 85m meteorological masts, 1no. substation compound with control house, internal road network and associated drainage features, 1no. wind turbine delivery entrance, 1no. light vehicle access entrance, 2no. borrow pits, underground cabling, temporary construction site compound and associated works, all in the townlands of Cleanrath South, Cleanrath North and Derrineanig, Macroom, Co. Cork."

The Planning Authority considered the detail of the planning application presented and highlighted a number of concerns in relation to the submitted proposal, as well as highlighting a number of issues arising from the submitted EIS. Following receipt of the response to the further information request, it was concluded that while the principle of the proposed development generally accorded with the Cork County Development Plan 2009-2015, outstanding concerns remained regarding access to the site and natural heritage. In this regard, the Planning Authority refused planning permission for the proposed development for the following 3 no. reasons:

"1. *The proposed development would be premature by reference to the existing deficiency in the road network serving the area of the proposed development, in terms of width and alignment, which would render the network unsuitable to carry the required transport to facilitate the proposed development and the period within which the constraints involved may reasonably be expected to cease. The proposed development would be contrary to the proper planning and sustainable planning of the area.*

2. *The proposed development would be partly located within habitats of high conservation value, including habitats listed on Annex 1 of the Habitats Directive, including active Blanket Bog, Dry Heath and North Atlantic Wet Heath with Erica tetralix which are key features of the county's ecological network.*

As indicated in the County Development Plan 2009, it is the Councils stated objective under ENV 1-9 to minimize the impacts of new development on habitats of natural value that are key features of the County's ecological network. It is considered that the proposed development would result in the destruction of habitat of ecological value and it would have a major negative impact on an area of high local biodiversity value. Therefore, it is considered that the proposed development would materially contravene the stated objective of the current County Development Plan and, hence, be contrary to the proper planning and sustainable development of the area.

3. *The site of the proposed development is located within the zone of influence of areas of ecological sensitivity, which includes lands designated as a Special Area of Conservation and a Special Protection Area. As set out in objective ENV 1-5 of the County Development Plan 2009, it is an objective to provide protection to all natural heritage sites designated or proposed for designation in accordance with National and European legislation. The Planning Authority is not satisfied, on the basis of the information submitted, that the proposed development would not have significant negative impacts on habitats of ecological value designated for conservation and protection and on the integrity of any Natura 2000 site. The Natura Impact Statement lacked sufficient information to enable an appropriate assessment to be completed in accordance with the requirements of Planning and Development Act 2000, as amended. The proposed development would, therefore, conflict with the objective of the current County Development Plan and would be contrary to the proper planning and sustainable planning of the area."*

Cleanrath Windfarm Ltd. appealed the decision of Cork County Council to An Bord Pleanála (PL04.240801) on 05/07/2012 and six local residents lodged observations with the Board with respect to:

- Visual impacts on the rural landscape, turning it into an industrial site, and negatively impacting on the rights of individual householders to a quality of life.
- The proposal contravenes a number of best practice guidelines and mitigation measures proposed are insufficient with regard to the impacts that would arise by noise, shadow flicker and theft of light.
- Impacts on human health have not been included as a reason for refusal which is a serious oversight.

- The area is of un-spoilt natural rugged beauty and the turbines would have a massive visual impact on the landscape and impact on tourism in the area.
- Impacts on wildlife and habitats, some protected species – notably the Gearagh, into which the Toon River flows into, is only a few kilometres downstream of the proposed development. It is requested that the Board not allow the safety of this unique habitat to be compromised by the proposed development.
- The impact of the development on the environment given that peat is the largest carbon store in Ireland, existing mainly in Blanket Bog
- Impacts on waterways and streams, in the vicinity due to trench and drainage developments.
- The information submitted in response to the further information request provides a number of unclear statements or anomalies. The further information response states, on page 62, that 'Lough Allua, a small upland lake bordering the site of the proposed development, is not good habitat for Whooper Swan, because there is little open water, a lack of good grazing around them and plenty of cover (nearby conifers and bushes) for predators like foxes to approach unobserved'. An EIS carried out for another planning application in the vicinity of the current appeal site (also a wind farm, approximately 1km to the north west of the currently proposed site) identified the presence of 12 whooper swans at Lough Allua, where the current EIS noted that 'Whooper Swans were not recorded during any of the winter bird work at the study area'.
- It is considered that the information submitted is lacking in relation to sensitive species such as the Kerry Slug, bats and the proximity to SAC sites. The bat survey carried out suggests that no Lesser Horseshoe Bats were present which is contrary to the actual events at the site where same were recorded. A Hen harrier family was photographed in the area which suggests that they are nesting on the site.
- Issues surrounding the Annex I Species White Tailed Sea Eagle – Reference to EIS prepared for another planning application (as above) is referenced notes the occurrence of this species in the area and recommended that a 12 month programme of avian monitoring at the site as part of an EIS to include 100 hours watches over the 12 month period to establish any use of the area by White-tailed Sea Eagle and other raptors and determine the risks, if any, pose by this development.

- An ecological report substantiates the sensitivity of the area.
- Concerns raised about the overall utility of the EIS as an appropriate evaluation of the potential impact of the proposed development.
- Concerns over landslide potential.
- Impact on the value of property in the area.
- Impact of the development on the local road network – the Council is currently unable to keep up with the maintenance of roads based on current usage.
- There have been an increasing number of articles which would question the value of wind farms which would mean that the argument that the needs of many (strategic nature of the proposed development) out weighing the needs of the few (local residents) may no longer be relevant if it turns out that wind energy is not environmentally efficient.
- Flooding of the Toon Valley is a concern. The construction of a wind farm will encroach further on the available soakage for heavy rainfall and add to the problems caused by land drainage.
- The observers are unaware of any European Court Judgement what supports the applicants contention that undesignated Annex I habitats "are afforded no legal protection".
- The Boards attention is drawn to the fact that in a letter from the NPWS Wetlands Unit, dated 2nd December, 2009, their research confirms that the Freshwater Pearl Mussel (Annex II Priority Species) population in both the Gearagh and its main tributary, the Toon, is a 'single population'.
- The Wind Turbine Bill 2012 is making its way through the Houses of the Oireachtas which sets out clear guidelines on the proximity of Wind Turbine generators to residential houses. The proposed development would be contrary to the minimum distances set out in this Bill.

The An Bord Pleanála Inspector in his report said:

"I do have a real concern regarding the scale of the proposed wind energy project which would exist on this site given its rural, but well-populated, upland location, particularly in terms of visual impact and certain residential amenity impacts. That said, I am of the opinion that the principle of the development is acceptable and should the Board be minded to grant planning permission, the omission of a number of turbines, nos 3, 4, 6, 7, is recommended in the interests of visual and residential amenity."

The Inspector concluded:

"Notwithstanding the above, I do have a real concern regarding the scale of the proposed wind energy project which would exist on this site given its rural, but well-populated, upland location, particularly in terms of visual impact and certain residential amenity impacts. That said, I am of the opinion that the principle of the development is acceptable and should the Board be minded to grant planning permission, the omission of a number of turbines, nos 3, 4, 6, 7, is recommended in the interests of visual and residential amenity."

The Board ruled in its decision that:

"In deciding not to accept the Inspector's recommendation to omit certain turbines by condition, the Board considered that the separation distances proposed between turbines and dwellings were in accordance with national guidelines which seek to protect residential and visual amenities and, taking into account the information on file, that omission was not necessary to ensure such amenities were properly protected. Furthermore, it was not considered necessary to omit any turbine in relation to ecological concerns."

Leave was granted to Klaus Balz and Hannah Heubach to seek a judicial review of the Board's decision, which was heard by Mr. Justice Bernard J. Barton (see Appendix 1), where the learned judge quashed the decision by the Board in his conclusion where he said:

"236. There is no express acceptance of the findings and conclusions of the Inspector such as they were. Even if the Board had done so, they were insufficient to satisfy the necessary requirements. Absent any consideration and conclusion in respect of the differing scientific opinions, how these were addressed and the particular reasons for preferring one view over the other in the report of the Inspector, it was necessary that the Board should have done so and that these matters were recorded in its decision.

237. As was observed by Hedigan J in Rossmore Properties Ltd v. An Board Pleanala [2014] IEHC 557, the test to be satisfied in respect of an AA involves a higher level of detailed reasoning than would occur in the wider jurisdiction of a normal "planning decision". The requirements and test, exemplified in Kelly are, in my judgment, neither satisfied by the report of the Inspector nor the decision of the Board either separately or when read together.

238. *Accordingly, it is not possible for the Court to determine whether the AA which the Board purported to carry out met the legal test required by the judgements of the CJEU and the decisions of this court. In the absence of the Inspector making and recording complete, definitive and precise findings and conclusions necessary to meet the standard required, which the Board would have been entitled to expressly accept, it was necessary and open to the Board to do so in its decision in a way which makes it plain that the obligations placed upon it in relation to the carrying out and completion of an AA were satisfied.*

239. *For all of these reasons and upon the conclusions reached the Court finds that an AA was not carried out by the Board in accordance with law.*

240. *Having due regard to all of the reasons given and the conclusions reached, the Court will grant the reliefs sought and will so order. I will discuss with counsel the form of the Orders to be made."*

CURRENT PLANNING PERMISSION (QUASHED)

Cleanrath Windfarm Ltd. applied for planning permission on this site from Cork County Council on Christmas Eve (22/12/2015) in 2015 under Cork County Council planning reference 15/6966. There were a total of 45 objections against the development lodged by local residents.

These were ordinary people who have lived in the upper Lee Valley for generations, and were appalled by the desecration of the natural uplands surrounding Lough Allua by first the Derragh wind farm, then the Shehy More wind farm followed shortly by the proposed Cleanrath wind farm.

In assessing the environmental impact, the Senior Executive Planner in his report dated 03/06/2016 said that:

"There are concerns about substantial levels of development over peat habitats which would give rise to permanent negative impacts on said habitats. This is contrary to the Planning Authorities approach to encourage siting of windfarm development away from intact peatland, and contrary to best practice too avoid construction on wet areas, flushes and easily eroded soils, and to avoid sites of sensitive or ecological receptors as advised in the Windfarm Guidelines 2006.

Therefore, turbines, 3, 4 as well as turbines 6, 7 and 9 and their associated connection tracks, hard standing areas etc are recommended to be omitted.

This will result in protecting the best areas of peatland on the site as well as reducing risk to important species of birds –identified as being at risk of negative impacts.

In light of the characteristics of this site and the visual assessment carried out to date it is felt that the proposed development can be further accepted from a visual viewpoint. In addition, the recommendation to omit 5 turbines on ecological grounds will further reduce visual impacts."

Condition 2 of the grant of planning permission by Cork County Council stipulated that:

"Turbines 3 and 4 as well as turbines 6, 7 and 9 and their associated connection tracks, hardstanding areas etc shall be omitted from the proposed scheme. In the interests of minimising negative impacts on habitats and species of high biodiversity value within the site."

Cleanrath Windfarm Ltd. appealed the decision of Cork County Council to An Bord Pleanála (PL04.246742) on 16/06/2016 with respect to the omission of turbines 3, 4, 6, 7 and 9, and four local residents appealed the grant of planning permission in the first place. These were Ms. Sharon Clatworthy, Klaus Balz, Hanna Heubach and Others, West Cork Ecology Centre and a joint appeal by Mick O'Connell and me.

The issues raised in the appeals by the local people included:

- Conditions of the permission are contradictory – particularly no.s 2 & 37.
- There is no precedent for a higher noise level of 43dB(A) over 40dB(A).
- One of the noise monitoring points was located next to a saw-mill and working farmyard, and so would naturally give a higher background noise level.
- A 35dB(A) night-time limit should be imposed on this development.
- Condition 5 suggests that shadow flicker of more than 30 minutes per day can be allowed – so long as the total is not more than 30 hours per annum. Shadow flicker of 30 minutes per day should be a maximum.
- The occupants of house H4, which is to the north of the hill, will likely suffer more shadow flicker in the evenings – just when the occupants would be relaxing after work.
- The scientific evidence presented by the applicant was accepted by Cork County Council, whilst that presented by objectors was dismissed.

- Increased run-off from this site will have a negative impact on The Gearagh SAC. The anastomising properties of the Toon River within The Gearagh SAC are being undermined by the creation of a single channel through the SAC due to the increased run-off from the upper reaches of the catchment and consequent increases in destructive flash-flooding. Flood attenuation measures to be put in place on the site will in no way substitute for the natural soakage of the heaths and bogs to be destroyed on this site. To understand the hydrology of the river takes years of measurements and observations. No attempt was made by those compiling the EIS to contact local people with knowledge of the river. Flood protection measures at other wind farms are completely ineffective. Floods wash away channels, roads and farmland. Attempts to control heavy discharges from wind farm sites can result in bog bursts and land-slides. Hydrologists compiling the EIS did not visit the damaged areas of The Gearagh.
- There is a danger that accidental spillage of contaminants will enter the Toon River and The Gearagh SAC.
- The site is a unique ecological area which is worthy of protection from development. This is reflected in the decision of the Council to omit five turbines. The site contains habitats and species of high biodiversity value. Permission should have been refused for the entire development.
- Cork County Council did not give sufficient consideration to the objections lodged by local people.
- This application is not the redesign of a previously-approved scheme, as the previous grant of permission from the Board was quashed by the High Court.
- The carbon used in the creation of this wind farm and the destruction of peatlands will far outweigh the clean energy benefits of electricity created from wind power. The cost of transmission and the necessity to have other forms of electricity generation (in the event of there being no or little wind) results in wind farms not being nearly as energy-efficient as claimed.
- The EIS submitted for the Derragh wind farm and the EIS submitted for the Cleanrath wind farm contradict each other – particularly in relation to winter bird surveys and White-tailed sea eagle studies.
- Drainage measures proposed for this site are not site-specific and are general in nature – such as are indicated by the applicant for any wind farm development.

- Excavation could impact on a spring serving The Farmhouse, Rath an Ghascaigh.
- Welfare and wishes of the community should have primacy over those of the developer. No special status can be afforded to the developer.
- Residential property in the area will be devalued.
- Noise nuisance will result for residents of the area – particularly in combination with the Derragh wind farm proposal. This can have a detrimental impact on health – particularly in relation to low frequency noise. Sleep patterns can be affected. There are a number of studies which show that wind farms have detrimental impacts on human health.
- Wind turbines can negatively affect people with epilepsy, and can result in other health impacts from noise and sleep disturbance.
- Turbines will be unsightly and will alter the landscape character. Photomontages underestimate the impact of the development. Some of the viewpoints chosen for the EIS are not representative. These turbines are on elevated ground and will entirely dominate the landscape.
- High voltage cables, even if underground, can impact negatively on peoples' health. It is not clear if 38kV will pass through each of the three underground cables at the one time.
- The Targeted Review of the Wind Energy Guidelines 2013 recommended stricter limits in relation to siting of turbines, noise and shadow flicker. No shadow flicker should be permitted to occur at nearby residences.
- Sediment entering watercourses will affect aquatic ecology – including the Freshwater pearl mussel in the Toon River. Discharge to vegetation will not be suitable on steep ground during heavy rainfall where ground is already saturated.
- Monthly rainfall has been under-estimated, and does not account for heavy rainfall events. Climate change makes heavy rainfall events much more likely. All drainage from this area ultimately ends up in Cork City and can contribute to flooding there.
- Scenic Routes S23, S26, S27 & S28 will be negatively affected by this development.
- Distracted drivers looking at wind turbines could cause traffic accidents.
- Turbines will result in interference with television and broadband signals.

- The Planning Report of Cork County Council had no regard to the fact that the decision of the Board to grant planning permission for 11 turbines at this site had been overturned by the High Court.
- Conditions attached by way of grant of permission are insufficient to protect the environment.
- There will be little or no employment or economic benefit to the local community from this development.
- The house of the Fourth Third Party appellant is located only 635m from the closest turbine. The family business (growing shrubs and making flower arrangements) is threatened by this development. There is no way of compensating the family for this loss, and the development would, therefore, be in breach of their Constitutional rights to respect for their family life and the peaceful enjoyment of their home, and their right to earn a livelihood from their property.
- The additional information submission to Cork County Council of 12th April 2016, was substantial, and objectors were not notified of its receipt.
- The Board is biased in favour of wind farm developments, just because of National Policy in favour of renewable energy. However, there are also National policies in favour of promoting sustainable rural enterprise and preserving viable lifestyles supportive of the rural economy.
- The 2006 Wind Farm Guidelines are out of date and were from a time when wind turbines were smaller. The noise condition recommendation is outdated (derived from an old ETSU-R-97 standard). The Board should have regard to the Targeted Review of the Wind Energy Guidelines 2013.
- The developer has not engaged with the local community in any meaningful way. The public meeting in Ballyvourney in December 2015, was poorly attended.
- Blades could fall off turbines, towers can collapse and nacelles go on fire. Ice throw is another safety concern. There have been a number of lightning strikes/fires/blade malfunction at turbines in Ireland. The 500m setback requirement is inadequate to protect the safety of nearby residents.
- The grid connection route is too close to houses. People living close to the route or using it for recreation will be subjected to unacceptably high levels of electromagnetic radiation. There is no information regarding magnetic flux density over ground level for the proposed 38kV cable when operating at its maximum design level.

- The narrow roads in the area will not be able to accommodate the proposed level of construction traffic; resulting in traffic hazard and obstruction of road users.
- The EIS submitted does not contain sufficient information to allow the Board to make a decision in relation to EIA.
- Cable-laying will be disruptive to local traffic and may result in longer delays than anticipated – particularly where there is rock to be excavated. Cost, rather than convenience of local people seems to have been the determining factor in selection of the route.
- The number of existing, permitted and proposed wind farms in the area undermines the tourism potential of the area.
- The site is zoned for agricultural use, and industrial turbines are not an appropriate use within this zoning.
- Peace and tranquillity of the area will be disturbed and industrial wind farms are not considered an appropriate use within this area.
- The development contravenes a number of Development Plan policies in relation to protection of rural communities, recreational facilities, business development in rural areas, tourism, protection of the natural and built environment.
- Documentation on this file was not available for consultation by the public until the third week of January 2016 – although the application had been received by Cork County Council on 22nd December 2015.
- Roads in the area of the Toon River have frequently been flooded in the past, and the proposed development will exacerbate this problem.

The Board ruled in its decision that:

"The Environmental Impact Statement submitted with the application, the additional documentation submitted at application and appeal stages and all other submissions on file, were adequate in identifying and describing the direct, indirect, secondary and cumulative effects of the proposed development. The Board adopted the Inspector's report on the environmental impact of the development and concurred with his conclusions. The Board completed an Environmental Impact Assessment and concluded that the proposed development, subject to compliance with the mitigation measures proposed, and subject to compliance with the conditions set out below, would not have unacceptable effects on the environment."

Leave was granted to Klaus Balz and Hannah Heubach to seek a judicial review of the Board's decision, which was heard by Mr Justice Robert Haughton, who in his judgement of 30th May, 2018 where the application for judicial review was dismissed. They were then granted leapfrog leave to appeal to the Supreme Court against the decision upholding the validity of a permission granted by the Board for the wind farm in a Determination issued on 14th February 2019. In granting leave the Court ruled:

"12. The Court considers that the application raises issues of general public importance as to the proper approach to the ministerial guidelines by the Board. It is statutorily bound to have regard to them but, it is agreed, is not obliged to follow them in any individual case. Clearly, a distinction could be drawn between a submission that the guidelines would not be appropriate in a particular case, for specified reasons, and a submission that the technical aspects of the guidelines have been overtaken by scientific understanding, and become outdated to the extent that they should not be applied at all."

The judgement of the Supreme Court delivered by Mr Justice J. O'Donnell on 12th December, 2019 (see Appendix 2) in discussing policy versus guidelines (paragraph 55) recorded that:

"I sympathise with much of what is said in this passage, but in my view it leads to the wrong conclusion. These were not policy guidelines. If they were, they would be mandatory and the Board would have been obliged to follow them rather than merely have regard to them. If so, the Board must at least consider submissions to the effect that little weight should be placed on the guidelines. In doing so it is not determining a matter of policy. It is deciding an appeal before it by reference to all relevant considerations, including the guidelines."

In quashing the decision of the Board, it concludes in paragraph 57 with:

"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. I consider, therefore, that it is necessary to quash the decision of the Board granting permission in this case."

EXCESSIVE GRANTS OF SUBSITUTE CONSENT

The Irish Times, in an article by Mary Carolan on 01/07/2020 reports that the "Supreme Court rules 'substitute consent' inconsistent with EU environmental law" and that a large number of applications for retention planning permission are on hold pending ruling.

Text of Irish Times article "Supreme Court rules 'substitute consent' inconsistent with EU environmental law"

The Supreme Court has declared "substitute consent", a form of retention permission in Irish planning law, inconsistent with the Environmental Impact Assessment (EIA) Directive.

The substitute consent procedure is inconsistent with the directive because it does not provide for public participation at the stage of leave to apply for substitute consent and does not provide for an "exceptionality" test for substitute consent as demanded by the Court of Justice of the EU (ECJ), the five-judge court declared.

Substitute consent allows applicants "in exceptional circumstances" to make a retrospective application for a project that should have had an environmental impact assessment carried out before planning but did not.

It is provided for in Section 177 of the Planning and Development Act, 2000, as amended in 2010.

That legislation was part of Ireland's bid to rectify deficiencies identified in 2006 by the ECJ after the European Commission won proceedings against Ireland over the State's retention planning permission rules.

The Supreme Court judgment on Wednesday was given on separate appeals by An Taisce and environmentalist Peter Sweetman concerning two quarries.

One appeal by An Taisce concerned An Bord Pleanála's decision to grant substitute consent in 2014 to J McQuaid Quarries Ltd for a quarry at Lemgare, Co Monaghan. That appeal was against the board, the State and the quarry company.

A second appeal by An Taisce concerned the board's refusal to accept submissions from it opposing Sharon Browne's application for leave to apply for substitute consent for a quarry at Ballysax, The Curragh, Co Kildare, owned and operated by her. Mr Sweetman also appealed the planning board's refusal to accept submissions from him.

An Bord Pleanála said it could not lawfully accept the submissions because there was no provision in law under which members of the public could make submissions at the leave stage of the substitute consent process, as opposed to the substantive stage of the process.

The Ballysax appeals were against the board and State, with Ms Browne as a notice party. The Supreme Court had agreed to hear all three appeals on grounds they raised issues of public importance, with a large number of applications on hold pending the outcome.

In a 104-page detailed judgment delivered by Mr Justice William McKechnie, the court allowed the appeals. The judge noted the 2006 ECJ judgment found that widespread availability of retention planning permission here, even for projects which required but did not have an EIA, was not consistent with the EIA Directive.

The Oireachtas sought to amend the law to comply with the directive. That included the creation of the concept of "substitute consent". The judge said these appeals raised important issues of EU law, including whether the State's response was adequate in upholding the requirements of the EIA Directive.

He found the substitute consent provisions do not sufficiently implement the EIA Directive in light of various decisions of the ECJ. The essential elements required for an application for leave for substitute consent, including the development at issue required an EIA, could not fairly be described as being exceptional and were rather "quite general and quite broad", he said.

Having considered the scope and meaning of the public right to participate under the Directive, he also held the exclusion in domestic law of public participation at the stage of seeking leave to apply for substitute consent is inconsistent with the public participation rights conferred by the directive.

CONCLUSION

The wind farm that is seeking substitute consent has been before An Bord Pleanála twice already and both times the grant of permission has been quashed by the Courts. Furthermore, on the issue of substitute consent, the Supreme Court has ruled that the conditions for exceptionality accepted by An Bord Pleanála on previous applications are unjustifiably broad.

In this instance not only is the development opposed by the entire community, but the construction was carried out despite the fact that the planning permission was the subject of a Supreme Court appeal - an appeal that quashed the grant of permission from An Bord Pleanála. As such the exceptionality required for substitute consent does not exist.

Mise le meas,

Con Lehane,

Gort na Rea,
South Lake Road,
Inchigeelagh,
Macroom,
Co. Cork.

Appendices

Appendix 1 Judgement of Mr. Justice Bernard J. Barton delivered on the 25th day of February, 2016, High Court Judicial Review 2013 450JR in the matter of Section 50 of the Planning and Development Act 2000 (as Amended) between Klaus Balz and Hannah Heubach, Applicants, and An Bord Pleanála, Respondent.

Appendix 2 Judgment of O'Donnell J. delivered the 12th day of December, 2019, Supreme Court Appeal No.: 167/18 in the matter of SS. 50, 50A, and 50B of the Planning and Development Act 2000 between Klaus Balz and Hannah Heubach, Appellants, and An Bord Pleanála, Respondent.

APPENDIX 1

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 450 JR]

IN THE MATTER OF SECTION 50 OF

THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

KLAUS BALZ AND HANNA HEUBACH — APPLICANTS

AND

AN BORD PLEANÁLA — RESPONDENT

AND

CORK COUNTY COUNCIL — FIRST NAMED NOTICE PARTY

AND

CLEANRATH WINDFARM LTD. — SECOND NAMED NOTICE PARTIES

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 450 JR]

IN THE MATTER OF SECTION 50 OF

THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

KLAUS BALZ AND HANNA HEUBACH

AND

APPLICANTS

AN BORD PLEANÁLA

AND

RESPONDENT

CORK COUNTY COUNCIL

AND

FIRST NAMED NOTICE PARTY

CLEANRATH WINDFARM LTD.

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 25th day of February, 2016

1. The first named Applicant is an owner in common of approximately 1.0344 hectares of land located at Cleanrath North, Inchigeelagh, Co. Cork. He and the second named Applicant set up home on those lands. They have three children and are engaged in the horticultural gardening and forest business.

2. On the 9th June, 2011 the second named Notice Party, Cleanrath Windfarms Ltd (Cleanrath) applied to the first named Notice Party, Cork County Council (the Council) for planning permission in respect of the development of 11 wind turbines of up to 126 meters height with ancillary structures including an 85 meter meteorological mast, a substation compound, an internal road network, two borrow pits, underground cabling, a temporary construction compound and associated works in the townlands of Cleanrath North, Cleanrath South and Derrineanig, Co. Cork.

3. On the basis of the planning application as submitted, the nearest of the wind turbines to the Applicants' home would, if erected, be located at a distance of approximately 650 meters.

4. The proposed development falls within the scope of part 5, schedule 2 of the Planning and Development Regulations 2001. Accordingly, the application for planning permission was accompanied by an Environmental Impact Statement (EIS).

5. The purpose of an EIS is to facilitate the planning authority in fulfilling its obligations under sections 171 and 172 of the Planning and Development Act, 2000, (the PDA) which, where applicable, require an Environmental Impact Assessment (EIA) to be carried out in order to determine the likely direct and indirect effects of the proposed development on the receiving environment. These provisions were enacted for the purposes of transposing into Irish law the State's obligations under Directive 2011/92/EU (The EIA Directive).

6. On the 7th July, 2011 the Applicants lodged an observation with the Council in which they outlined their opposition to the proposed development on a number of grounds including the visual and environmental impacts it would have on the immediate locality and on certain Natura 2000 sites nearby. The Council sought further information from Cleanrath. This was supplied on the 18th April, 2012. The request required, *inter alia*, the submission of a Natura Impact Statement (NIS) the purpose of which was to detail the likely impacts of the proposed development on any Natura 2000 habitats in the locality which were designated and protected under EU Council Directive 92/43/EEC (The Habitats Directive).

7. A number of such habitats were identified :

(i) The Gearagh Special Area of Conservation (site code 000108),

(ii) The Gearagh Special Protection Area (site code 004109); and,

(iii) Mullaghanish to Musheramore Special Protection Area (site code 004162).

8. Section 177 of the Planning and Development Act 2000 gives effect to the Habitats Directive by requiring the planning authority or, on appeal, An Board Pleanala (the Board) to carry out an Appropriate Assessment (AA) pursuant to which it is obliged to consider and make a determination in respect of the potential impacts which the proposed development would or might likely have on any nearby "Natura 2000" sites. The submission of the NIS by Cleanrath was designed to assist the planning authority in carrying out such an assessment.

9. On the 8th June 2012, the Council refused planning permission for three stated reasons which may be summarized as follows:

(1) The proposed development would be premature by reference to the existing deficiency in the road networks serving the area of the proposed development; details of which were set out and as a result of which the Council concluded that the proposed development would be contrary to the proper planning and sustainable planning of the area.

(2) The proposed development would be partly located within habitats of high conservation value, which included habitats listed on annex 1 of the Habitats Directive, such as active Blanket Bog, Dry Heath, North Atlantic Wet Heath and Erica Tetralix which were key features of the County ecological network. The County of Cork Development Plan 2009 has a stated objective under ENV 19 to minimize the impact of new developments on habitats of natural value that are key features of the ecological network in the County. For reasons which were set out, the Council considered that the proposed development would materially contravene the stated objective of the county development plan and, hence, be contrary to the proper planning and sustainable development of the area.

(3) The site of the proposed development was located within the zone of influence of areas of ecological sensitivity, which included lands designated as Special Areas of Conservation (SAC) and Special Protection Areas (SPA). On the basis of the information submitted the Council was not satisfied that the proposed development would not have significant negative impacts on habitats of ecological value designated for conservation and protection and on the integrity of any Natura 2000 site. In its view the NIS lacked sufficient information to enable an AA to be completed in accordance with the requirements of the PDA, as amended, and accordingly the development would conflict with the conservation objective of the development plan and would be contrary to the proper planning and sustainable planning of the area.

10. On the 5th July, 2012 Cleanrath appealed the decision of the Council to the Board.

11. The first named Applicant did not make a personal observation in respect of the appeal. However, he was a party to and signed an observation on his own behalf and on behalf of the 2nd Applicant which was lodged by Mr. Patrick Crowley on behalf of the 'concerned communities' of Derrineanig, Cleanrath, Inchigwela and Renanirree. Amongst a number of matters of ecological concern, this observation sought to bring to the attention of the Board deficiencies in the NIS submitted by Cleanrath. Concerns were also expressed in relation to the absence of any contact by those compiling the EIS with Dr. Alan Mee – an expert in the white tailed sea eagle, (a species listed on annex 1 of the Birds Directive) which had been identified as being particularly vulnerable to impact from wind turbines.

12. There were a number of other submissions, including observations by the Irish Peat and Conservation Council and An Taisce, which identified the proposed development as one which threatened the survival of protected peat land habitat having annex 1 status. Furthermore, the observations sought to draw the attention of the Board to the fact that the development site was located within the catchment of the Toon and Lee Rivers which flow into Loch Allua and The Gearagh with the consequence that the proposed development had hydrological links to the Natura 2000 sites which had been identified and therefore was a development within a zone of influence of areas of ecological sensitivity.

13. Additionally, attention was drawn to the potential consequences of the excavations necessary on the development site to provide foundations for the wind turbines, including the effect on the water courses leading from the surrounding rivers into the Lee up stream of the Natura 2000 sites. Furthermore, there were potential effects on the water course environments which included unique fresh water sponges and fresh water pearl mussels listed on annex 2 of the Habitats Directive.

14. In a detailed report addressing ecological and related concerns submitted by Mr. Kevin Corcoran, environmental biologist, an increased risk of downstream flash flooding and associated consequences was also identified for the Gearagh sites in the event that any serious changes were caused to the high quality of the River Toon which flows directly into the Gearagh system.

15. The Board appointed an Inspector, Ms. Auriol Considine, to prepare a report which she completed on the 5th October, 2013. An EIA and the AA were purportedly considered in her report. The Inspector recommended that planning permission be granted save in respect of four specific turbines which, in her consideration of the EIA, she recommended be omitted from the scheme of development in the interests of visual and residential amenity. The Board did not accept the Inspector's recommendation. It concluded that the proposed development would not materially contravene the county development plan; that, having carried out an EIA, it would not have a significant adverse effect on the receiving environment; and that, having carried out an AA; it would not adversely affect the integrity of the Natura 2000 sites. On the 23rd April, 2012, the Board granted permission for the development for the reasons and considerations and upon the conditions set out in its decision.

The proceedings.

16. By order of the 17th June, 2013 Peart J. gave the Applicants leave to seek an order of Certiorari by way of an application for Judicial Review, to quash the decision of the Respondent to grant planning permission and to seek a number of declarations which may be summarized as follows:

(a) A declaration that the Respondent failed to carry out an EIA in accordance with requirements of s. 172 of the Act of 2000 as amended and as interpreted in accordance with the obligations imposed by Article 3 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment; and,

(b) A declaration that the Respondent failed to carry out an AA in accordance with the requirements of s. 177V of the PDA;

(c) A declaration that Condition 7(a) of the permission was ultra vires and not severable from the remainder of the permission. (This was not proceeded with at the hearing).

(d) If considered appropriate, an Order remitting the decision back to the Respondent.

These reliefs were sought upon the grounds set out in the Applicants' statement of grounds, the first of which was an alleged failure on the part of the Board to comply with the provisions of s. 37 (2) (b) and (c) of the PDA.

Statutory Framework.

17. These proceedings are concerned with the lawfulness of the decision by the Board to grant planning permission for the proposed

development against a background where the Council had refused permission on the basis of ecological concerns and by reason of material contravention. Having regard to the nature and location of the proposed development there were, as part of the planning process, three separate and distinct matters which had to be considered and dealt with by the Board and which were in controversy between the parties. These are summarised as follows:

(i) The carrying out of an EIA as required by the EIA Directive as implemented by Part X of the PDA,

(ii) The carrying out of an appropriate assessment as required by Article 6 (3) of the Habitats Directive as implemented by Part XAB of the PDA; and,

(iii) In consideration of the general planning and procedural requirements by the Board, whether or not the proposed development contravened the Cork County Development Plan.

(1) General planning requirements and procedures.

18. Section 146 of the PDA provides:

> *"(1) The Board or an employee of the Board duly authorized by the Board may in connection with the performance of any of the Board's functions under this Act, assign a person to report on any matter on behalf of the Board.*
>
> *(2) A person assigned in accordance with subsection (1) shall make a written report on the matter to the Board, which shall include a recommendation, and the Board shall consider the report and recommendation before determining the matter."*

It was on foot of these provisions that the Board appointed Inspector Considine to prepare and submit her report. In compliance with the provisions of s.146 (2), the report contained her recommendations one of which was that turbines 3, 4, 6 and 7 should be omitted in the interests of visual and residential amenity; the practical effect of that recommendation, if it had been accepted, would have been tantamount a refusal of permission for that part of the proposed development.

19. I pause here to observe that in her report the Inspector had recommended the omission of these turbines when addressing the subject of *"visual amenity"* . However, when considering *"residential amenity"*, she had also made a finding that the proposed development was not acceptable in terms of the shadow flicker potential relating to turbines 2, 3, 4 and 6.

20. In this regard she recommended that a condition should be attached omitting those turbines on that ground and also recommended the non operation of the other turbines at times when the predicted shadow flicker might occur adversely effecting the adjacent houses. As to that she had made certain findings concerning the potential affect of shadow flicker on dwellings in the vicinity, including the home of the Applicants, albeit that these were located more than 500 meters from the nearest turbine.

21. When setting out the reasons, the considerations, the conclusions and final recommendation in relation to *'visual and residential amenity'*, the Inspector did not include turbine 2. Whilst the omission of turbines 3, 4 and 6 were common to the recommendations in the body of the report relating to both 'visual' and 'residential amenity', and turbine 7 had been specified in relation to 'visual amenity', the non inclusion of turbine 2 in the final recommendation was not explained by reason of mistake, oversight, or otherwise.

22. Section 34 (10) of the PDA provides that the notification of the decision is required to state the main reasons and considerations on which the decision is based, and, where conditions are imposed in relation to the grant of any permission, the main reasons for the imposition of any such conditions. Furthermore, main reasons must also be given where a recommendation of the Inspector is not accepted. Subparagraph (b) provides:

> *"(b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in—*
>
> *(i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or*
>
> *(ii) a report of a person assigned to report on an appeal on behalf of the Board,*
>
> *a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."*

23. The Board took a different view from that of the Inspector in relation to the omission of turbines 3, 4, 6, and 7, and, in purported performance of the provisions of s. 34(10) (b), indicated in the decision the main reasons for not accepting the recommendation. The adequacy and recording of the main reasons and considerations as stated by the Board, in particular with regard to the main reasons indicated for not accepting the Inspector's recommendation, was in contention between the parties.

(II) Environmental Impact Assessment.

24. It was accepted on the facts of this case that the Board was obliged to carry out an EIA. The obligations of the Board in this regard are to be found in Part 10 of the PDA which implements the EIA Directive. The nature and extent of the obligation imposed by Article 3 was considered by the CJEU in *Commission v. Ireland* (case C-50/09) where at para. 37 the court stated:

> *"In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in light of each individual case".*

25. Commenting on the obligation as well as the nature and extent of the assessment which was required to be undertaken at the end of the decision making process, the Court at para. 40 stated:

> *"...however, that obligation to take into consideration, at the conclusion of the decision making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3...indeed, that assessment, which must be carried out before the decision making process...involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing*

it, if appropriate, with additional data. The competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned and the factors set out in the first three indents of Article 3 and the interaction between those factors."

Article 3, so construed, was transposed into Irish law by amendments to the PDA 2000, specifically by s. 171 (A) and s. 172 (IJ) (c).

26. For the purposes of Part X, section 171A(1) defines an EIA as:

"An assessment which includes an examination, analysis and evaluation carried out by...the Board...in accordance with this part and regulations made there under, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Article 4 – 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

(a) Human beings, flora and fauna;

(b) Soil, water, air, climate and the landscape;

(c) Material assets and the cultural heritage and

(d) The interaction between the factors mentioned in paragraph. (a) (b) and (c)."

27. The Applicants contend that the Board was in breach of these provisions in the purported carrying out of its EIA. Section 172 (1H) permits the Board, when carrying out an EIA, to *"have regard to and adopt in whole or in part any report prepared by its officials or by consultants, experts or other advisors"*. As the planning Inspector is an official of the Board, her report could be and was expressly adopted by the Board save for the recommendation in relation to the omission of the 4 turbines.

28. Where the Board decides to grant or refuse permission for the proposed development it is obliged to inform the Applicant for permission and the public of the decision and is required to make certain information available; see s. 34 and s.172 (1J). The information to be provided under the latter is:

"(a)The contents of the decision and any conditions attaching thereto;

(b) An evaluation of the direct and indirect effects of the proposed development on the mattes set out in section 171A;

(c) Having examined any submission or observation validly made:

(i) The main reasons and considerations on which the decision is based and

(ii) The main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by members of the public;

(d)Where relevant, description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) Any report referred to in subsection (1H);

(f) Information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) The views, if any, furnished by other member states of the European Union pursuant to section 174."

Central to the submissions made by the parties is the extent and meaning of the phrase "*examination, analysis and evaluation*" which appears in the definition of an EIA together with the obligations of the Board under section 172 (1J) (b) to make available to the public its evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A.

(III) Appropriate Assessment.

29. It was accepted that the Board was required to carry out an AA pursuant to Article 6 of the Habitats Directive as implemented by Part XAB of the PDA. On the face of its decision the Board purportedly did so; the lawfulness of which is challenged by the Applicants. It is appropriate to observe at this juncture that a similar provision to s. 172 (1H), which permits the Board to adopt in whole or in part any report prepared by its officials, consultants experts or other advisors, has not been enacted in relation to the carrying out of an AA. The Applicants argued that that must be considered by the court to be intentional on the part of the Oireachtas, the result of which was that the Board itself had to carry out the AA. The adoption of that part of the Inspectors report relating to the AA was not permissible, however, where the Board expressly accepted the findings of the Inspector in relation to the AA, this could not satisfy the requirement to carry out its own AA in respect of that part of the development which had been the subject of the Inspectors recommendation which the Board did not accept.

30. Whereas the provisions of Part XAB are more detailed than those of Article 6 of the Habitat's Directive, it was accepted that the effect of these provisions is to impose on the Board obligations similar to those imposed by Article 6 (3).

31. Article 6 of the Directive of the Habitat's Directive, in so far as relevant, provides:

"2.Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the

competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

32. Article 6 (3) envisages a two stage process. For the purposes of Irish domestic law this provision was implemented by sections 177U and 177V of the PDA which provide for:

(i) Screening for appropriate assessment in accordance with s.177U; and

(ii) Where the Board accepts or determines as a result of screening for an AA in accordance with s. 177U that an AA is required, it must carry out an AA in accordance with the provisions of s. 177V.

33. Although s. 171A (1) contains a definition of an EIA for the purposes of Part X, s. 177 does not contain an equivalent provision in respect of an AA. Subsection 177V (1) provides that:

"An appropriate assessment carried out under this part shall include a determination by the competent authority under Article 6 (3) of the Habitat's Directive as to whether or not ...the proposed development would adversely effect the integrity of a European site".

Given that the effect of s. 177V (1) is to require the Board to make a determination as to whether or not the proposed development would adversely affect the integrity of a European site, it follows that an AA carried out by it must comply with the requirements of Article 6 (3) of the Habitat's Directive as construed by the case law of the CJEU.

34. It is also clear from the wording of s. 177V (1) and subs. (3) that the Board is required to carry out an AA before consent is given for a proposed development and that notwithstanding other provisions of the PDA and other Acts referred to, the Board is required to give consent to a proposed development only after having made a determination that the proposed development would not adversely affect the integrity of a European site.

Legal requirements of an appropriate assessment.

35. The requirements and legal test applicable to an AA have been considered by the CJEU in a number of cases. In "*Waddenzee* (case C-127/02) (2004) E.C.R.1-7405 at para. 61 of the judgment the court stated:

"...under Article 6 (3) of the Habitat's Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

36. In essence what is imposed on the planning authority, or the Board on appeal, is an obligation to reach a conclusion, as a matter of certainty, that the proposed development will not adversely affect the integrity of the European site in question in light of its conservation objectives. The standard required to support such a conclusion is that the planning authority, or the Board, must satisfy itself on the basis of complete, precise and definitive findings and conclusions that no reasonable scientific doubt remains as to the absence of such affects.

37. That this is so was subsequently confirmed by the CJEU in the decision of *Commission v. Spain* (case C-404/09) (2011) E.C.R. I-11853 where at para. 100 of the judgment the court stated:

"An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned".

As to the appropriate level of scientific knowledge necessary to inform the obligation to identify the affects of the proposed development on European sites in light of their conservation objectives, the Court observed at para. 99 of its judgment that the obligation was to be discharged "*..in the light of the best scientific knowledge in the field"*, the test being that "*..no reasonable scientific doubt remains as to the absence of such effects*".

38. These views were again reiterated by the CJEU in the case of *Sweetman v. An Bord Pleanála* (case C-258/11) where the Court also observed that "*..it is for the national court to establish whether the assessment of the implications for the site meets these requirements*".

39. Unlike the provisions of 171A (1), which requires that such an assessment must include an '*examination, analysis and evaluation'* by the planning authority, or the Board, no such wording appears in s. 177V (1). This difference fell for consideration in the case of *Kelly v. An Bord Pleanála* (2014) IEHC 400 where Finlay Geoghegan J. observed at para. 39:

"Section 177V (1) must be construed so as to give effect to Article 6 (3) of the Habitat's Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6 (3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the case referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings conclusions and a final determination."

40. The acceptance by the Board of the necessity to carry out an AA, or where it concludes, as a result the screening process, that an AA is required, implies that the proposed development is considered likely to have significant affects on a European site.

41. The stringent requirements necessary to be met in order to constitute a lawful AA as set out and summarised in *Kelly*, which the court adopts, are as follows:

"(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have any lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.

Hence in my judgment the full appropriate assessment required by s. 177V (1) must include all of the above elements and not just the determination expressly referred to in the subsection."

42. The meaning of the expression "*adversely affect the integrity of the site*" was also considered in *Sweetman*. At para. 39 the court stated that:

"Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6 (3) of the Habitat's Directive, the site needs to be preserved at a favourable conservation status; this entails, as the advocate general has observed in points 54 to 56 of her opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the Directive".

43. The opinion of the Advocate General given at para. 56 was :

".. that the constructive characteristics of the site that will be relevant are those in respect of which the site was designed and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision maker must ask is "why was this particular site designated and what are its conversation objectives?.."

Appropriate Assessment and Reasons.

44. Whilst there was no dispute as to the obligation on the Board under s. 177V (5) to give reasons for the determination to be made under Article 6 (3) of the Habitats Directive, at issue was the extent and nature of the reasons which must be given. The Applicants submitted that where the Board determines that the proposed development would not adversely affect the integrity of any European site having regard to the conservation objectives of such a site, then the reasons must include '*complete precise and definitive findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the site in light of the conservation objectives applicable to that site*'. It was argued that the stating of such reasons was required, inter alia, so that the public, and the Court on an application for judicial review, should be able to ascertain whether or not an AA had been conducted in accordance with the requirements of Article 6 (3).

45. A similar argument in relation to the sufficiency of reasons advanced by the Applicants in this case was made by the Applicant and the Department of the Arts Heritage and the Gaeltacht in the case of *Kelly* which also involved a challenge to the EIA and the AA carried out by the Board. On the AA, the learned judge stated that:

"48. I have concluded that the submission made on behalf of the Applicant and the Department is correct. First, the essential principle is that the reasons must be such as to enable an interested party assess the lawfulness of the decision and in the event of a challenge being brought, the court must have access to sufficient information to enable an assessment as to lawfulness to be made. On the facts of this judicial review, the challenged decisions are those to grant planning permissions. However, the grounds of challenge include the failure of the Board to carry out a proper or lawful appropriate assessment under Article 6(3) as implemented in Ireland. For the reasons already stated in this judgment, the Board could not make a lawful decision to grant planning permission unless it had reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development would not adversely impact on the European sites in question. In accordance with the CJEU decision in Sweetman, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the European site concerned in the light of the its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU.

49. Secondly, it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out inter alia as part of the planning process, the determination which must be made by the Board as competent authority is not a "planning decision" in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision, the Board is exercising a jurisdiction with a very wide discretion. By contrast, the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent, and therefore a decision which goes to its jurisdiction.

46. Apart from the controversy as to whether or not with regard to an AA it was the Board itself which was required to make the findings and reach the necessary conclusions on which to base its decision, there was also an issue as to whether the reasons upon which it was based had to be stated in the decision or could be ascertained by reference to that and / or the report of the Inspector. As has already been observed, the Board is empowered under s. 146 of the PDA, in connection with the performance of any of its functions, to assign a person to report on any matter on its behalf and must consider the report and recommendation submitted before making a determination.

47. That the report of the Inspector might be referred to for the purposes of ascertaining the reasons for the decision by the Board was commented upon in *Kelly*. Finlay Geoghegan J. observed that where the Board appoints an Inspector to prepare a report and the Inspector carries out an AA as part of his or her report, it may be that if the Board, on consideration, accepts the relevant findings made and conclusions reached by its Inspector, that production of the report may satisfy some or all of the obligations on the Board to give reasons for its determination, though that would depend on the relevant facts. It would seem to follow from this statement that, depending on the facts of a given case, reference to the report as a source or record of the findings, conclusions and some or all of the reasons for the decision is permissible where there has been an acceptance by the Board of the relevant findings made and conclusions reached by the Inspector.

48. The Applicants in this case argue that in the absence of a statutory power entitling the Board to adopt the report of the Inspector, then the relevant findings made and conclusions reached had to be those of the Board itself. However, if that proposition was not correct, it was submitted that, absent the power to adopt the report, there had to be an express acceptance on the face of the decision by the Board of the Inspectors findings and conclusions.

Effects on the decision making process relating to an EIA and an AA.

49. The statutory provisions in relation to the carrying out of an EIA and an AA have quite different effects on the decision making process of the Board. As to these it was stated in *Kelly* that:

> *"33. In carrying out an environmental impact assessment, the Board is required to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.*
>
> *34. In contrast, the Board, in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive".*

Judicial review in planning matters.

50. The accepted view of the law on the case authorities in relation to judicial review in planning matters is that the court is not entitled to identify or concern itself with the correctness of the decision reached by the planning authority or the Board, rather the court is concerned only with the lawfulness of that decision. In this regard there is a presumption, in the absence of evidence to the contrary, that the planning authority or the Board has performed its functions in accordance with the legal obligations placed upon it. See *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59 McMahon J, and *Lancefort Ltd v. An Bord Pleanála* [1998] 2 I.R. 511. It may also be said that the planning correctness or merits of the decision of the planning authority, or the Board, are not subject to judicial review where there was sufficient evidence before the planning authority or the Board which enabled it to make its decision.

51. In *Power v. An Bord Pleanála* [2006] IEHC 454 Quirke J. referring to the jurisdiction of the Court stated:

> *"It is decidedly not a function of this court to substitute itself for the Board for the purposes of determining whether it believes that the decision made was the correct one. This court has neither the jurisdiction nor the competence to undertake such an exercise."*

52. The learned judge also observed that in the absence of evidence of illegality the courts will not intervene by way of judicial review to quash decisions of administrative tribunals.

53. The onus of proof cast on an Applicant for judicial review of a decision to refuse or grant permission on the grounds of unreasonableness has been commented upon in a number of decisions and in this regard Finlay C.J. in his judgment in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 stated:

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

The burden of proof and the jurisdiction of the Court to interfere with a planning decision on judicial review were also considered by Charleton J. in *Weston Ltd v. An Bord Pleanála* [2010] IEHC 255 where he stated:

> *"The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the Applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanla can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere."*

Referring to the presumption of validity of the decision and the onus of proof placed on an Applicant he went on to observe:

> *"The onus of prove [sic] in establishing that An Bord Pleanla did not consider the question of environmental impact assessment and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant."*

54. The planning process involved in this case required the provision of an EIS by Cleanrath and the carrying out by the Board of an EIA in order to enable the Board to assess, evaluate, make findings and reach a conclusion in relation to the likely significant effects on the receiving environment of the proposed development. The EIS and EIA are part of the planning process but are not the sole basis upon which the Board reaches its decision. Commenting on the difference between these in the context of the planning process, McMahon J. in *Klohn* observed that:

"It is also worth emphasising that the environmental impact statement is a document submitted by the developer, the terms of which are set when it is submitted. In contrast, the environmental impact assessment is a process which is an ongoing exercise undertaken by the decision maker. A great deal can happen, and a great deal of information can be accumulated, between the lodging of the environmental impact statement by a developer and the final decision by the planning authority or by An Bord Pleanála."

55. Whereas the EIS must comply with the relevant planning regulations, the adequacy of the information supplied in it is primarily a matter for the decision maker. Once the statutory requirements have been satisfied the court is not concerned, in planning terms, with the qualitative nature of the EIS or with any discourse upon it by the Inspector.

56. The *bona fide* exercise by the Board of its discretion in relation to matters of planning is not something with which the Court will intervene. The reason for this was succinctly explained by McMahon J. in *Klohn*

"The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the Court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination."

57. Commenting on the obligation to state reasons and considerations under s. 34(10), including the obligation to give main reasons for granting or refusing permission when the Board disagrees with a recommendation of its Inspector, Hedigan J. in *O'Neill v. An Bord Pleanála* [2009] IEHC 202 summarised the appropriate principles as follows:

"First, it is well-established as a general rule that reasons need not be discursive. This was made clear by Murphy J. in the decision of O'Donoghue v. An Bord Pleanála [1991] I.L.R.M. 750. He stated at p. 757:

> *'It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of [its] deliberations'*

However, this principle is not without limits and it is apparent that a standardised or formulaic decision will not suffice. Indeed, in O'Donoghue , Murphy J. went on to state, also at p. 757:

> *'[T]he need for providing the grounds of the decision... could not be satisfied by recourse to an uninformative if technically correct formula.'*

28. The Respondent, therefore, is not obliged to engage in a lengthy review or analysis of its own reasoning when communicating its decision. Furthermore, and of particular relevance for present purposes, section 34(10)(b) only requires that the Respondent should explain its decision to differ from the overall recommendation of an Inspector, as opposed to the specific conditions suggested by him or her. In Dunne v. An Bord Pleanála [2006] IEHC 400, McGovern J. stated as follows:

> *'It seems to me that the submission of the first Respondent is correct and that there is no obligation on the first named Respondent to give reasons why it disagreed with its planning Inspector on a particular condition which was recommended by the Inspector to be imposed.'*

29. The second principle of general application is that the adequacy of reasons should be assessed from the perspective of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved. This requires that the Respondent's decision should not simply be read in isolation but rather in conjunction with any conditions attached thereto. In O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39, Finlay C.J. stated the following:

> *'I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to common sense and to fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons.'*

31. The third and final general principle is that the reasons should provide a certain minimum standard of practical enlightenment. In Mulholland v. An Bord Pleanála [2006] 1 I.R. 453, Kelly J. held at p. 465 that a statement of reasons must:

> *'(1) give to an Applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
>
> *(2) arm [the Applicant] for such hearing or review;*
>
> *(3) [enable the Applicant to] know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and*
>
> *(4) enable the courts to review the decision.'"*

58. It follows that, in considering the lawfulness of the decision reached, the court is required to ascertain from the record whether or not the Board complied with the obligations placed upon it in reaching its decision. The adequacy or sufficiency of the statement of reasons identified by Kelly J must be apparent and are to be ascertained from the record. What constitutes the record and whether or not the record in this case is sufficient for the purposes of meeting the requirements necessary to show that the Board complied with its statutory obligations concerning the EIA and AA is in issue.

59. In my judgment, it would seem to follow from the case law of the CJEU and, in particular, the recent decisions of this court on the subject, that deficiencies in the record which result in the court being unable to determine whether or not these obligations have

been complied with are fatal to the lawfulness of the decision and cannot be displaced or cured by a presumption that the Board acted lawfully. Such a presumption does not arise or exist in vacuo but is founded upon an appropriate and adequate record of what it was that the Board was required to do in relation to those matters which are called into question.

(1V) Section 37(2) (b) and (c) of the Planning and Development Act 2000.

60. I now propose to deal in turn with the individual grounds on foot of which the decision of the Board is challenged. The first of these concerns the requirements to be satisfied by the Board where, as occurred here, the Council refused permission on the ground that the proposed development would materially contravene the county development plan.

61. The second ground upon which the Council refused permission for the proposed development was as follows:

> *"The proposed development would be partly located within habitats of high conservation value, including habitats listed on Annex 1 of the Habitats Directive including active Blanket Bog, Dry Heath and North Atlantic Wet Heath with Erica Tetralix which are key features with the county's ecological network. As indicated in the County Development Plan 2009, it is the Council's stated objective under ENV1-9 to minimize the impacts of new developments on habitats of natural value that are key features of the county's ecological network. It is considered that the proposed development would result in the destruction of habitat of ecological value and it would have a major negative impact on an area of high local bio-diversity site value. Therefore, it is considered that the proposed development would materially contravene the states objective of the current County Development Plan and, hence, be contrary to the proper planning and sustainable development of the area."*

Appeal to An Bord Pleanála against a refusal on the ground of material contravention– Statutory Provisions

62. Appeals to the Board are provided for under Section 37 of the PDA.

a. Subsection (1) (b) provides that:

> *"... where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections (1), (2), (3) and (4) of section. 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority."*

63. Subsection (2) (a) provides that:

> *"...subject to paragraph. (b), the Board may in determining appeals under this subsection decide to grant permission even if the proposed development contravenes materially the Development Plan relating to the area of the planning authority to whose decision the appeal relates".*
>
> Subsection (2) (b) provides that:
>
> *"Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the Development Plan, the Board may only grant permission in accordance with paragraph. (a) where it considers that:*
>
> *(I) The proposed development is of strategic or national importance;*
>
> *(II) There are conflicting objectives in the Development Plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(III) The permission for the proposed development should be granted having regard to the Regional Planning Guidelines for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or;*
>
> *(IV) Permission for the proposed development should be granted having regard to the pattern of development, permission granted, in the area since the making of the Development Plan.*

Subsection (2) (c) provides *"Where the Board grants permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the Development Plan."*

64. Grounds 7, 8, 9 and 10 of the statement of grounds in these proceedings concern an alleged failure on the part of the Board to comply with the requirements of s. 37(2) (b) and (c) of the PDA.

65. Ground 9 is directed towards the provisions of s. 37(2)(b) which, on the face of it, restrict the power of the Board to grant permission under paragraph *(a)* for a development where the Council had decided to refuse permission on the grounds that the proposed development materially contravenes its development plan.

66. The Applicants' case is that the Board erred in law and acted ultra vires in failing to consider whether the proposed development, permission for which had been refused by the Council on the basis of material contravention, would meet one of the four criteria exemplified in sub section *(2) paragraph (b) sub paragraphs (i) to (iv);* such failure being manifest on the face of its decision.

67. Ground 10 is directed towards the provisions of s. 37(2) (c) of the Act which require the Board, when granting permission in accordance with (2) (b), to indicate in its decision, in addition to the requirements of *Section 34* ,the main reasons and considerations for contravening materially the development plan. The Applicants' case is that the Board erred in law and acted *ultra vires* in failing to state the main reasons and considerations for contravening materially the development plan, a failure also manifest on the face of the decision.

The Applicants' submissions

68. It was submitted on behalf of the Applicants that whilst the provisions of s. 37(2)(a) conferred a jurisdiction on the Board to

grant planning permission for a development which materially contravenes the development plan, the decision of the Board to do so is always subject to the terms of sub.s (2) (b) and (c). Consequently, as one of the grounds on which permission had been refused by the Council was that the proposed development would contravene objective ENV 1-9 of the development plan, the Board could only grant planning permission in accordance with the requirements of (2) (b) which, it was submitted, the Board had failed to do. That it did not do so was apparent on the face of the decision which made no reference to the matters or any of them exemplified in *sub paragraphs (i) (ii) (iii) and (iv)* of sub section (2) (b).

69. Furthermore, it was submitted that the failure by the Board to comply with the requirements of subsection (2) (c) by stating its main reasons and considerations for materially contravening the development plan was also fatal to the legality of the decision.

70. It was contended on behalf of the Applicants that the resolution of the issue which arises is largely dependant on an interpretation of s. 37(2) (b) and that in construing that provision it was unnecessary for the Court to assess whether or not the proposed development was or was not a material contravention of the development plan.

71. There is no doubt but that the Board considered the development plan nor is there any doubt about the awareness by the Board of the reasons given by the Council for refusal of permission. In its decision the Board noted that:

> *"...the planning authority was of the view (in its second reason for refusal) that the proposed development would constitute a material contravention of the development plan. The Board gave careful consideration to the policy set out in objective ENV 1-9, the ecology of the site, the nature and condition on the habitats therein, and the turbine and road layout proposed and was satisfied that impact on the environment had been minimised and concluded that a material contravention of this policy of the development plan did not arise."*

72. It was contended that, whilst prior to enactment of s. 37, the Board was at large when it came to determining appeals and could grant planning permission for a development that materially contravened the development plan without restrictions on its power to do so, the enactment of s. 37(2) (b) was intended by the legislature to restrict that power in circumstances where the planning authority had refused permission on the basis of a material contravention. The whole purpose of the provision, it was argued, was to ensure that where the Board decided to grant planning permission for a proposed development which the planning authority had concluded was a material contravention of the development plan and had refused permission, it could only do so in the limited circumstances where at least one of the four criteria set out in *sub paragraphs (i)-(iv)* had been met.

73. Whilst it was accepted that the Board in considering an appeal did so *de novo,* as if the planning application had been made to it to it in the first place, it was argued that this did not mean that the Board was free to make a decision without having any regard to the reasons upon which permission had been refused by the planning authority, and that this was particularly so where one of the reasons for refusal was that the proposed development would be a material contravention of the development plan. In this regard the Applicants relied on the decision of this Court in *Nee v. An Bord Pleanála* (2012) IEHC 532 in which the Court analysed the role of the Board where the planning authority had refused planning permission for the proposed development on the grounds of contravention.

74. It was argued that given the failure to comply with the statutory requirements apparent on the face of the decision, there was no basis upon which any interested party or member of the public, or the Court, could come to the conclusion that the Board had complied with those requirements.

75. Finally, whilst it was accepted by the Applicants that it was evident from its decision that the Board had disagreed with the Council on the question of material contravention, they argued that this did not relieve the Board from complying with the requirements of sub.s (2) (b) and (c) .

The submissions of the Respondent and Cleanrath .

76. The Respondent and Cleanrath submitted that the Applicants had neither sought nor obtained leave to challenge the conclusion of the Board that the proposed development would not materially contravene the development plan. Accordingly, they were bound to accept that the proposed development did not do so.

77. The consequence of this, they submitted, was that the Applicants' contention that the Board was in breach of the provisions of s. 37(2)(b) and (c) did not arise for consideration since those provisions refer to, are concerned with, and govern the circumstance where, having considered the development plan and exercising its de novo jurisdiction under s. 37(1) (b), the Board decides to grant permission for the proposed development where it has concluded that the proposed development materially contravenes the plan. In those circumstances the Board is empowered by sub.s (2) (a) to grant permission, however, it is only where the planning authority had also refused permission on that ground that the provisions of sub.s 2 (b) and (c) arise.

78. That this is the correct interpretation and was intended by the Oireachtas when it enacted that provision is, it was argued, supported by the provisions of s.37(2)(c) which require the Board to indicate in its decision the main reasons and considerations for materially contravening the development plan. When this provision is read with s.37 (2) (a), it is not only referable to but is also consistent only with the situation where the Board, and the planning authority before it, concludes that the proposed development would constitute a material contravention of the development plan.

79. Additionally, if it was the intention of the legislature that, when exercising its *de novo* jurisdiction under s.37 (1) (b) to grant permission under S. 37 (2) (a), the Board was to be fettered by the decision of the planning authority in relation to material contravention where the Board concludes otherwise, such would have had to have been clearly stated in the provision. Moreover, the practical effect of the interpretation suggested by the Applicants would be to preclude the Board from reaching its own view on whether or not the proposed development constituted a material contravention; no such intention was expressed.

80. It was argued that Section 37(2) (b) cannot be read in isolation from the jurisdiction exercised by the Board under s.37 (1) (b) which requires the Board to determine the application as if it had been made to the Board in the first instance. Furthermore, the effect of the decision of the Board operates from the time it is given to annul the decision of the planning authority.

81. Having regard to these provisions, and notwithstanding the decision of the Council, it was argued that the consideration by the Board of the development plan, and its decision that the proposed development did not constitute a material contravention was made *de novo* and that this was *a fortiori* the case where, as had happened here, Cleanrath in its appeal specifically contended that the proposed development would not constitute a material contravention of the plan.

82. In support of their contentions these parties relied on the decision of Irvine J. in *Cicol Ltd. v. An Bord Pleanála* [2008] IEHC 146, where it was held that on the hearing of an appeal the Board was not obliged to attach any special weight to the interpretation by

the planning authority of its own development plan and was required to determine the appeal as if the application for planning permission had been made to it in the first instance.

83. It was further submitted that Section 37(2) (b) could not be viewed in isolation from the *de novo* jurisdiction of the Board provided for by s. 37(1)(b) nor could it be viewed in isolation from s.37 subs. (2) (a). The Board was free to reach a conclusion contrary to that of the Council on material contravention and, as it had done so, the provisions of sub section (2) had no application.

84. It was forcibly argued that an interpretation which required the Board when granting permission to give main reasons and considerations for contravening materially the development plan in accordance with sub.s. (2) (c) in circumstances where it had concluded that no material contravention was involved, would be illogical and inconsistent with that decision. The provisions of s.37(2)(b) and (c) were only triggered if and when the Board, exercising its *de novo* jurisdiction, concludes, as the planning authority had done before it, that the proposed development constituted a material contravention. Absent a material contravention finding by the Board in this case, the application for permission fell to be dealt with in the ordinary way under s 37 (1) (b)

Decision on interpretation and applicability of section 37(2) (b) and (c)

85. Having due regard to the submissions made, the determination of the issue on this aspect of the case is dependent upon a construction of s.37 subs. (2).

86. It is clear from its decision that the Board considered and determined that the proposed development did not constitute a material contravention of the development plan. The Applicants did not seek nor was leave given to challenge that decision.

87. The failure to seek relief on that basis is not surprising when regard is had to the interpretation and construction which the Applicants submit should be placed on s.37(2) (b) and (c); it was not the decision that the proposed development would not materially contravene the development plan which was in question but, rather, the manifest failure by the Board to comply with the requirements and procedures laid out in paragraphs (b) and (c) of subsection (2) which they contend is fatal to the legality of its decision.

88. On the other hand, the Respondent and Cleanrath contend that the provisions of s.37 (2) (a), (b) and(c) are, on a proper construction, confined to the situation where the Council had refused permission on the ground of material contravention and the Board, in exercise of its *de novo* jurisdiction under s.37 (1) (b), reaches the same conclusion but decides to grant permission.

89. Insofar as it may be considered that these competing interpretations as to the meaning of the statutory provisions arise from any ambiguity or obscurity or, on a literal interpretation of them, would result in a meaning that would be absurd or would fail to reflect the plain intention of the Oireachtas, that situation is governed by the Interpretation Act, 2005. Section 5 requires the relevant provision to be given a construction that reflects the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole.

90. In my view, absent obscurity, ambiguity or, on a literal interpretation of the provision, a meaning that would be absurd or one which would fail to reflect the plain intention of the Oireachtas, the provisions of s. 5 have no application.

91. Section 37 (2) has been considered by this Court in a number of cases. In *Cicol Ltd v An Bord Pleanála* [2008] IEHC 146. The council having granted permission, the Board, on appeal from that decision, refused permission on the grounds that the proposed development would materially contravene the development plan. The Applicant sought to quash the decision of the Board on a challenge as to the lawfulness of its decision.

92. It was argued on behalf of the Applicant in that case that the Board, in reaching its decision, ought to have afforded some special primacy to the interpretation by the planning authority of its own development plan. That argument was rejected by the Court, Irvine J. observing that under the provisions of s.37 (1) (b) the Board was required to determine the appeal as if the application for planning permission had been made to it in the first instance and that that provision was not consistent with the Applicant's assertion. Neither, did she believe, was there any validity to the Applicant's argument that the provisions of s.27 (2) (b) lent any further legitimacy to its case on that point. She went on to state at p. 29 that

> *"...whilst that section places certain restrictions on the Board where a planning authority had decided to refuse permission on grounds that a proposed development materially contravenes the development plan, it does not follow that when the planning authority grants permission and the Board is minded to annul that decision that it is circumscribed in the manner contended for in reaching that decision. Nor did the Applicant's assertion withstand practical testing"*

93. Furthermore, the Applicant's assertion did not withstand practical testing; the learned trial judge observing that :

> *"...if special primacy was to be afforded to the local authority's interpretation of its own development plan, it is difficult to see how any party could mount a challenge to a decision made by a local authority and successfully claim that a proposed development was in contravention of the development plan. The right of a local authority to have its interpretation of its own development plan accorded some special weight would substantially dilute the clear intention of the legislature to restrict the powers of the local authority from developing in contravention of a Development Plan."*

94. In *Nee v. An Bord Pleanála* [2012] IEHC 532, an issue which arose as to whether or not the decision of the planning authority to refuse permission on the grounds that the proposed development would be *"a contravention of the Development Plan"* constituted and meant a *'material'* contravention of the plan. The Court considered that the absence of the word 'material' in the decision of the planning authority was intentional and legally significant. In the view of O'Malley J:

> *"...the section relied on specifically provides that the Board may grant permission "even if" the refusal is for a material contravention. That would make little sense if every refusal by a Planning Authority for contravention of a plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the Board in cases not coming within the excepted categories. I do not believe that to be the intent of the section."*

Accordingly, she went on to find that s.37 (2) had no application to the case.

95. More recently the provisions of s.37 (2) were considered by this Court in *People Over Wind and anor. v. An Bord Pleanála and ors* [2015] IEHC 271. The planning authority had decided to refuse planning permission on the ground that the proposed development

would have 'contravened' the Laois County development plan. An argument similar to that advanced on behalf of the Applicants in this case was advanced; namely, that as the local authority had refused planning permission on the ground that the proposed development would contravene the development plan, the Board was restricted to granting planning permission in the manner and way set out in s. 37(2) (b) and (c) ; having failed to have regard to those provisions and the decision of the planning authority, the decision of the Board was *ultra vires* , void and of no legal effect.

96. Just as in the case of *Nee*, the absence of the word 'material' in the decision of the planning authority was considered by the Court to be intentional and legally significant. Haughton J. observed that the effect of s.37 (1) (b) was "*...to annul the decision of the planning authority as from the time when it was given*". Given that the decision of the Board made after carrying out its own AA had the effect of annulling the decision of the Council to the effect that there was no adequate AA, the question of considering whether or not there was a material contravention no longer arose for consideration or decision by the Board and therefore s.37 (2) (b) was not relevant.

97. Having regard to the conclusion on the facts in those cases that the provisions of S. 37 (2) were not applicable , I find these decisions are of limited assistance in the task of construing the provision save that it would seem to follow from them that where a planning authority has refused permission on the basis that the proposed development contravenes the development plan but does not find that the contravention is a 'material' contravention, and the Board concludes likewise or decides that a material contravention is not involved, the provisions of S. 37(2) (a) (b) and (c) have no application to the exercise by the Board of its jurisdiction to grant permission under S.37 (1) (b).

98. It is necessary to approach the task of construing the provisions in question by reference to the rules governing the construction of statutes. These are well settled. Legislative intention is first and foremost to be ascertained from the text of the enactment itself: the words employed by the legislature are to be given their ordinary and natural meaning and where that meaning is plain and unambiguous, effect must be given to it and nothing more is required of the Court.

99. In *O'H v. O'H* [1990] 2 IR 558 at 563 Barron J. referred to the judgment of Brandon J. in *Powys v. Powys* [1971] P340 at 350 where the learned judge summarised the principles applicable to the construction of statutes in the following terms:-

> *"The true principles to apply are in my view, these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, the effect should be given to it; and that it is only if such meaning is not plain, but obscure and equivocal that resource should be had to presumptions or other means of explaining it."*

100. In *Howard v. Commissioners of Public Works* [1994] 1 IR 101 Blayney J. approved the judgment of Lord Blackburn in *Direct United States Cable Company v. Anglo American Telegraph Company* [1877] 2 App Cas 394 in which he said:-

> *"The Cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver."*

The decision of the Supreme Court in Howard has been cited in many cases since it was delivered, including ,by way of example, *Harrisrange v. Duncan* [2003] 4 IR 1; *Dunnes Stores v. Director of Consumer Affairs* [2006] 1 IR 355, *Murphy v. Cobh Town Council and An Bord Pleanála* [2006] IEHC 324 and *O'Brien v. The Revenue Commissioners* [2014] IEHC 347.

101. Applying these rules it is necessary in the first instance to give the words employed by the Oireachtas in s. 37 (2) their ordinary and natural meaning. Effect must be given where possible to all of the words used in the enactment of the provision under consideration since it is well settled law that the legislature is deemed to have intended the use of each word. See *Goulding Chemicals Ltd. v. Bolger* [1977] I.R. 211 and *O'Brien v. The Revenue Commissioners, infra.*

102. There is no controversy between the parties as to the meaning of s. 37(1) (b) which provides that where an appeal is brought against a decision of a planning authority, and is not withdrawn, the Board is required to determine the application as if it had been made to the Board in the first instance and that the decision of the Board operates to annul the decision of the planning authority as and from the time it was given. This is commonly referred to as the *de novo* jurisdiction of the Board.

103. Subject to necessary modifications, s. 37(1)(b) applies the provisions of subs. (1), (2), (3) and (4) of s. 34 to a determination by the Board of an application for permission on appeal in the same way as those provisions apply to a determination of an application by a planning authority.

104. Applying the principles to the provisions of subs. (2) (a), and giving the words "*..the Board may in determining an appeal under this section decide to grant permission even if the proposed development materially contravenes the development plan..* " their ordinary and natural meaning, it is clear that the *determination of the appeal* being referred to in this provision is the determination of an appeal by the Board under s. 37(1) (b) and that the remaining words of subs. (2) (a) confer on the Board the discretionary power to grant permission even if the proposed development materially contravenes the development plan.

105. It is also immediately apparent from the wording of the proviso at the commencement of subs (2) (a) that it makes the provisions of that paragraph subject to the provisions of subs (2) (b) which itself expressly refers back to the power of the Board to grant permission in accordance with subs (2) (a). Accordingly, neither provision can be read in isolation; rather, it is necessary that both provisions be read together.

106. Proceeding thus and giving the words of subs. (2) (b) their ordinary and natural meaning, it is plain that where there has been a decision by a planning authority to refuse permission on the grounds that the proposed development materially contravenes the development plan and the Board also decides that a material contravention would be involved, the power vested in the Board to grant permission in accordance with subs (2) (a), may only be exercised where the Board considers that the requirements set out in subs (2) (b) subparagraphs (i) and (ii) or (iii) or (iv) are met.

107. The interpretation which the Applicants seek to have placed on the provisions of s.37 (2) (b) and (c) would, in my view, produce a meaning, if not absurd, one which would not give effect to the plain intention of the legislature. By way of practical example, if a planning authority was mistaken in deciding that a proposed development materially contravened its own development plan, refused permission and the Board, exercising its *de novo* jurisdiction, came to the opposite conclusion, the result on the Applicants' case is that the Board would be bound by the decision of the planning authority on that matter and any decision made to grant permission

would be confined or limited in the way and manner set out in subs. (2) (b). Furthermore, and notwithstanding its own view to the contrary, the Board would nevertheless be required under subs. (2) (c) to set out the main reasons and considerations for materially contravening the development plan.

108. Subsection 34(6) confers on a planning authority the power to grant permission for a development which would contravene materially the development plan provided certain very strict requirements set out in that subsection are complied with. In my view, it is significant that in applying certain provisions of s.34 to the Board when considering an appeal, s.37 (1) (b) of the PDA did not apply the provisions of subs. 6. Consequently, if the legislature was to confer on the Board the power to grant permission for a development which materially contravened the development plan it was necessary that a provision enabling it to do so be enacted; it did that by enacting the provisions of subs. (2).

109. When one looks at the very strict procedures and limitations placed on the planning authority under s.34 (6) in respect of the grant of planning permission for a development that would materially contravene a development plan it is not surprising that if such a determination is made following that process and, on appeal, the Board comes to the same conclusion, that its ability to grant permission should be limited in the way set out in sub.s (2) (b) and(c).

110. I consider it pertinent and significant that where the Board concludes that the proposed development would constitute a material contravention but the planning authority has not done so, it may grant permission under subs. (2) (a) without the restrictions imposed by subs. (2) (b) or the necessity to comply with the additional requirements set out in subs. (2) (c).

111. In applying the principles to the wording in subs (2) (c) "*Where the Board grants a permission in accordance with paragraph(b)..*" these words in their ordinary and natural sense mean and refer to the circumstance where the Board decides to grant a permission under subs. (2) (b) and not otherwise.

112. It is also clear that the words "*its decision*" in subs. (2) (c) refer to the decision of the Board and not that of the planning authority. Similarly, the "*main reasons and considerations*" to be indicated in "its decision" are plainly those of the Board and not those of the planning authority since these are required to be given by the Board under subs. (2) (c) in respect of a permission granted by it under subs. (2) (b) where both the Board and the planning authority have determined that there would be a material contravention but where the planning authority had refused permission for that reason.

113. It is also significant that subs. (2) (c) is expressly concerned with the circumstance of a *decision to grant permission* by the Board in accordance with subs. (2) (b) for a development which materially contravenes the development plan rather than with a *decision to refuse permission* on that ground by the planning authority.

Conclusion

114. I accept the submissions of the Respondent and Cleanrath in relation to the meaning of s. 37(2) (a), (b) and (c). Interconnected as they are these provisions must be read together and when that is done they are incapable of being sensibly construed otherwise than as being concerned only with a decision of the Board, in the exercise of its de novo jurisdiction, to grant permission for a development which materially contravenes the county development plan.

115. Where and only where the planning authority has refused permission on the grounds that the proposed development materially contravenes its own development plan and so too the Board, do the limitations and requirements of subs. (2) (b) and (c) apply to its decision to grant permission. When so construed the words in their ordinary and natural sense are unambiguous and plainly declare the intention of the legislature.

EIA

The Applicant's submissions.

116. Detailed written submissions were submitted and legal argument made in respect of the alleged failure by the Board to carry out an EIA in accordance with the requirements of s. 172. It is not intended to set these out in an exhaustive fashion but, given the significance of the issues to be resolved, the essence of these will be given in summary form.

117. The particulars of the grounds upon which the Applicants seek to challenge the legality of the Board's decision may be summarised as follows:

(i) The Board does not identify with particularity or at all what constitutes its record of the EIA that it purports to have carried out.

(ii) The record does not identify, describe and assess the direct and indirect effects of the proposed development as required by s. 171A of the 2000 Act.

(iii) The record does not disclose any examination, analysis or evaluation of the direct and indirect effects of the proposed development as required by s. 171A.

(iv) The record does not identify, describe and assess the direct and indirect effects of the proposed development in light of each individual case as required by s. 171A.

(v) The Board failed to comply with its obligations to make available information to the public concerning any evaluation of the direct and indirect effects of the proposed development of the matter set out in s. 171A (s. 172(1J).

(vi) The Board adopted the EIA purported to have been carried out by the Inspector, which said EIA was flawed as it was based on the Inspector's understanding of the function of EIA, which was that "*the environmental impact statements submitted by the Applicant is required to be assessed by An Bord Pleanála, as the competent authority*", so that the Inspector appears not to have taken into account third party submissions in purporting to carry out an EIA, as required by s. 172 (1G).

(vii) Insofar as the Inspector, and by extension the Board, purports to record its evaluation for the purposes of s. 172 (1J), such record is limited to the "*likely main residual effects of the proposal*" and it does not "*identify, describe or assess*" the direct and indirect effects of the proposed development nor does it examine, analyse or assess other aspects of the EIS such as the effects of the proposed development before mitigation and/or the relevant data on the receiving environment.

(viii) Without prejudice to the generality of the foregoing the Board failed to carry out an EIA in relation to the likely direct and indirect effects of the proposed development on the matter set out in s. 171A of the four turbines that the Inspector recommended should be admitted, and in particular failed to provide any description or evaluation of the visual impacts of the inclusion of the said turbines on human beings and/or residential amenities, or at all.

118. On these grounds it was submitted by the Applicants that the Court was entitled to conclude that no EIA was carried out in relation to the proposed development as required by law. Central to their case, it was argued that as the Board had adopted in its entirety the final recommendations of the Inspector, save in respect of the omission of the four turbines, any defect in the Inspector's EIA, such as it was, impacts upon the validity of the EIA purportedly carried out and completed by the Board.

119. It was accepted that under s. 172 (1H) the Board was entitled to adopt in whole or in part the report of the Inspector. Even if it is considered that the Inspector carried out an EIA which was adopted by the Board, once the Board disagreed with the Inspector's recommendation in relation to the omission of the four turbines, the Board was obliged to carry and complete an EIA of the development as a whole – that is to say of the proposed development including the four turbines which the Inspector recommended should be omitted.

120. In that regard it was submitted that in carrying out an EIA the Board was required to conduct an examination, analysis and evaluation of and to identify the direct and indirect effects of the proposed development on the matters specified in s. 171A (1) namely the direct and indirect effects on "*human beings, fauna and flora; soil, water, air, climate and landscape, material assets and the cultural heritage; the interaction between the factors mentioned in paragraphs (a) (b) and (c).*

The Applicant's cited the decisions in *Kelly and Rathcniska v. An Bord Pleanála* [2015] IEHC 18 in support of their submissions. These authorities were also relied upon in argument by the Respondent and Cleanrath.

121. It was argued by the Applicants that the reasons given by the Board in its decision were hopelessly insufficient to enable the Applicants or members of the public, or the court, to understand the nature and/or extent of the evaluation and assessment carried out by the Board both in relation to the development as a whole and, in particular, its reasoning for disagreeing with the Inspector's recommendation.

122. Particular reference was made in this regard to the findings of this Court in *People Over Wind*, where the Court held that on pages 6 to 8 of its decision the Board had provided an analysis of the points raised by the Inspector and had explained the reasons for not adhering to those elements of the assessment, moreover, the narrative set out in the decision clearly set out the Board's own assessment and evaluation of those aspects. By contrast it was argued that no such analysis or explanation as was provided by the Board on the face of its decision in this case.

123. Insofar as the Inspector's report was deficient or otherwise contained defects which go to the root of the question as to whether or not an EIA was carried out, the Applicants submitted that it was clear from her report that the Inspector misunderstood the function of an EIA since she had referred to this as an obligation by the Board to assess the EIS submitted by Cleanrath. If that was her understanding, then that understanding was legally incorrect because the requirements of s. 171 A and s. 172 (1G) involves an examination assessment and evaluation of not just the EIS submitted by the developer but also an examination, assessment and evaluation of the submissions by members of the public, including the Applicants insofar as those submissions related to the likely significant effects of the proposed development on the environment.

124. As to whether or not the Inspector's report comprises an EIA it was submitted that notwithstanding references to an EIA, the Inspector essentially confined herself to a consideration of the adequacy of the EIS. It was argued that from a fair reading of the report, in particular section 12, there was no "*examination analysis and evaluation*" of the direct and indirect effects of the proposed development on the specified media as required under s. 172. Whilst the Inspector had referred back to her main assessment under section 11 of the report, it was submitted that when read together it did not take account the obligation to examine, analyse assess and/or evaluate other information furnished relating to the environmental impact of the project, such as the data on the receiving environment, mitigation measures and other information which were required to be considered in the context of an EIA for the purposes of complying with s. 172 and the EIA Directive. It was submitted that the references at paragraph 12.7 of the Inspector's report to section 13 was not sufficient for the purposes of an EIA since section 13 of her report was concerned with the AA, a standalone part of the planning process, but if that was not correct, the AA was itself deficient in terms of compliance.

125. With regard to the obligation of the Board to make available to the public, including the Applicants, information as to its evaluation of the direct and indirect effects of the proposed development on the relevant aspects of the environment referred to in s. 171A, it was submitted that the Board did not identify with particularity or at all what constitutes its evaluation or record of the EIA that it purports to have carried out. It was argued that in order to satisfy the obligation placed upon it by virtue of the provisions of s. 172 (1J), the evaluation and/or EIA of the Board must be recorded in such a manner as to be accessible and to enable members of the public and where necessary, the court, to understand the nature and/or extent of that evaluation and/or EIA and which must not be vague or uncertain.

126. Insofar as the Board purported to adopt the Inspector's assessment of environmental impacts save in respect of the omission of certain turbines, the Board failed to discharge that obligation since it was not possible for members of the public to identify with any degree of precision or certainty the relevant portions of the Inspector's report that the Board adopted and, therefore, it is not possible to identify what information was being made available by the Board for the purposes of s. 172 (1J). The consequence of that failure was to render the decision of the Board invalid.

127. In her report, the Inspector had observed that there was '*no real assessment*' of visual impact in relation to residential properties carried out in the context of the EIS. It was submitted that it was not possible to ascertain whether the Board agreed with that statement or not. No information was provided by the Board in relation to what its assessment or evaluation of visual impact was in relation to residential properties or what the direct or indirect effects of the development are in that regard.

128. Given that the Inspector identified visual impacts as a matter of principle concern and took the view that there was '*no real assessment*' of the visual impact in the EIS relating to residential properties, it was submitted that in rejecting the Inspector's recommendation to omit four turbines there was nothing in the Inspector's report upon which the Board could rely in that regard. Moreover, by recommending the omission of the four turbines, the only conclusion which the Board could have reached was that the Inspector considered that they were likely to have adverse effects on the environment. There was no proper record of an assessment or evaluation for the purposes of complying with the requirements of an EIA capable of justifying an opposite conclusion by the Board.

129. Criticism was also levelled at the Board in its purported carrying out of an EIA by the application of the wind energy guidelines as

a *'rule of thumb'* instead of itself carrying out an assessment which included an examination, analysis and evaluation in respect of the individual case as required under s. 171A and Article 3 of the EIA Directive. The approach taken by the Board resulted in a failure to actually consider to the fullest extent possible the environmental impacts of the proposed development.

130. And finally, regarding the Board's disagreement with the recommendation of the Inspector to omit four turbines in the *'interest of visual and residential amenity'* it was submitted that the Board's statement that the *"omission was not necessary to ensure such amenities were properly protected"* and that *"it was not considered necessary to omit any turbine in relation to ecological concerns"* could not satisfy the requirement that the Board evaluate, assess and identify the direct and indirect environmental impacts of the four turbines on the receiving environment. In the circumstances there was a failure on the part of the Board to comply with the requirements of s. 172 (1J).

Submissions of the Respondent and Cleanrath.
131. With regard to the complaint that in deciding not to accept the Inspector's recommendation in relation to the omission of the four turbines and that there was no evaluation, analysis and assessment by the Board to support that decision and that there was no evidence of such, it was submitted that the recommendations of the Inspector to omit the specified turbines were not made on the basis of inadequate evidence to enable a determination on impact but, rather, on the Inspector's views regarding impact. The Board had adequate information upon which it could take a view on impact. It took a different view from that of the Inspector and in its decision gave an explanation for not doing so. It was entirely disingenuous to suggest that all the Board had done was to apply *'a rule of thumb'* by reference to the national guidelines. It had information in relation to the separation distances proposed between the turbines and the dwellings which, it had noted in this particular and specific case were in accordance with those guidelines.

132. In reaching its decision the Board had also taken into account the comprehensive information on its file relating to those matters and, having done so, concluded that the omission was not necessary to ensure that residential and visual amenities were properly protected. Furthermore, the Board noted that it was not considered necessary by the Inspector to omit any turbine on the grounds of ecological concern. An EIA of the development as a whole had been carried out. The Board had evidence before it which enabled it to reach a different conclusion to that of the Inspector in relation to impact. The Board was perfectly entitled to reach its own decision provided it had sufficient evidence to do so. There was no basis for a suggestion that there was an inadequacy of evidence or that that was not assessed, analysed or evaluated by the Board. The evidence in relation to impact was not sufficient, in the view of the Board, to justify a refusal of the proposed development.

133. With regard to the complaint of inadequacy in relation to the reasons given for not accepting the Inspector's recommendation to omit certain turbines for the purposes of complying with the provisions of s. 172 (1J) and s. 34 (10) (b), it was submitted that the duty of the Board was confined to stating its main reasons for disagreeing with the Inspector's recommendation. As to the nature of that duty, these parties submitted that that had been apparently discharged on the face of the decision itself and in this regard reference was made to the decision in *Grealish v. An Bord Pleanála* [2007] 2 I.R. 536 where O'Neill J. had described the duty under s. 34 (10) of the PDA as *"a very light one, one could even say almost minimal."* Reliance was also placed on the decision of this Court in *O'Neill v. An Bord Pleanála* [2009] IEHC 202 where Hedigan J., commenting on the provisions of s. 34 (10) (b) on the extent of the obligation placed on the Board, stated that:

> *"There was no obligation to provide detailed reasoning equivalent to the highly professional and detailed report of the Inspector herself. Only the main reasons were required ..."*

Accordingly, the requirement of the Board under s. 34 (10) (b) was limited to explaining its decision to differ from the overall recommendation of the Inspector, which it did.

134. It was submitted that the Board's decision contains a proper and adequate indication of its reasons which were entirely clear. The complaint made by the Applicants that the Board failed to expressly state how it had overcome the concerns of the Inspector was not something which, on the jurisprudence, the Board was obliged to provide. The Board was obliged pursuant to the provisions of s. 28 of the PDA to have regard to the Wind Energy Guidelines, 2006. The Board had regard to those guidelines and recited that fact on the face of its decision. On the evidence before it the Board concluded that the omissions recommended by the Inspector were not necessary to deal with the impact on the receiving environment of the turbines under the headings of either residential or visual amenity.

135. The submissions made by Cleanrath were, in substance, to the same effect as the submissions made by the Respondent. Cleanrath also submitted that the Applicants had not specified the provisions of s. 172 (1J) which they asserted that the Board had been in breach. Moreover, they submitted that there was nothing vague or irrational in the decision of the Board. There was a failure on the part of the Applicants to identify what it was in the decision which was unclear or imprecise. The contentions of the Applicants amounted in essence to no more than an impermissible attempt to draw the Court into a qualitative review of the EIA carried out by the Board – something upon which, on the jurisprudence, the Court was not entitled to embark.

Supplemental submissions.
136. Subsequent to the conclusion of the oral hearing in this case, I became aware of a number of other judgments delivered by this Court of particular relevance to the issues which are the subject matter of these proceedings. Accordingly, the parties were invited to make further submissions and argument in relation to the applicability or otherwise of those decisions having regard to the facts of this case.

137. The case authorities upon which further legal argument and supplemental submissions were made are *Kelly v. An Bord Pleanála* [2014] IEHC 400, *Ratheniska v. An Bord Pleanála* [2015] IEHC 18, *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 *Rossmore Properties Ltd v. An Bord Pleanála* [2014] IEHC 557 and *People Over Wind v. An Bord Pleanála* [2015] IEHC 271.

138. In relation to the EIA, the Applicant's supplemental submissions focused on what the Applicants contended was a failure on the part of the Board to conduct *"an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed development"* in particular in relation to the four wind turbines which the Inspector recommended should be omitted from the grant of permission. They submitted that in line with the decision of the CJEU in *Commission v. Ireland* the Board was required to undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned including the factors set out in the first three indents of Article 3 and the interaction between those factors.

139. Noting the decision of this Court in *People Over Wind v. the Board & Ors*, the Applicants sought to make a distinction between the decision of the Board in that case in relation to the EIA and the decision of the Board under consideration here. They drew attention to the extent of the analysis and assessment by the Board of the points raised by the Inspector and incorporated in pages 6 to 8 of its decision. It was submitted that the deficiency of the decision of the Board in this case was such that it could not and did

not constitute an examination, analysis or evaluation by the Board of the effects on the receiving environment of the proposed development in respect of the four turbines which the Inspector had recommended should be omitted. Accordingly there was a failure to comply with the requirements of s. 171 (a) of the PDA; the decision of the court in *People Over Wind* had to be distinguished for the reasons given and was not an authority which supported the submissions of the Respondent and Cleanrath.

140. Those parties submitted that the decision of the Board was not required to include an examination, analysis or evaluation of the direct and indirect effects of the proposed development. Reference was made to the finding in *People Over Wind* that the Board recorded its conclusion and decision that the proposed development would not be likely to have significant effects on the environment, that that constituted a record of its decision and determination, and that no further record was required under domestic or European law. The decision of the Board in this case complied with the requirements under s. 172 (1J).

The Inspector's report.

141. Having set out a description of the site and the proposed development, the Inspector's report proceeded to describe the EIS which, in this case, consisted of three volumes which the Inspector had read in preparation of her report. She summarised the main impacts identified in the EIS under the headings of human environment, landscape and visual impact ,ecology, soils, geology and hydrology, air, climate and noise, shadow flicker, material assets, archaeology, traffic, interactions of the foregoing and other issues. Thereafter, the Inspector referred to the reports on the planning file noting that there were 107 submissions of which 34 constituted letters of objection. She summarised the issues raised in the letters of support and those raised in the objections. Of these, particular reference was made to the submission of Mr. Corcoran, environmental biologist, which provided an ecological analysis that sought to highlight omissions and deficiencies in the submitted EIS. Six external reports submitted to the planning authority were also referred to. These reports were from the Irish Aviation Authority, the Inland Fisheries, the Department of Agriculture, Fisheries and Food, An Taisce, Department of Arts Heritage and the Gaeltacht and the HSE itself. This latter report made certain observations in relation to specific environmental health issues including human beings, noise and vibration, shadow flicker, air quality/dust, water/hydrology/hydrogeology.

142. In addition to external reports, the Inspector noted four reports from internal Council departments namely reports from the area engineer, the environmental section, the heritage officer as well as a request for further information. The issues raised and responses received were summarised in some detail, following which the Inspector proceeded to note the decision of the planning authority, the relevant planning history, and policy considerations. Under that section the Inspector referred to the wind farm development Guidelines for Planning Authorities 2006 and Wind Turbines Bill 2012. It is to be observed that the Wind Turbines Bill, 2012 has yet to be enacted. The Inspector made it clear in her report that she was referring to the Bill for information purposes only. She then set out the grounds of appeal which were detailed under the headings of roads, site habitats and the NIS, (which had been amended) and which included identification of European sites being brought forward for an AA. The Inspector noted that all of the technical and environmental studies concluded that all of the ecological assessments indicated that the proposed development would not give rise to adverse impacts on any Natura 2000 site.

143. In relation to the appeal, the Inspector noted that the planning authority did not respond, but that there were six observations which included the Applicants – under the heading of 'concerned residents' – and Mr. Kevin Corcoran. The Inspector individually summarised the issues raised in the objections.

144. In section 11 of her report the Inspector summarised the issues arising in relation to the proposed development including compliance with policy, landscape/visual impact, residential amenity, archaeological impacts, roads and traffic, adequacy of the EIS, ecology and natural environment and other issues. These issues were dealt with individually by the Inspector and in respect of which she expressed her opinion.

Visual amenity

145. Following an on-site inspection the Inspector highlighted a concern which she had in relation to what she considered to be the potential for a number of houses, which she identified, as being likely to experience high adverse impacts notably from turbines 3, 4, 6 and 7. Referring to mitigation measures, the Inspector was critical of the EIS which referred only to the design features of the turbines. She expressed the opinion that whilst the measures proposed were appropriate in the overall visual impact of the proposed development they failed to address the potential for the significant visual impact of the turbines on local residential properties warranting real and genuine concern, and concluded *"in terms of a recommendation in this regard I would suggest it appropriate that turbines 3, 4, 6 and 7 be omitted from the scheme in the interests of visual amenity.*

Residential amenity

146. The Inspector then went on to consider the issue of residential amenity under headings of noise, shadow flicker, archaeological impacts, roads and traffic. In connection with noise the Inspector expressed a number of concerns.

And under the heading of shadow flicker she noted that the guidelines identified potential impacts on any inhabited dwelling within 500 metres of a turbine. Although there was no dwelling within 500 meters, there were dwellings which, in her view, having visited the site, could be adversely affected. Although satisfied that no third party dwelling was located within the 500 metre zone, she identified fourteen properties, including the home of the Applicants, within ten times motor diameter distance (at 820 metres) from the turbines that might experience more that 30 hours of shadow flicker on a specific day during the year.

147. Having identified the location of the properties in question she considered that turbines 1,2,3,4, 6 and 8 had potential to affect a number of houses and noted that the EIS had suggested that four houses, identified as 15, 19, 20 21 and 28, could be subject to shadow flicker in excess of 30 houses per year. However, she noted that in response to the further information requested by the planning authority, Cleanrath had presented a very detailed mitigation proposal which included shutting down of particular turbines at specific times on specific days of the year. The Inspector accepted the premise for the conclusions but did not consider that the proposed development was acceptable in terms of the shadow flicker potential in particular relating to the proposed turbines numbers 2, 3, 4 and 6. She concluded this section of her report in the following terms:

"however, and should the Board be minded to grant permission in this instance, a condition should be attached requiring the omission of these turbines and the non operation of the turbines at times when the predicted flicker might occur, adversely effecting the adjacent houses."

Ecology and the natural environment.

148. When considering ecology and natural environment, and in particular impacts on habitats, the Inspector commented on the refusal of permission by the Council based on the impact of the development of habitats within the proposed development site. In this regard she drew the attention of the Board to her recommendation that turbines 3, 4, 6 and 7 should be omitted in the interests of 'visual and residential amenity'. If her recommendation in that regard was accepted she expressly drew the attention of the Board to

the positive effect that the omission of turbines 3 and 4 would have in relation to the blanket bog, namely that impact on it would be avoided. It is clear from her report, therefore, that the Inspector considered that whilst turbines 3, 4, 6 and 7 should be omitted in the interests of visual and residential amenity, the omission of turbines 3 and 4 would also have a positive ecological consequence.

149. This is potentially significant since it is a finding by the Inspector that the omission of turbines 3 and 4 on the grounds of visual and residential amenity would, in relation to ecology and the natural environment, also result in avoiding impact on the bog in the area where it was proposed to site and erect those turbines. The potential significance of this finding arises in connection with the conclusion by the Board in its decision that *"it was not considered necessary to omit any turbine in relation to ecologic concerns."* On the face of its decision, that conclusion is at variance with the findings by the Inspector in relation to turbines 3 and 4.

150. Under the heading 'EIA' the Inspector refers specifically to the statutory requirements and in particular the requirement that the direct and indirect effects of the proposed project are identified, described and assessed in an appropriate manner. Referring back to the impacts identified in the EIS summarised at para. 3 of her report, she noted that the proposed development was generally in compliance with article 94 and 111 of the Planning and Development Regulations 2001 as amended and noted that the EIS contained information specified in para. 1 of the Schedule 6 of the Regulations which she then set out. She also referred to the additional information submitted in the course of the application detailing the main likely significant direct and indirect effects arising from the proposed development and identifies these under the headings of human beings, flora and fauna, soils and geology, hydrology/hydrogeology, air, time, noise, landscape and visual impact, cultural heritage and material assets; each of which is considered and discussed in turn.

151. With regard to the assessment of the likely significant effects identified, having regard to the mitigation measures proposed, the Inspector referred to the AA contained in s. 13 of her report noting that that assessment would fully consider the range of relevant likely significant effects having regard to the information submitted for the planning application *"together with all the comments and submissions made in relation to the proposed development"*. She observed that mitigation measures proposed to be applied if the proposed development proceeded would be fully integrated to that assessment.

152. I will return to that aspect of the Inspectors report when dealing with the challenge to the decision of the Board on the AA. However, it is sufficient to observe at this juncture that the Inspector considered that the conclusion contained in the NIS to the effect that the proposed development would not adversely impact on the SAC/SPA sites was *"reasonably supported"* whereupon she concluded that the cumulative impact of the development would not have adverse effects on the SACs in light of their conservation objectives. No specific mention was made of the submissions of Mr Corcoran or those of the other interested parties – including the Applicants – in this regard.

153. Section 14 of the report contains the Inspector's conclusion and recommendation. In brief, she did not consider that the proposed development would constitute a material contravention of the County Development Plan. While she considered that the proposed development, subject to the mitigation measures indicated, would not significantly impact upon flora and fauna, archaeology, water quality, geology and hydrology of the site or the immediate vicinity of the site as to warrant refusal of permission, she expressed real concern regarding the scale of the proposed project particularly in terms of visual impact and certain residential amenity impacts and on foot of which she recommended the omission of turbines 3,4,6 and 7 from the scheme of development.

154. With regard to the matters which she considered in connection with her final recommendation, the Inspector specifically and particularly refers to the contents of the planning application including the EIA, the NIS, the decision of the planning authority, the provisions of the Cork County Development Plan, the provisions of the Wind Energy Development Guidelines, the grounds of appeal, the responses thereto, the observations made to the Board, her inspection, and the assessment of the planning issues; she ultimately recommended that permission be granted for the reasons and considerations which she then sets out in her report. She also identified and had regard to the location of the SAC/SPAs.

155. The reasons and consideration and the conditions to be imposed as recommended by the Inspector, together with the submissions on file, were considered by the Board at meetings on the 4th of March, the 17th April and 23rd of April 2013. The Board decided by a majority of 3 to 2 to grant permission generally in accordance with the Inspector's recommendations, subject to certain amendments which were recorded in the Board's direction and decision.

Decision of the Board.

156. Under the heading *'reasons and considerations'* it was recorded that the Board had regard to:

(a) National policy relating to the development of sustainable energy sources.

(b) The Wind Energy Development Guidelines for planning authorities issued by the Department of the Environment Heritage and the local government in June 2006,

(c) The Cork County Development Plan and the Cork County Wind Energy Strategy

(d) The status of the site in the latter documents as being in an area not deemed "strategically unsuitable, for wind energy development proposals and in close proximity to a "strategic search area",

(e) The location of the site relative to the following designated sites which were set out;

(f) The pattern of development in the area, the distance from the proposed development to dwellings, and the character of the local road network.

(g) The extent and condition of habitats arising on the site.

(h) The mitigation measures set out in the submitted EIS, the additional material submitted by way of further information at application stage, and

(i) The submissions on file and the Inspector's report.

157. Thereafter the decision recites

"the Board considered the environmental impact assessment submitted with the planning application (including mitigation measures therein), the further information submitted by the Applicant in the course of the planning application and

appeal, the submissions from the planning authority, the appellants and observers and the Inspectors assessment of environmental impacts which is adopted save in respect of the omission of certain turbines. The Board completed an environmental impact assessment and concluded that the proposed development would not have a significant adverse effect on the environment.

The Board considered that the Natura impact statement submitted with the application and carried out an appropriate assessment of the proposed development having particular regard to the potential for impacts on nearby Natura 2000 sites (the Gearagh Sac (site code 000108), the Gearagh Spa (site code 004109) and the Mullaghanish to Nusheramore Spa (site code 004162). The Board completed an appropriate assessment and having regard to the nature and scale of the proposed development, the nature of the receiving environment and the mitigation measures set out in the course of the application and appeal, the Board is satisfied that the proposed development, on its own or in combination with other plans or projects, would not adversely effect the integrity of any European site.

It is therefore considered that, subject to compliance with the conditions set out below, the proposed development will not give rise to injury to residential amenity, visual amenity, water pollution, would be acceptable in terms of traffic safety and convenience, would not contravene the development for the area and would otherwise accord with the proper planning and sustainable development of the area.

In deciding not to accept the Inspector's recommendation to omit certain turbines by condition the Board considered that the separation distances proposed between turbines and dwellings were in accordance with national guidelines which seek to protect residential and visual amenities and taking into account the information on file, that omission was not considered necessary to ensure such amenities were properly protected. Furthermore, it was not considered necessary to omit any turbine in relation to ecological concerns".

The decision of the Board sets out the conditions and reasons given for imposition.

Decision on EIA.

158. Applying the legal principles to which reference has already been made earlier in this judgment to the grounds of challenge made by the Applicants to the legality of the Board's decision in relation to the carrying out of an EIA, the Court finds as follows.

159. It is apparent from the face of the decision of the Board that, with the exception of the Inspector's recommendation to omit four turbines on the basis of residential and visual amenity, the Board adopted the report of its Inspector as part of the decision making process in the carrying out of an EIA. That the Board was statutorily empowered to do so is evident from the provisions of s. 172 (1H) of the PDA. Section 146 empowers the Board in the discharge of its functions to authorise an employee to report on any matter on behalf of the Board. Of some significance to the facts in this case is the requirement that before making its decision, the Board is required to consider both the report and the Inspector's recommendation.

160. The obligation of the Board to provide the main reasons and considerations in its decision to grant or refuse permission arises under two separate and distinct provisions; namely, s. 172 (1J) and s. 34 (10) of the PDA. Additionally, where the Board, in granting or refusing permission, differs from the recommendation of the Inspector, it is required to indicate in its decision its main reasons for departing from the recommendation of the Inspector.

161. It follows from the provisions of 146 and 172 (1J), and from the jurisprudence already referred to relating to these provisions, that in determining whether an EIA has been carried out and completed , the report of the Inspector may be read with the decision of the Board. This is particularly germane having regard to the challenge by the Applicants to the lawfulness of the decision insofar as it concerns the issues on the EIA which fall for consideration here. Given the requirement under s. 146 that the Board consider both the report and the recommendation of the Inspector before making its decision, so too, in my judgment, must any concerned member of the public and, on judicial review, the Court in order to ascertain whether an EIA has been carried out and completed in accordance with statutory obligations.

162. Reading the report as a whole I am quite satisfied that the Inspector did not misunderstand, in assessing an EIS, the role of the Board in the carrying out of an EIA. In connection with the assessment of an EIS and the carrying out of an EIA, the report of the Inspector is replete with references not just to the EIS but also to the other reports, submissions, observations and information considered as part of the EIA process and that, in connection with an EIA, she understood that there was a requirement to identify the direct and indirect effects of the proposed development on the receiving environment and that, having done so, there was a requirement to investigate analyse and assess the likely direct and indirect effects of the development.

163. The Inspector's report is but part of the evidence laid before the Board for the purposes of enabling it to carry out and complete an EIA. In this case the Inspector was satisfied that there was sufficient evidence to enable an EIA to be carried out by the Board as part of the planning process. That conclusion was accepted by the Board; it is the Board and not the Inspector which makes the decision.

164. It is also clear from the report that the Inspector identified likely significant and direct and indirect affects arising from the proposed development. Her analysis, evaluation and assessment of these are considered and discussed under individual subheadings. The Board is obliged to consider these but they are not determinative of its decision. It was entitled to differ from the views of the Inspector; which it did in relation to her recommendation that four turbines be omitted from the scheme of development. The reasons given by the Inspector for recommending the omission of certain turbines are set out in pages 47 to 56 of her report and maybe referred to by the court.

Sufficiency of the main reasons given by the Board for not omitting the turbines.

165. Having regard to the submissions made by the parties in relation to the question as to whether in the carrying out of an EIA the Board is required to carry out and complete a specific EIA in respect of the development in so far as that relates to the four turbines which the Inspector recommended should be omitted or, whether in carrying out and completing an EIA in respect of the entire development, including those four turbines, that part of the Inspector's report relating to the four turbines remains evidence upon which the Board is entitled to rely, I am satisfied that, in light of its statutory obligation to give its main reasons for disagreeing with the recommendation of its Inspector, it is incumbent on the Board to consider the entire report and not just the Inspector's considerations and assessment on foot of which she based her recommendation, accordingly, the whole of her report remained evidence upon which the Board was entitled to rely in the carrying out and completion of its EIA.

166. However, it seems to me to follow that, in providing its main reasons for disagreeing with the recommendation of the Inspector, it must be made clear from those reasons that in considering that evidence the Board carried out an examination, analysis and

evaluation of that evidence when carrying out and completing the EIA if the requirement that a complete record be available to concerned members of the public, and the court, from which it can be established that an assessment within the meaning of s. 171(a) was carried out and completed in respect of the development as a whole and for which permission was given.

167. Insofar as the main reasons may be ascertained from the decision and direction of the Board as to the non acceptance of the recommendation of the Inspector, the main ground identified was the separation distances between the proposed turbines and the dwellings, that these were in accordance with national guidelines, and that having regard to the information on file it was not considered necessary to omit the turbines to ensure the protection of visual and residential amenities which the guide lines sought to protect. Whilst the Board also considered it unnecessary to omit any turbine in relation to ecological concerns, no reason is given nor is it apparent from the face of the decision or the direction of the Board as to how or why the Board reached that conclusion.

168. Moreover, in relation to the issues of concern raised by the Inspector in relation to residential and visual amenity, whilst the Board indicated that it had taken into account the information on file and had considered the national guidelines, there is no reference to or identification of particular information on the file which the Board stated it had taken into account in order to enable it to come to the conclusion it did.

169. Whilst I accept the jurisprudence in relation to what is required to be indicated or stated in the decision of the Board in relation to these matters is that there is no obligation on the Board to provide detailed reasoning equivalent to the highly professional and highly detailed report of the Inspector, or to deliver a discursive judgment, nor to include a re-evaluation of the Inspector's report, it is also clear that the obligations placed on the Board cannot be satisfied by recourse to an uninformative if technically correct formula.

170. In this case the Board considered it necessary to include, in its main reasons for differing with the Inspector, matters of ecological concern. Whilst these were clearly identified in the report and the Inspector had drawn the attention of the Board to the potential impact of turbines 3 and 4 on the bog, and that their omission would result in that impact being avoided, the bald statement by the Board that it did not consider it necessary to omit any turbine on the basis of those concerns is particularly uninformative. As was observed by Finlay C.J. in his judgment in *O'Keeffe v. An Bord Pleanála* what must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons.

171. In my judgment, that part of the Board's decision relating to the carrying out of an EIA and the provision of main reasons for disagreeing with the Inspector in relation to the turbines, stands in marked contrast to the decision of the Board in *People Over Wind*. In that case Haughton J. observed that it was notable from the decision of the Board that, in addition to the very specific adoption of the Inspector's assessment of the environmental impacts with the exception of certain matters which the Board set out in its decision, the Board also referred to and adopted specific information arising from the documents to which it also had regard when coming to its conclusion. Whilst in this case there is a reference to the guidelines and a conclusion that the proposed development complies with the separation distances between the turbines and the dwellings and a reference in general to the information on file, there is no identification of or reference to specific information on the file relevant to those matters and upon which the Board relied.

172. Additionally, it is clear from the judgment in *People Over Wind*, that the decision of the Board provided an analysis of the points raised by the Inspector and, having done so, explained the reasons for not adhering to those elements of the Inspector's assessment. Not only did the decision of the Board clearly set out its assessment of the points raised, but also its evaluation of those aspects.

173. Given that the observations, submissions, the planner's report and other reports upon which it was based all formed the background to the Inspector's recommendations, Haughton J. commenting on the obligation of the Board stated:

> *"it was incumbent on the Board in its decision to deal specifically with these aspects and to give its reasoning for departing from the Inspector's recommendation, in carrying out its EIA."*

Explaining the necessity for the Board to address these matters directly in its decision Haughton J. observed that this

> *"arises from the fact that were it not to do so, it would be open to the principled criticism that it gave no reason for departing from a particular recommendation of its Inspector."*

174. Considering that and other recent decisions of this Court referred to in argument, it is my judgment that where the Board decides to differ from the findings in the report and the recommendation of its Inspector, then in order that a concerned member of the public – or, as in this instance, the Court – maybe satisfied that, in addition to identifying and describing the direct and indirect effects of the proposed development on the receiving environment, these were the subject matter of an assessment as defined in s. 171 A and that there was compliance with its obligations under s. 172 (1J) (e) and s.34 (10) (b), the Board, when giving its main reasons for differing from those findings and recommendations, must identify and deal specifically with those aspects of the Inspector's report in relation to those matters with which it disagrees, furthermore, it must provide a rational explanation which is informative of the conclusion reached; this is also necessary if a challenge to the decision of the Board as being uninformative and/ or formulaic is to be avoided.

175. Whilst the Board does not need to engage in a discursive judgment or full re-evaluation in its decision in order to comply with these requirements, and which may be in summary form , the information which is required be given if the standard of practical enlightenment discernable from the statement of reasons referred to in the decisions of *O'Keeffe, Mulholland and O'Neill* is to be met, must be such as to enable a concerned member of the public and, where necessary, the Court, to be satisfied that the Board has directed its mind to the concerns expressed and reasons given for the recommendation by its Inspector with which it differs, and that its statutory obligations in carrying out and completing an EIA have been complied with.

176. In this case it is clear from her report that the reasons and concerns expressed by the Inspector and upon which she based her recommendation for the omission of the four turbines are not solely directed by or limited to the Wind Energy Guidelines, but also relate to other matters. Furthermore, in relation to ecology and the natural habitat, the Inspector drew the attention of the Board to the result which the acceptance of her recommendation would have; namely, the avoidance of certain impact on two areas of bog land within the site of the proposed development.

177. No explanation is given by the Board in its decision for the conclusion that it was not considered necessary to omit any turbine in relation to ecological concerns. Given the obligation to state its main reason for disagreeing with the Inspector on this matter, there was a requirement on the Board to provide an informative explanation for the conclusion that it reached.

178. Whilst there is ample evidence to support the analysis and evaluation which the Inspector undertook in relation to the development as a whole and on foot of which she based her recommendation, the same cannot be said of the evaluation and analysis as part of its assessment which the Board was required to carry out and on foot of which it decided not to accept the recommendation.

Conclusion
179. I am satisfied on the evidence and for all of these reasons that the record in this case fails to satisfy the requirements necessary to enable the court to determine whether or not the Board complied with its obligations to carry out and complete an EIA in respect of the development as a whole and in respect of which it granted permission.

180. Apart from the foregoing, but for the purposes of completeness, I would add that it is not possible to ascertain how, if at all, the Board dealt with the issue which the Inspector had identified in relation to turbine 2 and as a result of which she had recommended, in the body of her report, should be omitted. The fact that that recommendation, for whatever reason, did not make its way into the final recommendation does not relieve the Board of the obligation to deal with that since it was statutorily bound to consider both the report and the recommendation. A recommendation contained in the body of the report cannot be ignored simply because it or some part of it is not repeated in the final recommendation. At the very least an explanation from the Inspector should have been sought and obtained for the purposes of ascertaining the reason for the non inclusion of turbine 2, for example whether that was intentional or an accidental oversight, as it is the answer is unknown and the record to which the court must refer is incomplete.

Appropriate assessment.
181. The grounds of challenge to the legality of the AA purportedly carried out and completed by the Board may be summarised as follows:

> a. The Board failed to report adequately or at all its conclusions in relation to an AA as required by s. 177 V, as interpreted in accordance with Article 6 (3) of the Habitat's Directive.
>
> b. the Board fails to record that it took into account the various matters that it was required to take into account under s. 177V (2) other than the decision of the NIS submitted in the context of the application for permission. In particular, the Board's record does not disclose that the Board took into account the appeal submissions on behalf of both the Applicants and/or Mr. Kevin Corcoran in relation to the likely significant effects of the proposed development on the Gearagh SAC.
>
> c. The Board failed to give reasons for its determination in relation to AA as required by s. 177V (6).
>
> d. Insofar as the Board did record its conclusions and/or reasons in relation to the AA, the conclusions and/or reasons given were inadequate insofar as there was no record of any conclusion or reason in the Board's decision to indicate how or why the reasonable scientific doubt raised in the appeal submissions on behalf of both the Applicants and/or Mr. Kevin Corcoran in relation to the likely significant effects of the proposed development on the Gearagh SAC/SPA was discounted by the Board if those were taken into account at all and if they were, the record does not disclose that it did so.

182. As we have seen, a number of SACs were identified which might likely be affected by the proposed development and that, accordingly, an AA was required.

183. Article 6 (3) of the Directive requires that any plan or project that is not directly connected with or necessary to the management of a Natura 2000 site concerned but which is likely to have a significant effect on it, either on its own or in combination with other plans or projects, can be authorised only if it will not adversely affect the integrity of the site.

184. The Respondent and Cleanrath submitted that the Board's decision states that it carried out an AA as required under Article 6 (3) of the Directive and was satisfied that the proposed development, on its own or in combination with other plans or projects, would not adversely effect the integrity of the European sites and that this satisfies the obligation to record that fact. Their further submissions will be summarised later.

The Applicants' submissions.
185. The necessity to record the conclusions of the AA is required to ensure that existing and future plans or projects are not authorised if they are likely to adversely affect the integrity of the site. Section 177S requires the Board to carry out an AA in respect of the planning appeal. Section 177V (2) requires the Board to take into account certain matters when carrying out an AA and these are:

> i. The Natura Impact Report or Natura Impact Statement, as appropriate;
>
> ii. Any supplemental information furnished in relation to any such report or statement;
>
> iii. If appropriate, any additional information sought by the authority and furnished by the Applicant in relation to a Natura Impact Statement;
>
> iv. Any additional information furnished to the competent authority and its request in relation to the Natura Impact Report;
>
> v. Any information or advice obtained by the competent authority;
>
> vi. If appropriate, any written submissions or observations made to the competent authority in relation to the application for consent for the proposed development;
>
> vii. Any other relevant information.

Section 177V (5) requires the Board to make available any determination it makes in relation to an AA and also any reasons for that determination. It is clear from the provisions of that section that in addition to giving notice of its determination under subs. 1 in relation to the proposed development, the Board must give reasons for its determination. The Applicants submitted that whilst the Board determined that the proposed development would not adversely affect the integrity of the European sites in question, no reasons or no sufficient reasons were given for that determination.

186. Noting that there is no provision in the PDA which enables the Board to adopt the AA carried out by its Inspector, the Applicants

submitted that no record of the AA which it purported to have carried out and completed was provided by the Board.

187. The Applicants relied on the decisions in *Sweetman and Kelly* in support of their submissions as to the requirements of the Directive which must be met in order to constitute a lawful AA. The assessment must include *"an examination, analysis, evaluation, findings, conclusions and a final determination"*. As to the sufficiency of the reasons which were required to be given, the Applicants submitted that they must be such as to enable an interested party to assess and, from such assessment, ascertain that an AA was carried out in advance of the decision. Moreover, in the event of a challenge being brought, the Court must have sufficient information from the file in order to be able to make an assessment as to the lawfulness of the AA in accordance with the CJEU decision in Sweetman . In that regard the reasons given for the Board's determination in an AA must include *"complete, precise and definitive findings and conclusions"* which were relied upon by the Board as the basis for its determination.

188. The reasons given must be such as to disclose the main rationale upon which the Board considered those findings and conclusions capable of removing all scientific doubt as to the affects of the proposed development on the European site concerned in light of its conservation objectives and that these together with a conclusion to that effect must be recorded. Furthermore, they submitted that in the absence of such a record it would not be possible for a court to decide whether an AA was lawfully concluded or whether the determination made meets the legal test required by the judgements of the CJEU.

189. Referring to the guidelines for planning authorities in respect of the carrying out of an AA and prepared by the National Parks and Wildlife Service of the Department of the Environment, Heritage and Local Government, December 2009, revised in 2010, the Applicants submitted that the guidelines emphasised the necessity on the part of the Board to maintain and complete an audit trail of the AA process and envisaged the preparation of an appropriate assessment conclusion statement which was required to:

> (a) describe the plan or project in sufficient detail to make clear its size
>
> scale and objectives;
>
> (b) describe the base line conditions, conservation objectives and relevant ecological and environmental issues in relation to the relevant Natura 2000 sites (generally, the NIS and any other data or information obtained will be appended to the AA conclusion statement)
>
> (c) Identify potential adverse impacts of the plan or project on a Natura 2000 sites;
>
> (d) if possible, explain how these effects will be avoided through mitigation;
>
> (e) set out a time scale and identify the mechanisms through which the mitigation measures will be secured, implemented and monitored.

It was argued that the decision and direction of the Board failed to comply with these requirements and that this had the effect of rendering the decision *ultra vires* and invalid.

190. Whilst it was submitted that the decision of the Board was not a proper record of the AA carried out by the Board, even if the Court was of the view that the decision satisfied the requirements of s. 177 V (5), it was argued that the decision of the Board failed to have regard to all of the matters specifically referred to in s. 177 V (2) of the PDA. That this was so was evidenced by the reference to what it was that the Board stated it had considered. The section of the Board's decision dealing with the information which it considered in connection with the AA whilst referring to the nearby Natura 2000 sites, the NIS and the proposed mitigation measures set out in the course of the planning application, made no reference to other information or submissions, including the observations made in the course of the planning process in so far as these were pertinent to the carrying out and completion of an AA. The Board was required to consider these but on the face of its decision failed to record that fact. Accordingly, its decision did not constitute an appropriate record necessary to meet the recording obligation and was therefore invalid.

191. Addressing the question as to what constitutes or may constitute the record of the carrying out and completion of an AA and that this may include reference to the relevant findings made and conclusions reached in the report of the Inspector as observed in *Kelly*, the Applicants submitted that that view was *obiter*, though accepted that it appeared to have been adopted by Haughton J. in *Ratheniska*. However, they argued that the Court had found that the Inspector's report had become relevant in circumstances were the Board in its decision had expressly accepted the findings of the Inspector with regard to the AA. In this regard the Applicants referred in particular to the significance and effect of that finding and of which Haughton J. stated:

> *"...in other words, where the Board, having considered all appropriate documents and matters, accepts the scientific knowledge and findings in relation to the European site, accepts the Inspector's examination and analysis and that the proposed development will not adversely effect the integrity of the European site, it is not necessary for the Board to set out yet again at length in its decision the same examination and analysis. Such an exercise would be both pointless and unnecessary. The mere fact that the resulting decision might be perceived to be 'uninformative and perfunctory', clearly does not of itself amount to any ground for review."*

192. Furthermore, and of particular importance in light of the absence of a statutory power enabling it to adopt the Inspector's report in so far as the AA was concerned, the decision involved here did not expressly accept the Inspector's examination analysis and conclusions (which the Applicants submitted was insufficient in any event) that the proposed development would not adversely affect the integrity of the European sites, indeed, the Board did not even note the Inspector's report in that regard. It followed that it was not now possible to ascertain what, if anything in the Inspector's report, the Board considered.

193. For the same reason, even if the Inspector's report was considered, it is not now possible to ascertain how the Board dealt with the information provided and, in particular, what constituted the AA purportedly carried out by the Board in relation to the development as a whole and in respect of which it decided to grant permission. Whilst the EIA process was informative rather than determinative and did not require a conclusion in relation to the potential impact of the proposed development on the receiving environment, a determination in relation to the Natura sites was a mandatory requirement of a lawful AA. The failure on the part of the Board to comply with that requirement went to the jurisdiction of the Board to grant permission; accordingly, the whole of the decision was rendered invalid.

194. Even if it were permissible for the Board to adopt an AA carried out by its Inspector in the absence of a statutory power to do so and even if the Board's decision was effective to incorporate the Inspector's findings and conclusions such as they were, it was argued that that part of the Inspector's report which purported to be an AA or evidence on which the Board purported to carry out

an AA, did not meet the test formulated in *Kelly*. If the Court took the view, contrary to that submitted by the Applicants, that the record of the AA could be ascertained from both the decision of the Board itself and the report of the Inspector, then the content of the Inspector's report was deficient since it did not incorporate *complete, precise and definitive findings and conclusions* upon which the Board could rely and which could have enabled it to be satisfied that there was no reasonable scientific doubt as to the absence of any adverse affects on the Natura 2000 sites.

195. Moreover, it did not contain the necessary examination, evaluation and analysis and, crucially, did not address with particularity any of the submissions or observations raised by third parties relative to the AA. In this regard it was submitted that the finding by the Inspector that she had considered the revised NIS fell far short of what she was required to consider. Her reference to the level of information provided was inextricably linked to the NIS itself rather than to that *and* the observations and information provided by other third parties. As to her opinion that the conclusion in the NIS that the proposed development would not adversely impact on the SAC/SPA sites was 'reasonably supported' this fell far short of the "*complete precise definitive findings and conclusions*" which were required to support such a conclusion.

196. On the question of scientific doubt, it was submitted that there was scientific evidence to raise such a doubt contained in a submission made by Mr. Kevin Corcoran, and with which the Applicants had agreed, however, the issues raised by him were not addressed by the Inspector in her report. It followed that the requirement to make *complete, precise and definitive findings and conclusions capable of removing that doubt as to the potential adverse affects of the proposed development on the identified sites* could not have been properly made; nor was there any record of how the differing scientific views were considered, reconciled and dealt with by the Board.

197. If, notwithstanding the Applicants' submissions, the record was to include the evidence contained in the report of the Inspector, it was argued that the Inspector's report was deficient since it did not contain the requisite complete, precise, definitive findings and conclusions, accordingly, the Board was required to make them and to record these when carrying out an AA but it failed to do so, indeed, there was no conclusion by the Inspector or the Board that any such findings or conclusions, if made at all, were capable of removing all scientific doubt as to the absence of the likely effects of the proposed development on the Natura 2000 sites.

198. The consequence of that was that neither the Applicants nor the court could be satisfied that an AA had been carried out and completed by the Board in accordance with its statutory obligations. Furthermore, it was not permissible to infer such a conclusion from the finding in the Inspector's report that the information in the NIS reasonably supported the conclusion that the proposed development would not adversely impact on the SAC/SPA sites.

199. The Applicants also advanced the argument that where there were contradictory scientific views it would have been necessary, in the context of its AA, for the Board to give more the more detailed reasons referred to in *Ratheniska*, in order to explain its decision to prefer one side of the scientific argument over the other. No such reasons are apparent from the decision of the Board nor are they addressed by the Inspector in a way sufficient to meet these requirements.

200. No explanation was apparent from the record (if the Inspector's report is to be included) and certainly none is apparent from the direction or decision of the Board as to why it accepted the scientific evidence supporting its determination on the question of scientific doubt over that of Mr. Corcoran. The question of removing all reasonable scientific doubt in relation to the absence of adverse impacts was fundamental to the carrying out and completion of an AA. It had to be addressed appropriately and contained in the record if the Court was to be able to determine whether or not the Board had directed its mind adequately to that issue.

201. An averment contained in the Statement of Opposition and the verifying affidavit of Mr.Clarke sworn on behalf of the Respondent was not sufficient for these purposes. He was not a member of the Board, his averments were hearsay to which the Applicants objected and in any event was not part of the record upon which the Board had made its decision. The record which was to be considered by concerned members of the public and the Court was the direction and decision of the Board alone but if that was incorrect then, in addition, the reports and information before the Board at the time when it reached its decision.

202. Finally, it was argued that if the Board had regard to the other matters specified in s. 177 V (2) it ought to have expressly said so.

The submissions of the Respondent and Cleanrath.

203. The submissions and legal argument advanced by these parties in relation to the AA were, in substance, to the same effect. With regard to the sufficiency of the record, these parties argued that it was perfectly proper and appropriate for the Board to have regard to and consider the content of the Inspector's report in relation to its carrying out and completing of an AA; it was statutorily obliged to have regard to that report and to all of the information and documentation before it. There was no evidence that it failed to comply with that obligation and the Court was required presume that it had done so.

204. On the question of what constituted the record, to the extent that the view of the learned judge in *Kelly* concerning the record was *obiter*, it was clear that view was adopted and applied in *Ratheniska*. There was no obligation on the Board to refer specifically to the contents of the Inspector's report in relation to the AA nor was there a requirement either under the Directive or under the PDA that the Board should do so. Moreover, it was apparent from the face of the Board's decision that it had considered all of the material before it which included the Inspector's report. This was sufficient to ground its decision. It was not necessary that the Board should have engaged in a discussion on the report or delivered a judgment about matters which were fully addressed in the report and upon which the Board was entitled to rely.

205. Particular attention was drawn by these parties to the difference between the circumstances in *Kelly* and those absent in this case in relation to the AA; namely, that here there was no disagreement between the Inspector and the Board in relation to the AA. The findings made in relation to the European sites at issue made by the Inspector in her analysis as a whole were accepted by the Board. Moreover, it was abundantly clear from the Board's statement of opposition and from the record, including its decision, that an AA was in fact carried out and completed and that this fact is recorded in the decision itself; no more was required.

206. These parties rejected the criticism of the Inspector's report that there was no evidence of an assessment which included an examination, evaluation and analysis undertaken by the Inspector in respect of the applicable Natura 2000 sites. On the contrary, the compliance with this requirement is amply demonstrated in section 13 of her report.

207. Referring to the decision of this Court in *Maxol Ltd v. An Bord Pleanála*[2011] IEHC 537, it was submitted that it was entirely appropriate and permissible to read the report of the Inspector together with the decision of the Board in circumstances where, in relation to the AA, the Board was in agreement with its Inspector and from which the sufficiency and adequacy of the reasons required to be given for the purposes of complying with its statutory obligations could be ascertained.

208. It was also submitted that there was no requirement for the Board, especially where it was supported in its view by that of the Inspector, to identify and give express reasons for its disagreement with the views expressed by Mr. Corcoran. It was submitted that his submission did not operate to elevate his opinion to the point where it raised a reasonable scientific doubt for the purposes of an AA under Article 6 (3) of the Directive and s. 177 V. Nevertheless, his report constituted part of the materials for the Board upon which it made its decision. That report was duly considered and summarised by the Inspector, as was apparent from section 4.1 of her report and was considered by the Board.

209. Furthermore, during the planning process Mr. Corcoran did not revise his submission to take into account the additional information which had been submitted to the Board prior to lodging his submissions on the appeal. Specifically, he did not react to the proposed mitigation measures in the revised NIS to explain why he considered that these would be inadequate for the purposes of avoiding the scientific risks which he apprehended. There was ample evidence in the NIS and revised NIS submitted by Dixon Brosnan, environmental consultants on behalf of Cleanrath and upon which the Board was entitled to rely, including the mitigation measures proposed in detail in s. 11 of the revised NIS. The fact that Mr. Corcoran did not provide any constructive response permitted the Board to conclude that his concerns did not amount to demonstrating the continuing existence of any reasonable scientific doubt for the purposes of the Habitats Directive.

210. In such circumstances it was reasonable for the Board, having regard to the NIS and the revised NIS as well as the evidence contained in the Inspector's report, to consider that it had the benefit of the best scientific knowledge in the field in order to enable it to conclude, as it did, and as a matter of certainty, that the proposed development would not have lasting adverse effects on the integrity of the relevant European sites. The submissions of the Applicants and Mr. Corcoran on appeal were, in the circumstances, insufficient to cause a degree of concern about divergent scientific views. It was reasonable for the Board to conclude, therefore, that there was no necessity to provide more detailed reasoning for accepting one side of the scientific argument over the other as referred to in *Ratheniska*.

211. These parties also submitted that the decision of the Board is entitled to the presumption that the Board exercised its functions properly and that a positive statement to the effect that it had carried out an AA was to be taken as proof that it had done so. On the face of the decision the Board was satisfied, on all of the evidence, that there would not be any adverse affects on the integrity of the European sites. The Applicants' submissions that the Board had failed to carry out an AA and had failed to properly record that fact were singularly inappropriate and unsubstantiated. There was no evidence upon which the Court could be satisfied that the decision was unlawful. There was no evidential basis to support the grounds upon which the Applicants sought to challenge the legality of the decision in relation to the AA and, accordingly, there was no basis upon which the Court could intervene to quash the decision.

Decision on AA.

212. Applying the legal principles to which reference has already been made earlier in this judgment in relation to the lawfulness of an AA and having regard to the decisions in the *Commission v. Ireland, Sweetman and Kelly*, it is clear that the court has a particular competency and jurisdiction to determine whether the AA was carried out and completed in accordance with law.

213. To enable the court to so it is necessary that the record should disclose that the reasons given for the Board's determination in an AA must include the complete, precise and definitive findings and conclusions reached by the Board and upon which it made its decision. In my view, the words 'complete' 'precise' and 'definitive' do not in their ordinary and natural meaning admit to generality.

214. The sufficiency of the reasons given must contain the main rationale for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the absence of adverse affects by the proposed development on the European sites concerned in light of their conservation objectives. Rationally, such a conclusion could not be reached upon generality; hence the necessity for the findings made to be 'complete', 'precise' and 'definitive.'

215. Absent such evidence from the record, at the time when the determination was made, it would not be possible for the Court to decide whether the AA was lawfully completed or whether the determination made meets the legal test required in accordance with the judgements of the CJEU.

216. It was contended by the Applicants that as it was the Board which was required to carry out the AA and as it was the Board which purported in its decision to do so, the necessary evidence had to be ascertainable from the decision of the Board itself and that it was its decision which constituted the record to which reference was to be made. I cannot accept that submission. Whilst it is undoubtedly the function of the Board to carry out an AA and that it is the decision of the Board and not that of the Inspector which is determinative, regard must be had to the provisions of s. 146 of the PDA which enables the Board, in the discharge of its functions, to assign an Inspector to report to it. In considering the record in relation to an AA, where the Inspector, as part of her assignment, included in her report the evidence or part of the evidence upon which an AA was to be carried out that, in my view, forms part of the materials which the Board was statutorily obliged to consider in reaching its decision. The proposition that the Court cannot have regard to that part of the Inspector's report in relation to the AA but is constrained to look to the decision alone is, in my view, misconceived and unfounded in law.

217. Given the function of the Court in making a determination as to whether or not an AA had been carried out lawfully, it would be wholly irrational if, in the absence on the face of the decision of some or all of the requirements which must be satisfied but which could be ascertained by reference to the report of the Inspector, these were to be ascertained from the decision of the Board alone.

218. In so far as that question may not have been argued in *Kelly* and that the view expressed in relation to the production and reading of the Inspector's report, together with the decision of the Board, was *obiter*, I am fortified in my judgment that the court may do so by the judgment of this Court in *Ratheniska*.

Consideration and adoption of the Inspector's report.

219. Insofar as it was submitted by Cleanrath that the Board had adopted the report of the Inspector, I am quite satisfied that, for the purposes of the AA, the Board did not do so. In so far as the Board adopted the report of the Inspector save in respect of her recommendation regarding the four turbines, it is clear from the face of the decision that the adoption of the report was expressed to be in relation to the obligation on the Board to carry out an EIA as well as in respect of the giving of its main reasons for not accepting the Inspector's recommendation to omit certain turbines. There is no mention of the Inspector's report in the Board's decision on the AA, nor would that have been permissible or lawful since the Board was not empowered to adopt it. This does not mean that the Board is precluded from considering its contents and where both the Board and the Inspector on the question of the AA are in agreement, the report and the decision may be read together. Different considerations may apply where there is a disagreement but none such arises here.

220. The direction and decision of the Board is silent as to whether or not for the purposes of the carrying out of an AA it accepted the findings and conclusions of the Inspector in her report. On the face of its decision the Board considered:

(a) The Natura Impact Statement;

(b) The nature and scale of the proposed development;

(c) The nature of the receiving environment; and,

(d) The mitigation measures set out in the course of the application and appeal.

This is in contrast with the matters which the Board stated it had considered in reaching its decision on the EIA; namely, the further information submitted with the application and on appeal, including the submissions from the appellants and observers as well as the Inspector's assessment of the environmental impacts.

221. In *Ratheniska* the Court found that, on due consideration, the Board had accepted the relevant findings made and conclusions reached by the Inspector in relation to the AA. This constituted a cross reference to the content of the report in relation to that matter, including the Inspector's examination and analysis of the likely direct and indirect impacts of the proposed development and the conclusion that the proposed development would not adversely affect the integrity of the European site.

222. In these circumstances the Court found that it was unnecessary for the Board to set out yet again at length in its decision the same examination and analysis as had been contained in the report of its Inspector. The production of that report was permissible and sufficient in those circumstances for the purposes of ascertaining whether an appropriate AA – which included complete, precise and definitive findings and conclusions – had been made and on which the Board was able to satisfy itself that these were capable of removing all scientific doubt as to the absence of adverse affects by the proposed development on the European site concerned in light of its conservation objectives.

Sufficiency of the Inspector's report in relation to the AA.

223. Having regard to the findings made in relation to the record to which the Court may refer it is, in the absence of the necessary evidence on the face of the decision of the Board, appropriate to consider the sufficiency of the evidence in relation to the AA contained in the Inspector's report for the purpose of ascertaining whether it contains the complete, precise and definitive findings and conclusions which are required and upon which the Board was entitled to rely. I am quite satisfied that the Inspector was authorised, as part of her assignment, to carry out an assessment in respect of the AA and to report on that to the Board.

224. The AA was addressed by the Inspector in section 13 of her report which considered in some detail the NIS prepared by Mr. Karl Dixon and Mr. Vincent Murphy of Conservation and Landscape Management – submitted in response to the request for additional information by the Council – and the further NIS submitted to the Board as part of the appeal which sought to address the formatting and layout concerns which had been raised by the heritage officer of the Council. I pause to observe that that report was not commissioned by the Board. Mr. Dixon and Mr Murphy were not officials or employees of the Board to whom the functions of the Board could be delegated.

225. Their report addressed the three main Natura 2000 sites within fifteen kilometres of the development. The report identified the qualifying interests associated with each site as well as the conservation objectives afforded to each site and additional data which included EPA monitoring of river waters and relevant Q ratings applied. The report identified the potential impacts on the Natura 2000 sites, drawing from this information as well as baseline surveys undertaken for the EIS.

226. The Inspector summarised the findings of the report in relation to each of the sites in question and also the matter of combination affects. Reference was also made to the potential impacts on birds, terrestrial habitats and water quality. The Inspector noted that the report had concluded that there would be no direct or indirect impacts on the Natura 2000 sites either alone or in combination with other projects and concluded that there were no impacts on the qualifying interest of the SAC/SPA sites. Having considered the report the Inspector was satisfied that the methodology used in was clearly explained, that the information sought was set out and that on that basis she considered that the level of information provided allowed the Board, as the competent authority, to assess the impact of the proposed development on the integrity of the Natura 2000 sites.

227. Having regard to the mitigation measures proposed, she concluded that the proposed development would not adversely impact on the SAT/SPA sites. She found that the conclusion in the report was "*reasonably supported*" and on that basis was satisfied that the cumulative impact of the development would not have adverse affects on the SACs in light of their conservation objectives.

228. For reasons which were explained in Kelly, the carrying out and completion of an AA is not a "*planning decision*", rather, it is a distinct and separate part of that process the proper performance of which goes to the jurisdiction of the planning authority or the Board to grant or refuse permission.

229. Whilst the Inspector summarised the EIS in section. 3 of her report in some considerable detail and upon which she commented when making findings and reaching conclusions, the same exercise was not undertaken in relation to the NIS as amended. Furthermore, in relation to her report on the AA, the Inspector appears to have confined her consideration to the NIS. No reference is made in relation to the submissions of the observers including Kevin Corcoran or to the concerned residents, which included the Applicants, insofar as these submissions were directed towards the AA.

230. If the Inspector considered those submissions as part of her report on the AA and in particular the scientific doubts raised by Mr. Corcoran as to potential impacts on the Natura sites – which, in my view, she was obliged to do – no reference to these was made in her report nor is any explanation given for preferring one scientific view over another in circumstances where those views clearly differed. In fact, no reference at all was made by the Inspector under the AA to the very detailed report submitted by Mr. Corcoran. As an environmental biologist he was, in my view, qualified to express the scientifically based opinion contained in his report.

231. I cannot accept the submission that the Board was entitled to discount his concerns on the basis that he had made no further submissions on the amended NIS. Significantly, he continued as a party to the appeal. That being so, if the Board were concerned to ascertain whether he was satisfied that his concerns had been sufficiently addressed in the amended NIS, it would have been a simple expedient for the Board to invite a response; there is no evidence that it do so. Accordingly, and as he continued to be a party to the appeal, the Board was not entitled to conclude that, in the absence of further submissions by him, his concerns had been addressed and that his scientific opinion was no longer relevant or sufficient to give rise to the scientific concerns which had been expressed; the contrary is the case. Moreover, if the Board was entitled to regard his views as being insufficient to elevate those to

the level of scientific opinion, then such a conclusion and the reasons for it would have had to have been recorded; this is particularly so having regard to the conclusion and determination which the Board was required to reach on the question of scientific doubt; No such view appears from the record.

232. Reading the report of the Inspector and the Board together, it is clear that whilst the Board undoubtedly considered the NIS, no sufficient record was made either by the Board or the Inspector upon which the Court could conclude that an AA had been carried out which included *complete, precise and definitive findings and conclusions* upon which the Board relied as the basis for its determination that there would be no adverse affects on the Natura 2000 sites.

233. In so far as the Inspector made findings and reached a conclusion, these fall far short of what was required. Additionally, there is no evidence ascertainable from the record, such as it is, for the main rationale or reason upon which the Board would have been able to satisfy itself on the basis of the findings made and the conclusions reached that they were capable of removing all scientific doubt as to the effects of the proposed development on the Natura 2000 sites in the light of their conservation objectives.

234. It is an absolute requirement that, in addition to a record of the complete, precise and definitive findings and conclusions – which must also contain the main rationale upon which the Board considered those findings and conclusions capable of removing all scientific doubt as to the absence of adverse affects by the proposed development on the Natura 2000 sites concerned in light of their conservation objectives – the Board is required to record a determination to that effect; there is no evidence of such.

Conclusion.
235. On its face the decision of the Board was based on a consideration of the NIS having particular regard to the potential of impacts on the nearby Natura 2000 sites, the nature and scale of the proposed development, the nature of the receiving environment and the mitigation measures set out.

236. There is no express acceptance of the findings and conclusions of the Inspector such as they were. Even if the Board had done so, they were insufficient to satisfy the necessary requirements. Absent any consideration and conclusion in respect of the differing scientific opinions, how these were addressed and the particular reasons for preferring one view over the other in the report of the Inspector, it was necessary that the Board should have done so and that these matters were recorded in its decision.

237. As was observed by Hedigan J in *Rossmore Properties Ltd v. An Board Pleanala* [2014] IEHC 557, the test to be satisfied in respect of an AA involves a higher level of detailed reasoning than would occur in the wider jurisdiction of a normal "planning decision". The requirements and test, exemplified in *Kelly* are, in my judgment, neither satisfied by the report of the Inspector nor the decision of the Board either separately or when read together.

238. Accordingly, it is not possible for the Court to determine whether the AA which the Board purported to carry out met the legal test required by the judgements of the CJEU and the decisions of this court. In the absence of the Inspector making and recording complete, definitive and precise findings and conclusions necessary to meet the standard required, which the Board would have been entitled to expressly accept, it was necessary and open to the Board to do so in its decision in a way which makes it plain that the obligations placed upon it in relation to the carrying out and completion of an AA were satisfied.

239. For all of these reasons and upon the conclusions reached the Court finds that an AA was not carried out by the Board in accordance with law.

Ruling.
240. Having due regard to all of the reasons given and the conclusions reached, the Court will grant the reliefs sought and will so order. I will discuss with counsel the form of the Orders to be made.

APPENDIX 2

THE SUPREME COURT

Supreme Court Appeal No.: 167/18

Clarke C.J.
O'Donnell J.
McKechnie J.
Charleton J.
Irvine J.

IN THE MATTER OF SS. 50, 50A, AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN/

KLAUS BALZ AND HANNA HEUBACH

APPELLANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, CLEANRATH WINDFARMS LTD.

NOTICE PARTIES

Judgment of O'Donnell J. delivered the 12th day of December, 2019

1. The appellants, Klaus Balz and Hanna Heubach, have lived since 1992 at Bear na Gaoithe, County Cork, where they carry on a family horticulture nursery, flowers and gardening business. The second notice party, Cleanrath Windfarms Limited ("Cleanrath"), seeks permission to erect eleven turbines at Bear na Gaoithe. The appellants' house is 637 metres from the nearest proposed turbine.

2. Initially, Cork County Council granted permission for the development, but that permission was quashed by the High Court on judicial review for reasons which do not appear relevant to these proceedings. Subsequently, Cork County Council granted a further permission for six turbines only. This was appealed by Cleanrath, and cross-appealed by a number of objectors, including the appellants. An Bord Pleanála ("the Board") granted permission by a majority of 3:1 for eleven turbines at the site. The decision of the Board does not identify the Board members involved, the dissenting member, or the reasons for the dissent. It should not be assumed, however, that any division of opinion within the Board was in any way related to the very net issues which arise for determination on this appeal.

3. The appellants commenced judicial review proceedings which were heard in the High Court by Haughton J. A very large number of points were raised, and in a careful judgment, Haughton J. dismissed the challenge on each ground, and refused a certificate of leave to appeal to the Court of Appeal. This court granted leave to appeal on one issue only relating to the question of the application of guidelines under s. 28 of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). As a result, this appeal has been focussed on a single issue which now emerges in sharp, and perhaps unrealistic,

relief having regard to the large number of other issues that were debated before the Board, and subsequently the legal issues addressed in the High Court.

4. Under s. 28 of the 2000 Act, the Department, which is now the Department of Environment, Community and Local Government, may issue guidelines for use by planning authorities and the respondent Board. The statutory obligation imposed on the planning authorities and the Board is to "have regard" to such guidelines. In this respect, standard s. 28 guidelines may be contrasted with policy guidelines issued under s. 29 of the Act, which planning authorities must implement. The clear distinction is blurred somewhat because of a subsequent amendment to s. 28 which provided that where guidelines were issued on matters of policy, they also must be followed. However, it is accepted for present purposes that what were in issue here were guidelines under s. 28 simpliciter, and that the obligation on the respondent Board was merely to "have regard" to them.

The Wind Energy Development Guidelines 2006 ("W.E.D.G.")

5. The Wind Energy Development Guidelines ("W.E.D.G." or "the guidelines") were issued under s. 28 in 2006. The guidelines constitute a comprehensive and impressive document dealing clearly and lucidly with the very many issues related to wind power developments. Only a portion of those guidelines deal with the question of noise which is central to the issue in this case. Para. 5.6 of the guidelines sets out guidance on that issue. Although not expressly acknowledged in the text itself, it is accepted by all parties that the technical section of this aspect of the guidelines was drawn in turn from a U.K. document entitled "The Assessment and Rating of Noise from Windfarms" issued by the Energy Technology Support Unit ("ETSU") of the Department of Trade and Industry U.K. a decade earlier, in 1996.

6. The W.E.D.G. observe at p. 29 that "[a]n appropriate balance must be achieved between power generation and noise impact". Indeed, that balance can be said to lie at the heart of this case. It is necessary to set out one portion of those guidelines in greater detail:-

> "In general, a lower fixed limit of 45 dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations is considered appropriate to provide protection to wind energy development neighbours. However, in very quiet areas, the use of a margin of 5dB(A) above background noise at nearby noise sensitive properties is not necessary to offer a reasonable degree of protection and may unduly restrict wind energy developments which should be recognised as having wider national and global benefits. Instead, in low noise environments where background noise is less than 30 dB(A), it is recommended that the daytime level of the LA90, 10min of the wind energy development noise be limited to an absolute level within the range of 35-40 dB(A).
>
> Separate noise limits should apply for day time and for night time. During the night the protection of external amenity becomes less important and the emphasis should be on preventing sleep disturbance. A fixed limit of 43dB(A) will protect sleep inside properties during the night.

> In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres."

A footnote also helpfully explains that the unit of measure of here is an "A" weighted decibel, which is a measure of the overall noise level of sound across the audible frequency range (20Hz-20 kHz) with A frequency weighting to compensate for the varying sensitivity of the human ear to sound at different frequencies. The decibel scale is logarithmic. A 10 dB(A) increase in sound level represents a doubling of loudness. A change of 3 dB(A) is the minimum perceptible under normal circumstances.

7. It is not in dispute that the key components of the guidelines in this respect, namely the use of an "A" weighted decibel for measurements, the recommendation of both fixed limits and an increasable background noise limit, the daytime fixed limit of 45 dB(A) and nighttime limit of 43 dB(A), and the observation that there should be no significant problem when the distance from the nearest turbine to any noise sensitive property is more than 500 metres, are all derived from the 1996 ETSU document.

8. The notice party submitted a very detailed Environmental Impact Survey ("E.I.S."). The noise and vibration portion was contained in chapter 9 and runs to 57 pages. At para. 9.2.2, the E.I.S. addresses the W.E.D.G., which it acknowledges is based in this respect on the ETSU document, and observes that, while the W.E.D.G. acknowledge that an appropriate balance must be achieved, the guidelines "give no specific advice in relation to what constitutes an '*appropriate balance*'", and "[i]n the absence of this guidance will be taken from alternative and appropriate publications". The E.I.S. identifies the 45 dB(A) daytime absolute limit and 43 dB(A) nighttime limit contained in W.E.D.G., and observes, however, that a previous planning permission from An Bord Pleanála for the site (which was still active at the time of preparation of the E.I.S.) imposed a flat limit of 43 dB(A).

9. The E.I.S. also made reference under the heading "Future Potential Guidance Changes" to proposed changes to the assessment of noise impacts as outlined in a Department document entitled *Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker* (December 11, 2013). The E.I.S. recorded that a consultation process in relation to the document is currently being undertaken by the Department, and new formal guidelines had not been issued at the time of submission of the E.I.S. The consultation document, however, proposed amendments, the most significant of which was that a flat noise limit of 40 dB should be applied both day and night "in order to restrict noise from wind turbines at noise sensitive properties". The proposed approach, however, also suggested no noise limit at the properties of landowners with a financial interest in the proposed project. The E.I.S. also made reference to the assessment in the ETSU document and then proposed that:-

> "Due to the fact that there is a planning permission associated with the site for a development of a wind energy development, that if constructed, will operate the specific knowledge condition it is proposed to adopt a lower daytime threshold of 43 dB...in this instance."

10. The E.I.S. carried out detailed modelling of the noise at various standardised wind speeds at a number of locations, including the appellants' premises. At para. 9.4.2.6, the E.I.S. explained that the lower daytime threshold of 43 dB had been chosen because of the existing planning permission, and also "as it is in line with the intent of the relevant Irish guidance and is comparable to noise planning conditions applied to similar sites in the area previously granted planning permission by the local authority and An Bord Pleanála". At para. 9.4.2.7, the E.I.S. also modelled the noise levels against a 40 dB absolute criterion that had been put forward as part of the 2013 consultation document. The E.I.S. noted that they had been the subject of significant debate, and that the comments presented should be considered with the "knowledge that the intent of the document may change when finally published". That modelling noted "[s]light exceedances of the potential absolute noise criterion at some ten locations" including the appellants' property. The court was informed at the hearing of the appeal, by counsel for Cleanrath, that the technology adopted would permit the developer to comply with any limit, but these figures can be taken as indicating that the level of noise was a real and important one, as far as the appellants were concerned.

11. The appellants were represented in relation to the planning matter by Mr. Joe Noonan, a solicitor with experience in environmental matters. By letter of the 29th of June, 2016, he submitted the appellants' appeal to An Bord Pleanála, which set out a number of the objections raised by the appellants. In this regard, a booklet of enclosures was submitted with the letter supporting the grounds of appeal, and containing 35 enclosures. Of these, 19 appeared to be directed towards the question of noise.

12. The letter ran to 21 pages, with two further pages listing all the enclosures. The letter noted that the Board had previously granted permission for eleven turbines at the site, but that that permission had been quashed in the High Court by a judgment of Barton J. on the 25th of February, 2016, on the application of the appellants herein. The present application had been made prior to the determination of the High Court, and it was argued that accordingly it had been prepared without sight of the judgment, and without being in a position to have regard to the reasoning of the judgment. It was noted that the original application in 2012 had been refused by Cork County Council and that, in the material respects, the 2014 development plan contained the same objectives as those in the 2009 development plan which had been relied on in the refusal by Cork County Council.

13. The letter was a comprehensive challenge to the approach of the Board in respect of wind turbines. It was suggested that the 2006 guidelines rested on assumptions derived from the prevailing state of knowledge at the time they were drafted, but that the time had moved on and knowledge had evolved and the Department had publicly stated that the 2006 guidelines were not now fit for purpose in fundamental respects. The letter made reference to the public consultation notice published in 2013 by the Department in that regard and the proposed revisions issued by the Department, but not yet formally confirmed. It was argued that the initiation of the consultation process and the proposed revisions were a clear admission that the Department accepted that the 2006 guidelines

were not supported by robust or up-to-date evidence that enabled policy to be implemented in a manner which safeguards residential amenity. Radically different guidelines had been published by the Department, of which the Board was aware. It was argued that the fact that the 2006 guidelines were not robust or up-to-date was also evidenced by several expert studies which challenged what was described as the "old ETSU standard". Specific reliance is placed on an article by an acoustic consultant, Dick Bowdler. The letter asked the Board to read this article carefully, and to address it specifically in its written record.

14. The letter also referred to a decision by the senior Cork County Council planner on a windfarm at Carrigareirk of the 22nd of February, 2016, which concluded that:-

> "the existing 2006 Wind Farm guidelines are not fit-for-purpose given the changes in wind turbine development over the past ten years: The 500m rule-of-thumb and fit-all set-back guideline is clearly not appropriate for turbines that stand at 140m and the height with a rotor cut covering 10,300 square metres; nor do I concur with the view that it should be normal planning practice to accept that property holders should accept up to 30 minutes a day of shadow flicker".

It was submitted the Board had no robust up-to-date evidence which would enable it to safeguard residential amenity from excessive noise or shadow flicker, and that the Board could not grant permission for this application in reliance on the 2006 guidelines so far as the issues of noise, shadow flicker, and separation distance are concerned. The letter challenged as fundamentally flawed the noise condition typically imposed by the Board, which only limited noise measured using the dB(A) weighted filter. Again, reliance was based on the paper written by Mr. Bowdler. It was also suggested that international planning and regulatory practice had already evolved and that in Germany, where some of the most advanced wind turbine manufacturers were located, Bavaria had adopted a minimum separation distance of 10 times tip-height for large industrial wind turbines and, more recently, Poland had adopted a two-kilometre separation distance. The Bavarian policy would mean a separation of 1,500 metres from people's homes. The letter went on to make a series of other points about public health and safety, public consultation, policy, zoning, and the Cork Development Plan.

15. It should be said that the document upon which most reliance was placed in the letter was the article by Mr. Bowdler of July, 2005, which predated the adoption of the guidelines. However, the appellants also referred to documents from 2012 and 2014.

16. The Inspector's Report is dated the 18th of November, 2016, and runs to 96 pages. It is a comprehensive and impressive document and the precise concentration on the issue of turbine noise and the W.E.D.G. guidelines that have been the necessary focus of this case does not give a fair reflection of the breadth of the document. There was limited reference to the appellants and the question of noise. The letter of the 23rd of June, 2016, from the solicitors on behalf of the appellants was noted as one of the four third party appeals made to the Board. The issues were summarised generally in bullet points, and the bullet

points which appear referable to the issues raised by the appellants in respect of the guidelines were as follows:-

- "The Board is biased in favour of wind farm developments just because of National Policy in favour of renewable energy. However, there are also National Policies in favour of promoting sustainable rural enterprise and preserving viable lifestyles supportive of the rural economy.
- The 2006 Wind Farm Guidelines are out of date, and were from a time when wind turbines were smaller. The noise condition recommendation is outdated (derived from an old ETSU-R-97 standard). The Board should have regard to the Targeted Review of the Wind Energy Guidelines 2013."

17. The Inspector's Report noted that the four appeals were accompanied by documentation and, again, for present purposes, the relevant documentation noted appears to be the following:-

- "Proposed Revisions to Wind Energy Guidelines ...
- Series of Public Health & Safety studies in relation to noise and particular wind turbine models – including photographic examples of accidents in wind farms in Ireland.
- Irish Academy of Engineering submission (July 2014) on the review of National Energy Policy as set out in the "Green Paper on Energy Policy in Ireland"."

18. The developer's response to the appeals was noted. Again, the relevant bullet points appear to be the following:-

- "The EIS was prepared in line with all relevant guidance. The Council was satisfied that the EIS complied with Article 94 and Schedule 6 of the 2001 Planning Regulations.
- The development has the potential, if required, to comply with the stricter noise guidelines set down in the 2013 Targeted Review of the Wind Energy Guidelines 2006."

19. Para. 10.8.2 of the Inspector's Report dealt with the W.E.D.G. It set out in detail the portion of the guidelines already quoted above and then continued:-

> "The 2006 Guidelines are based on the UK Department of Trade & Industry, Energy Technology Support Unit (ETSU) publication "The Assessment and Rating of Noise from Wind Farms" (1996). Claims by objectors that this ETSU publication is out-dated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are, and remain in force. Proposed changes to these guidelines, outlined in the Department of Environment, Community & Local Government "Proposed Revisions to Wind Energy Development Guidelines 2006 – Targeted Review in relation to Noise, Proximity and Shadow Flicker" (December 2013), have not yet been adopted. The applicant notes that the 2013 revision proposes a noise limit of 40dB LA90, 10 min which should be applied to noise

sensitive properties – as measured outside such properties. The limit would apply day and night, and would not apply at properties of those with a financial interest in the wind farm." (emphasis added).

While it will be necessary to return to this in more detail, it may be noted at this point that this case has, to a large extent, consisted of rival arguments as to what was meant by the passage underlined.

20. It was noted that Cleanrath had adopted and proposed a standard for the development of 43 dB for both daytime and nighttime environments, but a 45 dB limit for both daytime and nighttime in relation to the houses of landowners who were participants in the proposed development. At para. 12 of the Report, the Inspector recommended that permission be granted for the eleven turbines for reasons and considerations set out, and subject to proposed conditions. The reasons and considerations had regard at para. (b) to "the provisions of the "Wind Energy Development Guidelines – guidelines for planning authorities" issued by the Department of the Environment Heritage and Local Government in 2006". No reference was made to the 2013 proposed revisions. Proposed Condition No. 6 provided that the wind turbine noise should not exceed the greater of (a) 5 dB(A) above background noise levels, or (b) 43 dB(A) L90 10 min when measured externally at dwellings or other sensitive receptors. It will be noted, therefore, that the Condition adopted the flat 43 dB(A) limit proposed by the developers, and extended that to all dwellings, irrespective of their ownership. Otherwise the developer's proposal was adopted and, it appears, the appellants' submission rejected.

21. The submissions and Inspector's Report were considered by the Board at its meeting held on the 25th of April, 2017. It is recorded in the Board's direction that it decided by a 3:1 majority to grant permission generally in accordance with the Inspector's recommendations, and subject to reasons, considerations and conditions set out. Again, it was recorded that the Board had regard to inter alia, the provisions of W.E.D.G. Condition No. 7 of the Board's decision was identical to Condition No. 6 proposed by the Inspector. The formal decision issued on the 19th of May, 2017, and was in similar terms in respect of noise. Under the heading "Matters Considered", it was stated:

> "[i]n making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions".

Again, it was noted that the Board had regard to the 2006 W.E.D.G.

Judicial Review Proceedings

22. Judicial review proceedings were commenced. A statement of grounds raised a wide number of issues. Once again, it is only necessary to consider the issue in relation to noise, and in particular the treatment of the W.E.D.G. guidelines, albeit that the isolation of this issue may give a misleading impression as to the breadth of the matters raised.

23. At para. 18 of the Statement of Grounds, the appellants referred to the fact that material had been put before the Board "describing [and] establishing the profound effects of noise from Wind Farms of the type proposed in this case... and/or raising issues which required investigation, identification, description, assessment, examination, analysis and evaluation, finding or conclusion". In particular, the appellants referred to evidence put before the Board, much of it post-dating the 2006 Guidelines, including the revision of the guidelines in 2013, the report of Cork County Council planner, as well as the 2005 Report by Mr. Bowdler, and noted that the appellants had requested that the Board read the paper research, and address it specifically in its written record. There were also further noise studies and other material, including the Large and Stigwood Report of 2014. The appellants noted that they had requested the Board to address this material, and contended that the Board was not entitled to ignore it. It was, moreover, asserted that the Inspector having failed, at least in the appellants' contention, to address this material and record his decision upon it, the Board did not have any material which would allow it conclude that the windfarm would not have an unacceptable effect on the environment in the form of noise.

24. At para. 23 of the Statement of Grounds, it was alleged that neither the E.I.S., the Inspector's Report, nor the Board's impugned decision performed or recorded any investigation or assessment of noise from the windfarm, and ignored and/or failed to take into consideration the material tendered by the appellant, which, it was alleged, demonstrated the likelihood or credibly raised the issue of profound impact of the said noise on the appellants, their home and family. Para. 24 alleged that the Board, in breach of its obligations, relied on the 2006 Guidelines in concluding that there were no adverse impacts on the residential amenity.

25. There followed a specific plea which, I think, it is useful to record *verbatim*:-

"(a) In advising the Board that the 2006 Guidelines could be applied, the Inspector determined, without any reference to the original research, reports, evidence and literature furnished by the applicants, that the applicants objection that the 2006 Wind Energy Guidelines and the ETSU publication on which they were based were outdated and not fit for purpose "*is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force*". The Board adopted this conclusion in adopting their Inspectors report.

- This conclusion constituted a fundamental error of law.
- The 2006 Guidelines remain in force and the Board was merely obliged at law to have regard to those guidelines.
- The Board was, in principle, entitled to, but not obliged to apply those guidelines.
- Accordingly, submissions that the guidelines should not be applied and the reasons and evidence on which such submissions were based were
    - Relevant planning considerations
    - Relevant EIA considerations

- Accordingly, neither the Board nor the Inspector was entitled to dismiss as irrelevant or to ignore (as the Inspector explicitly did by deeming them irrelevant) criticisms of those guidelines and evidence supporting such criticisms of those guidelines. The Board was entitled, I understand, to decide against such criticisms, but not to ignore them – as it did, thereby failing to take relevant considerations into account."

26. I appreciate that the Statement of Grounds is diffuse, and that a number of different contentions are raised, sometimes by reference to different legal principles, but it is, I think, tolerably clear from the above paragraph that at least one of the points being made on behalf of the appellants was that it was suggested that the Inspector, and therefore the Board, had not considered the material submitted on behalf of the appellants contending that the 2006 Guidelines were out of date; a conclusion, it must be said, which was derived from the statement in the Inspector's Report that the contention was "not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force". Furthermore, it is noteworthy that the contention set out at para. 24(a) above was repeated almost verbatim at para. 19(i) of the affidavit of Klaus Balz, which perhaps explains the incongruous reference "I understand" in para. 24(a) set out at para. 25 above.

27. It is unfortunate that the contention made and cited above does not appear to have been directly engaged with in the Board's Statement of Opposition. Thus at para. 5, it said: "[n]or is it correct to allege (as alleged at F.18) that the Board failed to have regard to the submissions before it". Paras. 9 and 10 of the Statement of Opposition are particularly relevant:-

"9. Whereas the Applicants challenge the lawfulness of the Board having regard to the Wind Energy Development Guidelines 2006, the Board was obliged to have regard to same in accordance with *inter alia* s. 28 of the PDA. Therefore, whereas the Applicants are of the view that same are not "fit for purpose" they remain guidelines to which the Board must have regard.

10. The pleadings in F24 are somewhat difficult to understand, and, indeed, appear to mistakenly contain the text of an averment therein. However, as best that can be understood, it would appear that the Applicants' complaint is, again, that the Board was not entitled to have regard to the Wind Energy Development Guidelines with regard to (it is assumed) issues of noise. In this respect, the Board relies on the above pleas and restates that the Board had determined that the proposed development will be acceptable in terms of noise impact within the threshold set out in condition 7. This was a determination the Board was entitled to reach, and the Board was, indeed entitled to (and required to) have regard to the guidelines."

28. A grounding affidavit was sworn by the secretary of the Board which exhibited a small amount of additional documents setting out a chronology of events, and suggested that the first-named appellant's affidavit was, in effect, legal submissions. The affidavit did deal in some detail with the question of confusion as to maps submitted for the purpose

of the appeal and markings thereon. The affidavit does not contain, however, any statement as to the approach either the Inspector or the Board took to the criticisms of the 2006 Guidelines, and the materials submitted in support of those criticisms. Nor, indeed, does the affidavit state what the Board understood the Inspector to have meant by the two sentences at para. 10.8.2 of his report, as highlighted at para. 18 above, and which it is worth recalling at this point:-

> "claims by the objectors that this ETSU publication is outdated and not fit for purpose is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force. Proposed revisions to Wind Energy Development Guidelines 2006 – Targeted Review in Relation to Noise Proximity and Shadow Flicker (December 2013) have not yet been adopted."

The High Court Judgment

29. The High Court (Haughton J.) delivered a comprehensive and impressively detailed judgment on the 30th of May, 2018. Once again, however, it may do a disservice to the judgment to select only the portion of it dealing with noise, but that is all that is now relevant to the proceedings. At para. 30 of the judgment, the appellants' court case was described as a contention that "the Board did not examine and analyse or evaluate this literature, or take proper account of it, or record their reasons, and that the appellants' submissions were deemed by the Inspector and the Board not to be relevant". At para. 32 of the judgment, the point is described as follows:-

> "The complaint of the applicants in relation to the manner in which the EIA was conducted relates to the use of the WEDG 2006 which they contend are outdated and no longer fit for purpose. The applicants point out that the WEDG 2006 have been under ministerial review since 2013. While not suggesting that the ministerial review of the WEDG 2006 was a basis for contending that the Board should have disregarded the guidelines altogether, they submitted (a) that the Board was not bound by the WEDG 2006, but merely must have regard to them, and (b) flowing from this, that the Board was obliged to take into account and evaluate any evidence presented which indicated that the guidelines were inappropriate or outdated or not suited to the particular planning application. This evidence should have been balanced with the WEDG 2006 and an assessment, analysis and examination of all evidence should have been conducted before any decision was taken. Instead, the Inspector's report explicitly states in response to the evidence proffered that the suitability of the WEDG 2006 or any evidence indicating that they are outdated or not fit for purpose "is not a relevant planning consideration. The 2006 Guidelines are as they are and remain in force." One important feature of the WEDG 2006 being adopted by the Board, allegedly without any proper consideration of contradictory information, is that the WEDG 2006 set a maximum noise level limit of 43dBA whereas the newer guidelines subject to ministerial review recommend a maximum noise level limit of 40dBA."

30. The reference to W.E.D.G. 2006 containing a maximum noise level of 43 dB(A) should be to a 45 dB(A) limit for daytime and 43 dB(A) for night. However, subject to this

clarification, the paragraph in the judgment fairly sets out what I would have understood to be the appellants' case in this regard if reading the papers for the first time.

31. At para. 42 of the judgment, the Board's replying contention is set out. It submitted, in reliance on a previous decision in *Element Power Ireland Ltd. v. An Bord Pleanála* [2017] IEHC 550, that the court had found that there was no obligation on the Board to apply or make decisions on the basis of the 2013 Guidelines which had not yet taken effect, and that the Board was entitled, and indeed obliged, to take W.E.D.G. 2006 into account. At para. 70 of the judgment, the learned trial judge observed that, fundamentally, the appellants asked the court "to impose on the Board (and by extension planning authorities) an obligation to consider, assess and evaluate the general science around wind farm turbine noise emissions, and to reject the currency of ETSU-R-97 and the W.E.D.G. 2006 and apply some new science to the assessment of noise affect, particularly on humans". The judgment considered that it was not the function of the Board to determine matters of policy where specific statutory guidance had been given. It was difficult to see how, without conducting its own research, the Board could come to a fully reasoned policy decision sufficient to override a statutory guideline. In particular, at para. 72 of the judgment, the judge noted:-

> "The Board's decision does not indicate that it examined, analysed or evaluated the scientific materials upon which Mr. Noonan's submission that the ETSU-R-97/WEDG 2006 were outdated/not fit for purpose. The statements in the Inspector's report at 10.8.2 demonstrate a cursory consideration of that claim, but are such as to persuade the court that that the Board probably did not examine, analyse or evaluate those materials in the context of EIA because they were not considered to be "a relevant planning consideration". Instead it is clear that the Inspector and hence the Board applied the WEDG 2006 in carrying out EIA. While there may be much that is cogent and persuasive in the scientific material presented by Mr. Noonan, it must be concluded for the reasons just given in the preceding paragraphs that the Inspector was entitled in law to state that a claim that ETSU-R-97 was out-dated and not fit for purpose "is not a relevant planning consideration", and that "The 2006 Guidelines are as they are and remain in force." It follows that the Board was not required to evaluate and assess the competing scientific research/papers that would tend to undermine ETSU-R-97 and the ongoing use of WEDG 2006 as a guideline."

32. Haughton J. also delivered a judgment on the appellants' application for leave to appeal to the Court of Appeal. For present purposes, it is noteworthy that at para. 15 thereof he describes the Inspector as concluding that the appellants' submission "was "not a relevant planning consideration" and I found that this was the reason why the Board did not engage in detailed analysis of the scientific papers". In a footnote, the learned judge also noted that, by contrast, the Inspector had considered scientific papers insofar as they concern the phenomenon of "amplitude modulation".

33. This court granted leave to appeal in a determination of the 14th of February, 2019. The court concluded that the application raised some issues of general public importance as to the proper approach to ministerial guidelines by the Board. The Board was:-

> "statutorily bound to have regard to them but, it is agreed, is not obliged to follow them in any individual case. Clearly, a distinction could be drawn between a submission that the guidelines would not be appropriate in a particular case, for specified reasons, and a submission that the technical aspects of the guidelines have been overtaken by scientific understanding, and become outdated to the extent that they should not be applied at all. In the first example, any submission or information presented to the Board would relate directly to the potential environmental effects of the development. In the second, the submissions or information might not necessarily have any relationship with the effects of the particular development and might appropriately be described as not dealing with a relevant planning consideration as far as that development was concerned. The question then is the extent, if any, to which the Board is obliged to consider such submissions and information when received."

34. It became apparent at case management that there were, unfortunately, large differences between the parties as to what was in issue and, at a more fundamental level, even as to what had occurred in the appeal to the Board, and in the Inspector's consideration of the appellants' submission. O'Malley J. accordingly directed an exchange of correspondence setting out the respective positions of the parties in relation to W.E.D.G.

35. The appellants' position was set out in a letter of the 6th of March, 2019. The guidelines, it was said, offered advice and, even on their own terms, were not prescriptive, exclusive, or conclusive. The Board was, as a matter of law, required to have regard to the guidelines, but was not obliged to follow or apply the guidelines in whole or in part in any individual case. It followed that the Board had a discretion in that regard. It also followed that the Board could not decline to consider whether it would exercise that discretion. It was obliged to consider in each case whether, and to what extent, it would follow and apply the guidelines. It was obliged, therefore, to consider the scientific and technical information and material submitted to the Board which bore on that decision. It was, in principle, possible that an applicant could submit to the Board that the guidelines should not be applied in whole or in part in a particular case, either because of material suggesting a general underlying deficiency in the guidelines, or by evidence of specific factors as to the guidelines in the context of the specific proposed development or the particular environment. It was submitted that the appellants had submitted material that was both general and specific in this sense. Finally, it was submitted that the Board's erroneous rejection of the scientific/expert materials and submissions thereon submitted by the appellants as irrelevant, and therefore not requiring consideration, amounted to a refusal to exercise in the discretion whether to follow the guidelines in whole or in part and in error treated the guidelines as prescriptive, conclusive, and exclusive. It was submitted accordingly that this amounted to a failure to perform a complete E.I.A.

36. I should say at this point that this was a short and succinct statement of the appellants' case, which perhaps shows the benefit of directing this exchange. The response of the Board in its turn made it clear that there was a fundamental disagreement between the parties, not so much as to any matter of law, but rather as to fact. The response was contained in a letter dated the 11th of March, 2019. With admirable brevity, it stated that it was agreed between the parties that the Board must have regard to W.E.D.G. under s. 28 of the 2000 Act; that the Board may depart from the guidelines; that it was obliged to carry out an E.I.A., and that it could not ignore submissions made to it that bear on matters within its jurisdiction. The letter then went on to state that the Board had regard to the W.E.D.G., and positively (after an E.I.A. in which the appellants' submissions had been considered) imposed a lower noise level than that recommended by W.E.D.G., 43 dB(A) rather than 45 dB(A).

37. It was then stated that the appellants had submitted scientific information contending that noise levels closer to 30 dB(A) were appropriate, and had also argued that a 40 dB(A) level found in proposed changes to W.E.D.G. was appropriate. It was asserted that the appellant had pleaded at para. E(24) of the statement of grounds that "the Board was not entitled to have regard to the W.E.D.G. at all – i.e. they should have been legally irrelevant, and, in effect, set aside". It was suggested that the Board had simply not acceded to the appellants' request that the W.E.D.G. should be deemed legally irrelevant, but had, however, clearly carried out an E.I.A. (in which the scientific information had been considered insofar as it "bore on the actual noise limit that should be considered appropriate for this development. This was done in fact"). This sets out the difference between the points of view of the Board and the appellants quite succinctly if, from the point of view of the Court which may have considered that an issue of law was concerned, rather disconcertingly, since the dispute seemed now to be one of fact. The Board elaborated on the contention that the Inspector (and by extension the Board) had merely rejected the contention that the W.E.D.G. were legally irrelevant, and had rather "as a matter of fact" considered the submission when considering the noise limit. It was said, bluntly, that while the appellants maintained that the Board had erroneously rejected the submissions as not requiring consideration "[t]his did not happen. The Board did not discount the submissions as not requiring consideration". The next sentence of the letter deserves particular attention:- "[t]he submissions – as to what level of noise was appropriate – were considered and nothing has been proven to the contrary". The letter then repeated that the contention that the W.E.D.G. should be ignored was not capable of consideration, and the Board did not consider the submissions "toward that end". This, it was said, was what the High Court had held, but the High Court did not hold that the Board did not carry out an E.I.A. and consider the substance of points being made about noise impact.

38. The letter concluded that the appellants' case as set out arose from this misconception. The appellants had contended that "as a matter of fact" the Board refused to exercise its discretion not to follow or apply the W.E.D.G. This, it was said, "is not true". Again, it was said that the Board had not treated the W.E.D.G. as prescriptive, exclusive, or conclusive. The last paragraph stated "[t]hus the Board's position on how the Appellant wishes to

argue the case is that it simply rests on a complete misrepresentation of what the Board actually determined".

39. There is, therefore, a very strong and direct dispute between the parties, and one which is disconcerting to encounter at this point in proceedings. The written and oral submissions of the parties reflected and elaborated on the positions set out in the correspondence, but added little to the essential argument. It is apparent that what is in dispute on the evidence is what the Board actually did and intended when it adopted the Inspector's Report, which referred to the appellants' claim that ETSU was outdated and not fit for purpose as "not a relevant planning consideration" and that "the 2006 Guidelines are as they are and remain in force".

40. This is a frustrating case, therefore, from the court's point of view, since it is plain that it does not appear to raise any issue of law of general importance, but rather is a dispute – evidently heated – as to how the facts should be characterised or, perhaps at an even more basic level, a dispute as to what occurred when the Inspector received the submissions made on the appellants' behalf. The court's frustration is perhaps minor, however, compared with the frustration which must be felt by the developer, who has now been seeking permission for a relatively modest wind farm development for over seven years, or, for that matter, for the appellants, who have had to come to court on two occasions now, and incur the cost and stress involved, and run the risk of a substantial award of costs against them. It must also be frustrating for the Inspector and, by extension, the Board. While obviously careful, comprehensive, and painstaking work was carried out in the assessment of this matter, legal proceedings now focus on a few sentences of the report, coupled with what might be deduced from the absence of a more elaborate statement of the facts. Any such frustration may be enhanced by a feeling that the submissions made on behalf of the appellants were somewhat peremptory, and, moreover, that the appellants' case, in this respect at least, has developed and been refined as the case proceeded. Furthermore, it should be said that, even taken at their height, the submissions made on behalf of the appellants appeared to have been gathered together by a solicitor with some knowledge of the area, but were not supported by any expert evidence. It is not clear that they would have carried particular weight if the Inspector was permitted to consider them. Finally, and perhaps most importantly, the case must be frustrating to any interested member of the public who would wish to see how two important values are balanced – the protection of the environment from damaging development on the one hand, and the promotion of useful and efficient development on the other, in this case a development asserted to be consisted with the State's Energy Policy.

41. However, this case must be decided in accordance with the law. It seems that the fundamental issue is one of fact, leading in turn to a relatively simple and familiar issue of public law. It does not appear to me that the case gains anything from being recast in terms of European law and the E.I.A Directive. If the Inspector was obliged to consider the submissions and the materials submitted on the appellants' behalf, and that that position was adopted by the Board, then it might be said that there had been a failure to

conduct a full E.I.A., but the case would succeed on the more basic ground, that the Inspector and Board had failed to have regard to a relevant consideration, in this case submissions made on behalf of the appellants.

42. It seems clear that the submissions made by the Board present a characterisation of the facts (and the appellants' arguments) that had not been apparent until this appeal, and the exchange of correspondence directed by the court. In my view, the interpretation of the Inspector's Report on which the appellants had proceeded is perhaps the more obvious and natural one. First, the Inspector stated that the submission that the ETSU document was outdated and not fit for purpose was not a relevant planning consideration, and that the 2006 Guidelines are as they are and remain in force. This does not suggest that the Inspector considered that the submissions were relevant in some limited respect. Instead, the submissions were treated as irrelevant. It would therefore follow that, if so, the Inspector could not have had regard to them in his decision, at least on the question of the noise limits. Furthermore, the Report itself is consistent with the Inspector taking that approach. The Report does not contain any reference to, or consideration of, the materials in question, or anything which can be fairly said to be derived from him. Last, this is exactly what the High Court judge, who had conducted a careful hearing of the entire matter, thought had occurred, as set out at para. 72 of his judgment.

43. The contrary contention now advanced by the Board is, in my view, implausible. First, the appellants' case is characterised as a contention that W.E.D.G. was legally irrelevant, and the Inspector was obliged to ignore the guidelines. I think that this inverts the case that had been made. The appellants had not submitted that the W.E.D.G. were legally irrelevant. The Inspector, however, had decided that the appellants' submissions were. The appellants had, at all times, accepted that the Inspector was obliged to have regard to the guidelines, but in doing so, it was submitted, he should give little or no weight to them, because it was suggested they were outdated and not fit for purpose. The suggestion made in the Board's letter, and repeated in the written submissions, that it is to be deduced that the Inspector must nevertheless have considered the submissions because he set a (daytime) limit lower than that recommended by that of the W.E.D.G. is not persuasive. It is quite clear that the 43 dB(A) limit was recommended by the Inspector and imposed by the Board, because it was the limit sought by the developer. That, in itself, does not suggest any consideration of the submissions on the appellants' behalf. It is true that the Inspector did not accept the developer's proposal that a 45 dB(A) daytime limit should be retained for properties owned by those involved in the development. But this cannot be treated as evidence that the Inspector or the Board considered the submissions made in respect of noise. Nothing has been pointed to in those submissions which would lead to this particular decision. Furthermore, the Board has acknowledged in the written submissions that it is explained simply that because any such properties might change hands, it would therefore be undesirable to distinguish the noise limit for such property simply on the basis of their present ownership.

44. It is worth pausing, however, to consider why this central issue of fact remains in contention and subject to rival interpretations. Whether or not the Inspector considered

the submissions for the purposes that were put forward, or at all, is a matter of fact to which there is only one correct answer, and indeed only one relevant witness. This issue remains a matter of such heated controversy, however, because neither the Inspector nor the Board has said what they did in this respect, either in the Report of the Inspector or the Board's decision, or by way of direct evidence to the court. Indeed, the absence of direct evidence in this regard gives rise to a further disconcerting possibility. Assuming, for these purposes, that there are two possible interpretations of the known and observable facts and the evidence adduced – first, that the Inspector considered that he could not have regard to the submissions that the W.E.D.G. were not fit for purpose (which it now seems to be conceded would be wrong) and second, that the Inspector correctly interpreted the appellants' submissions as suggesting that he should treat the W.E.D.G. as legally irrelevant and properly discounted that, but nevertheless had regard to the submissions in considering the noise limit itself – then it is not at all clear whether the Inspector and the Board were agreed as to what had occurred in fact. It is possible, at least in theory, that the Inspector wrongly excluded any consideration of the submissions, but that the Board erroneously thought that he had merely interpreted the submissions as suggesting that the W.E.D.G. were legally irrelevant, and properly considered them for the purposes of the noise limit. The opposite is also equally possible, at least in theory. It is furthermore unsatisfactory that the Board's characterisation of what occurred in this respect is only found explicitly in the correspondence written in the context of case management, and the written submissions advanced on this appeal, but is not addressed directly in evidence.

45. It is of the utmost importance that planning authorities and the Board, on appeal (or, as is increasingly the case, the Board in those circumstances in which direct application can be made to it for permission), should carry out their functions as professionally and competently as possible. The system of appeal (or first instance application) to an independent expert body was a great advance when introduced in 1976. The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function. It is apparent, even from the papers in this case, that the Board and its Inspector have carried out their functions with a high degree of technical expertise. It is, however, unsettling that there should be an absence of direct information on this central issue. This may be no more than an unfortunate misunderstanding at the time of the appeal, and the Board's decision may now have become entrenched in the defence of these proceedings. There are also valid reasons why Board decisions may be drafted in a particularly formal way, and it may be that, in most cases, interested parties are able to consult an Inspector's Report to deduce the reasons behind the Board's decision. However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision.

46. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision.

47. In this case, I would limit myself to the conclusion that the appellants have adduced sufficient evidence to lead to the inference that the Inspector considered that he could not entertain submissions directed to whether the guidelines were adequate or fit for purpose or not, and accordingly that he discounted the submissions, and treated them as irrelevant, and that that approach was adopted and approved by the Board. The Board has not produced, in this case, any evidence which rebuts that inference.

48. It follows from this conclusion, in my view, that the Board's approach was in error. It might reasonably be asked what the purpose of any s. 28 guideline is. It seems obvious that such guidelines are produced to avoid the possibility of inconsistent decisions between different planning authorities in different areas. Such guidelines also deal with technical issues and avoid considerable duplication of effort in respect of that issue, which could, moreover, be the subject of differing views, and therefore the possibility that individual planning authorities or the Board might be persuaded by one expert rather than another. If no guidelines were issued on a particular technical question, then the planning authority and the Board, on appeal, would be obliged to conduct some sort of assessment of what could be quite detailed and complex scientific matters. When guidelines are produced, then a planning authority and/or the Board must have regard to them, and can legitimately take them as the starting point, and in most cases the finishing point, of any consideration of the technical issue covered in the guidelines.

49. However, it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight. What is to occur then?

50. In my view, it is absolutely clear that it is open to a party, whether seeking or resisting permission, to put before a planning authority and/or the Board information, material and submissions suggesting that the decision-maker should depart from the guidelines to a greater or lesser extent. This is not only what the appellants did through their solicitor's letter of the 29th of June, 2016, but is also manifestly what the developer did in referring, prudently in my view, to the 2013 Review, and also in the manner in which reference was made to the 2006 W.E.D.G. and the ETSU documents.

51. A decision-maker must engage with such a submission, and if there is evidence that there is a consensus that the guidelines are no longer widely accepted within the relevant expert community, then that should lead to a reduced reliance on the guidelines as, in themselves, sufficient to ground a decision on any particular aspect of an application. Eventually, new guidelines will be promulgated. In those circumstances, while it might still be open to a party to maintain that such guidelines are erroneous, a decision-maker would be justified in being slow to depart from new guidelines, unless there was very convincing evidence that they were in error.

52. Here, the relevant guidelines were more than a decade old, and the relevant portion was based on the ETSU document which was more than 20 years old. The guidelines were given in an area where knowledge was advancing considerably. The very fact that the process of review had been commenced by the Department, and that proposals had been made suggesting that a significant departure from the guidance in place in the 2006 W.E.D.G. were, in themselves, significant matters suggesting that less reliance could be placed on the W.E.D.G. The fact that a senior local planner in an area with extensive wind turbine development, had considered that the guidelines were not fit for purpose is another feature which could not be discounted. These matters suggested, at a minimum, that what was advanced on behalf of the appellants was not merely one rather eccentric side of an academic controversy, but rather something which was required to be considered.

53. One thing that is beyond dispute, even in the context of the fractious engagement between the parties in this case, is that *something* was considered irrelevant by the Inspector, and therefore necessarily excluded from consideration by him (and, by extension, the Board). It seems tolerably clear to me that he considered that the contention made by the appellants, that the 1996 ETSU was outdated and not fit for purpose, was an irrelevant planning consideration. It must follow that he did not address that issue or any of the material advanced in support of the appellants' contention. In stating that the 2006 W.E.D.G. "are as they are and remain in force" and that the 2013 Review "has not yet been adopted", it seems clear that he considered that the 2006 W.E.D.G. and the 1996 ETSU were the only guidance to which regard could be had and excluded from consideration any argument whether the guidelines were outdated, or that regard could be had to the 2013 proposals. If this was the approach the Inspector took – and I think it was – then it was wrong in law, and meant unavoidably that he had excluded from his decision-making relevant considerations. It follows that the Board's decision, being based on the Inspector's report must be similarly flawed.

54. The High Court judge in his admirable, comprehensive, and careful survey of a complex issue in this case did not come to this conclusion. The reasoning of the learned judge is contained, in essence, in para. 71 of his judgment. He considered that while, if there was no national or local policy, the Board might be required to decide an issue of policy, that otherwise it was not a function of the Board to determine matters of policy where specific statutory guidance had been given and was extant. The Board, while an expert body, was not designed or intended to assess and evaluate policy matters.

55. I sympathise with much of what is said in this passage, but in my view it leads to the wrong conclusion. These were not policy guidelines. If they were, they would be mandatory and the Board would have been obliged to follow them rather than merely have regard to them. If so, the Board must at least consider submissions to the effect that little weight should be placed on the guidelines. In doing so it is not determining a matter of policy. It is deciding an appeal before it by reference to all relevant considerations, including the guidelines. It is common sense that the Board, or any planning authority, would be slow to depart from official promulgated guidelines, and even in cases where there is a substantial argument the guidelines were outdated and required to be replaced, the Board might be justified in considering, at least in principle, that it would be a matter for the body issuing the guidance to determine both whether the guidelines should be updated and in what respect. But neither the Board nor any other planning authority could exclude as irrelevant the argument that the guidelines were outdated, particularly when that had substantial independent support from official sources.

56. To return to a theme of this judgment, this distinction is clear, but undoubtedly frustrating. It must be doubtful that if, having considered all the materials and submissions made on behalf of the appellants, a decision-maker would have been likely to accept them, and certainly the more extreme version put forward. There was something of a scattergun approach about the submissions and the voluminous material landed on the Inspector as appendices to the letter of the 29th of June, 2016. No report from any expert, still less an expert of standing in the field, was produced either by reference to the specific application made or the more general scientific contentions. As the judge observed, there was no reason to assume that the material submitted was representative of a scientific consensus, or that it would not be possible to have a similarly selective exercise which might produce an equal amount of opposing views. In the circumstances, it would not have been unreasonable to continue to give weight to the existing guidelines, and to be slow to depart radically from them.

57. However, this was not what was done here. Instead, the submission was rejected *in limine* on the basis of a determination that the matters contained therein were irrelevant. 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. I consider, therefore, that it is necessary to quash the decision of the Board granting permission in this case. In the circumstances, I would hear counsel as to what ancillary orders should be made, and in particular whether it is possible or desirable to remit the matter to the Board, and if so, at what stage of the decision-making process.

AN BORD PLEANÁLA
04 SEP 2020
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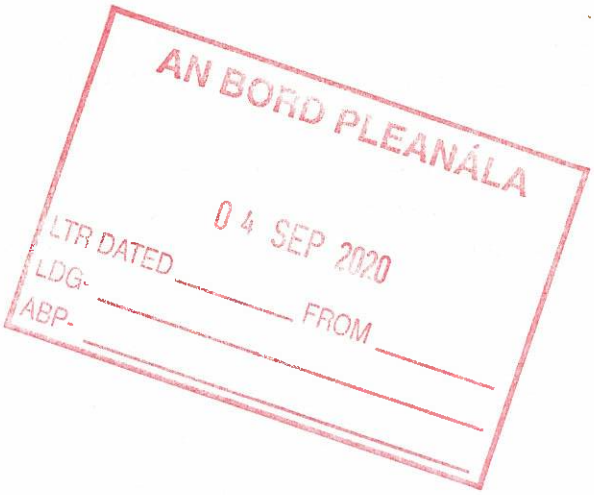
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