Philip Kenny
4 Temple Road
Dublin 6

AN BORD PLEANÁLA
LDG- 028359-20
ABP-
22 JUL 2020
Fee: € 50 Type: Cheque
Time: 11.15 By: hand

An Bord Pleanála
64 Marlborough Street
Dublin 1 D01 V902

21 July 2020

Re: Submission in relation to referral of Section 5 Declaration under Decision Order P3332 for review by An Bord Pleanála

Dear Sir/Madam,

1. I act on behalf of Mrs Patricia Kenny ("Mrs Kenny") of 4 Temple Road, Dublin 6. Mrs Kenny is the wife of Mr James Kenny ("Mr Kenny"), also of 4 Temple Road, Dublin 6.

2. Mr Kenny applied to Dublin City Council for a Section 5 declaration in respect of increases (the "Changes") that have been made to the floor area of Building 2 and Building 3 at Trinity Hall, Dublin 6 beyond what was permitted by the planning permission that had been granted in respect of those buildings.

3. Mr Kenny received notification of a declaration by Dublin City Council dated 23 June 2020 under Decision Order P3332 and referred this declaration for review by An Bord Pleanála under the provisions of Section 5 of the Planning and Development Act in a letter to An Bord Pleanála dated 20 July 2020. A copy of the cover letter for Mr Kenny's referral and receipt in respect thereof are attached.

4. I wish to make to a submission on behalf of Mrs Kenny in respect of the above-mentioned referral by Mr Kenny.

5. The first part of the submission is that I consider that the declaration made by Dublin City Council under Decision Order P3332 is fundamentally flawed, on the following grounds:

Ground 1	That the declaration is contradictory;
Ground 2	That the declaration is illogical and irrational;
Ground 3	That the declaration is contrary to Irish law on the basis that the Changes were material and were therefore development;
Ground 4	That the declaration is contrary to Irish law on the basis that the express agreement of the Council was not sought for the Changes and were therefore not agreed by the Council;
Ground 5	That the declaration is contrary to Irish law on the basis that there is no provision in planning law or regulations under which the Changes could be exempted development;
Ground 6	That the declaration is contrary to Irish law on the basis that any purported approval and/or agreement of the Council in respect of the Changes would have been ultra vires;
Ground 7	That the declaration is contrary to Irish law on the basis that revised environmental impact assessment is required in respect of the visual

	impact of the Changes and as this has not been done, they could not be exempted development; and
Ground 8	That the declaration is contrary to EU law on the basis that by making the declaration the Council failed to comply with its obligation to give effect to Council Directive 85/337/EEC, as amended, and deprived me and the public of our rights under that Directive.

6. The second part of the submission is that I believe that An Bord Pleanála should, in the interests of justice, consider using the powers available to it under S131 of the Planning and Development Act to serve a notice on Trinity College requesting that they make a submission to An Bord Pleanála outlining, inter alia, when, how and why the changes to the floor areas of Building 2 and Building 3 at Trinity Hall were made.

7. This submission is comprised of the following:
   - This letter;
   - A copy of the cover letter for Mr Kenny's referral and receipt in respect thereof;
   - An Addendum to this letter which provides, inter alia:
     - Details on the Development
     - In Sections 3, 4 and 5 of the Addendum the legal and factual information supporting the grounds mentioned in 5, above.
     - In Section 6 of the Addendum the information that I suggest that Trinity College should be requested to submit as mentioned in 6, above; and
   - A cheque for the prescribed fee of €50.

8. The Addendum to this submission letter provides legal and factual analysis of documents submitted by Mr Kenny to the Council in the Section 5 application and to the Board in the Section 5 referral. As these documents are already in the possession of the Board I do not consider it to be necessary to provide further copies of same to the Board with this submission. Should the Board require duplicate copies of these documents to be provided with this submission please let me know and I will make the necessary arrangements.

9. If there is any further information you require to assist in the assessment of this submission, my preferred means of contact is by email to pkenny@capital-ra.com. Otherwise I can be contacted at the above address or by phone at 4971599.

Yours faithfully,

PKenny

Philip Kenny

AN BORD PLEANÁLA

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ADDENDUM TO THE SUBMISSION TO AN BORD PLEANÁLA ON BEHALF OF MRS KENNY

IN RESPECT OF
THE REFERRAL BY MR KENNY OF THE SECTION 5 DECLARATION MADE BY DUBLIN CITY COUNCIL IN RESPECT OF TRINITY HALL, DARTRY, DUBLIN 6 UNDER DECISION ORDER P3332

21 JULY 2020

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1 INTRODUCTION

1.1 Purpose of this addendum

This addendum (the "Submission Addendum") has been prepared by Philip Kenny to accompany the letter dated 21 July 2020 to An Bord Pleanála (the "Board") on behalf Mrs Patricia Kenny ("Mrs Kenny") in respect of the referral by Mr James Kenny ("Mr Kenny") to the Board of the Section 5 declaration made by Dublin City Council ("the Council") under Decision Order P3332 in respect of Trinity Hall, Dartry, Dublin 6.

1.2 Section 5 application to the Council

Mr Kenny submitted an application (the "Section 5 Application") dated 5 May 2020 to the Council for a declaration under Section 5 of the Planning and Development Act in respect of Trinity Hall. The Section 5 Application was comprised of a cover letter, an application form, an addendum (the "Application Addendum") to the Section 5 application form and annexures to the Section 5 Addendum.

1.3 Section 5 referral to the Board

Mr Kenny received notification of a declaration by Dublin City Council dated 23 June 2020 under Decision Order P3332 and referred this declaration for review by the Board (the "Section 5 Referral") under the provisions of Section 5 of the Planning and Development Act. The Section 5 Referral was comprised of a cover letter dated 20 July 2020, an addendum (the "Referral Addendum") and annexures to the Referral Addendum.

1.4 Supporting documents

This Submission Addendum provides legal and factual analysis of documents submitted by Mr Kenny to the Council in the Section 5 Application and to the Board in the Section 5 Referral. As these documents are already in the possession of the Board it has not been considered necessary to provide further copies of same to the Board with this submission and they are accordingly incorporated herein by reference. Should the Board require duplicate copies of these documents to be provided with this submission the necessary arrangements can be made on request.

1.5 Background to the Development

1.5.1 The April 1999 Submission

On 12th April 1999 Murray O'Laoire, architects for Trinity College Dublin ("Trinity"), submitted a planning application (the "April 1999 Submission") to the Council for a development (the "Development") at Trinity Hall, Dublin 6. The initial proposed development was for nine new student halls of residence and included the refurbishment and renovation of a tenth building, Trinity Hall, which is a listed building.

The April 1999 Submission included, inter alia, drawings and plans (the "April 1999 Plans"), an architect's report (the "April 1999 Architect's Report") outlining the key elements of the proposed development and various other documents, a copy of which is provided in Annexure 1 to the Application Addendum, and an EIS (the "April 1999 EIS").

On 14th September 1999 the Council sent a letter to Trinity in accordance with Article 35 of the Local Government (Planning & Development) Regulations 1994 requesting revised plans to be submitted taking into account various matters that were noted in the letter.

1.5.2 The October 1999 Submission

On 7th October 1999 Trinity made a submission (the "October 1999 Submission") in response to the Article 35 Request comprising a revised set of drawings and plans for the Development (the "October 1999 Plans") an architect's report dated 4 October 1999 (the "October 1999 Architect's Report") outlining the key elements of the revised proposed development, a revised EIS (the "October 1999 EIS") and various other documents. A copy of the October 1999 Architect's Report is provided in Annexure 2 to the Application Addendum. Copies of selected drawings from the October 1999 Plans that are considered to be relevant to the Section 5 Application are listed in section of 11.1 of the Application Addendum and provided in Annexure 3 of the Application Addendum.

Significant changes were made in the October 1999 Plans, with the nine buildings that had originally been proposed in the April 1999 Submission being replaced with three buildings that provided similar overall floor space and bed spaces.

On 11th November 1999 the Council made an order (the "1999 Council Order") granting permission to the October 1999 Plans subject to 14 conditions.

1.5.3 The Grant of the Permission

The 1999 Council Order was appealed to the Board by the Dartry and District Preservation Association, and various residents living close to Trinity Hall. A Board Inspector held an oral hearing from 24th-26th May 2000 and on 4th August 2000 the Board granted planning permission (the "Permission") for the October 1999 Plans, subject to 19 conditions (the "Board Conditions"). A copy of the Permission is provided in Annexure 4 to the Application Addendum.

Board Condition 1 stated:

> *The proposed development shall be carried out in accordance with the revised plans submitted to the planning authority and received on the 7th day of October, 1999, in response to a request for revised plans under Article 35 of the Local Government (Planning and Development) Regulations, 1994, except as may otherwise be required in order to comply with the [other Board Conditions].*

In order to be allowed to commence development, Trinity was required to prepare a revised submission incorporating such changes to the October 1999 Plans as were necessary to comply with the Board Conditions and to seek the Council's agreement in respect of those changes.

1.5.4 Legal proceedings relating to the grant of the Permission

On 3rd October 2000 Mr Kenny sought leave in the High Court (High Court Reference 2000 532 JR) to apply for a judicial review of the Permission and to declare the Permission invalid and ultra vires. Mr Justice McKechnie gave judgment on 15th December 2000 refusing leave to apply for judicial review. Mr Kenny sought leave to appeal but this application was refused by Mr Justice McKechnie on 2nd March 2001.

Mr Kenny subsequently instituted three further sets of proceedings (High Court References 2002 14269P, 2003 7926P and 2005 3320P) in which he sought to have the decision of Mr Justice McKechnie set aside, but was unsuccessful in each of these proceedings.

None of the above proceedings (collectively the "Permission Proceedings") are relevant to the subject matter of this Section 5 application as the judgements in the Permission Proceedings only dealt with challenges to the validity of the Permission and did not deal with or make any determination in relation to the question of whether the Development as constructed complies with the Permission.

The Permission Proceedings are referred to in this addendum solely for the purposes of providing a full summary of the history of the Development.

1.5.5 The Compliance Submissions

In August 2001 Murray O'Laoire made a submission (the "August 2001 Compliance Submission") which included a revised set of plans for the Development accompanied by an architect's report dated 22 August 2001 (the "August 2001 Architect's Report") which identified and explained certain changes that had been made in the revised plans compared to the October 1999 Plans.

In November 2001 Murray O'Laoire made a second submission (the "November 2001 Compliance Submission") which included a full revised set of plans for the Development (the "Compliance Plans") accompanied by an architect's report dated 22 November 2001 (the "November 2001 Architect's Report") which identified and explained certain further changes that had been made in the Compliance Plans.

Trinity's compliance submissions (the "Compliance Submissions") were effectively the Compliance Plans read with the November 2001 Compliance Architect's Report and, where appropriate, the August 2001 Compliance Architect's Report.

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The agreement of the Council was sought for various changes that were identified and explained in the August 2001 Compliance Architect's Report and November 2001 Compliance Architect's Report (together the "Compliance Architect's Reports"). No information in respect of the Changes was disclosed in the Compliance Architect's Reports.

Copies of the August 2001 Compliance Architect's Report and November 2001 Compliance Architect's Report are provided in Annexure 5 and Annexure 6, respectively, to the Application Addendum. Copies of selected drawings from the Compliance Plans that are relevant to this Application are listed in Section 11.2 of the Application Addendum and are provided in Annexure 7 to the Application Addendum.

1.5.6 The Council Order

The City Planning Officer for the Council at that time, Mr Pat McDonnell, prepared a report (the "McDonnell Report") dated 24 December 2001 in which he stated that the Compliance Submissions were *"satisfactory"*. On the basis of the McDonnell Report the Council, by an order of 4 January 2002 (the "Council Order"), determined that the submissions were *"satisfactory"* and *"acceptable to the planning authority"*, and construction was then allowed to commence on the following day, 5 January 2002. A copy of the Council Order is provided in Annexure 8 to the Application Addendum. The Development was completed on 5th September 2003.

1.6 The questions put to the Council

The floor area approved by the Board for Building 2 was, as stated in section 8.2 of the Application Addendum, 7,145 m^2. The floor area of Building 2 as built is, as stated in section 8.4 of the Application Addendum, 8,174 m^2, which represents an increase of 1,029 m^2, or 14.4%, compared to what was approved by the Permission.

The floor area approved by the Board for Building 3 was, as stated in section 9.3 of the Application Addendum, 7,878m^2. The floor area of Building 3 as built is, as stated in section 9.5 of the Application Addendum, 9,217 m^2, which represents an increase of 1,342 m^2, or 17%, compared to what was approved by the Permission.

The Section 5 Application sought a declaration in respect of two questions, as follows:

> *Question 1*
> *Is the increase in floor area of Building 2 of 1,029 m^2 compared to what was approved by the Board development or not development and, if it is development, is it exempted development or not exempted development for the purposes of the Planning and Development Acts 2000-2019?*
>
> *Question 2*
> *Is the increase in floor area of Building 3 of 1,342 m^2 compared to what was approved by the Board development or not development and, if it is development, is it exempted development or not exempted development for the purposes of the Planning and Development Acts 2000-2019?*

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Board Condition 1 required the Development to be carried out in accordance with the October 1999 Plans except as was otherwise required in order to comply with the other Board Conditions. As none of the other Board Conditions required changes that would or could have resulted in an increase in the floor area of Building 2 or Building 3, these changes (the "Changes") represent material differences between the permitted development and the as constructed development.

1.7 Referral of the Section 5 Declaration by the Council

Mr Kenny received letter a letter dated 23 June 2020 containing the decision of the Council. A copy of this letter (the "Section 5 Letter") is provided in Annexure 4 to this Referral Addendum, and an extract from the letter is provided below:

> *Proposal EXPP: PROTECTED STRUCTURE: The application relates to the question as to whether various works that have been carried out at Trinity Hall, Dartry, Dublin 6,*

namely:- (a) An increase in the floor area of Building 2 of 1,029m2 compared to what was approved; and (b) An increase in the floor area of Building 3 of 1,342m2 compared to what was approved are or are not development and, if they are development, whether they are or are not exempted development for the purposes of the Planning and Development Acts.

NOTIFICATION OF DECLARATION ON DEVELOPMENT AND EXEMPTED DEVELOPMENT

In pursuance of its functions under the Planning & Development Acts 2000 (as amended), Dublin City Council has by order dated 19-Jun-2020 decided to issue a Declaration that the above proposed development is EXEMPTED from the requirement to obtain planning permission under Section 32 of the Planning & Development Acts 2000 (as amended).

Reasons & Considerations:

I am satisfied, having examined the proposal that the following conclusions apply;

The floor areas of Building 2 and Building 3 were deemed to be in compliance with the conditions imposed as part of the planning permission granted under Reg. Ref. 1101 /99 (ABP Ref. 29S.117164). The 'increase in floor areas' referred to were approved and constructed and therefore are not development.

It is submitted on behalf of Mrs Kenny that this declaration (the "Declaration") is contradictory, illogical, irrational, contrary to Irish law and contrary to EU law for the reasons set out later in this document.

1.8 When the changes to Building 2 and Building 3 were made

It should be noted that Sections 8 and 9 of the Application Addendum, which outlined the basis on which the two questions were being asked of the Council, did not make any statements or assertions as to when the changes to the floor area of Building 2 and Building 3 were made.

The possible explanations as to how and when these changes were made was considered in Section 10 of the Application Addendum as follows:

- Section 10.3 of the Application Addendum outlined the possibility that the changes were made in the Compliance Plans and that the absence of information relating to those changes and of information on the floor area of the buildings in the Compliance Architect's Reports was either an oversight (which I consider to be implausible given the detailed disclosure of many other minor changes in the Compliance Architect's Reports) or deliberately done with the objective of concealing the changes from the Council (which I consider to be the more likely explanation).
- Section 10.4 of the Application Addendum outlined the possibility that the changes were made after the Compliance Submissions had been submitted to and approved by the Council and were never disclosed to the Council or the public.

In making the Declaration it is clear that the Council assumed that the changes were made in the Compliance Plans. The analysis in Sections 3 and 4 below has been undertaken on the basis that this assumption is correct. Further analysis is provided in Section 5 in respect of the alternative scenario where the changes were made after the Compliance Plans were submitted and agreed by the Council.

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2 GROUNDS 1 & 2 – THE DECLARATION IS CONTRADICTORY, IRRATIONAL, AND ILLOGICAL

2.1 Ground 1 – the Declaration is contradictory

There are only 3 possible outcomes to a Section 5 application in respect of a structure that has already been constructed, namely that the changes in respect of which the declaration is being sought are either:

i. Not development, which is appropriate in cases where the changes represent immaterial deviations from the permission granted for that structure; or

ii. Development, which is appropriate in cases where the changes represent material deviations from the permission granted; or

iii. Exempted development, which is appropriate in cases where the changes represent material deviations from the permission granted but are exempted from the requirement to apply for planning permission under a specific provision of the Planning and Development Act and Planning regulations.

I contend on behalf of Mrs Kenny that the Declaration is contradictory as it indicates that the Council determined that the Changes were both *"EXEMPTED from the requirement to obtain planning permission"* and also that they were *"not development"*. These are contradictory determinations and it is not possible for the Changes to be both of these.

2.2 Ground 2 – the Declaration is irrational and illogical

The Declaration states that the Council *"[deemed] the floor areas of Building 2 and Building 3 ... to be in compliance with [the Permission]"* and that *"the [Changes] were approved [by the Council]"*.

Leaving aside the fact that, as outlined in 3 and 4 below, any such deemed *"approval"* would have been unlawful under national and EU law, it is illogical and irrational for the Council to claim that the Changes were approved by the making of the Compliance Order when the Council does not know, as noted in 1.8 above, whether the Changes had been made in the Compliance Plans submitted to the Council Order or at a later date after the Council's review of the Compliance Submissions had been completed.

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3 GROUNDS 3 TO 7 - THE DECLARATION IS CONTRARY TO IRISH LAW

3.1 Ground 3 - The Changes were material and were therefore development

The Council's determination that the Changes were not development could only be lawful if the Changes were immaterial deviations from the Permission.

As explained in detail in Sections 8.5.2 and 9.6.2 of the Application Addendum the Changes represent material deviations between the building as constructed and what was approved by the Permission and accordingly the statement in the Declaration that the changes were *"not development"* is contrary to Irish law.

Furthermore, it is not possible to make an argument that the Changes could be considered to be immaterial deviations from the Permission on the basis of the principles as outlined in the Krikke judgment[1]:

> *122. There is a further reason that the Developer cannot rely on the concept of "immaterial deviations". **The case law indicates that the rationale for allowing some flexibility in planning permissions is to address unexpected contingencies during the course of the carrying out of the development.** On the facts of the present case, the decision to change turbine types was a deliberate decision made in advance of the carrying out of the works. **This was not an unexpected event such as might benefit from the concept of "immaterial deviations".** [Emphasis supplied]*

As was the case in the development that was the subject of the Krikke judgement, the Changes were a deliberate decision made by Trinity in advance of carrying out of the works on the Development and were not an unexpected event such as might benefit from the concept of "immaterial deviations".

3.2 Ground 4 - Express agreement of the Council was not sought for the Changes

In making the statement in the Declaration that *"[the Changes] were deemed to be in compliance with the [Board Conditions]"* the Council completely ignored the detailed analysis and clear and explicit case law provided in Section 6.3 of the Application Addendum. In particular, the Council ignored the extracts provided in Section 6.3 from the Krikke judgement[2], which dealt explicitly with what changes can be deemed to have been accepted by a planning authority when it accepts a compliance submission. This principle is outlined clearly in the additional extract from the Krikke judgment below:

> *128. First, as a matter of interpretation, **the decision-letter cannot be read as "agreeing" to an increase in rotor diameter in circumstances where the Developer did not expressly request agreement to this increase.** Planning documents are to be interpreted in their ordinary meaning as they would be understood by members of the public, without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning. (See In re XJS Investments Ltd. [1986] IR 750). [Emphasis supplied]*

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The Krikke judgment makes it clear that where changes are made in plans submitted for compliance review and those changes are not expressly identified and the agreement of the planning authority is not expressly sought in the documents accompanying those plans, then, notwithstanding the acceptance of the plans by the planning authority, those changes cannot be deemed to have received the agreement of the planning authority.

Section 6.3 of the Application Addendum concluded by stating:

> *Applying this principle to Trinity Hall, it is clear that any changes that were made in the Compliance Plans that were not disclosed in the Compliance Architect's Reports and for which the express agreement of the Council was not sought in the Compliance*

[1] *Krikke and others v. Barranafaddock Sustainability Electricity Limited,* Simons G., 6 December 2019 [2019] IEHC 825
[2] Ibid.

Architect's Reports could not[3] have received and therefore did not receive the agreement of the Council by the making of the Council Order.

On the basis of the above and Section 6.3 of the Application Addendum the Declaration is accordingly contrary to Irish law.

3.3 Ground 5 - No provision under which the Changes could be considered exempted development

A development which would otherwise require planning permission will not require such permission where it falls within a category of exempted development as specified in the Planning and Development Act and/or the Planning and Development Regulations.

As (i) neither the Planning and Development Act nor the Planning and Development Regulations contain any provisions under which the Changes would qualify as exempted development, and (ii) the Declaration does not refer to the provision of the Planning and Development Act or the Planning and Development Regulations under which the Changes would qualify as exempted development, the Declaration contrary to Irish law.

3.4 Ground 6 - Purported approval by the Council of the Changes would in any case have been ultra vires

Even if the express approval of the Council had been sought at the compliance stage for the proposed increase in size of Building 2 and Building 3, any material increase in size of Building 2 and Building 3 would have represented a breach of Board Condition 1 and any purported approval, agreement or acceptance by the Council of such increases at the compliance stage by the making of the Compliance Order would have been ultra vires.

The legal analysis supporting this position is outlined in Section 6.1 of the Application Addendum, an extract from which is reproduced below for convenience[4].

The only power exercisable by the Council [during the compliance process] was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. ***Any agreement reached without that condition having been fulfilled was necessarily ultra vires the Council.*** *[Emphasis supplied]*

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Furthermore, there is a distinction between conditions in a planning permission which, for their implementation require the *"approval"* of the planning authority and conditions which require the *"agreement"* of the planning authority. This point was made by McKechnie J in the Permission Proceedings[5] when he stated

b) Secondly, there is a clear distinction between conditions in a planning permission which, for their implementation require the "approval" of the planning authority and conditions which require the "agreement" of the planning authority

None of the Board Conditions contained provisions that required the Council to approve any changes to the October 1999 Plans. Board Conditions 2, 7, 10(4), 18 and 19 contained provisions that required the Council to agree certain matters, but none of these matters would have required or allowed the floor areas of Building 2 and Building 3 to increase in size. In fact, the implementation of Board Condition 2 would have required the size of Building 3 to be reduced rather than increased.

Furthermore, any agreement reached in respect of any Board Condition was limited by law to what was necessary to give effect to that condition and no more. This principle was outlined by Dodd[6] as follows:

In entering into such agreement the planning authority and person carrying out the£ development, must ensure that the agreement is within the scope of the true or correct meaning of the condition. See O'Connor v Dublin Corporation, unreported,

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[3] Erratum: the word "not" was omitted from the text in the Application Addendum at the time of submission to the Council, but has been corrected for the purpose of this referral to An Bord Pleanála.

[4] Gregory v Dun Laoghaire Rathdown County Council (Supreme Court, unreported 28th July 1977)

[5] Kenny v An Bord Pleanála (No. 1) [2001] 11.R. 565

[6] *Planning and Development Acts 2000-2007 Annotated and Consolidated,* Stephen Dodd (Round Hall, Ltd November 30, 2008), p132

High Court. O'Neill J., October 3, 2002. Where the agreement goes beyond the scope of such condition, the agreement will be ultra vires.

It follows from the above that in relation to the statement in the Declaration that *"The 'increase in floor areas' referred to were approved [by the Council]"*, any such purported approval would have been ultra vires and unlawful and the Declaration is therefore contrary to Irish law.

3.5 Ground 7 – The Changes could not be exempted development as a revised EIA is required in respect thereof

3.5.1 The relevant legislation

Section 4 (4) of the Planning and Development Act 2000, as amended, states:

> *"(4) Notwithstanding paragraphs (a), (i), (iA) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.*

3.5.2 The Development had required an environmental impact assessment

The April 1999 Architect's Report, the October 1999 Architect's Report, the August 2001 Compliance Architect's Report and the November 2001 Compliance Architect's Report, copies of which were provided in Annexures 1, 2, 5 and 6, respectively, to the Application Addendum, all make reference to an EIS, so it is clear that an environmental impact assessment had been required in relation to the Development.

3.5.3 The environmental impact assessment included an assessment of the visual impact of the Development

The April 1999 Architect's Report noted[7] that an EIS had been prepared in respect of the Development. The October 1999 Architect's Report stated[8] that a revised EIS had been prepared in respect of the Development and indicated that seven views of the Development that had previously been supplied in the April 1999 EIS had been required to be regenerated as a result of the redesign of the Development and that comment on those revised views were included in the revised EIS. The relevant text was as follows[9]:

> *Critical viewpoints from outside the proposal have been [required] to be regenerated and submitted as part of the revised documents, and a comparative commentary should be included in the EIS appendix. These are to be as previously, namely:*
>
> • ***Viewpoint 1***
> *View from Temple Road (opposite the Embassy) looking into the Southeast corner of the development.*
>
> • ***Viewpoint 2***
> *View from junction of Dartry Road and Temple Road*
>
> • ***Viewpoint 3***
> *Panoramic View from Sunbury Gardens*
>
> • ***Viewpoint 4***
> *View from junction of Dartry Road and Palmerston Park*
>
> • ***Viewpoint 5***
> *View from Palmerston Park*
>
> • ***Viewpoint 6***
> *Internal view of West edge of central space*

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[7] April 1999 Architect's Report pp 8, 19, 20, 21, 32, 38 & 43
[8] October 1999 Architect's Report, p3 of cover letter
[9] Ibid. p16

• ***Viewpoint 7***
Internal view of East edge of Central Space showing the central facilities building in context with the existing listed pavilion buildings.

The August 2001 Architect's Report included[10] an extract from the October 1999 EIS which indicated that the visual impact of the Development would result in a *"readily apparent change of character"*, that the appearance would *"change significantly from most points to the immediate north west and south of the site"*, and that *"The ... scale will contrast with the established 19th century dwellings which surround the site.* The full extract is provided below:

> ***11.4 Impacts of the Proposed Development***
> ***11.4.1 General***
> ***Impact***
> *There will be a readily apparent change of character from open, undeveloped, amenity and leisure uses to comprehensive and uniform residential landuse.*
>
> *The development will represent an intensification which will contrast with the established low levels of use.*
>
> *The appearance will also change significantly so that there will be a much greater variety of materials, forms, scales and uses visible from most points to the immediate north, west and south of the site.*
>
> *The contemporary materials, forms, colours, finishes and scale will all contrast with the established 19" century dwellings which surround the site.*

3.5.4 *A revised EIA should have been undertaken in respect of the visual impact of the Changes and a revised EIS prepared*

As (i) the October 1999 EIS stated that the visual impact of the Development was significant, and (ii) the Changes represented material changes to Building 2 and Building 3, the Development should have been subjected to an updated visual impact assessment by means of undertaking another regeneration of the seven views that had been provided in both the April 1999 EIS and October 1999 EIS to reflect those changes and providing those regenerated views in a revised EIS for review and comment by the Council and the public. As noted in 4.2.2 below, six of the above-mentioned visualisations (being Views 1, 2, 3, 4, 5 and 7) showed Building 2 and/or Building 3 and these should have been revised to assess the visual impact of the Changes.

As this was not done the Changes cannot be exempted development due to the provisions of Section 4 (4) of the Planning and Development Act 2000, as amended, and the Declaration is therefore contrary to Irish law.

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[10] August 2001 Architect's Report, hand marked p19

4 GROUND 8 - THE DECLARATION IS CONTRARY TO EU LAW AS THE COUNCIL FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER THE DIRECTIVE

4.1 The relevant EU law requirements

4.1.1 The Development was subject to Directive 85/337

The size and type of the Development were such at that an EIS was required to be prepared in respect of the project, as noted in the April 1999 EIS, which stated[11]:

> *By law, the type and size of the project means that an environmental impact statement (EIS) must be carried out.*

The EIS requirements at the time that the April 1999 Submission and October 1999 Submission were submitted to the Council were contained in Council Directive 85/337/EEC, as amended by Council Directive 97/11/EEC, (together the "Directive").

The Directive required that public and private projects likely to have a significant impact on the environment undergo an assessment of their effects on the environment and also set out requirements for public participation and consultation in the decision-making process for authorisation of such projects.

One of the matters to be assessed in an EIS is impact on visual amenity, as noted in item 3 of Annex IV of the Directive which requires *"a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular... landscape..."*

4.1.2 The Directive had come into direct effect in Ireland

The deadline for transposing the provisions of Directive 85/337, as amended by Directive 97/11, into Irish Law was 14 March 1999, and as the Irish Government did not meet that deadline, Directive 85/337, as amended by Directive 97/11 had come into direct effect in Ireland prior to the date on which the April 1999 Submission was submitted to the Council.

Where the provisions of an EU Directive are directly applicable, all organs of State must protect the rights conferred on individuals by the Directive. The Council and the Board are organs of the state and thus bound by this obligation. This position was outlined by John Gore-Grimes as follows[12]:

> *The ECJ has held, on a mainly consistent basis, that Directive 85/337/EEC, as amended, has 'direct effect', that is to say that it can be relied on directly in proceedings before the courts dealing with the planning authorities and with appeals before An Bord Pleanála.*

4.1.3 National laws contrary to the Directive must be set aside

If an organ of State is unable to fulfil its obligation to protect the rights conferred on individuals by the Directive as a result of a provision of national law, it has the right and obligation to disapply such provision if its application would, in the circumstances of the case, lead to a result contrary to European law.

This principle was outlined by the Court of Justice of the European Union in C-378/17[13] when it held that the obligation to apply EU law in preference to national law was owed by all organs of State.

> *38 As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law (see, to that effect, judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraph 31; of 9 September 2003, CIF, C-198/01, EU:C:2003:430, paragraph 49; of 12 January 2010, Petersen, C-341/08, EU:C:2010:4, paragraph 80; and of 14 September 2017, The Trustees of the BT Pension Scheme, C-628/15, EU:C:2017:687, paragraph 54).*

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[11] Technical summary, April 1999 EIS, p2

[12] *Planning and Environmental Law in Ireland*, John Gore-Grimes (Bloomsbury Publishing PLC, 2011)

[13] Minister for Justice and Equality v. Workplace Relations Commission, CJEU, 4th December, 2018, ECLI:EU:C:2018:979

39 It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.

...

50 It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.

This principle was also referred to by Garret Simons as follows[14]:

13-286 In conclusion, therefore, it seems that the better view is that where planning permission has been granted in breach of the requirements of the Directive, the courts have a jurisdiction to set aside the grant. This should be so irrespective of whether the decision-making procedure may have been fully in accordance with the requirements of national law. An Bord Pleanála and the planning authorities are, as emanations of the State, obliged to give effect to the Directive, if necessary by disapplying provisions of national law.

13-290 It should be emphasised that planning authorities and An Bord Pleanála are obliged to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. Thus, it may be necessary on occasion for a planning authority or An Bord Pleanála either to supplement or disapply national law, so as to ensure compliance with the requirements of the Directive. For example, if it is some rule of national law which is preventing a particular project being subjected to an environmental impact assessment, this rule may have to be disregarded by An Bord Pleanála or the relevant planning authority.

4.1.4 *The obligation to give full effect to the Directive applies even if the time limits for bringing proceedings in relation to the matter has expired.*

The obligation to give full effect to the Directive applies even if the time limits for bringing proceedings in relation to the matter has expired. In the case of the Development, even though the time limit for the Council to take enforcement action in relation to the Development may have expired the Council does not have the power to declare the development authorised in respect of any breaches of the Directive. This principle was referred to by Simons as follows[15]:

143. The very recent judgment of the CJEU in Case C-261/18, Commission v. Ireland (Derrybrien) has emphasised that a Member State cannot deem a development project, which has been carried out in breach of the requirements of the EIA Directives, to be authorised simply because the domestic time-limits for legal challenges to the relevant development consent have expired.

4.2 Visual impact was one of the matters assessed in the EIS

4.2.1 *The April 1999 EIS*

The April 1999 Submission contained an EIS for the Development (the "April 1999 EIS"). Section 11 of the April 1999 EIS, a copy of which is provided in Annexure 2 to this Referral Addendum, dealt with the visual impact of the Development, as noted in the extract below:

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[14] *Planning and development law*, Garrett Simons (Thompson Round Hall, 2nd Ed. 2007)
[15] *Krikke and others v. Barranafaddock Sustainability Electricity Limited*, Simons J., 6 December 2019 [2019] IEHC 825

11.1 Introduction
This section examines the effects upon the appearance and character of the site and its immediate environs. The objectives of the analysis are twofold:-
1. *to determine the extent of the visibility of the new development*
2. *to determine whether and how the visibility will affect viewers.*

Section 11.3 provided photographs of the site from 7 viewing positions at various locations on the roads surrounding the site. The location of the viewing positions is shown on the View Location Map in Section 11.6 of the April 1999 EIS. Section 11.4 provided visualisations of the impact of the proposed development on the views from those viewing positions and an analysis of the impact.

The visual impact of the Development was considered to be significant, as noted in the extract below:

11.4 Impacts of the Proposed Development
11.4.1 General
There will be a readily apparent change of character from open, undeveloped, amenity and leisure uses to comprehensive and uniform residential landuse.
The development will represent an intensification which will contrast with the established low levels of use.
The appearance will also change significantly so that there will be a much greater variety of materials, forms, scales and uses visible from most points to the immediate north, west and south of the site.

4.2.2 The October 1999 EIS

Due to the significant changes made to the overall design of the Development in the October 1999 Plans, the October 1999 Submission was accompanied by a revised EIS (the October 1999 EIS). Section 11 of the October 1999 EIS, a copy of which is provided in Annexure 3 to this Referral Addendum, dealt with the visual impact of the Development, as noted in the extract below:

11.1 Introduction
This section examines the effects upon the appearance and character of the site and its immediate environs. The objectives of the analysis are twofold:-
1. *to determine the extent of the visibility of the new development*
2. *to determine whether and how the visibility will affect viewers.*

Section 11.3 provided the same photographs of the site from the same 7 viewing positions as shown in the April 1999 EIS, as can be seen from the View Location Map in Section 11.7 of the October 1999 EIS. Section 11.4 provided revised computer-generated simulated visualisations of the impact of the development as shown on the October 1999 Plans on the views from those viewing positions.

The visual impact of the Development was again considered to be significant, as noted in the extract below:

11.4 Impacts of the Proposed Development
11.4.1 General
There will be a readily apparent change of character from open, undeveloped, amenity and leisure uses to comprehensive and uniform residential landuse.
The development will represent an intensification which will contrast with the established low levels of use.
The appearance will also change significantly so that there will be a much greater variety of materials, forms, scales and uses visible from most points to the immediate north, west and south of the site.

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Based on the View Location Map, it can be the seen that the buildings shown in the 7 computer-generated simulated visualisations in the October 1999 EIS were as follows:

View number	Buildings shown
View 1	Building 3
View 2	Building 3
View 3	Buildings 1, 2 & 3
View 4	Building 2
View 5	Building 1 & 2
View 6	Building 1
View 7	Building 2

4.3 Building 2 and Building 3 should have been subjected to an updated visual impact assessment

The material changes made to the size of Building 2 and Building 3 are likely to have altered the visual impact of the development.

In those circumstances the October 1999 EIS should have been further revised to show the extent of the changes on the visual impact of the development in order to provide the Council and the public with an opportunity to assess whether the changes were material or not.

In particular, under the requirements of the Directive the six visualisations in the October 1999 EIS which showed Building 2 and/or Building 3 (being Views 1, 2, 3, 4, 5 and 7) should have been revised to reflect the increased size of those buildings and those revised visualisations should have been submitted to the Council in a further revised EIS for review and comment by the Council and the public.

4.4 By making the Declaration the Council failed to comply with its obligation to give effect to the Directive and deprived Mrs Kenny and the public of their rights under the Directive

It is not possible to determine whether the increase in size of Building 2 and Building 3 would have made a significant change to the visual impact of the Development by comparison to that shown in the October 1999 EIS for the simple reason that neither the Council nor any member of the public knows what changes were made to the length and/or width and/or height of those buildings in order to result in the significant increase in floor area of the buildings.

Notwithstanding whether the changes to the visual impact would have been considered to be material or not, by making the Declaration the Council failed to comply with its obligation to give effect to the Directive by depriving Mrs Kenny and the public in general of their rights under the Directive to be consulted in relation to the Changes.

The key point here is not whether an assessment of the visual impact of the Changes would have resulted in them being approved by the planning authority or not had a revised planning application and revised EIS been submitted in respect thereof, but the fact that Mrs Kenny, Mr Kenny and the public in general were deprived of their rights under the Directive to express their opinions and to participate in the decision-making process regarding the matter.

This right was described by Simons as follows[16]

> *13-06 A similar point came before the House of Lords in Berkeley v Secretary of State for the Environment. In the leading speech, Lord Hoffmann identified the directly enforceable right under the Directive as not merely a right to a fully informed decision on the substantive planning issues, but as requiring the inclusive and democratic procedure prescribed by the Directive in* ***which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues*** *[Emphasis supplied]*

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[16] *Planning and development law*, Garrett Simons (Thompson Round Hall, 2nd Ed. 2007)

The Krikke judgment is also relevant to the above points:

> *134. Had the Developer wished to obtain the planning authority's agreement to an increase in rotor diameter, then this should have been stated in express terms in the body of the compliance submission. Neither a planning authority nor a member of the public should be expected to wade through extensive documentation in order to attempt to ascertain what precisely it is that a developer is seeking agreement to.* ***Public participation lies at the heart of the planning process. This is especially so in the context of development, such as the present case, which consists of a project subject to the public participation requirements of the EIA directive.***
>
> *135. The second reason for saying that the decision-letter cannot be relied upon as authorising the increase in rotor diameter is, perhaps, more fundamental.* ***It is a requirement of the EIA Directive that any "change" or "extension" of projects already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must itself be subject to assessment. It is necessary, therefore, that a form of screening exercise be carried out before a decision to authorise a change or extension can lawfully be made.*** *[Emphasis supplied].*

The requirement of the Council to ensure that a screening exercise is undertaken in respect of the Changes is supported in the statement by Advocate General Pizzarella in his opinion in the Derrybrien case[17] that:

> *[it is] incumbent on Member States, in accordance with the principle of sincere co-operation enshrined in Article 4 TEU, to nullify the unlawful consequences of the infringement (of the obligation to carry out a prior assessment of the effects of the project on the environment)* ***and it is therefore for the competent authorities of each Member State, to take, within the sphere of their competence, all the general and particular measures necessary to ensure that they are subject to an assessment.*** *[Emphasis supplied]*

It is clear from the above extract that as no screening exercise has ever been carried out in respect of the Changes (i) no decision to authorise, approve or accept the Changes can have been lawfully made, (ii) in making the Declaration the Council failed to comply with its obligation to give effect to the Directive, and (iii) in making the Declaration the Council deprived Mrs Kenny, Mr Kenny and the public of their rights under the Directive, as a result of which the Declaration is contrary to EU law.

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[17] Case C-261/18 (Commission v Ireland)

5 IMPACT OF TIMING OF CHANGES ON LAWFULNESS OF THE DECLARATION

The analysis in Sections 3 and 4 of this Referral Addendum has been carried out on the basis that the assumption made by the Council that the Changes were made in the Compliance Plans is correct.

In the event that it were to be determined that the Changes were made after the Compliance Submissions were accepted by the Council, the proposition that the Declaration is contrary to both national and EU law, as outlined in Sections 3 and 4 above, would still stand.

6 INFORMATION TO BE REQUESTED FROM TRINITY COLLEGE

It is submitted on behalf of Mrs Kenny that the Board should, in the interests of justice and in order to assist in the determination of the referral, consider using the powers available to it under S131 of the Planning and Development Act to serve a notice on Trinity College requesting that they make a submission to the Board providing the following information:

- What changes were made to the length and/or width and/or height of Building 2 and Building 3 that resulted in the increase in floor area of those buildings and why.
- Whether the Changes were made in the Compliance Plans or after the Compliance Plans were completed and submitted to the Council.
- If the Changes were made in the Compliance Plans:
    - Why no information on the Changes was contained in the Compliance Architect's Reports considering that, as noted in Sections 10.2 and 10.3 of the Application Addendum, the Compliance Architect's Reports gives the impression that they contain a comprehensive and detailed disclosure of <u>ALL</u> changes that had been made in the Compliance Plans compared to the October 1999 Plans, including even minor and immaterial changes such as In addition to disclosing more significant changes that had been made to the October 1999 Plans in order to comply with the Board Conditions, the Compliance Architect's Reports also contain details of changes that could be considered minor or immaterial, such as *"insertion of small windows into plans"* and *"review of dimensional inaccuracies in windows and standardisation of window typologies"*.
    - Why the explicit agreement of the Council was not sought in relation to the Changes.
    - Why no information on the floor area of the buildings as shown in the Compliance Plans was provided in the Compliance Architect's Reports.
- If the Changes were made after the Compliance Plans were completed and submitted to the Council, why no information in respect thereof was provided to the Council or any other party.

The provision of the information outlined above will be of significant value in ascertaining exactly what happened and when in relation to the Changes, and will place the Board in a position to make a fully informed and appropriate decision in respect of the referral.

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7 FURTHER OBSERVATIONS

7.1 Not a challenge to the Compliance Order

It is possible that in responding to the Section 5 Referral Trinity will seek to characterise the referral as an attempt to challenge the Compliance Order. This is not the case. The Compliance Order has already been, as noted in Section 5.2 of the Application Addendum, the subject of legal challenge and the matters raised therein and the judgement of the courts in respect thereof are res judicata and are not being raised in this referral.

I am simply stating on behalf of Mrs Kenny that the only changes that can be considered to have been approved and/or agreed by the Council in making the Compliance Order were changes (i) within the scope of what was required to comply with the Board Conditions, and (ii) for which the express agreement of the Council was requested in the Compliance Architect's Reports.

7.2 Not a challenge to the October 1999 EIS

It is also possible that in responding to the Section 5 Referral Trinity will seek to characterise the referral as an attempt to challenge the validity of the October 1999 EIS. This is not the case. The October 1999

EIS was, as noted in in Section 1.3 of the Application Addendum, one of the matters dealt with in the Permission Proceedings and the matters raised therein in respect of the October 1999 EIS and the judgement of the courts in relation thereto are res judicata and are not being raised in this referral.

I am simply stating on behalf Mrs Kenny that as the Changes were not part of the October 1999 Plans the visual impact of the Changes could not have been and were not assessed by the October 1999 EIS and should have therefore been the subject of an updated visual impact assessment which should have been provided in an further revised EIS.

Philip Kenny
on behalf of Mrs Patricia Kenny

AN BORD PLEANÁLA
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AN BORD PLEANÁLA
GENERAL RECEIPT
ADMHÁIL

No. IR 110609
Uimh. IR

An Bord Pleanála

RECEIVED FROM
FUARTHAS Ó

James F Kenny.

The sum of
Suim

€270

in respect of:
ar:

Appeal or other Statutory Fee
Achomharc nó ar Tháille Reachtúil eile

Section 5 Referral - DCC + 1 Copy.

Purchase of Statutory Documents
Doiciméid Riachtiúil a cheannach

Other - Please specify
Eile - Sonraigh le do thoil/len bhur dtoil

Kevin Hall
Dublin 6.

(2) Documents in relation to:
Doiciméid a bhaineann le:

Cheque Payment.

AN BORD PLEANÁLA
LOGGED
22 JUL 2020
ABP

SEE NOTE ON BACK OF RECEIPT
LÉIGH AN NÓTA AR CHÚL

Signed
Sínithe

Date
Dáta

20/7/20.

James F Kenny
4 Temple Road
Dublin 6

An Bord Pleanála
64 Marlborough Street
Dublin 1 D01 V902

20 July 2020

Re: Referral of Section 5 Declaration under Decision Order P3332 for Review by An Bord Pleanála

Dear Sir/Madam,

1. I applied to Dublin City Council for a Section 5 declaration in respect of increases (the "Changes") that have been made to the floor area of Building 2 and Building 3 at Trinity Hall, Dublin 6 beyond what was permitted by the planning permission that had been granted in respect of those buildings.

2. I received notification of a declaration by Dublin City Council dated 23 June 2020 under Decision Order P3332. I wish to refer this declaration for review by An Bord Pleanála under the provisions of Section 5 of the Planning and Development Act on the following grounds:

Ground 1	That the declaration is contradictory;
Ground 2	That the declaration is illogical and irrational;
Ground 3	That the declaration is contrary to Irish law on the basis that the Changes were material and were therefore development;
Ground 4	That the declaration is contrary to Irish law on the basis that the express agreement of the Council was not sought for the Changes and were therefore not agreed by the Council;
Ground 5	That the declaration is contrary to Irish law on the basis that there is no provision in planning law or regulations under which the Changes could be exempted development;
Ground 6	That the declaration is contrary to Irish law on the basis that any purported approval and/or agreement of the Council in respect of the Changes would have been ultra vires;
Ground 7	That the declaration is contrary to Irish law on the basis that revised environmental impact assessment is required in respect of the visual impact of the Changes and as this has not been done, they could not be exempted development; and
Ground 8	That the declaration is contrary to EU law on the basis that by making the declaration the Council failed to comply with its obligation to give effect to Council Directive 85/337/EEC, as amended, and deprived me and the public of our rights under that Directive.

3. Due to the fact that the history of the development at Trinity Hall is long and complex I wish to request an oral hearing of this referral.

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4. This referral is comprised of the following:
    - This referral letter;
    - An Addendum to this referral letter providing details on the Development and the legal and factual information supporting the above-mentioned grounds for the referral;
    - Appendices to the Addendum;
    - A copy of all documents and plans submitted in support of the application to the Council for a Section 5 declaration; and
    - A cheque for €270, being the prescribed fees of €220 for the referral and €50 for the request for an oral hearing.

5. If there is any further information you require to assist in the assessment of this submission, my preferred means of contact is by email to jfkenny.ie@gmail.com. Otherwise I can be contacted at the above address, by phone at 4971599 or 086 866 2269.

Yours faithfully,

James F Kenny

98-50-10

Ulster Bank
Private Banking
College Green

Date 20/7/20.

Pay An Bord Pleanala or order

two hundred and seventy euro's

€ 270 —

MR JAMES KENNY

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