THE COURT OF APPEAL

CIVIL

Court of Appeal Record Nos 2021/9

Collins J. **Neutral Citation Number [2023] IECA 155**

Whelan J.

Noonan J.

BETWEEN

DUBLIN CITY COUNCIL

Applicant/Respondent

AND

AN BORD PLEANÁLA

Respondent

AND

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

Notice Party

JUDGMENT of Mr Justice Maurice Collins delivered on 16 June 2023

INTRODUCTION

1. This appeal presents a net issue of statutory interpretation, encapsulated in the point of law certified by the High Court (Humphreys J) which is in the following terms:

> *"Does the Board have jurisdiction under the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended to grant permission [for strategic housing development] in material contravention of a planning scheme?"*

The Board is, of course, An Bord Pleanála ("*ABP*"). A "*planning scheme*" is a scheme adopted in accordance with the provisions of Part IX of the Planning and Development Act 2000 (as amended) ("*the PDA*").

2. The Planning and Development (Housing) and Residential Tenancies Act 2016 (*"the 2016 Act"*) was enacted in December 2016. It will be necessary in due course to refer its provisions in more detail but, at this point, it is sufficient to observe that Part 2, Chapter 1 of the Act established new procedures governing applications for planning permission for "*strategic housing development*" (as defined). Subject to an exception I shall mention in a moment, section 4(1) of the Act (which was repealed by the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 with effect from 17 December 2021) made it mandatory for applications for permission for such development to be made directly to ABP rather than to the relevant planning authority. When determining such applications, ABP is required to "*have regard to*"

(*inter alia*) the provisions of the development plan (including any local area plan) for the area but nonetheless has significant scope for granting permission even where the proposed development would materially contravene the development plan or local area plan: section 9(6).

3. The obligation under section 4(1) of the 2016 Act to apply to ABP where planning permission was sought for strategic housing development was, however, subject to a significant qualification in subsection (4). That subsection is central to the resolution of the certified point of law and so I shall set it out in full now:

> *"In the case of an application for a strategic housing development that is located in a strategic development zone, the applicant may elect to make the application to the planning authority under section 34 of the Act of 2000 rather than under this section and, accordingly, section 170 of that Act applies to the application to which the said section 34 relates."*

4. It will be necessary to come back to this provision. But a number of points may be made immediately. The first is that it makes clear that the 2016 Act applies to proposed strategic housing development within an SDZ. SDZs could have been excluded from the scope of the Act but the Oireachtas clearly decided not to do that.[1] Secondly, as

[1] In contrast, development within SDZs *is* excluded from the application of the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 which effectively replaces the 2016 Act: see section 32A(1)(b)(i) PDA (inserted by section 3 of the 2021 Act). Such an exclusion was recommended by the

regards proposed strategic housing development within a SDZ, the applicant for planning permission was given two options. The applicant could elect to apply to the planning authority under section 34 PDA or could instead apply to ABP under section 4 of the 2016 Act. In the event that the applicant elected to make the application to the planning authority under section 34 PDA, section 170 PDA would apply to the application.

5. Section 170 PDA significantly modifies the operation of the PDA as regards applications for development in a SDZ: see generally the discussion in my judgment (with which Costello and Donnelly JJ agreed) in *Spencer Place Development Company Limited v Dublin City Council* [2020] IECA 268. Section 170(1) provides that, where an application is made pursuant to section 34 for a development in an SDZ, that section and any permission regulations shall apply, subject to the other provisions of section 170. Section 170(2) then provides that permission shall be granted for a development where the planning authority is satisfied that it would be consistent with the applicable planning scheme and that no permission shall be granted for any development which would not be consistent with such planning scheme. As I noted in *Spencer Place Development Company Limited v Dublin City Council*, that appears to be an absolute prohibition and there is no procedure analogous to section 34(6) PDA permitting a planning authority to grant permission for a development that would be inconsistent with a planning scheme and therefore no mechanism within Part IX PDA whereby

Strategic Housing Development Review Group appointed by the Minister for the purposes of the statutory review of the operation and effectiveness of Part 2, Chapter 1 (Report of September 2019, recommendation 6)

development inconsistent with a planning scheme may be permitted (short of varying the scheme itself): para 16. Finally, section 170(3) excludes any appeal to ABP from a decision on an application for permission in respect of a development in an SDZ.

6. So much was common case here. There was no dispute that, if the application for planning permission the subject of these proceedings had been made to the planning authority, Dublin City Council ("*the Council*"), pursuant to section 34 PDA, section 170(2) PDA would have dictated its refusal, on the basis that the proposed development was inconsistent with the North Lotts Scheme and, in particular, was inconsistent with the maximum building heights fixed by the Scheme. However, the Notice Party's application was not made to the Council under section 34 PDA. Rather, it elected to apply to ABP pursuant to section 4 of the 2016 Act. The Notice Party contended – and ABP accepted – that, in determining that application, ABP was not rigidly bound by the terms of the Scheme and was entitled to grant the permission sought notwithstanding any inconsistency with any prescribed building height limits.

7. ABP was of the view that the proposed development was consistent with the proper planning and sustainable development of the area and proceeded to grant planning permission. That decision was challenged by the Council. In the High Court, Humphreys J upheld the Council's challenge and quashed the permission: [2020] IEHC 557. He did, however, grant leave to appeal in respect of the question already set out: [2021] IEHC 34.

8. The essential issue is whether the Judge was correct in concluding that, where an applicant applies for permission for strategic housing development to ABP under section 4 of the 2016 Act in respect of land within an SDZ, ABP is bound by the terms of the relevant planning scheme to the same extent as a planning authority would have been had the developer instead elected to make its application to the planning authority pursuant to section 34 PDA and thus has no entitlement (or, in the language of the certified question, no jurisdiction) to grant permission for any such development be inconsistent with such scheme.

9. For the reasons set out in this judgment, I conclude that ABP did have jurisdiction under 2016 Act to grant permission for strategic housing development in an SDZ that materially contravenes a planning scheme.

THE SCHEME, THE APPLICATION FOR PERMISSION AND THE DECISION OF ABP

The Scheme

10. Though the certified question is framed in abstract terms, these proceedings are concerned specifically with the North Lotts and Grand Canal Planning Scheme 2024 ("*the North Lotts Scheme*") which governs development within the *North Lotts and Grand Canal Strategic Development Zone* ("*the North Lotts SDZ*"). The North Lotts SDZ encompasses the Dublin docklands, both to the north and the south of the Liffey, including an area lying between Sheriff Street Upper, New Wapping Street, Mayor Street Upper and Park which is designated in the Scheme as City Block 2, comprising four sub-blocks, 2A, 2B, 2C and 2D.

11. The North Lotts Scheme was made in 2014. It contains detailed provisions prescribing building height limits within the North Lotts SDZ (section 168(2)(c) requires a draft planning scheme to include "*proposals in relation to the overall design of the proposed development, including the maximum heights ....*"). Many, including the Notice Party (and, it appears, ABP also) consider that higher buildings should be permitted in the North Lotts SDZ than is provided for in the North Lotts Scheme. In December 2018 the Minister for Housing, Planning and Local Government issued the *Urban Development and Building Heights, Guidelines for Planning Authorities* ("*the Guidelines*") pursuant to section 28 PDA. The Guidelines contain a number of specific policy requirements ("*SPPRs*") with which planning authorities and ABP are required to comply in the

performance of their functions: section 28(1C) PDA. In *Spencer Place Development Company Limited v Dublin City Council*, this Court rejected Spencer Place Development Company Limited's argument that SPPR 3(A) mandated Dublin City Council to override the building height limits in the North Lotts Scheme. The Court took the view that SPPR 3(A) did not apply to existing planning schemes and that the requirements of the Guidelines were intended to be implemented through the review and amendment of such schemes mandated by SPRR 3(B) (judgment at para 94).

12. My judgment in *Spencer Place Development Company Limited v Dublin City Council* recorded that the Council had undertaken a review of the North Lotts Scheme and had sent a draft amended Scheme to ABP for approval. That judgment was given in October 2020. Surprisingly, an amended Scheme has yet to be made. In March 2021, ABP, declining to follow the recommendation of its inspector, refused to approve the draft amended Scheme, because (*inter alia*) in its view it provided for only minimal increases in height and density and did not properly reflect the policy objectives in the Guidelines and also because it was of the opinion that the Council had not properly engaged with the submissions made to it advocating greater height and density.[2] ABP's refusal was in turn challenged by the Council and, in January 2022, it was quashed by the High Court, apparently without opposition. The High Court then remitted the approval application to ABP for reconsideration by it ([2022] IEHC 5) and that appears to be where matters rest. The net result is that, some 4½ years after the adoption of the

[2] Board Order ABP-304604-19.

Guidelines, they have yet to be implemented in respect of a crucial part of Ireland's capital. That is hardly satisfactory.

13. In any event, the North Lotts Scheme made in 2014 remains in force. It provides (at page 183) that Blocks 2B and 2D are to "*range between 5-storey commercial/6-storey residential and 6-storey commercial/7-storey, stepping down to 3 residential immediately north and west of the Mayor Street terrace."*

The Application for Permission

14. In August 2019 the Notice Party applied to ABP to amend a previously permitted development at Blocks 2B & 2D by the addition of 115 further residential units and the change of use of a previously permitted aparthotel to 84 shared accommodation units. The application proposed an increase in the maximum height of Block 1 (City Block 2B) from 7 storeys (27.5m) to 13 storeys (47m) and of Block 2 (City Block 2D) from 7 storeys (27.5m) to 11 storeys (40.5m). These heights exceed the limits provided for in the Scheme. That fact was acknowledged in the Material Contravention Statement submitted by the Notice Party as part of the application (the submission of such a statement was a requirement of section 5(6) of the 2016 Act). The Statement asserted that, as the application for permission was being made to ABP under section 4 of the 2016 Act, ABP was not bound by the Scheme in the same way as the planning authority would be and was free to grant permission for the proposed development. Reference was made to section 37(2)(b) PPA and in particular to section 37(2)(b)(iii) and, in that context, to the Guidelines, as well as the *National Planning Framework 2040* and the

Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (2009).

15. In accordance with the 2016 Act the Council prepared a report on the proposed development which was furnished to ABP as part of the application process. That report concluded that the proposed development would not be consistent with the North Lotts Scheme and would be contrary to the proper planning and sustainable development of the area.[3]

ABP Decision

16. ABP's inspector recommended refusal of the application, essentially on the basis that the proposed development was inconsistent with the North Lotts Scheme (Report of 18 November 2109). Nonetheless, ABP decided to grant the permission sought, subject to a number of conditions. In its Order of 3 April 2020, it set out its conclusions on proper planning and sustainable development in the following terms:[4]

> *"The Board considered that the proposed development is, apart from the building height parameters, broadly compliant with the current Dublin City Development Plan 2016-2022 and the current North Lotts and Grand Canal*

[3] Report of 14 October 2019.

[4] ABP's Order also deal with Appropriate Assessment Screening and Environmental Impact Assessment but nothing arises in respect of those aspects of the Order.

Dock Strategic Development Zone Planning Scheme (which is deemed to form part of the Development Plan), and would therefore be in accordance with the proper planning and sustainable development of the area. The Board considers that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the Development Plan (incorporating the Planning Scheme), it would materially contravene the Plan with respect to building height limits set out for the site concerned. The Board considers that, having regard to the provisions of section 37(2)(b)(i),(iii) and (iv) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the development plan would be justified for the following reasons and considerations:

(a) The proposed development is considered to be of strategic or national importance by reason of its location within an area designated as a Strategic Development and Regeneration Area (SDRA 6 – Spencer Dock, Poolbeg and Grand Canal Dock), its potential to contribute to the achievement of the Government's policy to increase delivery of housing from its current under supply set out in Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016, and to facilitate the achievement of greater density and height in residential development in an urban centre close to public transport and centres of employment.

(b) It is considered that permission for the proposed development should be granted having regard to Government policies as set out in the National

Planning Framework (in particular objectives 3a, 3b, 11, 13 and 35) and the Guidelines for Sustainable Residential Developments in Urban Areas issued 2009 (in particular section 5.8).

(c) Having regard to the pattern of existing and permitted development in the vicinity of the proposed development site (not limited to the Planning Scheme area) since the Development Plan and Planning Scheme were adopted.

In deciding not to accept the Inspector's recommendation to refuse permission on the basis that the proposed development would be premature pending the determination of the concurrent application to the Board by the planning authority for amendments to the North Lotts and Grand Canal Dock Strategic Development Zone Planning Scheme, the Board considered that it is obliged to determine the application by reference to the development plan currently in force, and that it is not entitled under the 2000 or 2016 Planning Acts to determine the application based on previous or proposed future iterations of the plan. The Board was satisfied that it was not precluded from determining the application under section 9(4) of the 2016 Act on the basis of prematurity, and that the Board has the requisite jurisdiction under section 9(6) of the 2016 Act to grant permission for a strategic housing development which would materially contravene a development plan or which would be inconsistent with a planning scheme which is deemed to form part of the development plan. In accordance with section 9(6) of the 2016 Act, the Board considered that the criteria in

section 37(2)(b)(i), (iii) and (iv) of the 2000 Act were satisfied for the reasons and considerations set out in the decision.

Furthermore, the Board noted the inspector's analysis of the design of the proposed development and agreed with the inspector's ultimate assessment in terms of the scale, massing and site context." (my emphasis)

JUDICIAL REVIEW APPLICATION AND HIGH COURT DECISION

17. The Council then brought judicial review proceedings to quash ABP's decision to grant permission. The Council also sought declaratory relief. The Statement of Grounds runs to 45 pages. For the purposes of this appeal, the key complaint made by the Council was that ABP had no power to grant permission for a development amounting to a material contravention of the Scheme and that ABP erred in considering that section 9(6)(c) of the 2016 Act and section 37(2) PDA permitted it to do so. Insofar as ABP's planning assessment may have been at issue before the High Court, it is not an issue in this appeal. The certified point of law - the only issue that this Court has jurisdiction to determine having regard to section 50A(11)(a) PDA – is concerned solely with jurisdiction/*vires*. Accordingly, this Court is not concerned in any way with the planning merits of the proposed development at City Block 2.

18. The application for judicial review was opposed both by ABP and the Notice Party. In due course, it came on for hearing before Humphreys J in the High Court. At the conclusion of the hearing he informed the parties that he would be making an order quashing the planning permission. He gave his reasons subsequently: [2020] IEHC 557. In his view, section 9(6) of the 2016 Act had no application to material contravention of a planning scheme. He was not persuaded that the reference in section 9(6) to *"development plan*" should be read as including a planning scheme (Judgment, paras 23-25). His view in that respect was reinforced by the fact that the criteria for material contravention in section 37(2) PDA did not make a lot of sense when applied to a

planning scheme and would allow "*wholesale contravention*" of planning schemes (Judgment, para 26). Such an interpretation would also be logically inconsistent with the fact that ABP had only a limited entitlement to amend a planning scheme under section 170A(4)(b) PDA and if that interpretation was accepted, ABP could *"achieve results that it could never achieve in relation to amending the scheme simply by allowing material contraventions in the case of individual planning applications*" (Judgment, para 27). The overall statutory policy was clear that planning schemes formed a detailed framework for development with primacy over the development plan and it followed that not only the planning authority but also ABP was required to work within the scheme (Judgment, para 28). That same logic would appear to apply in the context of strategic infrastructure development (*ibid*).

19. As regards the option given by section 4(4) of the 2016 Act, the Judge thought that *"it would be totally inconsistent and illogical if fundamentally different rules applied at the whim of the developer".* To ABP's argument that the application of the same rules would deprive the election of a benefit, that appeared to the Judge to be a desirable and rational outcome as "*developers should not be able to game the system*". It would be illogical if the choice of forum permitted ABP to materially depart from a planning scheme in a way that the planning authority could not. In his view, the better reading of the "*ambiguous*" provisions of the 2016 Act was that the lack of reference to planning schemes in the Act was consistent with the intention that ABP is simply bound by the planning scheme and did not have a jurisdiction to depart materially from it. If ABP was so bound, it would not make sense to require ABP "*to have regard*" to the planning scheme, which would be a "*weaker obligation*". In any event, even if "*development*

plan" in section 9(2)(a) of the 2016 Act was read as including a planning scheme, it did not follow that "*development plan*" in section 37(2) PDA includes such a scheme (Judgment, para 30).

20. The Judge then addressed what he characterised as a "*final fall-back argument*" namely that there was no express prohibition on material contravention of a planning scheme by ABP, in contrast to the clear prohibition applicable to planning authorities under section 170(2). Though allowing that the drafting of the legislation left something to be desired in terms of expressly articulating some of these issues (a point made once again at the conclusion of the Judgment), in the Judge's view "*it would completely undermine the planning scheme to allow such a procedure based simply on the lack of an express provision, doubly so where material contravention of the development plan requires express provision"* (Judgment, para 32).

21. The Council's argument that any material departure from the Scheme should have been the subject of SEA screening reinforced the Judge's conclusion that ABP had no jurisdiction to grant an application in material contravention of the Scheme (Judgment, para 33). The further argument made by the Council, to the effect that ABP had acted in breach of SPPR 3 – apparently by pre-empting the review of the Scheme – was not determinative (Judgment, para 34) but the Judge did consider it relevant that an interpretation that kept ABP within the parameters of the Scheme as one more likely to lead to a high level of environmental protection in accordance with Article 37 of the Charter (Judgment, para 35), though he emphasised that he was not departing from the

black-letter meaning of the statute in order to give effect to that requirement (Judgment, para 40).

22. In light of his conclusion on the issue of ABP's jurisdiction, the Judge granted *certiorari* to quash the planning permission. In the circumstances, it was not necessary for him to address the other complaints made by Dublin City Council (Judgment, para 41).

23. The Judge subsequently gave leave to appeal and made an order for costs against ABP (by consent) and, notwithstanding its opposition, against the Notice Party also. The Judge also granted a limited stay on the order of *certiorari*: [2021] IEHC 34.

APPEAL

24. The Notice Party appeals from the order of *certiorari*. It also seeks to set aside the costs order against it.

25. ABP did not bring any appeal and did not participate in the appeal of the Notice Party.

26. On the Notice Party's analysis, the starting point is the absence of any express statutory provision precluding ABP from granting permission for a strategic housing development inconsistent with or in contravention of a planning scheme. Section 170(2) imposes such a restriction on the planning authority but not on ABP. Section 4(4) preserves the application of section 170 PDA to applications for strategic housing development made to a planning authority but does not apply it to applications made to ABP pursuant to section 4 of the 2016 Act. The Notice Party places very significant reliance on section 4(4) and the absence from it of any provision applying section 170 to application to ABP. It relies in this context on the principle of *expressio unius est exclusio alterius*. The absence of any express restriction on ABP's jurisdiction is said to be "*the core ground of appeal*". The Notice Party also argues that, by virtue of section 169(9) PDA, the term "*development plan*" in section 9(6)(a) of the 2016 Act can be construed as including reference to a planning scheme. However, Mr McCullough SC emphasised that is a secondary point and not one on which the Notice Party has to succeed in order to be successful in its appeal. The Notice Party acknowledges that in *Spencer Place Development Company Limited v Dublin City Council*, this Court held that "*development plan"* did not include a planning scheme but it submits that that

appeal was concerned with a different statutory regime and not with the provisions of the 2016 Act. The different context of the 2016 Act, it is said, requires reading *"development plan*" in section 9 as including a planning scheme. Otherwise, ABP would not be under any obligation to have any regard to such a scheme. That, the Notice Party says, cannot have been the intention of the legislature.

27. According to the Notice Party, no rational purpose would have been served in bringing applications for large scale residential development in an SDZ within the strategic housing development process established by the 2016 Act unless it offered the possibility of a different outcome than a permission in strict compliance with the relevant planning scheme. Such a construction of the 2016 Act would, the Notice Party says, render it largely ineffectual in terms of achieving greater delivery of housing in areas located within SDZs. As it is put in the Notice Party's written submissions:

> *"Unless there is an opportunity for a developer to obtain a better outcome than a development which strictly conforms to the relevant planning scheme, there is no incentive for them to make an application under section 4 of the 2016 Act. That then defeats the objective of bringing large scale residential development proposals located in the area of a planning scheme into the strategic housing development process, which object is to improve the supply of housing."*

28. The Council in response advances the arguments that succeeded before the High Court and relies on the Judge's analysis. It says that the Notice Party's argument based on the absence of any express restriction on ABP's jurisdiction under the 2016 Act "*starts*

from the wrong premise". The correct starting point, it says, is to ask whether ABP has been conferred with the *"significant and wide-ranging jurisdiction"* to depart from the terms of a planning scheme. Clear words would be necessary to confer such a jurisdiction and, according to the Council, there is no sufficiently clear provision to that effect in the 2016 Act. The Council accuses the Notice Party of reading too much into section 4(4) of the 2016 Act. Its purpose is *"simply to preserve the already existing fast track mechanism in the context of planning schemes*". As regards the Notice Party's argument that "*development plan*" in section 9(6) of the 2016 Act can and should be interpreted as including a planning scheme, the Council says that such an interpretation was "*squarely rejected*" by this Court in *Spencer Place Development Company Limited v Dublin City Council*.

29. I shall refer in more detail to the arguments of the parties in the course of addressing the issues raised by the appeal.

ANALYSIS AND DECISION

30. According to its long title, the 2016 Act was enacted to "*facilitate the implementation of the document entitled "Rebuilding Ireland – Action Plan for Housing and Homelessness" that was published by the Government on 19 July 2016 and for that and other purposes to amend the Planning and Development Acts 2000 – 2015….".* As already noted, Part 2 of the 2016 Act established new procedures governing applications for planning permission for a "*strategic housing development*". "*Strategic housing development*" means the development of houses and/or student accommodation units exceeding specified quantitative thresholds: see section 3 of the 2016 Act.[5]

31. Apparently following the precedent set by the Planning and Development (Strategic Infrastructure) Act 2006, the 2016 Act established a new division of ABP – the Strategic Housing Division – to determine applications for strategic housing development made to it (section 11). As already noted, subject to section 4(4), section 4(1) made it mandatory for applications for permission for strategic housing development to be made directly to ABP rather than to the relevant planning authority. As with strategic

[5] Primarily (a) The development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses, (b) the development of student accommodation units which, when combined, contained 200 or more bed spaces, on land the zoning of which facilitates the provision of student accommodation or a mixture of student accommodation and other uses or (c) development including type (a) and type (b) developments. Subject to certain specified thresholds, strategic housing development may include other uses also.

infrastructure development under the 2006 Act, the 2016 Act made extensive provision for pre-application engagement between prospective applicants and ABP.

32. The 2016 Act clearly reflects particular policy judgments made by the Oireachtas. Many of those judgments were and remain controversial. In the event, the regime established by the Act has since been replaced by a new statutory regime applicable to "*large-scale residential development*" which restores the role of planning authorities as first-tier decision makers and which also, as already noted, expressly excludes lands located in an SDZ. But the Court is not concerned here with any question of policy. The issue arising in this appeal is whether as a matter of law ABP *was* entitled to grant the permission it did to the Notice Party or whether (as the Council contends) it was constrained by the terms of the North Lotts Scheme to refuse permission. Whether ABP *ought* to be able to grant permission for a development within an SDZ that is inconsistent with the relevant planning scheme is an issue for the Oireachtas rather than one for this Court.

33. Section 9(1) of the 2016 Act identifies various matters which ABP is required to consider before making a decision on a section 4 application. Section 9(2) then identifies a number of matters to which ABP "*shall have regard to"* in considering the likely consequences of the proposed development for the proper planning and sustainable development in the area where it is to take place. I shall set these out in full:

> *"(a) the provisions of the development plan, including any local area plan if relevant, for the area,*

(b) any guidelines issued by the Minister under section 28 of the Act of 2000,

(c) the provisions of any special amenity order relating to the area,

(d) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact

(e) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact

(f) the matters referred to in section 143 of the Act of 2000, and

(g) the provisions of the Planning and Development Acts 2000 to 2016 and regulations made under those Acts where relevant."

34. ABP is also required to "*apply, where relevant, specific planning policy requirement of guidelines issued by the Minister under section 28 of the Act of 2000*" (subsection (3)(a)) and where such specific planning policy requirements differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, *"apply instead of the development plan"* (subsection 3(b)).

35. Section 9(1) and 9(2) are notable for the absence from them of any reference to a planning scheme. Unless the reference to "*development plan*" in section 9(2)(a) is read

as including a relevant planning scheme – and that is disputed by the Council – then, on the face of the 2016 Act, ABP is not required even to "*have regard to*" such a scheme, still less is it bound by such a scheme in the manner contended for by the Council.

36. Even if "*development plan*" in section 9(2)(a) is read so as to include a planning scheme – with the consequence that ABP must "*have regard to*" the terms of such a scheme in deciding whether or not to grant an application for permission made under section 4 - section 9 itself indicates that ABP is, in principle, entitled to depart from it in certain circumstances. Section 9(6)(a) provides that, subject to paragraph (b), ABP may decide to grant a permission for a proposed strategic housing development in respect of an application made under section 4 even where the proposed development, or a part of it, contravenes materially the development plan (or local area plan) relating to the area concerned. Section 9(6)(b) provides that ABP shall not grant permission under subsection 6(a) where the proposed development, or a part of it, contravenes materially the development plan (or local area plan) in relation to the zoning of the land.[6] Section 9(6)(c) goes on to provide that where a development would materially contravene the development plan (or local area plan) other than in relation to the zoning of land, then ABP may only grant permission in accordance with paragraph (a) "*where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development."*

[6] Given that strategic housing development is defined in section 3 as development of housing and/or student accommodation on land zoned for such development, the practical significance of this limitation is questionable.

37. Section 37(2)(b) PDA provides that where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, ABP may only grant permission where it considers that:

> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, 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, and permissions granted, in the area since the making of the development plan."*

38. Accordingly, on the face of section 9 (and the 2016 Act more generally), ABP is either not required to have regard to a planning scheme at all or it is required to have regard to it but is entitled to depart from it in certain circumstances. There is nothing in the 2016 Act to the effect that, when deciding on an application under section 4, ABP is bound by a planning scheme in the same way as a planning authority is in deciding an application for permission under section 34 PDA. There is also nothing in the 2016 Act – which, though it is to be construed with the PDA, is largely self-contained – that

suggests that different decision-making regimes apply under the Act, depending on whether or not the proposed strategic housing development is located in an SDZ.

39. Clearly, the 2016 Act could have so provided. It could have provided that, where an application was made to ABP under section 4 of the Act in respect of strategic housing development within an SDZ, the restrictions in section 170(2) PDA would apply to ABP. But it did not do so. To the contrary, the 2016 Act explicitly confirmed (in section 4(4)) that section 170 PDA would apply where a developer opted to apply to the planning authority pursuant to section 34 PDA without any indication that the section should apply where the developer instead opted to apply to ABP under section 4 of the 2016 Act.

40. The maxim *expressio unius est exclusion alterius* is not to be seen as some rigid rule of statutory interpretation. It is never more than a useful guide to legislation and its utility depends on the particular terms of the legislation under review: *McCarron v Kearney* [2010] IESC 28, [2010] 3 IR 302, per Fennelly J at para 45. Even so, in my view, the contrast between the express statement in section 4(4) confirming the application of section 170 PDA to an application for permission for strategic housing development within an SDZ where that application is made to the planning authority under section 34 PDA, and the absence of any statement to the effect that section 170 PDA would also apply where such an application was made to ABP under section 4 of the 2016 Act speaks very powerfully here.

41. So how then is it said that ABP was bound by the North Lotts Scheme in the manner suggested by the Council and found by the High Court? That question is not, in my view, sufficiently addressed in the High Court's judgment or by the Council in argument. If it is said that ABP was obliged, as a matter of law, to refuse the Notice Party's application because the proposed development exceeded the building height limits in the North Lotts Scheme, the source of that obligation must be identified. I do not accept the Council's submission that to pose this question is to "*start from the wrong premise*". It is the Council here that contends that ABP acted in excess of its jurisdiction by granting the permission. It is for the Council to make good that contention. Logically, the issue of whether, and to what extent, ABP was bound by the North Lotts Scheme is the prior issue, which has to be addressed before addressing any issue of whether, and to what extent, ABP could depart from the Scheme.

42. Section 9 of the 2016 Act does not impose any such obligation, for the reasons just explained. There is no language in section 9 capable of being construed as requiring ABP to refuse permission on the basis that the proposed development here was inconsistent with the building height limits in the North Lotts Scheme (section 9(6)(b) does require refusal where the proposed development contravenes the applicable zoning, which could arise in relation to an SDZ but there was no suggestion here that the planning permission should not have been granted by reason of section 9(6)(b)). No other provision of the 2016 Act does so either. One therefore looks to the PDA (with which Part 2 of the 2016 Act is, by virtue of section 1(2), to be construed as one). Under that Act, ABP has no function in determining applications for planning permission for development within an SDZ. Section 170 imposes obligations on a planning authority,

not on ABP. There was a faint suggestion from Mr Dodd SC (for the Council) that the reference to planning authority might be read as including ABP, on the basis of the decision of the Simons J in *Mount Juliet Estates Residents Group v Kilkenny County Council* [2020] IEHC 128. That argument is, in my view, wholly unpersuasive. What was at issue in *Mount Juliet Estates Residents Group v Kilkenny County Council* was whether the prohibition in section 34(12) PDA on planning authorities entertaining applications for retention permission for developments carried out in breach of the EIA and/or Habitats Directives should also apply to ABP. It was clear as a matter of EU law that ABP was bound to comply with those Directives and that EU law dictated that the section 34(12) prohibition should apply to ABP also. No such circumstances arise here. Furthermore, section 170 expressly applies (and applies only) to applications made to a planning authority *under section 34 PDA*. On its own terms, it cannot by any process of statutory interpretation be applied to applications made to ABP under section 4 of the 2016 Act.

43. The Judge thought that ABP was required to *"work within the scheme and not make a decision in contravention of it*" (Judgment, para 28). Significantly, however, he did not identify any express statutory basis for any such limitation and implicitly accepted that there was none, though in his view that was not determinative (Judgment, para 32). The mere absence of a prohibition on overriding the scheme did not, in the Judge's view, give rise to a jurisdiction to do so. That may be so but, in my respectful view, the Judge's analysis did not adequately address the prior question of whether and to what extent the scheme was binding on ABP in the first place.

44. In that context, the absence from the 2016 Act of any provision applying section 170 PDA, and in particular section 170(2), to ABP when exercising its functions under the 2016 Act in respect of proposed development within an SDZ is highly significant. In light of the provisions of section 4(4) of the 2016 Act, it does not appear to me that such absence can plausibly be said to be an oversight. The Oireachtas clearly intended that the 2016 Act would apply to strategic housing development within an SDZ and, it seems equally clear, intended to give developers the option of applying for permission for such development either to the planning authority under section 34 PDA (in which case section 170 applied, with the result that the proposed development could be permitted only to the extent that it was consistent with the terms of the relevant planning scheme) or to ABP under section 4 of the 2016 Act (in which case section 170 did not apply).

45. The Judge was of the view that there was no rational basis for giving a choice between two entirely different regimes with different rules and potentially different outcomes (Judgment, para 30). That would be to permit developers to game the system. But the wisdom of giving such a choice to applicants is not the issue here: the issue is what the Oireachtas intended, having regard to the language used in the 2016 At and the context in which and purpose for which it was enacted. As counsel for the Notice Party explained in argument, there were rational reasons for adopting such an approach. An application to a planning authority under section 34 would be dealt with more quickly and would be more predictable in outcome than an application to ABP under the 2016 Act. Depending on the terms of the planning scheme and the nature and extent of the development proposed, there therefore could be an advantage to a developer in seeking permission under section 34. But there was clearly a potential benefit in making an

application under the 2016 Act – a benefit to developers but also, indirectly, a benefit to the public in the form of the provision of additional housing – in that ABP was not bound by the terms of the planning scheme and could therefore grant permission for development that could not have been permitted by a planning authority under section 34 PDA. That, in my view, was the entire point of applying the 2016 Act to strategic housing development on land within an SDZ.

46. In fact, as the Notice Party also observed, the suggestion that section 4(4) carefully provided for two options governed by precisely the same rules and necessarily reaching the same outcome begs the question of why the Oireachtas would so provide and why any developer would apply to ABP in respect of strategic housing development within an SDZ.

47. The Council argued that the Notice Party was guilty of reading too much into section 4(4) of the 2016 Act, suggesting that its purpose was *"simply to preserve the already existing fast track mechanism in the context of planning schemes*". That restrictive reading of section 4(4) is not sustainable in my view. Section 4(4) certainly preserves the "*existing fast track mechanism"*, namely an application to the planning authority under section 34 PDA but, critically, it provides a further stand-alone option, namely application to ABP under the 2016 Act, which is governed by the provisions of the 2016 Act and, in particular section 9, *not* by section 34 (or section 170) PDA.

48. Does it follow that ABP may simply disregard a planning scheme when exercising its functions under the 2016 Act? In my view, it does not. The reference to "*development*

plan" in section 9(2)(a) must, in my opinion, be read as including any relevant planning scheme – here the North Lotts Scheme. That conclusion may appear to be at odds with this Court's decision in *Spencer Place Development Company Limited v Dublin City Council*. However, any seeming conflict is apparent rather than real. The issue in *Spencer Place Development Company Limited v Dublin City Council* was whether the reference to "*development plan*" in section 34(2)(ba) PDA should be read as including a planning scheme. In my judgment, I noted the terms in which "*development plan*" is defined in section 2(1) PDA (as "*a development plan under section 9(1*)") and noted also that section 2(1) allowed for the possibility that the context might require a different construction. However, the context did not require any different meaning in *Spencer Place Development Company Limited v Dublin City Council;* on the contrary, the context pointed firmly to "*development plan*" being given its standard section 2(1) meaning: para 69.

49. The statutory context here is materially different. Unless "*development plan*" in section 9(2)(a) is read as including a relevant planning scheme, the 2016 Act effectively imposes no obligation on ABP to have regard to such scheme. In my view, such a situation would be wholly inconsistent with the provisions of section 169(9) PDA (which provides that a "*planning scheme made under this section shall be deemed to form part of any development plan in force in the area of the scheme until the scheme is revoked, and any contrary provisions of the development plan shall be superseded")* and cannot have been the intention of the Oireachtas. The context here therefore requires that "*development plan*" in section 9(2)(a) be construed as including a planning scheme. In other words, where (as here) an application is made to ABP under section 4

of the 2016 Act for development within an SDZ, ABP must have regard to the relevant planning scheme as part of the development plan. ABP here clearly did have regard to the North Lotts Scheme.

50. If "*development plan*" in section 9(2)(a) includes the terms of any relevant planning scheme, then the reference to "*development plan*" in section 9(6) must be similarly construed. In his judgment, the Judge suggested that, even if "*development plan*" in section 9 includes a planning scheme, it does not follow that "*development plan*" in section 37(2) PDA include such a scheme. But section 37(2) PDA has no direct application. In terms, it applies to section 37 *appeals* to ABP. Section 9(6)(c) of the 2016 effectively deems section 37(2) to apply for the purpose of delimiting the circumstances in circumstances in which ABP may depart from a development plan for the purposes of its functions under the 2016 Act. It follows that, for the purposes of section 9(6) of the 2016 Act, section 37(2) must be read as permitting ABP to depart from the same *"development plan*" to which it is required by section 9(2)(a) to have regard, that is to say (in the case of proposed development within an SDZ) the development plan including the planning scheme.

51. Nor, with respect, do I see any decisive force in the points made by the Council (and accepted by the Judge) regarding the limited powers of ABP to amend a planning scheme or the requirement for SEA screening of such schemes and of amendments to them. ABP did not amend the North Lotts Scheme here. The parameters of ABP's power of amendment of a planning scheme under section 170A PDA are not in any way determinative of the issue presented in this appeal, which relates to whether and to what

extent in an application for planning permission made to it under section 4 of the 2016 Act, ABP is bound by the provisions of a planning scheme. As regards the issue of SEA screening, I did not understand the Council to contend that ABP's decision to grant permission contravened the requirements of Directive 2001/42/EC or that the proposed development required assessment under that Directive. If that indeed was the Council's case, it failed to identify any basis for its argument in the Directive. Planning schemes, and amendments to such schemes, may require assessment (or at least screening) under the Directive, as may developments plans adopted under section 9 PDA and modifications to such development plans: see the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (SI 436/2004) as amended by the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011 (SI 201/2011). But the Directive, and these Regulations, apply to *"plans and programmes .. which are likely to have significant environmental effects."* ABP here was not engaged in the adoption of a plan or programme. Rather, it was determining an application for planning permission under the 2016 Act. As is clear from section 9 of that Act, ABP was required to consider *"the likely effects on the environment or the likely effects on a European site, as the case may be, of the proposed development, if carried out"* but that obligation was distinct from any obligation arising under Directive 2001/42/EC (and no issue arises on this appeal as to ABP's compliance with that obligation).

52. Ultimately, what the Court is required to do here is to construe the 2016 Act, read as appropriate with the PDA. The Court cannot rewrite the Act. The proper approach to this exercise of statutory construction was considered recently by the Supreme Court in

Heather Hill Management Co v An Bord Pleanála [2022] IESC 43, per Murray J (with whose judgment the other members of the court agreed). At para 112 of his judgment, Murray J noted that the line between the permissible admission of "*context*" and identification of "*purpose*", and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, can sometimes become blurred. He identified four basic propositions to be kept in mind in order to maintain the clarity of that distinction:

> *"113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.*
>
> *114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say*

they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276). - 68 - 115.

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable

background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

53. In my view, the language of the 2016 Act read as a whole compels the conclusion that ABP had jurisdiction under the Act to grant permission for strategic housing development in material contravention of a planning scheme. The same statutory provision that required ABP to have regard to the North Lotts Scheme – section 9 of the 2016 Act – expressly permitted it to depart from its terms in certain circumstances. In the course of its submissions, the Council made the argument that very clear statutory language was needed to give ABP power to depart from a planning scheme. Such a power, it was said, should not be implied or read into ambiguous language. In my view, section 9(6)(c) clearly gave such a power to ABP. The Council's argument to the contrary is premised on a contention that, though they fall outside the scope of section 9 altogether, planning schemes nonetheless impose binding obligations on ABP, However, that contention simply finds no support in the language of the 2016 Act or in the provisions of the PDA.

54. The context and purpose of the 2016 Act does not point to any different conclusion, still less is that context and purpose "*decisively probative*" of the alternative construction advocated by the Council and accepted by the Judge. There is no textual

foundation for that alternative construction in the 2016 Act itself or in the PDA. It requires the Court to disregard the clear terms of section 4(4) and section 9(2) of the 2016 Act and to read into the Act a restriction that is not there and which would be inconsistent both with its language and its stated purpose and policy objectives.

55. I reach that conclusion without any sense of satisfaction. There appear to be compelling policy arguments for excluding SDZs from the special statutory regime established by the 2016 Act. That was certainly the view of the Review Group appointed by the Minister and, as noted, the 2021 Act reflects its recommendation by excluding its application to SDZs. I sympathise with the position of the Council. The 2016 Act has permitted the Notice Party to obtain permission for a development that could not have been obtained under the PDA and which could not now be obtained under the 2021 Act But the Court is required to take the 2016 Act as it finds it. For the reasons set out in this judgment, I have come to the clear conclusion that ABP was, as a matter of law, entitled to grant permission here notwithstanding that proposed Blocks 1 and 2 exceed the building height limits in the North Lotts Scheme.

CONCLUSION AND ORDER

56. It follows that the certified question should be answered in the affirmative: An Bord Pleanála does have jurisdiction under the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended to grant permission [for strategic housing development] in material contravention of a planning scheme (no further applications can be made to ABP under the 2016 Act but there may still be applications working their way through the statutory process).

57. It would seem to follow that the Court should allow the appeal and set aside the order of *certiorari* made by the High Court. If that is agreed, such an order will be made. Absent agreement, it appears appropriate to hear the parties before finalising the order(s) to be made. The issue of costs has also to be determined. The Supreme Court's decision in *Heather Hill* has altered the landscape significantly and, again, it appears appropriate to give the parties an opportunity to be heard on the issues of costs in the event that they are unable to reach agreement on the order(s) to be made. What I would propose, therefore, is to allow the parties a period of 3 weeks within which to engage to see whether agreement can be reached on the orders to be made. If agreement is not reached within that period, the parties can contact the Office and a short hearing will be arranged to deal with all outstanding matters.

Whelan and Noonan JJ have indicated their agreement with this judgment and the orders proposed.