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Judgment of Mr Justice Holland delivered the 16th of March 2022

INTRODUCTION

1. These judicial review proceedings seek to quash the decision of An Bord Pleanála (“the Board”) pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 (as amended) (“the 2016 Act”) to grant planning permission (the “Impugned Permission”) to Burkeway Homes Limited (“Burkeway Homes” or “Burkeway”) for a Strategic Housing Development (“SHD”) of 121 residential units, (52 houses and 69 apartments) on a 5.3 ha site (“the Site”) at Bearna, County Galway (“the Proposed Development”), which site includes Trusky East Stream and its floodplain. The Proposed Development includes a creche and also a public linear park in the eastern part of the Site – essentially, the floodplain.

2. The Board’s Inspector’s report, of 180 pages, records¹ inter alia that:

- The primary access to the Site is from the L1321 public road via the existing Cnoc Fraoigh housing estate (“Cnoc Fraoigh”)².
- It is proposed to connect the Proposed Development, via Cnoc Fraoigh, to the Irish Water watermain and foul sewer on the L1321.
- The Proposed Development will also divert the Cnoc Fraoigh sewage to the Irish Water foul sewer on the L1321 in the manner described below.
- Surface/Storm water from the Proposed Development is to discharge to the Trusky East Stream. Surface/Storm water from Cnoc Fraoigh already does so.

¹ §§3.4 & 3.5

² E.g. see Engineering Services Report §6.6

3. The figures below may assist understanding of the issues:

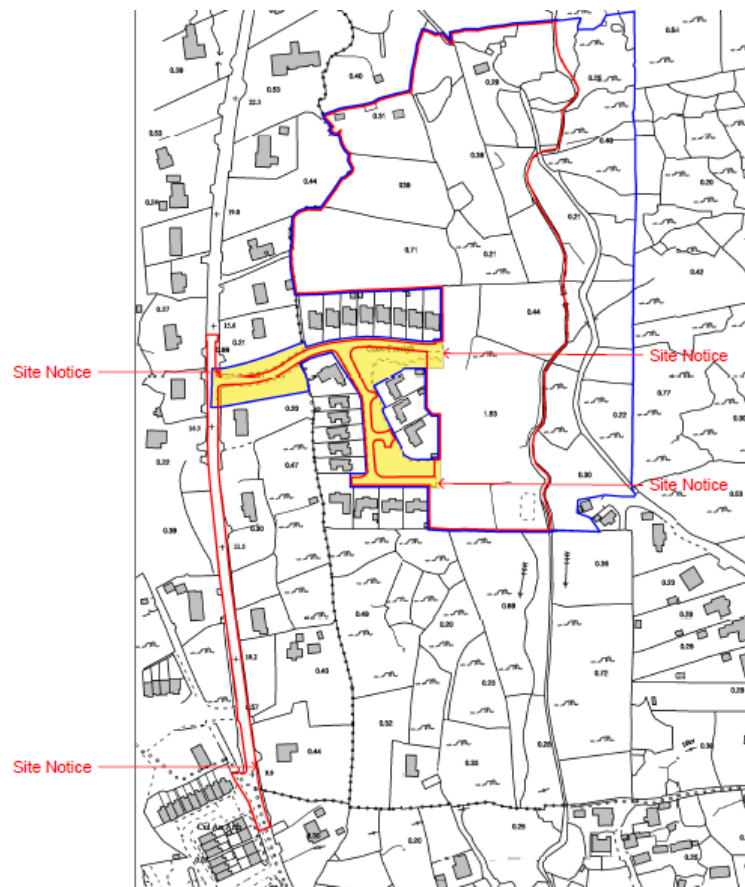


Figure 1³ Extract from Planning Application Site Location map⁴

Notes

- The “red line” encloses the undeveloped application Site for purposes of Article 297 PDR 2001⁵.
- Though not readily discernible on this map⁶, the eastern segment of the red line follows the route of the Trusky East Stream (a.k.a. “the Trusky Stream” a.k.a. the “Cloghscoltia River”) which runs north-south to discharge to Galway Bay at Bearna Pier about 690m south of the site.
- Cnoc Fraoigh, comprising 21 detached houses, lies essentially around the yellow areas.
- The Site lies essentially east and north of Cnoc Fraoigh.
- A blue line shows the “overall landholding” of Burkeway⁷. It includes the roads and common areas in Cnoc Fraoigh. It also includes an area east of the Trusky East Stream which does not form part of the Site.
- A yellow area showing roads and common areas in Cnoc Fraoigh. The legend in this regard reads “Easement”.

³ Note - figures are for illustration only.

⁴ 924-MDO-XX-XX-DR-A-00001.

⁵ The Planning and Development Regulations 2001 as amended.

⁶ See Figure 2 below

⁷ I have ignored here any distinction between Burkeway Homes and Burkeway Barna – see below

- The L1321 road lies west of the site and runs south to Bearna.
- The Site falls from the north to the southeast.⁸



Figure 2⁹ Extract from Planning Application Proposed Site Layout Plan¹⁰.

Notes

- As stated above, the Trusky East Stream runs north-south down the eastern boundary of the Site. A tributary, the Trusky West Stream, not shown on this figure, runs north-south generally along the western side of the L1321 and joins the Trusky East Stream shortly before they discharge to Galway Bay at Bearna Pier.
- The most south-eastern house is inside the red line at site 121. It is part of the Proposed Development and not part of Cnoc Fraoigh.
- A proposed foul water pumping station is to be located in the green area at the south of the Site - just east of the southernmost of the three houses on the eastern side of Cnoc Fraoigh and of the footpaths which can be seen at that location.

⁸ Engineering Services Report §1.4. Site Specific Flood Risk Assessment §2.3.

⁹ Note - figures are for illustration only.

¹⁰ 924-MDO-XX-XX-DR-01101

- The Cnoc Fraoigh sewage and that of the house to be built at site 121 will be intercepted by a pipe on the road just outside site 121 and gravity-fed northeast to the pumping station from which it will be pumped to the north-eastern corner of Cnoc Fraoigh. From there it will be gravity-fed west under the Cnoc Fraoigh estate road to the L1321 and then south to the Irish Water sewer network in Bearna. This will enable the decommissioning of the Cnoc Fraoigh Waste Water Treatment Plant (“WwTP”) and percolation area which at present lies roughly midway between the eastern boundary of Cnoc Fraoigh and the Trusky East Stream.

4. The Site is owned by Burkeway Barna Limited (“Burkeway Barna”) – a wholly-owned subsidiary of Burkeway Homes (collectively, “Burkeway”). The planning application included a letter in which Burkeway Barna consented to the making of the planning application by Burkeway Homes.

5. The Applicant (“Heather Hill”) is a company limited by guarantee and a representative body of the residents of Cnoc Fraoigh. The residents consider that the Proposed Development represents a different, more intense, form of development than Cnoc Fraoigh and believe it would adversely impact the amenity of their homes and would not comply with environmental requirements, especially though not only, as to flooding. Heather Hill made submissions in the planning process by a planner’s report¹¹ and 22 sub-documents which are exhibited in these proceedings. Inter alia, Heather Hill asserted that it owns the private roads of Cnoc Fraoigh and Burkeway has no right to use them for access, water mains or sewers and that permission and connection to the Irish Water sewer awaits determination of separate litigation (described below) in that regard. Its planner’s report asserted various material contraventions of the Development Plan. It also disputes the Burkeway argument to justify a material contravention of the Development Plan’s allocation of population growth to Bearna.¹²

6. This judicial review application is grounded only in the affidavit of Gabriel McGoldrick, sworn 7 April 2021 and the exhibits thereto. It:

- verifies the facts asserted in the Statement of Grounds.
- briefly describes Heather Hill and its management for the previous ten years of the waste water treatment plant and percolation area (“WwTP”) which treats the sewage from Cnoc Fraoigh.
- records that it is in other litigation (described below) with Burkeway as to the ownership of the roads and common areas of Cnoc Fraoigh.
- asserts that flooding of the Site is a constant problem (recognised in the Development Plan¹³ and the relevant Strategic Flood Risk Assessment) and will be exacerbated by the Proposed Development.

¹¹ HRA Planning Report 13 November 2020

¹² This was an issue in Heather Hill #1 (see below) but is not at issue in these proceedings.

¹³ Incorrectly described as the Bearna Local Area Plan – see further below

It contains no other relevant averments¹⁴ and the Application is not grounded in any sworn expert evidence or exhibited expert report.

7. The Board's Opposition is grounded in the affidavit of Chris Clarke, but it adds little to the relevant factual matrix. Burkeway's Opposition is grounded in the Affidavits of Colm Ryan, Planner and Michael Burke, Managing Director of Burkeway Homes. Combined, they verify Burkeway's Statement of Opposition. I have considered both and their contribution to the relevant factual matrix is reflected in this judgment.

8. A ground of alleged invalidity of the Impugned Permission, asserting the invalidity of the Height Guidelines 2018¹⁵ and of S.28(1C) PDA 2000, stands adjourned generally and is not addressed in this judgment.

9. Local planning policy is found in the "Bearna Plan". For the avoidance of doubt, it is not a Local Area Plan but was adopted in July 2018 as Variation 2a of the Galway County Development Plan 2015-2021 (the "Development Plan"). Broadly, the proposed residential units are on lands zoned residential and the green areas between those proposed units and the Trusky East Stream and in the south of the Site are zoned open space and coincide with flood plain. Or to put it another way, the Proposed Development in general complies with zoning. However, and as will be seen, there is devil in the detail in those regards.

10. The statutory¹⁶ report to the Board by the Chief Executive of Galway County Council generally favoured the grant of permission but, as roads authority, identified what it considered problems with the design of the proposed road works on the L1321.

Flood

11. While I will return to it below, it may assist to note at this point that for some time, prompted by the EU 'Floods' Directive¹⁷, flood risk has formed a significant element of land use planning. The general thrust of policy, subject to exceptions, is to avoid development on flood plains. Avoidance of development on flood plans has at least two distinct objectives:

¹⁴ An averment as to the timing of the application for leave is no longer relevant

¹⁵ Urban Development and Building Heights Guidelines 2018

¹⁶ Under S.4 of the 2016 Act and the Planning and Development (Strategic Housing Development) Regulation 2017.

¹⁷ 2007/60/EC

- To maintain floodplains as such – preserving their function of storage of flood waters, thereby reducing flood flow downstream and tending to reduce flooding downstream, the flood waters stored on the flood plain being released back into the watercourse more gradually over time.
- To avoid development which will itself be inundated by flood waters. In this respect different types of development are assigned different levels of vulnerability. Residential and ancillary development is highly vulnerable and deemed generally unsuited to Flood Zones A & B¹⁸.

12. The mapping of flood plains in river catchments and coastal areas and planning for their protection and for flood risk protection has been informed by a national CFRAMS¹⁹ programme, led by OPW, and included preparation by OPW of “Preliminary Flood Risk Assessment” (“PRFA”) maps of areas at risk of fluvial²⁰, coastal, pluvial²¹ and groundwater flooding and Flood Hazard Mapping. This resulted in more detailed localised flood plain mapping and flood risk planning by way of Strategic Flood Risk Assessment (“SFRA”) at Galway County Development Plan level and again, by way of an SFRA done specifically for the Bearna Plan²². This process results in the identification in Development Plans of “Indicative” Flood Zones A, B & C. Flood Zone A represents a greater than 1% risk of flooding per year. Flood Zone B represents a 0.1% - 1% risk of flooding per year. Flood Zone C is at low risk of flooding. Very roughly, and by reference to flood risk, development is at least discouraged in Flood Zones A & B and is generally permissible in Flood Zone C. As will be seen, in the development management process, more localised analysis still is required of sites on which development is proposed, inter alia by way of detailed hydrological assessments and Site Specific Flood Risk Assessments (“SSFRA” – not to be confused with SFRA). This cascade of assessments and plans, descending from the PRFA, is the more complex and potentially confusing to the layperson in that each process is iterative and often to some degree contemporaneous with and informing, and informed by, other processes, such that it can be important to know which version of each document, issued for what purpose, on what date, and whether draft or final, one is considering.

13. Flood Risk Assessment in the planning process is the subject of ministerial guidelines issued under S.28 PDA 2000 - The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009 (the “Flood Guidelines 2009”), to which, by S.28, planning decision-makers must have regard in performing their functions.

¹⁸ As to the meaning of which, see further below.

¹⁹ National Catchment Flood Risk Assessment and Management

²⁰ i.e. from a river/stream

²¹ i.e. from rain. Pluvial flooding occurs when the amount of rainfall exceeds the capacity of urban storm water drainage systems or the ground to absorb it.

²² See below

Heather Hill #1- Introduction

14. The present is the third SHD application as to this site. The first was refused. The second (“the earlier permission”), granted to Burkeway Homes in 2018 for 197 units in a different layout²³ on not quite the same site²⁴, was quashed on the application of Heather Hill by the High Court (Simons J.) in July 2019 (“**Heather Hill #1**”²⁵). In that planning application the “red line” did not encompass the roads and common areas in Cnoc Fraoigh or the L1321, though it did envisage works in those areas. While I will refer to this decision again below, it may assist to give a brief initial account of it here: in part to set the background to this case; in part as the findings in that case explain in some respects the form taken by the planning application which resulted in the Impugned Permission; in part as Simons J. decided issues against Heather Hill which, the Board and Burkeway say, Heather Hill attempts to re-litigate now; and in part because, more generally, Simons J. elucidated legal principles of assistance.

15. It will assist in understanding the judgment of Simons J. to note that:

- By S.9(6)(b) of the 2016 Act, the Board may not grant SHD planning permission in material contravention of the development plan in relation to the zoning of the land. It may grant planning permission in material contravention of the development plan other than in relation to the zoning of the land – but only if justified via the procedures provided by S.9(6)(c) of the 2016 Act and S.37(2)(b) PDA 2000.
- The parties agreed that Development Plan Objective CCF6 – that at issue - related to zoning, such that the Board could not grant planning permission in material contravention thereof.
- While I will consider it in more detail in due course, Objective CCF6 relates, for present purposes, to certain residentially-zoned lands forming part of the Site just east of Cnoc Fraoigh and in Indicative Flood Zone A&B of the Development Plan. In brief and general terms, it requires that any development proposal for those lands should be considered with caution and will need to be accompanied by a detailed hydrological assessment and robust SUDS design which demonstrates the capacity to withstand potential flood events, to maintain water quality and avoid potential effects to ecological features and will be required to comply with [the Flood Guidelines 2009²⁶] and the associated Development Management Justification Test.
- The Board is obliged by S.28 PDA 2000 only to have regard to the Flood Guidelines 2009. But the Bearna Plan, by itself requiring compliance with those Guidelines, in effect transmuted them into provisions of the Bearna Plan such that contravention of the Guidelines is rendered

²³ Notably it seems that 13 residential units and 6 bridges over the Trusky East Stream were proposed in Flood Risk Zones A and that the Burkeway lands east of Trusky East Stream were included in the development site - see Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450 §§6, 61 & 174

²⁴ Not precisely, in part as the site included lands east of the Trusky East Stream

²⁵ Heather Hill Management Company clg & Gabriel McCormack v. An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019)

²⁶The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009

contravention of the Bearna Plan and, in an appropriate case, material contravention of the Bearna Plan.

16. Simons J. quashed the permission as made in material contravention of the Bearna Plan without being justified via the procedures provided by S.9(6)(c) of the 2016 Act and S.37(2)(b) PDA 2000, and so ultra vires the Board, in that:

- The scale of the proposed development would breach the population allocation for the area as set out in the development plan. This is not here at issue and need not detain us further, though it is of general interest on the question whether a contravention is material.
- In material contravention of Zoning Objective CCF6 of the Bearna Plan the Board:
 - Did not do a 'Justification Test' as described in Objective CCF6 and the Flood Guidelines 2009 where part of the application site lay in an area identified as at risk of flooding.
 - By planning condition deferred completion of a site specific flood risk assessment until after the grant of permission.

17. Simons J. also quashed the permission for relying, in an Appropriate Assessment (“AA”) Screening for Habitats Directive²⁷ purposes, on measures intended to avoid or reduce potential harmful effects of the proposed development, via the Trusky Stream hydrological pathway, on the same two European sites in Galway Bay²⁸ cited in these proceedings.

18. Importantly, Simons J. refused to quash the permission on foot of Heather Hill’s allegation that the planning application was not made with the consent of the owner of part of the lands such that Burkeway Homes was not entitled to make the planning application. This in circumstances where, in separate legal proceedings, Heather Hill asserts ownership rights over part of the lands intended to be used as access to the site. In substance, the same argument was again made in this case.

The Wastewater Network and Pumping Station

19. The Site and the lands on which Cnoc Fraoigh lies were originally owned by the developer of Cnoc Fraoigh. The existing Cnoc Fraoigh WwTP was always intended as temporary pending connection of the Cnoc Fraoigh sewage system to the Irish Water sewer network once available. Indeed, that connection was a condition of the Cnoc Fraoigh planning permission many years ago.

²⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)

²⁸ Galway Bay Complex SAC & Inner Galway Bay SPA

20. As will be seen, Heather Hill criticises a want of information in the planning application about the pumping station as relevant to its location on the flood plain and alleged risk of its malfunction and consequent sewage pollution of the Trusky East Stream. Heather Hill identifies information not to hand, including absence of detailed drawings, the overflow arrangements for the emergency sewage storage tank and the arrangements with a view to ensuring any malfunction is fixed before it overflows or significant quantities of sewage enter the Trusky East Stream.

21. It will assist to identify some of the information which is provided. The planning application documents, including a “Wastewater Network Layout” drawing²⁹, disclose the following information:

- The pumping station will not be a pump-house in the sense of an above-ground building. But for a control kiosk, it will be below ground: hence the description pumping station rather than pump-house.
- The pumping station will deal only with the sewage of the 21 houses in Cnoc Fraoigh and one house, “Unit 121”, to be built as part of the proposed development on “Site 121” at the south-eastern corner of Cnoc Fraoigh.
- The existing Cnoc Fraoigh wastewater network and the sewage from Unit 121 will be intercepted at its low point in the south-eastern corner of Cnoc Fraoigh and gravity-fed north east to the pumping station.
- The gravity feed will be to a below-ground pumping station chamber in which will sit 2 pumps operating alternately in a duty/standby arrangement. There will also be, below ground, a valve chamber and a meter chamber.
- From the pumping station the sewage will be pumped north via a rising main to the north-eastern corner of Cnoc Fraoigh where it will join the gravity-fed sewage from the Proposed Development, from which point it will be gravity fed west, via a sewage pipe under the Cnoc Fraoigh Estate road, to the L1321 public road. At that point the pipe will turn south and run under and along the L1321 to the Irish Water network in Bearna.
- The sewage in the Bearna sewer network is pumped to the main Galway City WwTP at Mutton Island.
- Returning to the pumping station, and against the possibility of both pumps failing, it will be equipped with an emergency underground storage tank with a minimum 24-hour capacity in accordance with Irish Water requirements to mitigate the risk of sewage flooding from the pumping station due to pump failure³⁰.

²⁹ 0502

³⁰ Site Specific Flood Risk Assessment §4.4.3

- As required by Irish Water, the pumping station will be a minimum of 15m from the nearest dwelling.
- The control kiosk – essentially a large metal box of control switches and the like – will sit on a concrete plinth, the floor level of which will be 500mm above the 1% flood return level in accordance with GSDS³¹ requirements.
- All wastewater drainage is to be installed in accordance with the Irish Water Code of Practice for Wastewater Infrastructure, the Building Regulations Part H and the Site Development Specification.
- The “Wastewater Network Layout” drawing includes a table which includes the DSIL - downstream invert³² level OD³³ - of the pipe feeding the pumping station at the pumping station, the pipe diameter and the DSC Depth – the cover depth from ground level over the top of the pipe.

The Pumping Station – Ground level

22. It is convenient here to dispose of one factual dispute. Heather Hill says the ground level at the pumping station is not given in the planning application. Burkeway says that adding the pipe diameter and the DSC to the DSIL OD gives you ground level OD at the pumping station. On its face that seems logical. However, Heather Hill says the information in the “Wastewater Drainage Network Details” table on the “Wastewater Network Layout” drawing³⁴ is unreliable as manhole “WW-37”, to which – counsel for Heather Hill says – the relevant figures relate, is not on the drawing. The primary answer is that the adequacy of this information is for the Board. A secondary answer is that Heather Hill has not made it at all clear what, in its view, turns for purposes of these proceedings on knowing the precise ground level at the pumping station.

23. However, as invited by counsel for Heather Hill, I have examined the table closely. An adjacent table cites a Public Road Drainage Layout drawing³⁵ as also relevant to the table. Regrettably, there is no legend or glossary or narrative (or none to which I have been referred) explaining the system of the table and acronyms used in the column headings. That would have saved a lot of time. But I have deciphered it by reference to the drawings - as a matter of probability. It is clear, not least by reference to both drawings, that the table identifies locations by reference primarily to numbered manholes, “MH”, on the network. These are listed in the far left column “USMH” – upstream manhole - and the far right column “DSMH” – downstream manhole. On a given row, the “USMH” on the far left and the “DSMH” on the far right are linked by a numbered pipe identified in a column headed “PN”. So, a given manhole may appear in both columns - as relating

³¹ Greater Dublin Strategic Drainage Study

³² i.e. the base of the pipe

³³ Ordnance Datum

³⁴ 0502

³⁵ 0540

respectively to the pipe downstream of it (as to which it is the USMH) and the pipe upstream of it (as to which it is the DSMH). In addition to USMH, PN and DSMH, the columns of present concern are as follows, as to which I am satisfied I have discerned their meaning as a matter of probability:

- “Dia (mm)” refers to a pipe diameter in millimetres.
- “DSIL (m)” refers to the invert level of a pipe in metres OD as it enters its downstream manhole.
- “DSC Depth (m)” refers to the cover level over the pipe in metres OD as it enters its downstream manhole.

24. In the last row, the DSMH entry “WW-PS” can be readily identified on the map as at the pumping station. “WW-PS” appears on the “Wastewater Network Layout” drawing³⁶ at and as clearly referable to the Pumping Station and that the PN entry on that table row is “WW-8.000” which corresponds to the pipe shown on the drawing as feeding the Pumping Station.

25. The corresponding USMH entry on that row of the table, which should identify the manhole upstream of both WW-PS and of pipe WW-8.000 is “WW-37”. Like counsel for Heather Hill, I have failed to find manhole WW-37 on either drawing and the manhole shown on the drawing is WW-38. WW-38 is not listed in the table. The conclusion, which I infer as a matter of probability from the foregoing, is that “WW-38”, as it appears on the drawing, is in error and should read “WW-37”. I find support for this view in the fact that the second last row of the table correctly identifies manhole WW-36 upstream of, and linked by pipe WW-1.023 to, “WW-Outfall” which is the connection to the Irish Water Network as shown on the Public Road Drainage Layout drawing³⁷. I find further support for this view in the fact that the manhole numbering scheme proceeds anti-clockwise from WW-1 in the top left of the “Wastewater Network Layout” drawing³⁸ such that one would expect the manhole upstream of the pumping station to have the highest number. So, while counsel for the applicant has correctly pointed to an error as between the table and the drawing, it seems clearly a typographical/ numbering error the content of which is readily discernible and, as between the table and the drawing, the table is correct.

26. On that basis and as to Heather Hills’ allegation that the ground level at the pumping station cannot be discerned in the planning application, it is clear to me that the reading of the table by Counsel for Burkeway is correct – that the four entries on the right bottom line of that table relate to relevant levels at the “WW-PS” and enable ready calculation of the ground level OD at that locus.

27. For the avoidance of doubt I should note that, as to the absence of detailed drawings of the pumping station, no argument was pleaded or made by reference to the obligation to provide

³⁶ 0502

³⁷ 0540

³⁸ 0502

drawings set out in Article 297(4) PDR 2001³⁹ such as that made in **Balscadden**⁴⁰ as to absence of detailed drawings of five “huge” subterranean sheet piling structures, which consist of structures.

³⁹ Regulation 297(4)(a) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (inserted by reg. 5 of the Planning and Development (Strategic Housing Development) Regulations 2017 (S.I. No. 271 of 2017)),

⁴⁰ Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála [2020] IEHC 586 (High Court (Judicial Review), Humphreys J, 25 November 2020)

IMPUGNED PERMISSION

28. The Board’s Inspector’s report broadly accepted the contents of the planning application and recommended that permission be granted. The Board decided to grant conditional⁴¹ permission generally in accordance with its Inspector’s report and recommendation. I will refer in more detail to that report when considering the specific issues arising in these proceedings.

29. The Board decided, pursuant to S.9(6) of the 2016 Act and S.37(2) PDA 2000 Act, to grant permission in material contravention of the Development Plan on the basis of compliance with the Height Guidelines 2018. It did not find a material contravention of the Development Plan in relation to application of the Flood Guidelines 2009.

30. The Impugned Permission included an AA. AA is sometimes termed “Stage 2 Appropriate Assessment” to distinguish it from AA Screening. To avoid confusion⁴² I will refer simply to “AA” and “AA Screening” respectively. The AA determined that the proposed development would not, by itself or in combination with other plans or projects, adversely affect the integrity of European sites (Galway Bay Complex SAC⁴³ and Inner Galway Bay SPA⁴⁴) in view of their conservation objectives. The Impugned Permission was also preceded and informed by an Environmental Impact Assessment (“EIA”). The Board adopted its inspector’s report as to both AA and EIA.

31. In EIA, the Board’s reasoned conclusions on significant effects⁴⁵:

- Concluded that the EIAR and other information before it was up-to-date and adequate to enable assessment.
- Listed the likely main significant direct and indirect effects of the Proposed Development on the environment as including:
 - Biodiversity: Significant direct local impacts on flora and fauna will be mitigated by measures identified in the EIAR, including construction management, retention of the existing riparian corridor along Trusky Stream and landscaping. The proposed development would not have a significant negative impact on biodiversity.
 - Water: Potential effects due to residential development near Trusky Stream and risk of flooding. The information as to proposed mitigation demonstrated likely success in protecting the proposed development from flooding and comply with the justification test for residential development in flood risk zones A and B, as set down in the [Flood Guidelines 2009].

⁴¹ The Permission is subject to 30 conditions.

⁴² The CJEU considers the AA to be Stage 1 and the project approval decision to be Stage 2 – e.g. Case C-441/17, Commission v Poland; 17 April 2018 §110

⁴³ Special Area of Conservation within the meaning of the Habitats Directive

⁴⁴ Special Protection Area within the meaning of the Birds Directive - Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Directive 2013/17

⁴⁵ Not verbatim

32. As to Proper Planning and Sustainable Development, and subject to compliance with the conditions imposed, the Board concluded that the Proposed Development would⁴⁶:

- constitute an acceptable residential density,
- not seriously injure the residential or visual amenity of the area,
- be acceptable in terms of surface water management
- not materially contravene a zoning objective of the statutory plan for the area.

33. But, the Board held, the Proposed Development would materially contravene “*provisions of the core strategy and density*” (sic) as in breach of the housing yield of 130 units assigned to Bearná. But having regard to S. 37(2)(b) PDA 2000⁴⁷ permission in material contravention of the Development Plan would be justified for reasons including:⁴⁸

- It is of strategic and national importance having regard to the definition of ‘strategic housing development’ in S.3 of the 2016 Act; and its potential to contribute to Government policy to increase delivery of housing.
- The Development Plan objectives are not clearly stated as to density.
- The density is “reasonable” and would contribute to the objectives of the Regional Spatial and Economic Strategy and Galway Metropolitan Area Strategic Plan where Bearná is identified as a residential opportunity site and the primary strategy is for consolidation and higher density development on zoned lands.
- The lands are zoned, serviceable, and spatially sequential to the Bearná settlement.
- The development in all other regards accords with the principles of proper planning and sustainable development and does not significantly undermine the county’s settlement hierarchy or the principles of compact growth and sustainable development.
- The development is in accordance with the broad principles and objectives of the national and regional planning framework documents⁴⁹.

⁴⁶ Not verbatim

⁴⁷ Planning and Development Act 2000, as amended

⁴⁸ I have not set out the full list and those here indicated are not verbatim

⁴⁹ Including National Policy Objectives 27, 33 and 35 of the National Planning Framework and the Guidelines for Planning Authorities on Sustainable Residential Developments in Urban Areas 2009 and the Height Guidelines 2018 Specific Plan Policy Requirement SPPR4

GROUNDNS 1 & 2 - TITLE/CONSENTS ISSUES

Article 297 PDR 2001, Frescati & Keane

34. Article 297(2)(a) PDR 2001⁵⁰ requires that an SHD planning application “*be accompanied by — (a) where the applicant is not the owner of the land concerned, the written consent of the owner to make an application under section 4 of the Act of 2016 in respect of that land;*”. Article 297 is the equivalent of Article 22 PDR 2001 as to “ordinary” planning applications. S.2 PDA 2000 defines “owner” of land essentially as the person entitled to its’ rack rent or who would be so entitled if the land were let. Compliance with this consent requirement goes to the validity or invalidity of the planning application.

35. The consent required by Article 297 is “to make” the application. It is not necessary that the owner consent to the grant of permission or consent to the performance of the permitted works. This distinction is consonant with the purpose of the Article 297 requirement as elucidated in the cases.

36. The genesis of this requirement of owner’s consent is well-understood as deriving originally from **Frescati Estates v Walker**⁵¹ and it has been the subject of caselaw over the years. The requirement has been interpreted in light of its purpose as identified in Frescati. Henchy J. considered that the concept of a planning applicant must be given a restricted application and continued:

“The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.

Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question.”

37. Frescati was authoritatively, if obiter, considered by Keane J. in the Supreme Court in **Keane v An Bord Pleanála & the Commissioners of Irish Lights**⁵² in terms emphasising the narrowness of the restriction imposed by the consent requirement:

⁵⁰ Planning and Development Regulations 2001 (as amended)

⁵¹ [1975] IR 177

⁵² [1998] 2 I.L.R.M. 241

*“It may be that the ratio of this decision⁵³ is to be found in the first paragraph of this passage and that the second paragraph, to the extent that it suggests that an application for planning permission can only be made by or with the consent of a person entitled to a legal estate or interest sufficient to enable him to carry out the proposed development, should properly be regarded as obiter. One could readily envisage circumstances in which an application could be made by some other person which could not possibly be described as either ‘unnecessary’ or ‘vexatious’. In the context of the present case, however, it is sufficient to say that the principle apparently laid down in *Frescati Estates Ltd v. Walker* must be strictly confined to cases in which the application is not made by or with the approval of a person who has a legal estate or interest in the relevant property sufficient to enable him to carry out the proposed development.”*

38. In this case, the requirement raises questions as to the extent of the Board’s obligation to interrogate ownership issues and disputes.

Works in Cnoc Fraoigh and on the L1321 – Positions of the Parties as to Consents

39. As already described, the Impugned Permission permits Burkeway Homes to lay a new sewage pipe from the North East corner of Cnoc Fraoigh west along the existing east-west Cnoc Fraoigh Estate Road to the L1321 public road. From that junction it will travel south in a new sewage pipe to be laid by Burkeway Homes under and along the L1321 to connect to Irish Water Bearna sewer network to the south.

40. As to the other works in the L1321, the Bearna Plan deems it *“essential that all new developments link with the existing footpath network”* such that Objective RT3 requires that *“New development shall be required to connect to the footpath and public lighting network that currently serves the village centre.”* So, it is unsurprising that the Proposed Development would also involve construction by Burkeway Homes of a 340m long 1.8m wide footpath south to Bearna on the eastern side of the L1321 and some *“slight”⁵⁴* realignment of the L1321 and adding to the metalled surface on the western side to maintain carriageway width (I presume in compensation for space taken by the footpath). All these works will be done within the existing presumed *“fence-to-fence”* width of the L1321⁵⁵. Of course, that the proposal of the footpath works is unsurprising by reference to Objective RT3 does not imply the relevant consents to the making of the planning application are adequate.

⁵³ i.e. *Frescati*

⁵⁴ Inspector’s report §10.7.6

⁵⁵ This presumption is recently cited in *Kildare County Council v Morrin* [2021] IECA 341

41. So, the intended works by Burkeway Homes on the L1321 will have three main elements: the sewer, the footpath, and the widening. By reference to those works, consents to the making of the planning application accompanied the planning application having emanated from:

- Burkeway Barna as registered owner of Folio GY76484F - which includes the roads and common areas of Cnoc Fraoigh.
- Galway County Council as to the works in the L1321.
- Irish Water as to feasibility of connection to its sewer network.

42. Heather Hill asserted to the Board and asserts in these proceedings, that such consents were insufficient. Heather Hill says Burkeway Barna's consent as registered owner was insufficient as Heather Hill, not Burkeway Barna, is the beneficial owner of the common areas and roads in Cnoc Fraoigh. Heather Hill submitted to the Board, and has exhibited in these proceedings, a copy of the Civil Bill it had issued accordingly in Galway Circuit Court, which proceedings await trial. By those proceedings Heather Hill seeks to compel Burkeway Barna to transfer the roads and common areas of Cnoc Fraoigh to it. Heather Hill did not submit to the Board a copy of the contract on which it relies in those proceedings. Part of that contract is exhibited before me – not the contract map by reference to which the lands to be transferred are identified, though at least in general terms its content can be inferred. Heather Hill says that as Burkeway Barna's consent was insufficient as it relates to the envisaged works in those roads and common areas of Cnoc Fraoigh, the planning application was invalid.

43. On its face, the exhibited contract does not appear to reserve any rights such as wayleaves or easements in favour of Burkeway's predecessors in title. But I am unaware of the basis on which Burkeway disputes Heather Hill's claim in those proceedings or asserts its right to lay a sewage pipe through Cnoc Fraoigh. I am unaware of the legal basis on which Burkeway resists the Circuit Court claim or of any counterclaim by it in that action. I understand that Burkeway Barna has commenced its own action on those issues, but I know no more of that, nor do I need to.

44. Heather Hill, in its objection to the planning application, also pointed out that the roads and common areas of Cnoc Fraoigh had not been taken in charge by the Local Authority and recorded Heather Hill's decision that they would not be placed in such charge, such that, as a matter of property rights, Burkeway could not lay sewers in those estate roads or use them for access to the Proposed Development.

45. Heather Hill asserts in submissions that Burkeway seeks to retain legal ownership of the roads and common areas of Cnoc Fraoigh as a device to assist it laying sewage pipes from the proposed pumphouse to the L1321 via Cnoc Fraoigh and to afford the Proposed Development road access to the L1321. But Burkeway point out, correctly, that while Heather Hill in objecting to the planning application, did canvass the title dispute, its assertion of Burkeway's motive first appeared in its submissions in these proceedings and there is no evidence to that effect in these proceedings –

even by way of an averment on affidavit on Heather Hill's behalf. In truth, all that can be between the parties on this issue is the word "device" and its arguably pejorative imputations. But I don't see that anything turns on that difference for present purposes. I do not need to decide whether Burkeway's reliance on its registered title is or is not a "device".

46. The Inspector's report, adopted as the Board's position, states⁵⁶:

"Any disputes relating to such matters as ownership and rights of way are a legal matter, outside the remit of this planning application. The Board generally does not arbitrate on matters of dispute in relation to private property as they are not strictly planning matters. It should be noted that the granting of planning permission does not entitle the applicant to carry out works, if the consent of third parties is required. As per section 34(13) of the Planning and Development Act 2000 (as amended), "A person shall not be entitled solely by reason of a permission under this section to carry out any development".

47. As to the works under and on the L1321, the planning application asserted that *"the redline boundary includes an area along the L-1321 which is within the ownership of Galway County Council."* The Inspector similarly refers to S.34(13) in this regard⁵⁷.

48. Heather Hill says that no evidence of the Council's ownership of the L1321 was provided with the planning application and, presumptively, Galway County Council does not own the lands on which the L1321 sits. Heather Hill says that they are presumptively owned by the adjacent landowners subject to the public right of way. Heather Hill says that private persons such as Burkeway have no right to do works on public roads save with the consent of all such adjacent owners. In this case there were no consents before the Board to the making of a planning application for such works.

Pleadings – Grounds 1 & 2

49. The Amended Statement of Grounds filed 20 April 2021 states Core Grounds 1 and 2 of challenge to the Impugned Permission as follows⁵⁸:

1 Roads

The Decision is invalid because it imposes conditions relating to road works which the Developer cannot comply with because it does not have legal title to the lands in question or the consent of the landowner or roads authority to carry them out. S.13 of the Roads Act is pleaded.

⁵⁶ §10.6.15

⁵⁷ §10.7.7

⁵⁸ Not verbatim

2 Sewers

The Application is invalid because it proposes to construct sewers on lands which it does not own without the consent of the owner of the lands or of the relevant water services authority to the making of the application; and the Decision is invalid because it imposes conditions relating to sewerage works which the Developer cannot comply with because it does not have legal title to the lands in question or the consent of the landowner, roads authority or water services authorities affected to carry them out, and there is no certainty that such consent will, or can, be provided.

50. Beyond traverses and recital of undisputed fact the Opposition papers filed by the Board and Burkeway plead notably:⁵⁹

- That the consents necessary to validate the planning application were before the Board – of Galway County Council as to the L1321, of Burkeway Barna as to the common areas of Cnoc Fraoigh and of Irish Water as to the feasibility of connection to its sewer network and as to design acceptance⁶⁰.
- That it is not for the Board to arbitrate private land ownership disputes.
- Article 297(2)(a) PDR 2001 and that the planning application was not frivolous or vexatious.
- That these issues have already been decided against Heather Hill in **Heather Hill #1**.
- That further consents may be required in order to enable works in accordance with the permission, including Conditions 1 and 3, does not invalidate the permission. S.10(6) of the 2016 Act provides that a person shall not be entitled solely by reason of a permission to carry out any development.
- That S.13 of the Roads Act 1993 does not preclude permission for works on the L1321.

Pleading Point & the Scope of the Applicant's case at trial.

51. As to Ground 1, the allegation of invalidity of conditions of the Impugned Permission was, though not formally abandoned, not pursued at trial – correctly in my view.

⁵⁹ The lettering of sub-paragraphs here is mine.

⁶⁰ Copies of the Irish Water Confirmation of Feasibility Letter and Statement of Design Acceptance are at Appendix D to the Engineering Services Report at Exhibit GMG1 Tab 11

52. As to the roads and sewers, Heather Hill alleges invalidity of the permission on the basis that Burkeway Homes lacks landowner consents to its carrying out the works. Only as to sewers does Heather Hill allege invalidity of the permission on the different basis that Burkeway Homes lacks landowner consents to the making of the planning application. The Board points out that in neither respect is Article 297 PDR 2001 expressly pleaded, yet Heather Hill's focus in its written submissions was on Article 297, which requires landowner consents only to the making of the planning application.

53. In my view, had Article 297 been pleaded, as it should have been, the precise substance of its consent requirement might better have been appreciated. However as to a plea that Burkeway Homes lacked consent to the making of the planning application, it was in my view clear to anyone with any knowledge of the Planning Acts and Regulations that the Applicants would rely on Article 297 and it would be unfair and pedantic to shut them out from that argument. But it is fair to say that the only case pleaded of lack of consent to the making of the application, as opposed to the performance of the works, relates to the laying of the sewage pipe in the Cnoc Fraoigh Estate Road and the L1321 - no such case is pleaded as to other road works.

54. I reject any case based on a want of consent to the performance of the works, as opposed to the making of the application, as lacking basis in law. I reject as not pleaded any case based on a want of consent to the making of the application as to any road works other than to lay the sewer. However, as I will decide the alleged want of consent to the making of the application as to road works to lay the sewer and lest I am wrong on the pleading point, I will also decide the substance of the point not pleaded.

Caselaw on Owner's Consent to the Making of Planning Applications

55. It suffices to consider two recent cases.

Heather Hill #1⁶¹ - Owner's Consent

56. As noted above, this judgment relates to judicial review of an earlier SHD permission on the Site. As in the case before me, the planning application before Simons J. had included a letter in which Burkeway Barna, as registered owner of the application site, consented to the making of the planning application by Burkeway Homes. While the "red line" boundary of that planning application and permission did not include the common areas and roads of the Cnoc Fraoigh Estate or the L1321, as the present application and Impugned Permission do, Heather Hill argued in that case that the Burkeway planning application at issue was not made with the consent of the owner of part of the lands to be developed under the permission – in substance the same legal issue as to consent of

⁶¹ Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019)

the owner of the common areas and roads of the Cnoc Fraoigh Estate as that with which I am concerned. That this is so is confirmed by the following passage in the judgment of Simons J.:

“..... the Applicants contend that, as a result of a contract for sale, the first named applicant has a beneficial interest in the lands over which access to the site is to be obtained. This contention is disputed by the Developer: the contract for sale is said to reserve certain rights over the lands in sale. This dispute is the subject of separate proceedings before the Circuit Court.”

57. Simons J. identified the question for him as being whether the existence of this dispute as to ownership invalidated the application for planning permission. Simons J. rejected Heather Hill’s case on three bases as follows:

“First, the ownership dispute appears to relate not to the application site per se but rather concerns the ownership of adjacent lands through which access is to be gained to the application site. On its ordinary and natural meaning, article 297(2)(a) of the Planning and Development Regulations 2001 is concerned with the ownership of the application site and not with any other lands.

Secondly, as of the date the planning application was made, Burkeway Barna Ltd. was the registered owner of the relevant lands. The Developer has exhibited the relevant folio in this regard. If and insofar as An Bord Pleanála is required to consider issues of title at all, the board is certainly entitled to accept the folio as evidence of title. The board is not required to go behind the registered title and to make enquiries as to who might be the beneficial owner.

Thirdly, and perhaps most importantly, it is doubtful whether An Bord Pleanála is required to interrogate issues of title at all. The purpose underlying the requirement to obtain a letter of consent from the owner of the application site under article 297(2)(a) is to guard against the making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development. (See Keane v. An Bord Pleanála [1998] 2 I.L.R.M. 241 at pages 248 and 249). Notwithstanding the existence of separate legal proceedings arising out of the contract for sale, it is self-evident that the application for planning permission was not frivolous or vexatious in this sense.”

58. The present case differs as to the first reason cited by Simons J. as the “red-line” site of the planning application before Simons J. did not include the Cnoc Fraoigh Estate Roads, whereas they are inside the red line in the case before me. However, and while Heather Hill now stresses that that first reason does not apply to the present case, it is not apparent to me that the fact that the first reason does not apply (which I accept) serves to disapply also the second and third reasons given by Simons J. Neither does it matter that access via Cnoc Fraoigh was the issue in Heather Hill #1 as opposed to the laying of sewers via Cnoc Fraoigh in the present case: both turn on the issue of ownership.

59. The written submissions in these proceedings canvass distinctions between stare decisis and issue estoppel on which I need not embark. Nor need I decide the Applicant's point asserting a **Right to Know**⁶² exception as to points not appealed by parties who succeeded on other grounds. I need only observe that Simons' J's view that "*the board is certainly entitled to accept the folio as evidence of title. The board is not required to go behind the registered title and to make enquiries as to who might be the beneficial owner*" is a general statement of law which clearly forms part of the ratio of the decision of Simons J. Accordingly, I am bound by it on **Worldport**⁶³ principles. That suffices for present purposes, but I also agree with the third reason given by Simons J.

Walsh v An Bord Pleanála & Sinnott⁶⁴

60. **Walsh v An Bord Pleanála & Sinnott** was a case as to Article 22 PDR 2001, the equivalent as to "ordinary" planning applications of Article 297 as to SHD planning applications on the question of owner's consent. Barrett J. said:

"10. There was considerable discussion at the hearing of this application of the purpose of Art.22(2)(g) of the Regulations of 2001, not least because that purpose is relevant when it comes to (a) how the court might exercise its discretion in the context of judicial review proceedings, and (b) the level of engagement that can reasonably be expected and required of the Board in terms of the level and extent of reasoning in an inspector's report as to title.

61. Barrett J. considered the judgment of Simons J. in Heather Hill and also **Hynes v An Bord Pleanála**⁶⁵ which Barrett J. saw as indicating a role for the Board "*curtailed*" to instances where the planning application was "*clearly invalid*". He also cited, clearly approvingly, a passage from the "*Development Management Guidelines for Planning Authorities*"⁶⁶. I set out below some edited excerpts of those Guidelines which, I hope correctly, identify the essentials:

- The planning system is not designed as a mechanism for resolving disputes about title to land ... or rights over land.
- Only where it is clear that the applicant does not have sufficient legal interest should permission be refused on that basis.
- If, some doubt remains, the planning authority may decide to grant permission.

⁶² Right to Know CLG v An Taoiseach, [2021] IEHC 233

⁶³ In re Worldport Ireland Ltd. [2005] IEHC 189

⁶⁴ Walsh v An Bord Pleanála & Sinnott [2021] IEHC 523, Barrett J 22 July 2021

⁶⁵ [1998] IEHC 127

⁶⁶ Department of the Environment June 2007 §5.13

- However, such a grant of permission is subject to ... S.34(13) PDA 2000.

62. S.34(13) PDA 2000 in effect provides that planning permission does not clear any legal obstacles to development other than the requirement for planning permission. In other words, if the intending developer lacks title or owner's consent to do works permitted by a planning permission, the permission will not avail the intending developer.

63. From his review of the cases Barrett J. synthesises the correct approach to planning applications in which the adequacy of owners' consent to the making of a planning application arises⁶⁷:

- (1) The Board must consider the issue.
- (2) If the want of title is clear, the Board can refuse permission if it is clear that what presents is a frivolous or vexatious planning application by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development.

Notes

- In referring to "Title", Barrett J. is clearly referring to both title in the developer and title in someone else who has consented to the making of the application.
- Barrett J. seems to suggest that the want of title and that the planning application be frivolous or vexatious are cumulative requirements.
- As the matter is one of validity of the planning application as opposed to a discretionary ground for its refusal, I respectfully suggest that the phrase "*the Board can refuse permission*" is intended to mean that it must do so.
- (3) If, *prima facie*, someone has a sufficient interest or the dispute as to such interest goes to issues that the Board is not competent to resolve, then the Board can grant planning permission, knowing that it is subject to s.34(13) of the PDA 2000 which provides that "*A person shall not be entitled solely by reason of a permission under this section to carry out any development*".
- (4) If the Board is found to have erred in considering the issue of validity when raised, a review court may, in deciding how best to proceed, have regard to, inter alia,
 - (a) the level of engagement that can reasonably be expected and required of the Board in terms of the level and extent of reasoning as to title issues in a planning inspector's report,
 - (b) the purpose of Art.22(2)(g) PDR 2001 (for which in this case read Article 297(2)(a))
 - (c) that the law does not demand perfect decision-making, and
 - (d) whether in the particular circumstances of a case, any purpose is served by the court exercising its discretion so as to grant any of the reliefs sought by an applicant.

⁶⁷ I have edited slightly.

64. This last §4 clearly refers back to the question posed by Barrett J. at §10 of his judgment: how the court might exercise its discretion in the context of judicial review proceedings? Barrett J. clearly envisages consideration of refusal of certiorari on discretionary grounds even where it is found that the Board should have invalidated the planning application.

Application of the Law to the Facts

65. I respectfully agree with Simons J. and Barrett J. on this issue. In my view, and despite the blunt terms of Art.22(2)(g) PDR 2001 (for which in this case read Article 297(2)(a)), the courts have, long-since, clearly and for good reason, taken a purposive, pragmatic and realistic approach to the owners' consent requirement and the view that its real purpose is to invalidate only frivolous and vexatious planning applications. The Courts properly seek to avoid having the Board enmeshed in title disputes outside its expertise or true role and function. I do not agree with the Applicant's submission that the solution lies in the Board's power under S.50 PDA 2000 to refer questions of law to the High Court. Perhaps it could exercise that power in a specific case as to landowner consent if warranted. But, as a general proposition, to require the Board to do so would be a recipe for pointless, considerable and possibly endemic delay in the planning process on an issue which should be resolved outside the planning process and in respect of which the landowner always has the protection of s.34(13) – as does Heather Hill in this case. Its Circuit Court proceedings are testament to that protection and are the proper forum for resolving the title issue as to Cnoc Fraoigh. But the issue requires some more specific consideration.

Cnoc Fraoigh Estate – Sewage Pipe

66. Sewage pipes all convey sewage and are colloquially referred to as sewers. But in law there are various types depending on their precise function and who owns, maintains and/or controls the pipe. For present purposes and without attempting a legally technical or full description of a surprisingly complex area⁶⁸ it suffices to identify sewers as sewage pipes in the control of Irish Water and the intended sewage pipe from the Proposed Development to the Irish Water sewer as a private "connection". It will remain a private connection unless and until at least it is connected to the Irish Water Sewer and arguably until it is taken by Irish Water into its control and becomes, in law, a sewer properly so-called. So, the Impugned Permission envisages that Burkeway will lay a private connection from the site, via the Cnoc Fraoigh estate road and thence under the L1321 public road south to the existing Irish Water sewer.

⁶⁸ See Browne on Local Government §16-87 et seq; Keane on Local Government (Butler) p102 et seq

67. As to the sewage pipe to be laid through Cnoc Fraoigh, I am bound by Simons J.'s statement of law that *"The board is not required to go behind the registered title and to make enquiries as to who might be the beneficial owner"*. As it inescapably applies to the facts of the present case, which are in all relevant respects identical to the facts of the case before Simons J., on this basis alone I reject the Heather Hill's challenge based on want of consent to the making of the application in respect of those works.

68. However, I would also reject that aspect of Heather Hill's challenge as I not merely follow, but respectfully share, the view of Simons J., on essentially the same facts as here, that *"Notwithstanding the existence of separate legal proceedings arising out of the contract for sale, it is self-evident that the application for planning permission was not frivolous or vexatious in this sense."*

69. The title dispute here will be resolved in Galway Circuit Court and perhaps on appeal from it. If Heather Hill succeed there the planning permission will become inoperable for practical purposes: if Heather Hill fails there, the consent issued by Burkeway Barna will have been proved valid in any event. In my view this was a case in which the Board, at least in this respect of owners' consent, *"can grant planning permission, knowing that it is subject to s.34(13) of the PADA 2000"* as Barrett J. put it.

70. In the foregoing light, in my view the consent of Burkeway Barna sufficed to satisfy Article 297 PDR 2001 as bearing on laying the sewage pipe in Cnoc Fraoigh. I reject the Applicant's challenge in this respect. If I am wrong in that conclusion of law then, for the same reasons, I would exercise the discretion envisaged by Barrett J. in Walsh by refusing certiorari.

71. For completeness, I should mention that no case was pleaded as to consent to the making of the planning application as it relates to Burkeway's availing of the Cnoc Fraoigh road for access to the Proposed Development and to lay a watermain to it. For the reasons set out above, had it been pleaded such a case would necessarily have met the same fate as the plea as to laying the sewage pipe in the Cnoc Fraoigh road.

L1321 – Sewage Pipe

72. The Applicant correctly points out that the land on which the public road sits is presumptively the property of the adjacent owners. It is presumptively not the property of the Local Authority⁶⁹ though, as Roads Authority it has many statutory rights in respect of the road. The Applicant correctly points out that the adjacent owners have not consented to the making of the planning application. At common law the ownership of the adjacent owners is subject to a public

⁶⁹ This presumption applies save where the Local Authority has acquired the land itself – for example for motorways.

right of way - a right only⁷⁰ to pass and repass over the way. At common law private persons have no right to do anything else on the public road – for example to dig it up and lay pipes under it. But it seems highly unrealistic to describe the adjacent owners as entitled to the rack rent of the road: save in theory and by reason of the public right of way it is, in practice, incapable of being let.

73. Statute intervenes in the common law position: by **S.43(8) of the Water Services Act 2007** any person who wishes to install a connection to a sewer, which connection is intended to run along or under a public road, and who has the consent of the road authority, “*may do so*”. So, even if not technically the owners of the public road, it is clear that the roads authority may by statute exercise a significant power normally reserved to owners – that is to say to permit another to lay a sewage pipe thereon as long as it is for purposes of connection to a sewer. It is also clear that Galway County Council, the roads authority in this case, has consented to the making of the planning application.

74. In the foregoing light, in my view the consent of the Local Authority sufficed to satisfy Article 297 PDR as bearing on laying the sewage pipe in the L1321. If I am wrong in that conclusion of law, then, for the same reasons I would exercise the discretion envisaged by Barrett J. in Walsh by refusing certiorari.

L1321 – Footpath & Carriageway Widening/Realignment.

75. Essentially, the reasoning above as to the sewers in the L1321 applies, mutatis mutandis, to the question of consent to the making of the application as it relates to laying the footpath and carriageway widening/realignment, save to identify the applicable statutory intervention. S.13(6) of the Roads Act 1993 provides that “*A person or group of persons may, with the consent of a road authority, carry out maintenance works on a local road.*” S.2 of the Roads Act 1993 provides that “*“maintenance” in relation to public roads includes improvement and that “road” includes a footpath and any other structure or thing forming part of the road and necessary for the safety, convenience or amenity of road users or for the construction, maintenance, operation or management of the road.* In my view, these works envisaged by the Impugned Permission are improvements to the L1321 road.

76. Again, in the foregoing light and in my view, the consent of the Local Authority sufficed to satisfy Article 297 PDR 2001 as bearing on laying the footpath in and doing road surface widening/realignment works on the L1321. If I am wrong in that conclusion of law, then, for the same reasons I would exercise the discretion envisaged by Barrett J. in Walsh by refusing certiorari.

⁷⁰ Ignoring rights ancillary to the right of passage – primarily to maintain the road.

Local Authority Consent to Works

77. I should add that as the consent required by Article 297 PDR 2001 relates only to the making of the planning application and as the Local Authority gave that consent, it is nihil ad rem that, as to the separate question whether the planning application should be granted, as opposed to considered a valid application capable of being considered by the Board, the Local Authority, qua roads authority, expressed in its statutory report to the Board reservations as to the substance of the works on the L1321 intimated in the planning application. In any event and despite reservations as to the question in what terms – subject to what conditions - permission should be granted, it was *“in principle favourably disposed to a grant of permission on this site.”*⁷¹

That the Court Should Determine the Title Issue

78. In reply, and for the first time, counsel for Heather Hill suggested that I should determine the title issue as between Heather Hill and Burkeway as it relates to the roads and common areas of Cnoc Fraoigh. I respectfully reject that suggestion.

79. As recorded above, two title actions between Heather Hill and Burkeway in that regard are live in Galway Circuit Court. While Heather Hills’ title was asserted in the Statement of Grounds and in the Article 297 context, the Statement of Grounds contained no claim for relief in that regard. Practice Direction HC107⁷² envisages a general claim for declaratory relief in planning judicial reviews but that is to be understood in light of the preceding paragraph of PD HC107 which explains that statements of grounds should not normally claim reliefs repetitively - for example by seeking a declaration that a decision is ultra vires while also seeking certiorari. So, with limited exceptions, declarations are generally redundant. That rationale certainly does not apply to a declaration resolving such an important issue as a title dispute. In any event, PD HC107 requires that precise terms of any such declaration sought be addressed in legal submissions. No such declaration was prefigured in Heather Hill’s written submissions. Nor even was such a declaration sought in Heather Hills’ oral submissions, save in reply. It would be manifestly unfair to expect Burkeway – a notice party against whom no relief is sought in these proceedings - to meet such a claim in these proceedings. Nor, at least as a general observation and while I would not rule out the possibility of exceptions, is it appropriate that the court should, in judicial review of a planning decision, resolve such an issue as a title dispute which was not for the Board to resolve. Even were it within its purview to resolve it, the Board could not have resolved the title question as the contract on which Heather Hill bases its title was not before it. Generally, a judicial review of a planning permission is not the appropriate vehicle for determining, as between an applicant and a notice party, what are ordinarily to be plenary proceedings as to a disputed title. Nor will my decision in this regard visit any injustice on Heather Hill. Their title will be decided in the title actions in the Circuit Court and, possibly, on appeal to this court. If they win there they will presumably frustrate the proposed

⁷¹ Galway County Council Report to An Bord Pleanála p49 – Exhibit GMcG1 Tab 55

⁷² HC107 Commercial Planning & SID List 17th June 2021.

development. If they lose there they can have no complaint as to the Impugned Permission – at least as to land ownership.

Alleged Invalidity of Conditions – Ground 1

80. As recorded above, the Applicant pleads also that the Impugned Permission is invalid as imposing conditions as to the works on the L1321 and in Cnoc Fraoigh with which Burkeway cannot comply for want of title to the lands in question or the necessary landowner or public authority consents or the certainty of its getting such consents. The point was not argued at trial. But in any event, I reject the point. The Board is obliged to determine the validity of the planning application by reference to title in the applicant or consent of the owner to the making of the application. The validity of the application or of any resulting permission does not require consent of the owner to the carrying out of the development. There is no obligation on the Board to be certain that the development can be carried out before approval can be granted. S.34(13) implies precisely that. Planning permissions are frequently granted on the basis of the intentions of a developer - for example to obtain consents of third parties. If third-party consent is not forthcoming, that does not invalidate the planning permission.

GROUND 3, 5 & 6

Pleadings & Submissions

Heather Hill Amended Statement of Grounds

81. The Amended Statement of Grounds sets out Core Grounds 3, 5 & 6 of the challenge to the Impugned Permission as follows⁷³:

3 *EIA and AA (Sewers and Roads⁷⁴)*

The Decision is invalid because the Board failed to carry out an adequate EIA to comply with the EIA Directive and/ or failed to carry out an adequate Appropriate Assessment to comply with the Habitats Directive (and this ground includes failure to comply with relevant implementing provisions in the 2000 Act.)

5 *Flood Guidelines*

The Decision is invalid because it failed to apply the Sequential Approach set out in [the Flood Guidelines 2009], or the relevant Justification Test.

⁷³ Not verbatim

⁷⁴ The words “Sewers and Roads” do not appear in Core Ground §E(a)3 but appear in §E(b)3 in giving particulars of Core Ground 3

6 *Determination in Accordance with Law*

The Decision is invalid because the Board failed to determine it in accordance with the judgment in Heather Hill Management Co Ltd v Bord Pleanála⁷⁵, in particular as to treatment of ancillary development as residential, and accepting flood zones as defined for the purposes of the LAP⁷⁶ as opposed to the modified versions proposed by the Developer and failing to address the method of decommissioning the WwTP which the Court identified as a potential pollutant.”

82. Out of sequence, but as I think it will assist comprehension, I will set out some only of the facts pleaded at §E(c) of the Amended Statement of Grounds as to the content of the planning permission application.

“5.9. The application documents address the construction of the sewer network. They do not consider the risk of discharges to the Trusky West stream which lies to the west of the L1321 Road, or of discharges from that stream to Galway Bay.

5.10. The application documents, including the EIAR, address the building of the new pumping station to lift the sewage up to the level of the east - west Cnoc Fraoigh estate road from which it is intended sewage will discharge by gravity to the Irish Water sewer network. The documents state that the ground level at the pumping station will be located 500m above the likely maximum 1.0% probability flood level, and that no further mitigation or other measures are required. They do not address:

- The fact that the sewage pipes at this point will be below ground level;*
- The level at which the pump will be installed;*
- Whether there will be any collection chambers and/ or inspection manholes;*
- Whether an overflow will be provided at this point;*
- Whether a pump malfunction would result in an overflow of sewage to the Trusky Stream, or in a backup of sewage in the Cnoc Fraoigh sewers and into the Cnoc Fraoigh houses;*
- The likelihood of a pump failure over the indefinite lifetime of the development ...*
- The maintenance regime for the pump.*

5.11. The application documents state that the existing wastewater treatment plant will be disconnected and decommissioned. They say the existing sewers will be connected to the new pump and rising main before decommissioning, and that the old plant will be filled with concrete. They say that this will avoid any risk of pollution. They do not address:

- The risk of a discharge when disconnecting the existing sewers and reconnecting them to the proposed pumping station;*
- The risk of a discharge of material already within the treatment plant prior to disconnection.*

⁷⁵ [2019] IEHC 450

⁷⁶ I read this as referring to the Bearná Plan – see below

5.14. *The application documents state that the proposed sewer will continue under the L1321 road; but they do not address:*

- *The risk that silt, oil or materials may be discharged during these works, or where they would be discharged to;*
- *The absence of silt traps and spill kits in this work area;*
- *The likely pathway of any material discharged, and whether materials would enter the Trusky West Stream, and discharge from there into Galway Bay;*
- *The potential for any such discharge to impact on protected sites in Galway Bay;*
- *The reasons for not including mitigation measures that were considered necessary in relation to the main development site.*

5.15. *The application documents stated that the Proposed Development would comply with the Flood Risk Guidelines. They did not apply the Sequential Approach of avoidance, substitution and mitigation."*

83. The Amended Statement of Grounds at §E(b)3 asserts as legal particulars of Core Ground 3 – EIA and AA – insofar as pursued in written and oral submissions:

- A want of information before the Board and analysis by it as to the risk of flooding of the pumping station and/or pump failure and defeat of the storage tank and discharge of sewage to the Trusky East stream and/or backup of sewage in Cnoc Fraoigh homes.

Counsel for Heather Hill in written submissions and at hearing, and citing the absence of detailed drawings or specifications for the pumping station, listed “things we don't know”: such as the level of pumping station and the holding tank; the level of the ground around them; whether the pumping station and holding tank are sealed; whether the manholes might leak; the pump breakdown arrangements; the overflow arrangements; the profile of the land when the development is completed. Counsel said that to evaluate the flood risk, the Board needs to understand the contours, “the level of everything” and where the flood water is to go. Counsel said that the developer says it's going to relieve flood water by excavating this area, but this area is still higher than the ground behind it, and therefore there's still going to be a build-up of water behind it even on the developer's argument. He says the Board had the outputs from the developer's tests and models but not the inputs. He says that because we don't know these things, the Board didn't have the information necessary to carry out a proper assessment and to reach a conclusion beyond reasonable scientific doubt for the AA or to constitute a complete assessment for the EIA. Heather Hill adduced no evidence in these regards and relied entirely on the argument of counsel.

- A want of information before the Board and analysis by it as to the risk that digging up the L1321 road might discharge silt to the Trusky West Stream.

Counsel for Heather Hill confined that argument to the risk posed by the excavation of the road to lay the sewer beneath it and the absence of any mitigation measures for those works of the sort deemed necessary to protect the Trusky East Stream from the construction works generally and argued that the Board had not considered whether mitigation of the risk of silt discharge to the Trusky West Stream was necessary.⁷⁷

- Thereby, non-compliance with Articles 1, 3 and 8a of the EIA Directive⁷⁸ and S.171A PDA 2000⁷⁹ in failing to:
 - examine effects to determine if they were likely to be significant and to identify likely significant effects.
 - describe and assess likely significant effects and reach and record reasoned conclusions as to their significance.
 - complete EIA.

- Thereby, non-compliance with Article 6(3) of the Habitats Directive and Ss.177R, 177U and 177V PDA 2000 Act⁸⁰ in failing to:
 - identify whether the above impacts were likely to have a significant effect on the Inner Galway Bay SPA⁸¹ and the Galway Bay SAC⁸² - to which Simons J. in Heather Hill #1 had recognised a “*potential hydrological connection*” with the Site.
 - determine that the proposed development would not thereby adversely affect the integrity of either of those sites.
 such that the AA contained gaps or lacunae.

84. The Amended Statement of Grounds asserts at §E(b)(5) as particulars of Core Ground 5 – Flood Guidelines – insofar as pursued in written and oral submissions, essentially a failure to:

- apply the Flood Guidelines 2009 in the context of a Bearna Plan residential zoning of part of the land in breach of the Guidelines and Objective CCF6.
- apply the Sequential Approach required by the Flood Guidelines 2009 before applying the Justification Test⁸³ required by those Guidelines.
 - Counsel said that the nutshell of his case in this regard was that the Board did a justification test but ignored the other requirement of Objective CCF6 of general compliance with the

⁷⁷ The Applicant had also pleaded a want of information before the Board and analysis by it as to the risk of the L1321 footpath and kerb, once done, interfering with drainage and so discharging additional waters to the Trusky West Stream and on to adversely affect European Sites. Risk was also alleged to be posed by the laying of the sewer under the Cnoc Fraoigh estate road. But these issues were not pursued.

⁷⁸ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014

⁷⁹ As applied by S.172 PDA 2000 and S.20 of the 2016 Act

⁸⁰ As applied by S.23 of the 2016 Act

⁸¹ Special Protection Area – designated under the Birds Directive

⁸² Special Area of Conservation – designated under the Habitats Directive

⁸³ A submission that the Board applied wrong Justification Test was abandoned by Heather Hill at trial.

Flood Guidelines 2009 – specifically it failed to apply the Sequential Approach and skipped directly to the Justification Test.

- Heather Hill say more specifically that the Sequential Approach requires that development on lands prone to flooding should be first avoided; if it cannot be avoided, a less vulnerable use should be substituted, if possible; and if no such use is available, a Justification Test should be applied. They say that avoidance and substitution were not considered by the Board.

Observations on the Amended Statement of Grounds as to the Flood Guidelines

85. It is necessary to say a little more of the Statement of Grounds as to the Flood Guidelines. §E(b)5.1 states in part that the Board's decision is invalid because it failed to apply relevant aspects of the Flood Guidelines 2009 contrary to S.28 PDA 2000. S.28 imposes no obligation to apply those guidelines: by S.28 the Board's obligation was merely to have regard to them. §E(b)5.1 states also that the Board's decision is invalid because it failed to apply relevant aspects of the Flood Guidelines 2009 contrary to S.37 PDA 2000 and S.9 of the 2016 Act. S.37 imposes no obligation to apply those guidelines. Nor does S.9 – it merely requires the Board to have regard to them. Thus far, the plea of failure to apply the Flood Guidelines 2009 is simply misconceived.

86. §E(b)5.3 of the Statement of Grounds pleads that the Board erred in law by considering that it could invoke S.37(2)(b)(iii) PDA 2000 where the application failed to comply with the Flood Guidelines. S.37(2)(b)(iii) applies only where a proposed development materially contravenes a Development Plan and the Board nonetheless decides to grant permission having regard, amongst other possibilities, to guidelines. The Board did not find a material contravention of the Development Plan in relation to application of the Flood Guidelines 2009 and so could not have invoked, and did not purport to invoke, S.37(2)(b)(iii) by reference to those guidelines. The Board did invoke S.37(2)(b)(iii) but – for reasons which had nothing to do with flooding - by reference to material contravention of the Development Plan “Core Strategy and Density” (essentially, population targets, housing targets and density issues relating to Bearna). And the S.28 guidelines it invoked were not the Flood Guidelines 2009 but the Height Guidelines 2018⁸⁴ and the Sustainable Urban Residential Developments Guidelines 2009⁸⁵. This plea is equally misconceived.

87. However, returning to §E(b)5.1, it also pleads, correctly, that Objective CCF6 of the Bearna Plan⁸⁶ requires that, before a proposed development can be authorised, it must comply with the 2009 Guidelines and the associated Justification Test. § E(b)5.3 also pleads that the Board erred in law by failing to recognise that the development application did not comply with the 2009

⁸⁴ Urban Development and Building Heights Guidelines for Planning Authorities, - Department of Housing, Planning and Local Government in December 2018

⁸⁵ Guidelines for Sustainable Residential Developments in Urban Areas and the accompanying Urban Design Manual, A Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009

⁸⁶ In fact, it refers to “the LAP” – but the reference is clearly to the Bearna Plan

Guidelines, and therefore did not comply either with the methodology prescribed by Objective CCF6. In other words, this allegation is, in its legal significance, not of breach of S.28 or S.37 PDA 2000 or S.9 of the 2016 Act but of material contravention of Objective CCF6 of the Bearna Plan. With considerable hesitation, but largely because the substance of the allegation remains the pleaded one of failure to apply the Flood Guidelines 2009 – albeit via the Bearna Plan as opposed to the cited statutory provisions - and also in light of the factual pleas cited above, I have concluded that the Applicant has achieved the notable feat of successfully pleading “material contravention” without actually using the phrase.

88. The Amended Statement of Grounds asserts as particulars of Core Ground 6 – Determination in Accordance with Law – insofar as pursued in written and oral submissions, essentially a failure to have due regard to the relevant judgment of the High Court in **Heather Hill #1**⁸⁷ in failing to:

- treat ancillary works such as car parking and domestic sewers as residential works unsuitable in a flood plain.
- treat the flood zones as those defined in the LAP⁸⁸, and erroneously accepted modifications to those zones proposed by Burkeway.
- address the method by which the WwTP would be decommissioned.

The Board and Burkeway Homes - Opposition Papers

89. Beyond admissions, traverses and recital of undisputed fact, the Opposition papers filed by the Board and Burkeway plead inter alia as follows.⁸⁹

Ground 3 EIA and AA

- a) Reliance on the Planning Report, Statement of Consistency, Site Specific Flood Risk Assessment (“SSFRA”), Assimilative Capacity Modelling Study, Trusky East Stream Flood Study, Engineering Services Report, Construction and Environmental Management Plan (“CEMP”), Environmental Impact Assessment Report⁹⁰ (“EIAR”) and Natura Impact Statement⁹¹ (“NIS), which accompanied the planning application. There is considerable recital of their content.
- b) The evidence before the Board established that the proposed pumping station is in Bearna Plan Indicative Flood Zone A and B, but outside the detailed predicted flood extent identified in the Trusky East Stream Flood Study:, i.e. it is not susceptible to flooding and would have

⁸⁷ Heather Hill Management Co Ltd v Bord Pleanála [2019] IEHC 450

⁸⁸ Sic – but I read this as referring to the Bearna Plan

⁸⁹ Note – the headings of Grounds used in this section are indicative only as there is considerable overlap and repetition of pleaded content as between the Grounds. The lettering of sub-paragraphs here is mine.

⁹⁰ The report type required by statute to inform EIA. See Exhibit GMG1 Tab 6

⁹¹ The report type required by statute to inform AA. See Exhibit GMG1 Tab 19

- no impact on the floodplain - would not give rise to displacement of flood waters - and that the location and scale of the pumping station was acceptable at the location proposed.
- c) It completed a valid EIA and AA.
 - d) The evidence before the Board established that the flood risk arising from the proposed drainage infrastructure will be negligible. Heather Hill put no evidence to the Board that the operation of the pumping station would cause significant risk to the environment.
 - e) The EIA and AA were based on a complete assessment of all aspects - the entirety - of the proposed development, including the works on the L1321 and those via Cnoc Fraoigh.
 - f) The EIAR considered potential impacts during construction arising from, *inter alia*, sediment input from runoff and concluded that, with mitigation, there will be no significant impacts to surface water and groundwater quality. Those mitigation measures include, by way of example, measures to prevent the transportation of silt laden water or pollutants from entering the wider environments including downstream watercourses. As examples, EIAR §4.4.8.1⁹² and CEMP⁹³ §3.1 are cited.
 - g) The footpath, where there now is none, will improve pedestrian safety.
 - h) The Board's conclusion, per the Inspector's report, as to the issues raised in relation to the proposed works to the L1321 that,
 - Those works are relatively minor and, given the contained nature of the work (along a metalled road with no direct in-flow to either stream), no likely significant effects are predicted to occur from those works.
 - Any surface water as may arise during the construction phase would be very minor and once in place, surface water will be managed by a drainage system and that there is no uncertainty as to the operation of such a standard system.
 - i) The Applicant has failed to identify any likely significant effects on designated sites which it asserts that the Board has failed to consider.

Ground 5 – Flood Guidelines

- j) The Bearna Plan was adopted in accordance with the Flood Guidelines - including a sequential approach to land use zoning.
- k) Criticisms of the Bearna Plan and its compliance with the Flood Guidelines are irrelevant – collateral attack in these proceedings on the Bearna Plan or its land use zoning is impermissible.
- l) The Impugned Permission was made having regard to the requirements of the Flood Guidelines and the Bearna Plan, and complies with those Guidelines, including as to the application of a sequential approach.
- m) The sequential approach was correctly adopted in the zoning of the lands (and reflected in Objective CCF6) and the Impugned Permission complies with the sequential approach.

⁹² This relates to Construction Site Management Pollution Prevention Control Measures based on Construction Industry Research and Information Association guidance 'Control of Water Pollution from Construction Sites, guidance for consultants and contractors', CIRIA, 2001

⁹³ Construction and Environmental Management Plan. It is in the papers at Appendix 5 to the Natura Impact Statement at Exhibit GMG1 Tab 19 to the Affidavit of Gabriel McGoldrick. §3.1 of the CEMP is headed "Site Drainage" and elaborates on the introductory assertion that prior to the commencement of any construction activities, mitigation measures will be put in place to ensure the protection of surface water during the works. It also describes the SuDS provision for surface water drainage in the operational phase of the development

- n) The Impugned Permission was granted in accordance with land use zoning and Objective CCF6 of the Bearna Plan and having satisfied the Justification Test, which is part of the sequential approach.
- o) The Proposed Development complies with the Flood Guidelines.
- p) Heather Hill misinterprets the Flood Guidelines.
- q) The SSFRA, a detailed hydrological assessment of the Trusky Stream in the Trusky East Stream Flood Study and a detailed hydrological assessment of the Site in the Engineering Services Report demonstrate compliance with Objective CCF6, the Flood Guidelines and the Justification Test.
- r) In a conservative approach in order to ensure the most robust assessment, and regardless of, the SSFRA applied the Development Management Justification Test to the entire proposed SHD - not only those aspects of it considered “highly vulnerable” and located in Flood Zones A & B.

Ground 5 – Flood Guidelines & Ground 6 - Determination in Accordance with Heather Hill #1

- s) Consistent with Heather Hill #1, the SSFRA, in assessing the risk of flooding associated with the Proposed Development, accepted and applied the indicative Flood Zones identified in the Bearna Plan.
- t) In addition, and to ensure the most robust assessment, the SSFRA noted the need to *‘quantify the fluvial flood risk by detailed and robust hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures’*. The Trusky East Stream Flood Study did so.
- u) The SSFRA⁹⁴ and the Trusky East Stream Flood Study provide evidence that the pumping station is not in the flood extent predicted by the Flood Study and that it will include alternating duty/standby pumps and a 24-hour capacity emergency storage tank in accordance with Irish Water requirements to mitigate flooding risk from interruption of pumping⁹⁵.
- v) The SSFRA conclusions are pleaded – including that the flood risks arising from the proposed drainage infrastructure will be negligible. The EIA and NIS note this conclusion, evidence of which was before the Board.

Ground 6 - Determination in Accordance with Heather Hill #1

- w) Heather Hill #1 did not prohibit ancillary works on lands subject to Objective CCF6 – it made them subject to a Justification Test, which was done in the SSFRA.
- x) Contrary to an assertion in the Grounds, Heather Hill #1 did not find that decommissioning the WwTP had the potential to pollute.

⁹⁴ Fig7 & §4.1.7

⁹⁵ SSFRA §4.4.3

- y) The Grounds identify no specific finding in Heather Hill #1 as to the decommissioning of the WwTP, so the alleged conflict is unclear.
- z) But the EIAR⁹⁶ and the inspector⁹⁷ addressed the decommissioning of the WwTP as involving electrical disconnection and removing all above ground elements. The WwTP will then be filled with inert material and covered with at least 30cm of topsoil and landscaped. Part of the existing Cnoc Fraoigh wastewater pipe network will be decommissioned - plugged and left in-situ. To ensure continuity of service the Cnoc Fraoigh wastewater network will be connected to the proposed development network and on to the public sewer before decommissioning the WwTP.

Structure of Judgment from this Point

90. In varying degree and respects much of Grounds 3, 5 and 6 concern what may very broadly be described as “flood” issues – whether flooding by storm water or sewage escape. In what follows I first will address such issues generally and later attempt to apply my analysis more particularly. However, a precise adherence to that structure is impractical and the reader should have regard to the entire. And I will, in introducing the relevant materials, make some comments as to their implications for the present case.

Flood Guidelines 2009

Introduction

91. As noted above, one function of floodplains is to hold excess water until it can be released slowly back into a river system or seep into the ground as a storm subsides⁹⁸. They are valuable both in storing floodwater and in conveying floodwater in a relatively controlled and safe way such that flood risk both upstream and downstream can be more effectively managed. As development tends to undermine the storage function of flood plains, it is important where possible, to safeguard floodplain against development – termed “leaving space of water”. That is also important to avoid development prone to flooding.

92. The Flood Guidelines 2009 were adopted under S.28 PDA 2000. It must be said that the Guidelines are imperatively phrased and assume compliance in terms which jar somewhat with the true legal obligation of the Board and Planning Authorities – which is to “have regard to” the Guidelines in the performance of their functions. There is no statutory obligation of compliance. This should be borne in mind in considering what follows.

⁹⁶ §13.2.44.

⁹⁷ Inspector’s report §12.12.5

⁹⁸ Flood Guidelines 2009 §2.34

93. The Flood Guidelines 2009 are a lengthy document of which only a brief account is possible here. They introduce flood risk assessment as an integral and leading element of development planning functions. The core objectives of the Guidelines⁹⁹ are to:

- Avoid inappropriate development in areas at risk of flooding;
 - [I observe that this primarily reflects flood risk to the proposed development itself.]
- Avoid new developments increasing flood risk elsewhere, including that which may arise from surface water run-off;
 - [I observe that this in part reflects the purpose of a floodplain in storing flood waters, thus attenuating flood flows and downstream flood risk.]
- Ensure effective management of residual risks for development permitted in floodplains;
 - [I observe that this reflects the possibility of development in floodplains.]
- Avoid unnecessary restriction of national, regional or local economic and social growth;
 - [I observe that this reflects the desirability of not unnecessarily restricting development by reference to flood risk.]
- Improve the understanding of flood risk among relevant stakeholders;
- Ensure that the requirements of EU and national law in relation to the natural environment and nature conservation are complied with at all stages of flood risk management.

Accordingly, the Guidelines seek to “*outline methodologies for the transparent consideration of flood risk*”.¹⁰⁰

94. The Flood Guidelines 2009 state that development plans are to establish the flood risk assessment requirements of their functional areas by flood risk assessment - which may be supplemented by more detailed site-specific flood risk assessment to comply with the Guidelines. Planning authorities will assess planning applications for development in accordance with the Guidelines - following the guidance of Strategic Flood Risk Assessment and the application of the sequential approach and, if necessary, the Justification Test required by the Guidelines. Planning authorities will ensure that development is not permitted in areas of flood risk, particularly floodplains, except where there are no suitable alternative sites available in areas at lower risk that are consistent with the objectives of proper planning and sustainable development. Planning authorities will ensure that only developments consistent with the overall policy and technical approaches of these Guidelines will be approved and permission will be refused where flood issues have not been, or cannot be, addressed successfully and where the presence of unacceptable residual flood risks to the development, its occupants or users and adjoining property remains.

⁹⁹ Flood Risk Guidelines 2009 §1.6

¹⁰⁰ Flood Risk Guidelines 2009 §1.7

95. Where such development has to take place, the type of development has to be carefully considered and the risks mitigated and managed through location, layout and design of the development to reduce flood risk to an acceptable level.

96. The Guidelines¹⁰¹ purport to require the application of the Sequential Approach, Strategic Flood Risk Assessment and a Development Plan Justification Test¹⁰² in adopting or varying development plans. I will refer to these issues further as need arises.

97. As to planning permission applications, the Flood Guidelines 2009 purport to impose various obligations including site-specific flood risk assessment, as appropriate, and compliance with the terms and conditions of any grant of planning permission with regard to the minimisation of flood risk. Notably, the obligation to perform site-specific flood risk assessment to accompany the planning application is imposed on the planning applicant rather than the Board¹⁰³ – though clearly the Board will consider that assessment in making its decision.

Sequential Approach

98. The Flood Guidelines 2009 Glossary describes the Sequential Approach as *“a risk-based method to guide development away from areas that have been identified through a flood risk assessment as being at risk from flooding.”* The sequential approach is a precautionary approach using:

- flood risk assessment
- prior identification of flood zones and
- classification of the vulnerability to flooding of different types of development.¹⁰⁴

99. The Guidelines adopt¹⁰⁵ key principles of a risk-based sequential approach, to be applied at all stages of the planning and development management process, and as a key tool to managing flood risk. Those key principles, in sequential order, are:

- First, avoid development in areas at risk of flooding;
- Second, if avoidance is not possible, consider substituting a land use less vulnerable to flooding.

¹⁰¹ Flood Risk Guidelines 2009 Chapter 4

¹⁰² Flood Guidelines 2009 §4.23 & Box 4.1

¹⁰³ Flood Risk Guidelines 2009 Page V & §5.8, 5.10

¹⁰⁴ Flood Risk Guidelines 2009 §3.3

¹⁰⁵ Flood Risk Guidelines 2009 Chapter 3 generally

- Third, only when both avoidance and substitution cannot take place should consideration be given to mitigation and management of risks.
- Inappropriate types of development that would create unacceptable risks from flooding should not be planned for or permitted.
- Exceptions to the restriction of development due to flood risk are provided for via a Justification Test, whereby the planning need and the sustainable management of flood risk to an acceptable level must be demonstrated.

100. Notably, the Guidelines say¹⁰⁶ that the sequential approach is “*applicable in the layout and design of development within a specific site at the development management stage*”.

Flood Risk Assessment

101. Flood risk assessment may be Strategic or Site-Specific. The role of Strategic Flood Risk Assessment (“SFRA”) is summarised as follows¹⁰⁷:

“The SFRA is not a statutory planning document. It is a consultation document that should be used to inform a development plan or local area plan, enabling the implementation of the sequential approach and the testing of development zoning against flood risk criteria. It can also be used to assist other planning decisions, such as development management, and emergency planning. In any instance, a site-specific flood risk assessment may be required when deciding on the grant of planning permission.”

As will be seen, the passage above also cites the role of Site-Specific Flood Risk Assessment (“SSFRA”) “*when deciding on the grant of planning permission*”.

102. The Guidelines recommend a staged approach to flood risk assessment as follows¹⁰⁸:

- Stage 1 - Flood risk identification: to identify any flooding or surface water management issues related to either the area of regional planning guidelines, development plans and local area plans or a proposed development site that may warrant further investigation at the appropriate lower level plan or planning application levels. This is a desktop exercise.

¹⁰⁶ Flood Risk Guidelines 2009 §3.2

¹⁰⁷ Flood Guidelines 2009 p68

¹⁰⁸ §2.21

- Stage 2 - Initial flood risk assessment: to confirm sources of flooding that may affect a plan area or proposed development site, to appraise the adequacy of existing information and to scope the extent of the risk of flooding which may involve preparing indicative flood zone maps¹⁰⁹. Where hydraulic models exist the potential impact of a development on flooding elsewhere and of the scope of possible mitigation measures can be assessed. In addition, the requirements of the detailed assessment should be scoped; This includes “groundtruthing” by way of physical inspection.
- Stage 3 - Detailed flood risk assessment: to assess flood risk issues in sufficient detail and to provide a quantitative appraisal of potential flood risk to a proposed or existing development or land to be zoned,¹¹⁰ of its potential impact on flood risk elsewhere and of the effectiveness of any proposed mitigation measures.

As will be seen, the SFRA¹¹¹ in this case was to Stage 2 only. And as Counsel for Heather Hill observes, the “staged approach” to flood risk assessment is not to be confused with the “sequential approach” to the location of development.

Indicative Flood Zones

103. The Guidelines specify 3 levels of Indicative Flood Zones, based on current risk, without future climate change adjustment and excluding pluvial flooding¹¹²:

- Flood Zone A – the highest probability of flooding from rivers - exceeds 1% per year or 1 in 100. Most types of development (including housing and development ancillary to it) are inappropriate in this zone and should be avoided and/or only considered in exceptional circumstances and where the Justification Test¹¹³ has been applied.
- Flood Zone B – moderate probability of flooding from rivers - between 0.1% and 1% per year or 1 in 1000 or 1 in 100.
 - [I note that, depending on topography, around many rivers, and on the Trusky East Stream, the extent of flood Zones A & B is the same]
- Flood Zone C – low probability of flooding from rivers – below 0.1% per year or 1 in 1000. Flood Zone C covers all areas not in zones A or B and is generally developable. In the present Development Proposal all but ancillary works (primarily the pumping station) will be on Flood Zone C.

¹⁰⁹ Emphasis added

¹¹⁰ Emphasis added

¹¹¹ Exhibit GMcG1 Tab 62

¹¹² I have excised the references to sea/coastal flooding

¹¹³ See below

Though referring to Indicative Floodplain Maps rather than Indicative Flood Zones, the Glossary to the Guidelines usefully glosses the word “Indicative”: “*Being indicative, such maps only give an indication of the areas at risk but, due to the scale and complexity of the exercise, cannot be relied upon to give precise information in relation to individual sites.*” This to my view conforms to what one would have broadly and generally expected “indicative” to mean.

Flooding in Planning Applications – Chapter 5

104. Chapter 5 of the Guidelines addresses flooding in planning applications. The following key messages appear¹¹⁴:

- Planning authorities should apply a risk-based sequential and balanced approach, based on Flood Zones and the Justification Test in aiming to avoid development in areas at risk of flooding, through the development management process¹¹⁵.
- Planning applications will, where appropriate, need to be accompanied by a detailed flood risk assessment to quantify the risks and the effects of mitigation¹¹⁶.
- Development in flood risk areas, defined as inappropriate in chapter 3, but considered necessary to proper planning and sustainable development, will be subject to the Justification Test.

105. It will be noted in the foregoing that the Sequential Approach is required in considering and deciding a planning application and is “*risk-based*” and “*balanced*” and “*based on Flood Zones and the Justification Test*”. It could arise in a particular planning application that the Avoidance and Substitution elements of the Sequential Approach will require that the very principle of development or of a particular type of development on the site in question will require properly sceptical consideration. However, as will be seen, I have concluded that in this case the Avoidance and Substitution elements of the Sequential Test had been overtaken by the quite particular terms of the Bearna Plan, despite its requirement of compliance with the Guidelines.

106. One thing the foregoing key messages makes clear is that an approach by the planning authority (here, the Board) to a planning application based on Flood Zones and the Justification Test is itself an application of the Sequential Approach. Also, it is clear that a detailed flood risk assessment to quantify the risks and the effects of mitigation is a valid part of applying the Guidelines to a planning application. Indeed, it is a main element of the Justification Test.

¹¹⁴ p43

¹¹⁵ I have added to the text from §5.14 to make the message more complete

¹¹⁶ I have added to the text from §5.2 to make the message more complete

107. As to what is meant by “*balanced*”, the concluding Chapter 6 of the Guidelines includes, as Counsel for Burkeway emphasises, the following:

“Planning authorities must strike a fair balance between avoiding flood risk and facilitating necessary development, enabling future development to avoid areas of highest risk and ensuring that appropriate measures are taken to reduce flood risk to an acceptable level for those developments that have to take place, for reasons of proper planning and sustainable development, in areas at risk of flooding.”¹¹⁷

108. In similar vein and notably, the Guidelines accept that flood risk is not the only, or even necessarily the principal issue in a planning application: *“Assessment of the application should be based principally on the policies and detailed objectives of the development plan, with flood risk considered, along with the full range of planning considerations for the application.”¹¹⁸*

109. Chapter 5 of the Guidelines states that, notwithstanding the availability of flood zone maps and a SFRA, the applicant for planning permission is primarily responsible in the first instance for assessing whether there is a flood risk issue and how it will be addressed in the development they propose. Where flood risk may be an issue, a more detailed flood risk assessment should be done appropriate to the scale and nature of the development and the risks arising. The Flood Guidelines Glossary describes Site Specific Flood Risk Assessment as *“An examination of the risks from all sources of flooding of the risks to and potentially arising from development on a specific site, including an examination of the effectiveness and impacts of any control or mitigation measures to be incorporated in that development.”*

110. The detailed SSFRA is to be incorporated into any EIA and should quantify the risks and the effects of any necessary mitigation, together with the measures needed or proposed to manage residual risks. Key outputs from SSFRAs include: surveys of site levels and cross-sections relating relevant development levels to sources of flooding and likely flood water levels; assessment of all potential sources of flooding; the potential impact of flooding on the site; how the layout and form of the development can reduce those impacts¹¹⁹; proposals for sustainable surface water management; the effectiveness and impacts of any necessary mitigation measures; the residual risks to the site after mitigation and the means of managing those risks. The Guidelines refer to the potential complexity of SSFRA - which should be approved/certified by a competent person, qualified and experienced in flood risk assessments.

¹¹⁷ §6.4

¹¹⁸ §5.14

¹¹⁹ Emphasis added

111. By way of comment, it is clear that Indicative Flood Zones in Development Plans based on SFRA are very important to setting presumptions as to whether development is permissible in a particular zone and in prompting rigorous analysis of any development proposals in those zones. But it appears to me necessarily implicit in the foregoing that Indicative Flood Zones may in a particular case be far from the end of the analysis, especially site-specific analysis. The function of Indicative Flood Zones is to require site-specific flood risk analysis, not to predetermine its outcome or the outcome of the planning application it informs.

Justification Test

112. The Development Management Justification Test described in the Flood Guidelines 2009 was applied to the planning application in the present case. The proposition that in the particular circumstances of this case the Development Plan Justification Test should instead or also have been applied to that planning application was, correctly, abandoned at trial. And Heather Hill did not argue that the Development Management Justification Test was incorrectly applied in this case. However, given its role in the consideration of planning applications to develop sites on Flood Zones A&B (as the Site partly was) and given also its place in the Sequential Approach, I set out below the Development Management Justification Test as set out in the Flood Guidelines 2009¹²⁰.

“5.14 In assessing development proposals in areas at risk of flooding, planning authorities should adopt a risk-based sequential and balanced approach that gives priority to development in areas of lowest risk, while at the same time allowing consideration of appropriate and necessary development, through the use of the sequential approach based on flood zones and application of the Justification Test.

Application of the Justification Test in development management

5.15 Where a planning authority is considering proposals for new development in areas at a high or moderate risk of flooding that include types of development that are vulnerable to flooding and that would generally be inappropriate as set out in Table 3.2¹²¹, the planning authority must be satisfied that the development satisfies all of the criteria of the Justification Test as it applies to development management outlined in Box 5.1 below.

<p><i>Box 5.1 Justification Test for development management (to be submitted by the applicant)</i></p>
<p><i>When considering proposals for development, which may be vulnerable to flooding, and that would generally be inappropriate as set out in Table 3.2, the following criteria must be satisfied:</i></p>

¹²⁰ pp 47 & 48

¹²¹ Includes housing as “highly vulnerable”

*Box 5.1 Justification Test for development management
(to be submitted by the applicant)*

1. *The subject lands have been zoned or otherwise designated for the particular use or form of development in an operative development plan, which has been adopted or varied taking account of these Guidelines.*
 2. *The proposal has been subject to an appropriate flood risk assessment that demonstrates:*
 - (i) *The development proposed will not increase flood risk elsewhere and, if practicable, will reduce overall flood risk;*
 - (ii) *The development proposal includes measures to minimise flood risk to people, property, the economy and the environment as far as reasonably possible;*
 - (iii) *The development proposed includes measures to ensure that residual risks to the area and/or development can be managed to an acceptable level as regards the adequacy of existing flood protection measures or the design, implementation and funding of any future flood risk management measures and provisions for emergency services access; and*
 - (iv) *The development proposed addresses the above in a manner that is also compatible with the achievement of wider planning objectives in relation to development of good urban design and vibrant and active streetscapes.*
- The acceptability or otherwise of levels of residual risk should be made with consideration of the type and foreseen use of the development and the local development context.¹²²*

It will be seen above that the Justification Test for Development Management essentially has two elements:

- Zoning of the site for the type of development in question. [The Site is zoned for residential development.]
- Flood Risk Assessment of the proposal for development.

113. Also, and contrary to an argument of counsel for Heather Hill, I take the view that the Justification Test for Development Management, by its references to “*the development proposed*”, to “*measures to minimise flood risk*”, to “*measures to ensure that residual risks ... can be managed*” and to consideration of the “*acceptability or otherwise of levels of residual risk*” clearly envisages that the Justification Test for Development Management and specifically its Flood Risk Assessment element will take mitigation into account. Counsel for Heather Hill has not proffered any substantive or practical or legal reason why that should not be so. Accordingly, and again contrary to the argument of counsel for Heather Hill, there is no reason why the Justification Test for Development Management and specifically its Flood Risk Assessment should not have taken into account proposals in the development to re-profile ground to minimise flooding.

114. I note also that, as to the Justification Test, the Flood Guidelines 2009 state:

¹²² Irrelevant content omitted

“Where development has to take place in areas at risk of flooding following the application of these Guidelines, the risks should be mitigated and managed through the location, lay-out and design of the development to reduce such risks to an acceptable level.”¹²³

While the initial words of this excerpt may not precisely apply to the present case, what follows appears, in common-sense, equally applicable to any circumstance in which development is permitted in an area at risk of flooding. With some justification it is said that the lay-out and design of the Proposed Development – by placing all but the pumping station off the flood plain - tends to reduce the flood risk, both to the development and as to reducing the storage capacity of the flood plan. This seems to me an application of the requirement to show *“how the layout and form of the development can reduce those impacts”*. Whether acceptably so seems to me to be a matter for the Board not the Court.

Bearna Plan, Strategic Flood Risk Assessment & Material Contravention

115. The Bearna Plan is as adopted and not challenged in these proceedings. But it will assist to understand how, in relevant respects, it came about. The adoption of a variation to a development plan, such as the Bearna Plan, is an iterative process governed by S.13 PDA 2000. Briefly, it involves the presentation by the council executive to its elected members of a draft variation, who adopt it as a Proposed Variation. This goes to public consultation and the council chief executive reports to the elected members on that consultation and makes recommendations. If, as a result, the elected members propose Material Alterations to the Proposed Variation further public consultation and a further chief executive’s report thereon ensue, after which the members may make the variation to the development plan, either with or without the proposed material alterations.

116. The Bearna Plan adoption process also involved SFRA as an iterative process which drew on earlier sources such as the PRFA. An early iteration of the SFRA, including Indicative Flood Risk Zone maps¹²⁴, was published with the Proposed Variation.

117. Gabriel McGoldrick (deponent in these proceedings for Heather Hill and an applicant in the earlier judicial review) made a submission on the Proposed Variation which included photographic and video evidence of flooding of lands adjacent to Cnoc Fraoigh in December 2015, July 2017 and September 2017 and requested that Flood Zone A be extended accordingly. (I have seen a sample photo taken from the north-eastern corner of Cnoc Fraoigh looking south-east across the area subject to the CCF6 Objective). This was taken into account in a Stage 2 SFRA to inform the Development Plan variation process and in his report on the submissions on the Proposed Variation,

¹²³ §5.16

¹²⁴ SFRA Final Report - Figure 3 - Indicative Flood Risk Zones in advance of public display of Proposed Variation and associated documents

the council chief executive welcomed this “*incontrovertible*”¹²⁵ new evidence and recommended extension of the Flood Plain by 0.48ha and consequent reduction of the proposed zoning of that area from residential to open space/recreation/amenity as follows:


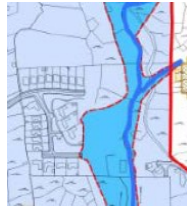


	Proposed Variation	Chief Executive’s Recommendation
Flood Zone A & B (mid blue)	 126	
Zoning Residential – Yellow Open Space/Recreation/Amenity - Green		

Figure 3 Recommended Alteration of Flood Zone and Zoning

118. In effect, the recommendation proposed extending the flood zone into the area in which the pumping station was later proposed and reducing accordingly the area to be zoned residential.

119. The elected members, however, by “Material Alteration 3” (“MA3”) to the Proposed Variation in effect accepted the extension of the flood zone but not its exclusion from the area to be zoned residential. This was followed by further public consultation and chief executive’s report on the Material Alterations. The Chief Executive advised against adopting MA3, but the elected members did so.

120. It is important to state however that there is, and at this remove of time could be, no challenge to the validity of the Bearna Plan and hence there is, and at this remove of time could be, no assertion of failure by the elected members in adopting the Bearna Plan to fulfil their statutory duty to have regard to the Flood Guidelines 2009. Such a conclusion is in no way contradictory of a view that the Bearna Plan as adopted is inconsistent with the Flood Guidelines 2009 in any greater or lesser degree, but it does inform interpretation of the Bearna Plan.

¹²⁵ Chief Executive’s Report on Submissions on Proposed Variation 2(a) - §2.1 Item 26 McGoldrick submission.

¹²⁶ See also SFRA Final Report - Figure 3 - Indicative Flood Risk Zones in advance of public display of Proposed Variation and associated documents

Bearna Plan as adopted - Flood Zones, Land Use Zoning, Objectives CCF1 & CCF6 and DMFL1

121. So, the Bearna Plan as adopted identified Flood Zones A & B¹²⁷ along both sides of the Trusky East Stream and generally zoned these areas “OS” and “CL” for open space and constrained land use. The part of the Site outside Flood Zones A & B was zoned “R” for residential by the elected members. But some of Flood Zones A & B was, arguably inconsistently, also zoned “R” for residential. In respect of that area both zoned residential and deemed Flood Zone, a specific Objective CCF6 – “*Inappropriate Development on Flood Zones*” was included in the Bearna Plan – in effect to attempt to reconcile the inconsistency. This was controversial in that the County Manager and the SFRA authors overtly disagreed.

122. The final version of the SFRA, “*most unusually*”¹²⁸ and “*strikingly*”¹²⁹ expressly states that, in this respect, the Bearna Plan was made “*contrary to*”¹³⁰ and “*inconsistent with*” the Flood Guidelines 2009. While these phrases are correct, as the elected members were not obliged to comply with the Flood Guidelines 2009 in adopting the Bearna Plan (being obliged only to have regard to it), neither they nor the Plan can properly be said to be in breach of the Flood Guidelines 2009.

123. Lest any other view be inferred, I pause to observe that it is no part of my role as a judge to take sides in the controversy or to approve or disapprove of the members’ decisions in adopting the Bearna Plan. I express no view on such lines and all must accept the Bearna Plan as it is.

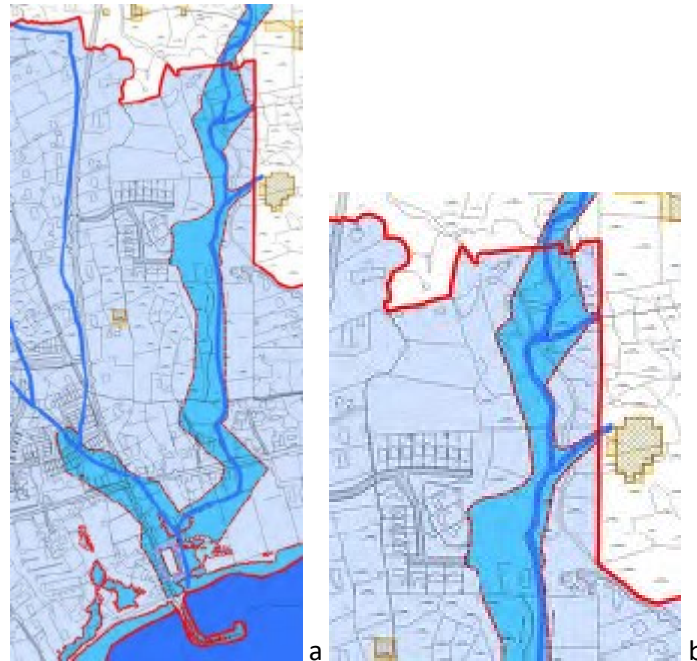
124. The resultant final Bearna Plan Flood Zone and Land Use Zoning position as to the Site is illustrated as follows:

¹²⁷ Flood Zone A identifies the extent of 1% or greater risk of flooding per year. Flood Zone B identifies the extent of 0.1% to 1% risk of flooding per year. In this location Flood Zones A & B coincide.

¹²⁸ The phrase used by Simons J. in Heather Hill #1

¹²⁹ Simons J, Heather Hill #1 §98

¹³⁰ Chief Executive’s Report on the Material Alterations. Exhibit GMcG1 Tab 64; SFFA p22



Figures 4a&b Extracts from the Bearna Plan Flood Risk Management Map

- The Trusky East Stream, in dark blue, runs north-south down the eastern boundary of the Site.
- The Trusky West Stream in dark blue, runs north-south down the western edge of the L1321 road.
- The confluence of the Trusky East & West Streams is apparent, as is their joint discharge to Galway Bay at Bearna Pier.
- Indicative Flood Zones A & B are depicted in mid-blue edged red.
- Indicative Flood Zone C in light blue essentially designates land as developable.
- Cnoc Fraoigh and the North/Central area of the Site can be seen in Flood Zone C to the west of Flood Zones A & B. Note the position of the Flood Zone A & B immediately east of and contiguous to Cnoc Fraoigh.
- The Map bears “Important User Notes” which include “The Zones indicate broadly where there are elevated levels of flood risk and have informed the Barna plan. The zones should not be relied on solely for site-specific flood risk assessments. Zones may be updated in future to take account of new information”. It seems to be that this note is consistent with the “Indicative” status of the Flood Zones depicted in the Bearna Plan.



Figure 5 Extract from the Bearna Plan Village Centre Zoning Map

- The red line coincides in part with the planning application red line but in this instance depicts the boundary of the Bearna Plan area.
- Residential zoning is in yellow.
- Open space and constrained land use are in green cross-hatched blue and include most but not all of Indicative Flood Zones A & B.
- Note the “triangle” immediately east of Cnoc Fraoigh in yellow cross-hatched red indicating residential zoning and “Mitigation Measures Apply”. This, and other areas similarly marked in Flood Zone A&B, yet zoned residential. They are also subject to Objective CCF6, signified by the “orange triangle!”, as to the circumstances in which development may be allowed in that area. As described above Flood Zone A was extended into this area as a result of public consultation in the SRFA/Proposed Variation processes – essentially on foot of the evidence supplied by Mr McGoldrick. In the Proposed Development, the pumping station is to be in this area - as is car parking and open space. This area was the subject of the controversy to which I have referred above but in the proceedings before me, only the pumping station is controversial.
- Indeed, as a perusal of the full Bearna Plan Village Centre Zoning Map reveals, the four instances of the application of Objective CCF6 depicted above are the only such instances. It nowhere else appears. Objective CCF6 is exclusively applied to lands in the greater site owned by Burkeway.

Objectives CCF1 & CCF6

125. Simons J. in **Heather Hill #1** held that Objective CCF6 must be read with Objective CCF1 of the Bearna Plan. **Objective CCF1** – “Flood Zones and Appropriate Land Uses” - applies generally to all Flood Zones and provides:¹³¹

- Protect Flood Zones A and B from inappropriate development.
- Direct developments/land uses into the appropriate Flood Zone “in accordance with” the Flood Guidelines 2009¹³² inter alia.¹³³
- “Where a development/land use is proposed that is inappropriate within the Flood Zone, then the development proposal will need to be accompanied by a Development Management Justification Test and Site-Specific Flood Risk Assessment, in accordance with the criteria set out under” the Flood Guidelines 2009¹³⁴ inter alia.¹³⁵
- In Flood Zone C, where the probability of flooding is low (less than 0.1%) the developer should satisfy him or herself that the probability of flooding is appropriate to the development being proposed.

126. **Objective CCF6** is entitled “Inappropriate Development on Flood Zones” and, in part provides¹³⁶:

“Where a development/land use is proposed within any area subject to this objective the development proposal will need to be accompanied by a detailed hydrological assessment and robust SUDS design which demonstrates the capacity to withstand potential flood events to maintain water quality and avoid potential effects to ecological features.

- *Any development proposals should be considered with caution and will be required to comply with [the Flood Guidelines 2009¹³⁷] and the associated Development Management Justification Test.*
- *Protect the riparian zones of watercourse systems through a general 10 metre protection buffer from rivers (this distance may be increased and decreased on a site by site basis, as appropriate).*
- *Any development proposals will require a detailed ecological report(s), [to inform AA Screening]*
- *.....*
- *Climate Change should be duly considered in any development proposal.”*

¹³¹ Not verbatim

¹³² The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009/Circular PL2/2014

¹³³ Flood Risk Management Guidelines (DM Guidelines DM2)

¹³⁴ The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009

¹³⁵ Circular PL2/2014

¹³⁶ Layout changed for exposition purposes

¹³⁷The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009

DMFL1

127. In a table at §3.2, under the headings “Flood Risk Management Guidelines”¹³⁸ and “DM Guideline FL1 – Flood Zones and Appropriate Land Uses” (“DMFL1”), the Bearna Plan identifies “the types of land uses that are appropriate in each of the Flood Zones identified within the plan area, in accordance with the [Flood Guidelines 2009] ... Where developments/land uses are proposed that are considered inappropriate to the Flood Zone, then a Development Management Justification Test and Site-Specific Flood Risk Assessment will be required in accordance with the [Flood Guidelines 2009].” When that table is read with the Guidelines¹³⁹ it is quite clear that residential developments are considered “Highly Vulnerable Development” (“HVD”) and “inappropriate” to Flood Zone A such that, “if proposed then Justification Test & detailed FRA¹⁴⁰ required”.

Bearna Strategic Flood Risk Assessment 2018¹⁴¹

128. As stated above, an SFRA was prepared to inform the adoption of the Bearna Plan¹⁴². The Bearna Plan refers¹⁴³ to the Stage 2 SFRA as a “supporting document”. An initial version of the Bearna SFRA was published with the Proposed Variation. The version exhibited had been updated after public consultation on the Proposed Variation and appears to have been completed after the adoption of the Bearna Plan. I infer that an intervening version may have been presented to the elected members after public consultation on the Proposed Variation and before the adoption of the Bearna Plan. The exhibited version (“the Bearna SFRA”) records that it is an assessment of flood risk and includes mapped boundaries of Indicative Flood Risk Zones, taking into account factors including site walkovers and flood risk indicators and that it was prepared in accordance with the Flood Guidelines 2009¹⁴⁴ and with the aim of protecting existing and future properties and populations from the adverse effects of flooding.

129. The exhibited Bearna SFRA is dated July 2018, postdates the adoption of the Bearna Plan and repeatedly records, in the following or like terms, the authors’ view that:

“..... certain Material Alterations were made to the Proposed Variation and adopted by the Elected Members as part of the adopted Variation. These Material Alterations provide for a range of incompatible uses within areas that are at elevated risk of flooding and are contrary to [the Flood Guidelines 2009] and Circular PL2/14. Consequently, the Variation is contrary to these Guidelines and associated Circular.”

¹³⁸ §3.2

¹³⁹ to which the reader is specifically referred

¹⁴⁰ i.e. Site-Specific Flood Risk Assessment

¹⁴¹ Exhibit GMcG1 Tab 62

¹⁴² The SFRA was itself informed, inter alia, by the relevant OPW PFRA Fluvial, Coastal, Groundwater and Pluvial flood maps, a 2012 Stage SFRA prepared to inform Proposed Amendments to the Bearna LAP 2007-2013 and the 2015 Stage 1 SFRA prepared to inform the adoption of the 2015 Development Plan.

¹⁴³ Note on p16 Bearna Plan

¹⁴⁴ Flood Risk Management Guidelines for Planning Authorities 2009

130. The Bearna SFRA records that the Flood Guidelines 2009 recommend a staged approach to flood risk assessment and recites the 3 stages set out above. The Bearna SFRA covered Stages 1 and 2 only. So, it did not include a Stage 3 Detailed Flood Risk Assessment. Stage 2, including “groundtruthing” and resultant Indicative Flood Risk Zone Maps of fluvial and coastal risk areas, had been completed, at least provisionally, in the version published with the Proposed Variation and later revised. Though not taken into account in the delineation of flood zones, pluvial flood risk is identified and informed the flood risk management provisions of the Bearna SFRA. As to the Trusky East Stream¹⁴⁵ the Summary of Groundtruthing Findings¹⁴⁶ notes an area of elevated flood risk along the river consistent with the PFRA Fluvial mapping and states *“Micro-topography at this area would influence predicted flow paths and direction at the site-specific level.”* I take this as intimating the need for further investigation in a planning application.

131. Section 4 of the Bearna SFRA is entitled *“Submissions made during the Variation-preparation process and changes arising”*. It prominently records that, on foot of submissions from local residents, including video and photographic evidence of flooding in the Cnoc Fraoigh area on lands adjoining the Trusky Stream in 2015 and 2017, Flood Zone A at Cnoc Fraoigh was revised and extended.¹⁴⁷ Submissions arguing for reduction of the Flood Zones and zoning for incompatible uses to be managed by flood risk management were rejected by the SFRA authors as contrary to the Flood Guidelines 2009, as having failed to contradict the photographic evidence and as it would be *“irresponsible and reckless to zone lands for vulnerable uses in these areas”*.

132. Section 4 of the SFRA records that, nonetheless, Material Alterations 1 - 6, [including MA3 as to the Site], were proposed, after public display of the Proposed Variation, for incompatible uses in areas at elevated risk of flooding and were subjected to SEA, informed by the SFRA. Section 4 asserts that Material Alterations 1-6 would result in elevated potential for water quality to be adversely affected (as a result of flooding of water treatment systems and collection networks and flooding of unknown substances stored onsite). Polluted or contaminated waters would have the potential to adversely affect human health, biodiversity (including European Sites). Section 5, headed Measures for Flood Risk Management, lists, inter alia, Objectives CCF1 and CCF6 set out above.

133. Appendix 1 of the Bearna SFRA gives a brief account of the Flood Guidelines 2009 and includes the following:

“In summary, the planning implications for each of the flood zones are:

Zone A - High probability of flooding. Most types of development would be considered inappropriate in this zone. Development in this zone should be avoided and/or only considered in exceptional circumstances, such as in city and town centres, or in the case of

¹⁴⁵ Sub-nom Cloghscoltia River

¹⁴⁶ Table 3, p12

¹⁴⁷ See figures 3 – 5 above

essential infrastructure that cannot be located elsewhere, and where the Justification Test has been applied. Only water-compatible development, such as docks and marinas, dockside activities that require a waterside location, amenity open space, outdoor sports and recreation, would be considered appropriate in this zone.”

“Highly Vulnerable Development” includes dwellings and essential infrastructure such as water and sewage treatment, permissible in Flood Zone A only on passing a Justification Test. The Justification Test is described as part of the Sequential Approach and as an assessment of whether a development proposal within an area at risk of flooding meets specific criteria for proper planning and sustainable development and demonstrates that it will not be subject to unacceptable risk nor increase flood risk elsewhere.

134. Heather Hill relies on the SFRA in these proceedings in asserting that:

- The SFRA records that the area in which the pumping station is to be put floods.
- It is clear that the authors of the SFRA
 - strongly disagreed with residential zoning of any areas in the flood zones identified in the SFRA as contrary to the Flood Guidelines 2009.
 - considered that reprofiling the flood zones to manage flood risk to enable residential development in the flood zones would be contrary to the Flood Guidelines 2009.

Heather Hill #1¹⁴⁸ on Flooding – Bearna Plan, Flood Guidelines 2009 & Justification Test

135. As has been seen, Simons J. quashed the earlier permission – inter alia as in material contravention of Zoning Objective CCF6 of the Bearna Plan such that the Board, ultra vires,

- Did not do a development management 'justification test' where part of the application site lay in an area identified in the Bearna Plan as at risk of flooding.
- By planning condition deferred completion of a site-specific flood risk assessment until after the grant of permission.

Simons J. also quashed the permission for impermissibly relying in AA Screening on “best practice” measures intended to avoid or reduce potential harmful effects of the proposed development on two European sites in Galway Bay.

136. Burkeway proposed in the earlier permission to carry out certain development works on the Flood Zones A & B as identified in the Bearna Plan. They were not the same works as those proposed

¹⁴⁸ Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450

in the present case. Mostly they were to be works ancillary to the residential units, such as areas of hard standing, roads and bridges. But a small number of residential units were to be on the Flood Zones A & B. In Heather Hill #1 Burkeway approached these issues in two ways.

- First, Burkeway asserted that the ancillary works were “*water-compatible development*” - not “*inappropriate*” or “*vulnerable*” within the meaning of the Flood Guidelines 2009. Heather Hill argued in response that the entire development should be characterised as residential for the purposes of flood risk assessment and that it was incorrect to distinguish the residential units from ancillary works.
- Second, Burkeway proposed ground re-profiling works on Flood Zones A & B and, on the assumption of those works, proffered as part of the earlier planning application the Trusky East Stream Flood Study (July 2018) - not to be confused with the Trusky East Stream Flood Study (October 2020) proffered as part of the present planning application. The July 2018 study and resultant SSFRA in essence purported, in part by those works, to reduce the extent of the Flood Zones such that no residential units would be on the Flood Zones as so revised. Burkeway submitted that this was legitimate for purposes of site specific flood risk assessment and rendered a justification test under Objective CCF6 unnecessary. As Simons J. said, “*Put shortly, the Developer seeks to rely on this revised flood risk zone in preference to the flood risk zones actually set out in the Bearna Plan.*” It seems the Board had agreed but by condition required a revised site specific flood risk assessment to provide a full assessment of any impacts of the proposed groundworks.

137. Heather Hill argued that:

- Burkeway could not unilaterally alter the contours of the Bearna Plan flood risk zones adopted after public participation: and could not do so by proposing ground re-profiling works.
- Objective CCF 6 expressly required a “justification test” of development proposals on these lands.
- The ground re-profiling works had not, in any event, been properly assessed by the Board – which could not by planning condition defer flood risk assessment of these works to be done post-grant.

138. While the foregoing is not a complete account of the controversies, it suffices to say that the Board had taken Burkeway’s view. Simons J. agreed with Heather Hill.

139. In considering these issues, Simons J. first described the “Development Management Justification Test”¹⁴⁹ introduced under the Flood Guidelines 2009. He noted that the Guidelines

¹⁴⁹ From pp 47 & 48 Flood Guidelines 2009 – set out above

adopt the Sequential Approach which seeks to ensure that new development is first and foremost directed towards land at low risk of flooding. The sequential approach uses flood risk assessment and prior identification of flood zones for river and coastal flooding.

140. Simons J. interpreted Objective CCF6 as unequivocally requiring that any development proposal be considered with caution and as requiring a justification test of any application to develop any lands to which Objective CCF6 applied.¹⁵⁰ He held that the Objective CCF6 requirements (i) to comply with the flood risk management guidelines, and (ii) to comply with the “justification test”, are cumulative, not disjunctive. He held it understandable that the requirements are mandatory given *“the lands have been identified, at plan level, as inappropriate for development because of the risk of flooding. Before a competent authority could grant planning permission, it would have to be satisfied that the development of these lands was justified.”* Simons J. observed also that the fact that certain Bearna Plan zoning objectives were contrary to the Flood Guidelines 2009 tends to explain why land zoned for development were *“nevertheless made subject to a mandatory requirement for a “justification test” by Objective CCF6.”*

141. Simons J. held¹⁵¹ that Objective CCF6 must be read with the other objectives addressing climate change and flooding – in particular Objective CCF1 which addresses in general terms the need to protect Flood Zones A & B from inappropriate development. Objective CCF6 requires a “justification test” in respect of land subject to that objective irrespective whether such a test would have been triggered by the guidelines¹⁵². It is always open to a planning authority to impose more stringent requirements in development plan than those in guidelines and, in a conflict between the development plan and statutory guidelines, the former prevails.¹⁵³ The Flood Guidelines 2009 require planning authorities to identify in the development plan areas at risk of flooding. That done, individual planning applications fall to be assessed by reference to the identified flood risk zones. A planning authority is entitled to indicate in the development plan that in respect of particular areas a justification test will always be required.

142. Simons J. held¹⁵⁴ that, as the Bearna Plan refers¹⁵⁵ to the Stage 2 SFRA as a *“supporting document”*, *“it is therefore legitimate to have regard to same in interpreting the development plan”*. I agree but would add that where they conflict – and they do, as shown above – the Bearna Plan must prevail as the SFRA is an aid to its interpretation not an amending document and, whatever one’s view might be of its substantive merits or demerits, the Bearna Plan is the statutory expression of the democratic and statutorily effective will of the elected members.

¹⁵⁰ §85 & 93

¹⁵¹ §86

¹⁵² Simons J. §87 & 93

¹⁵³ §88 - Citing Brophy v. An Bord Pleanála [2015] IEHC 433 [Baker J.]

¹⁵⁴ §94

¹⁵⁵ Note on p16 Bearna Plan

143. Simons J. held¹⁵⁶ that, as Objective CCF6 of the Bearna Plan requires a “justification test” where development is proposed on lands subject to the objective and as the proposed development involved works on lands affected by Objective CCF6, a “justification test” should have been done but was not done. The failure to carry out a “justification test” represented a material contravention of the development plan (i.e. the Bearna Plan) and so the decision to grant planning permission was *ultra vires*.

144. Having so decided, Simons J. considered¹⁵⁷, against the possibility his decision was wrong, further argument by the Board and Burkeway that:

“..... having regard to the proposed land re-profiling works — no “inappropriate” or “vulnerable” development will be carried out on lands subject to the risk of flooding if determined by reference to the revised flood risk zones. The argument continues to the effect that the identification of the flood risk zones should be done — not by reference to the objectives under the Bearna Plan or by reference to the flood zone map under that plan — but rather by reference to the revised flood risk zones as per the site specific flood risk assessment prepared on behalf of the Developer.

It is said that this document indicates that subsequent to the carrying out of ground re-profiling works, none of the residential units will be located on flood zone A (as revised), and that the only development works which will take place there are what are described as “water compatible development”, i.e. roads, car parks and hard standing. It is said, therefore, that it would be redundant to require the carrying out of the “justification test” because the justification test is not required under the guidelines in such circumstances.”

145. Simons J. described this argument as predicated on two assumptions, both of which he rejected:

- First, that it is legitimate to have regard to flood risk zones as revised by a developer in preference to the flood risk zones identified in the development plan. On this analysis, no “justification test” was required as no “inappropriate” or “highly vulnerable” development was proposed in Flood Zone A (as so revised).
- Second, that it is legitimate to treat ancillary works as being separate to and distinct from residential development.

146. In rejecting the first assumption, Simons J. observed:

¹⁵⁶ §100 & 101

¹⁵⁷ §108 et seq

- *“..... the determination of whether or not a proposed development is to be located in an area at risk of flooding must be done by reference to the flood risk map provided for under the Bearna Plan.”*
- *“The flood zone map in the Bearna Plan was prepared following a detailed process of public consultation, which included the preparation of an SFRA and the carrying out of an environmental assessment for the purposes of the SEA Directive ... It would set this procedure at naught if a developer were to be permitted to unilaterally modify the flood zones subsequently.”*
- *“Whereas it may be correct to say that a site specific flood risk assessment may include mitigation measures, a developer is still required to comply with the “justification test”. More specifically, the developer must justify the proposal to carry out development on land which has been identified, following a public participation process, as being at risk of flooding.”*
- And §3.2 of the Bearna Plan, headed “Flood Risk Management Guidelines” required, as Simons J. held, that *“both a site specific flood risk assessment and a justification test will be required where developments / land uses are proposed that are considered inappropriate to the flood zone” - “in accordance with the” Flood Guidelines 2009.* This latter phrase does not appear in Simons J’s passage on the issue¹⁵⁸ but clearly was in his mind as it appears in §3.2 of the Bearna Plan which he had set out in full. A developer can’t, Simons J. said, *“unilaterally alter the flood zone so as to sidestep these procedural requirements.”*

147. I pause to note that Heather Hill in the present proceedings say, and Burkeway and the Board dispute, that Burkeway in the subject application, and despite Heather Hill #1, has again purported to revise the Bearna Plan Indicative Flood Zones.

148. It is important to observe that, in insisting on the Bearna Plan Flood Zones and holding that a developer could not alter them, Simons J. was doing so with respect to the role of the Flood Zones in activating, as to development proposals for lands in the Flood Zones, the “procedural requirements” of the Bearna Plan. As relevant to the facts of that case these included the Justification Test which had not been done.

149. Simons J. also made clear the necessity of applying, in respect of such lands, the more general requirement imposed by Objective CCF6 of compliance with the Flood Guidelines 2009. However, being concerned on the facts of the case before him only and specifically with the failure to do a Justification Test, Simons J. did not need to and did not address, the detail of the more general requirement of compliance with the Flood Guidelines 2009. That question arises in this case and, as will be seen, requires consideration of the interpretation of the Bearna Plan in its relationship with the Flood Guidelines 2009.

¹⁵⁸ §112

150. Simons J. also held¹⁵⁹ that though Burkeway had submitted an SSFRA to the Board, the Board had, *ultra vires*, “failed to complete the assessment” and instead by Condition 12(e) left it over to be carried out post-grant. Condition 12 had required of Burkeway a revised SSFRA “to provide full assessment of any impacts of the proposed ground works and cut and fill measures at the development site”. Simons J. considered it evident from the inspector’s report and Condition 12 that the Board had not done a robust assessment of the proposed ground re-profiling works. It was inconsistent with both national law, and Article 7 of the Flood Directive¹⁶⁰ to leave over this assessment to after the grant of development consent.

151. In rejecting the second assumption - that it is legitimate to treat ancillary works as being separate to and distinct from residential development - Simons J. considered untenable the attempt to exclude essential elements of any residential development, i.e. roads and car parks, from the overall proposed development for the purpose of categorising the flood-vulnerability of those elements as lesser than that of the highly-vulnerable core residential components of the development¹⁶¹. In his view it would be artificial to treat integral elements of a residential development piecemeal. Ancillary or incidental works are part and parcel of the overall development. The entire development must be treated as residential development for the purpose of flood risk assessment.

Status & Interpretation of Bearna Plan & Objective CCF6 – Relationship to Flood Risk Guidelines 2009 - Application of Sequential Approach

152. It is clear that the authors of the SSFRA and the Chief Executive, and, indeed, Heather Hill, disagreed strongly with the controversial aspects of the members’ decision in adopting the Bearna Plan - to the unusual point of publicly recording that disagreement, particularly as to the areas in the Flood Zones A&B zoned residential and subject to Objective CCF6. They disagreed on the basis that, as they see it, the Bearna Plan as adopted was inconsistent with the Flood Guidelines. Whether they are correct is beside the point as it relates to the validity of the Bearna Plan. The legal obligation of the members in adopting the Bearna Plan was not to comply with the Flood Guidelines, but to have

¹⁵⁹ §112

¹⁶⁰ Directive 2007/60/EC - on the assessment and management of flood risks. Article 6 requires member states to prepare flood hazard maps (as to the probability and extent of flooding) and flood risk maps (as to potential adverse effects of flooding on populations and economic activity). Article 7 requires member states to prepare, on the basis of those maps, flood risk management plans to reduce those effects. Article 7.3 includes the following:

Flood risk management plans shall take into account relevant aspects such as costs and benefits, flood extent and flood conveyance routes and areas which have the potential to retain flood water, such as natural floodplains, the environmental objectives of Article 4 of Directive 2000/60/EC, soil and water management, spatial planning, land use, nature conservation, navigation and port infrastructure.

Flood risk management plans shall address all aspects of flood risk management focusing on prevention, protection, preparedness, including flood forecasts and early warning systems and taking into account the characteristics of the particular river basin or sub-basin.

Flood risk management plans may also include the promotion of sustainable land use practices, improvement of water retention as well as the controlled flooding of certain areas in the case of a flood event.

¹⁶¹ Simons J. §118 & 119

regard to them. Which they did. The Bearna Plan is effective, presumed valid and cannot be challenged in these proceedings.

153. However, the question remains of the interpretation of the Bearna Plan – in particular Objective CCF6. The interpretive question arises as to the dispute regarding the application, or non-application in the Impugned Permission of the Sequential Approach described in the Flood Guidelines 2009.

154. In some degree, Simons J. considered this issue in **Heather Hill #1**. But as I have said, it is important in considering his judgment, to bear in mind that he was concerned specifically with the question whether, under Objective CCF6, the application of the Justification Test (which had not been done in that case and has been done in this case) was mandatory or whether its application or not in a particular case was a matter for the judgment of the Board - as permitted, the Board argued, by the Flood Guidelines. As recorded above, Simons J. held¹⁶² that - as a matter of compliance with the Bearna Plan - application of the Justification Test was mandatory as to proposed development on lands to which Objective CCF6 applied.

155. One might suggest that Simons J. had an easier interpretive task than do I. He was concerned with the express and discrete requirement of a justification test, not with the arguably knottier question of interpreting a development plan which adopts a general requirement of compliance with guidelines in circumstances in which there is a credible view that the development plan text and the zoning choices made by the local authority in adopting the development plan are themselves inconsistent with those guidelines and, as Simons J. put it, this in circumstances in which, though zoned residential, *“the lands have been identified, at plan level, as inappropriate for development because of the risk of flooding.”*¹⁶³

156. This question of interpretation would appear to engage the following issues:

- a) First, interpretation of the Development Plan (including the Bearna Plan) is a matter of law and ultimately for the Court. So too is any question of material contravention of a Development Plan.
- b) Second, the Development Plan is a document prepared by, generally, planners rather than lawyers and for public consumption. It includes significant policy content and is prepared with flexibility and holistic decision-making in mind. So, it is not to be interpreted as if a statute or a contract or in an excessively technical and over-legalistic manner. It is to be interpreted as to its ordinary meaning and as if by an intelligent layperson as that phrase is elaborated in many cases – most recently in **Ballyboden Tidy**

¹⁶² §85 & 93

¹⁶³ Simons J. §85

Towns Group v An Bord Pleanála & Shannon Homes¹⁶⁴. As Simons J. observes in **Heather Hill #1**, the intelligent layperson has “no particular expertise in law or town planning”.

- c) Third, a Development Plan is to be interpreted via a “holistic approach”¹⁶⁵ – in other words “as a whole”. On that basis, a development plan should be interpreted with a view to reconciling its content where possible rather than finding conflicts¹⁶⁶. One should not lightly find, much less strain to find, such a conflict.
- d) Fourth, in this case a question of sequence of events falls to be considered. The land-use zoning was adopted after and despite the flood zoning – not vice versa. That tends to suggest that if they conflict the land-use zoning prevails. Of course, the position is more nuanced and not a straight choice between the two zonings: any such view must also consider the reconciliation attempt reflected in Objective CCF6. But the sequence merits some weight.
- e) Fifth, the question arises what approach to take, where despite holistic interpretation, elements of a development plan conflict. As Simons J. said in **Heather Hill #1**¹⁶⁷:

“The fact — if fact it be — that there is a conflict between two objectives of a development plan does not allow a decision-maker to contravene one of the objectives and to dismiss that contravention as immaterial.

Rather, the solution which the Oireachtas has put in place to address the contingency of conflicting objectives is that provided for under section 37(2)(b) of the PDA 2000 (as applied to “strategic housing development” by section 9(6) of the PD(H)A 2016).”

In this respect Irish law as to material contravention of conflicting development plan objectives may differ from that in England as set down in **Tesco v Dundee**¹⁶⁸ - which, crudely put, allows the planning authority to choose to apply one of two conflicting objectives without being deemed in material contravention of the other. Also, the reliance of Simons J. on the legislative solution provided by S.37(2)(b) which permits material contravention where development plan objectives conflict is unavailable in the case of material contravention of a zoning objective.

However, I do not think I need decide any issue in that regard if, as I consider here, an holistic interpretation of the Bearna Plan is possible.

- f) Sixth, comes the general proposition that Objective CCF6, as a matter of compliance with the Development Plan, requires compliance with the Flood Guidelines 2009. Thus

¹⁶⁴ [2022] IEHC 7

¹⁶⁵ Navan Co-Ownership v. An Bord Pleanála [2016] IEHC 181; Eoin Kelly v. An Bord Pleanála & Aldi [2019] IEHC 84

¹⁶⁶ Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §225

¹⁶⁷ [2019] IEHC 450 §56

¹⁶⁸ Tesco Stores Limited v. Dundee City Council [2012] UKSC 13; discussed in Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7

the “*have regard to*” obligation imposed by S.28 PDA 2000 is transmuted to a compliance obligation imposed by the Bearna Plan. And, as Objective CCF6 is a zoning objective¹⁶⁹, by S.9 of the 2016 Act, it may not be materially contravened by the Board.

- g) Seventh, specific to this case and for reasons stated above, the SFRA is an interpretive aid to the Bearna Plan but if they conflict the latter prevails.
- h) Eighth, the question arises of interpretation of a development plan in which guidelines are incorporated by reference, as is not uncommon. Again, no doubt, holistic interpretation with a view to reconciling content where possible rather than finding conflicts should be the first resort. However, it may be that an intelligent layperson would approach the interpretation of conflicting content differently depending on whether the conflict is between content in the development plan itself or between content in the development plan itself and content in the document incorporated by reference (in this case the Flood Guidelines 2009).

157. On the Seventh and eighth question, Objective CCF6 is, on its face, crafted bespoke for land both zoned residential and in a Flood Zone A in an attempt to mitigate that particular incongruity. Indeed, it is crafted bespoke for the Burkeway lands. In my view, the intelligent layperson in interpreting the Objective CCF6 in that context would prioritise the bespoke wording over the wording of the document incorporated by reference [here the Flood Guidelines 2009]. If needs be (s)he would prefer the words carefully chosen in contentious circumstances for purposes focussed on specific small areas of land to those of the more general document drafted for a much wider and national purpose, especially when the carefully chosen words were chosen expressly having regard to the national guidelines. Lest it be thought otherwise, I think all this would be apparent to the intelligent layperson on reading, in the Bearna Plan, the land use zoning, the flood zoning, objectives CCF1 and CCF6 and the references to the Flood Guidelines 2009 – and even the mildly alarming symbol on the zoning map - and without knowledge of the controversy disclosed in the SFRA and the Chief Executive’s report on the Material Alterations. However, as the Bearna Plan explicitly records the SFRA as informing future land uses through the avoidance of ecologically sensitive and flood risk areas and the inappropriate development of same¹⁷⁰ and refers the reader to the SFRA as a “*supporting document*”¹⁷¹ I consider that the intelligent layperson in interpreting the Bearna Plan would in fact be aware of the controversy disclosed in the SFRA and the view that the Bearna Plan does not conform to the Guidelines. And, as recorded above, Simons J. held that it is legitimate to have regard to the SFRA in interpreting the Bearna Plan. But the SFRA is not a back door to undoing or even paring back the democratic decision of the elected members – however critical the SFRA may be of that decision.

158. To the foregoing one may add the fact that Objective CCF6 unusually provides that “*The relevant lands will be outlined and flagged with a symbol on the land use zoning map and on the GIS*

¹⁶⁹ Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450 §8

¹⁷⁰ §1.4

¹⁷¹ §3.2

system of Galway County Council so that staff and the public are aware of the special conditions/constraints attached” and “A briefing will be provided to relevant staff within Galway County Council on the special conditions and constraints on relevant lands”. These provisions reinforce the impression of Objective CCF6 as attempting to reconcile residential zoning of lands in Flood Zone A. That one should not lightly find, much less strain to find, a conflict within a development plan is perhaps a particularly applicable principle in considering a plan in which it is apparent that the planning authority very deliberately adopted arguably conflicting provisions and so must have considered them reconcilable and has gone to some lengths, here by way of Objective CCF6, to reconcile them. As Simons J. said in **Heather Hill #1**¹⁷², knowledge that certain of the zoning objectives under the Bearnna Plan were contrary to the flood risk management guidelines informs an understanding of Objective CCF6.

159. I am reinforced in this view, though I would take it anyway, by the fact that lawyers take a similar view in interpreting contracts: **Lewison** says¹⁷³ that the terms of a “host”¹⁷⁴ contract prevail, in case of conflict, over the terms of another document incorporated by reference in the contract. And *“When terms are incorporated by reference then the terms of the main, incorporating, document have normally been taken to show the intention of the parties in the case of conflicting terms”*¹⁷⁵.

160. Applying the principles set out above to the interpretation of the relevant elements of the Bearnna Plan, I think the intelligent layperson would first note the residential zoning of the lands on which the pumping station is proposed. That is a clear statement that, in principle, residential development is permitted on that land: it can mean nothing else and must be the starting point of interpretation. Indeed, the weight of that residential zoning goes beyond permission of residential development in principle – Objective RD1 actively supports development of lands so zoned, subject to normal planning, access and servicing requirements. The importance of zoning objectives, in contradistinction to other objectives of a development plan, is generally known even to those without planning expertise and generally understood by the intelligent layperson. S(he) would not know it, but it is useful as a cross-check to note that the importance - “enhanced status”¹⁷⁶ - of zoning as opposed to non-zoning objectives is reflected in S.9(6) of the 2016 Act which forbids the Board to materially contravene zoning objectives while providing an avenue for its material contravention of non-zoning objectives.

¹⁷² §99

¹⁷³ Interpretation of Contracts, 6th Ed’n 2015, §9.12 citing Sabah Flour and Feedmills v Comfez Ltd [1988] 2 Lloyds Rep 18 and Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd [1975] 2 All ER 549, [1975] 1 WLR 1281 at 129 - “Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported.” See also Smo v Hywel Dda University Health Board [2021] IRLR 273.

¹⁷⁴ Word “host” not used by Lewison but see Smo v Hywel Dda University Health Board [2021] IRLR 273.

¹⁷⁵ The Law of Contract (Common Law Series) §3.50 – LexisNexis

¹⁷⁶ Highlands Residents Association v. An Bord Pleanála [2020] IEHC 622 (High Court (Judicial Review), McDonald J, 2 December 2020) citing Simons J. in Redmond v. An Bord Pleanála [2020] IEHC 151

161. The intelligent layperson would next note that certain lands zoned Residential (on which the pumping station is now proposed) are in Indicative Flood Plain A identified in the Bearna Plan. S(he) would, in a general sense, appreciate the incongruity of that coincidence - one need not be a planner or a lawyer to understand that, at least generally, putting houses in a flood zone is not a great idea. The intelligent layperson would also discern that incongruity from the terms of Objective CCF1 and also DMFL1, which makes clear that residential development is generally inappropriate in Flood Zone A. Nonetheless, the intelligent layperson would, as s(he) must, see that incongruity as the conscious choice of the elected members of the Council. Arguably, the members' choice of residential zoning is the more striking and deliberate given the incongruity (also the controversy) attendant on that choice.

162. Having appreciated that incongruity, the intelligent layperson would see Objective CCF6 as an attempt to mitigate it and would interpret Objective CCF6 as such and in the context of the Bearna Plan as a whole – in particular perhaps both the residential zoning and the flood zone designation, Objective CFF1 and DMFL1.

163. In that light, I note that Objective CCF6 is headed “Inappropriate Development on Flood Zones”. Interpreting this heading requires some care. The intelligent layperson may not share the lawyer's caution as to the value of headings in interpreting documents. But s(he) will appreciate in a general sense that headings are a shorthand and typically non-nuanced reference to the subject-matter which follows and are primarily an aid to navigation of a document rather than part of the detail of that subject-matter or central to its interpretation. S(he) will appreciate that the more important text is found beneath the heading. In this case (s)he will also appreciate that, reading the Bearna Plan as a whole, the land-use zoning represents a clear decision that, on these lands, and at least in general terms, residential development is permitted, indeed supported – if conditionally. To put it another way, Objective CCF6 is bespoke to the Burkeway lands. That being the starting point, s(he) will read the heading of CCF6, not as positively asserting that development on Flood Zones is inappropriate in general terms (which it is) but as indicating that what follows provides a means of ensuring that inappropriate development does not occur on these particular flood zones even though zoned for residential development. Counsel for Heather Hill suggested that Objective CCF6 conflicts with the residential zoning. I respectfully disagree. Objective CCF6, in my view, applies – emphatically so - additional conditionality to the residential zoning of this site.

164. And given the residential zoning, the concept of “inappropriate development” used in Objective CCF6 cannot be the full version, as it were, of the general concept of “inappropriate development” used in Objective CCF1 and DMFL1: it would be a nonsense to suggest that, as a matter of interpretation of the Bearna Plan, residential development is generally inappropriate on land zoned residential and so being land on which residential development is to be supported. Rather, the concept of “inappropriate development”, as applicable to lands to which Objective CCF6

applies, relates to specific proposed development found to be inappropriate in a site-specific sense on foot of the steps required by Objective CCF6 and taking a cautious approach¹⁷⁷.

165. As to those steps, in my view Burkeway was correct to, in effect, consider Objective CCF6 with Objective CCF1 and DMFL1 in supplying with the Planning Application the documents contemplated by those objectives, including the SSFRA, a detailed hydrological assessment of the Trusky Stream in the Trusky East Stream Flood Study 2020 and a detailed hydrological assessment of the Site in the Engineering Services Report.

166. One may ask, what, in practical terms was the purpose of these documents when the Bearna Plan had already identified the Flood Zones by which Burkeway was bound – as found by Simons J. in **Heather Hill #1**. The answer depends on the purpose of the identification of the Flood Zones in the Bearna Plan, what the Bearna Plan contemplated as to development on the Indicative Flood Zones and what one means by “bound”. I have adverted to this issue in considering Heather Hill #1. It merits a little further examination.

167. As Simons J. says, and as I agree, a proposing developer cannot revise the location and extent of the Bearna Plan Indicative Flood Zones. And by such designation of the developer’s lands consequences necessarily follow in terms of the application of various objectives (notably CCF6) and other aspects of the Bearna Plan. But the Bearna Plan Flood Zones are explicitly adopted as “Indicative”. That word must mean something. Counsel argued before me the precise meaning of the word “Indicative”. But it seems to me that one need take no more than a general view, as would the intelligent layperson, that the word means that while the zones are immutable as to location and extent, they are indicative in a sense revealed by a consideration of other elements of the Bearna Plan. As I have indicated above they are also indicative in a sense in which this word is glossed by the Flood Guidelines 2009¹⁷⁸ (albeit referring to floodplain maps) - *“Being indicative, such maps only give an indication of the areas at risk but, due to the scale and complexity of the exercise, cannot be relied upon to give precise information in relation to individual sites.”*

168. For example, as to the lands which concern us, the Bearna SFRA which resulted in the adoption of the Bearna Plan Indicative Flood Zones observes that *“Micro-topography at this area would influence predicted flow paths and direction at the site-specific level.”* Perhaps more importantly, the SFRA is a stage 2 SFRA only. It records that Stage 3 would be a *“Detailed flood risk assessment: to assess flood risk issues in sufficient detail and to provide a quantitative appraisal of potential flood risk to a proposed or existing development or land to be zoned, of its potential impact on flood risk elsewhere and of the effectiveness of any proposed mitigation measures.”* No Stage 3 SFRA informed the terms of the Bearna Plan.

¹⁷⁷ Objective CCF6 says that “Any development proposals should be considered with caution ...”

¹⁷⁸ See above

169. In that context and in understanding the word “Indicative”, it is unsurprising that DMFL1 requires an “FRA” – which in context can only mean an SSFRA – as to any proposal to residentially develop a flood zone. It is equally unsurprising that CCF1 requires a SSFRA with such proposals and that Objective CCF6 requires a “detailed hydrological assessment”. All of which Burkeway supplied with the Planning Application. The merits and demerits of those assessments, and their worth when weighed against contrary evidence such as that supplied by Heather Hill are matters for the Board not me.

170. Notably, and as set out above, the Flood Guidelines 2009 state¹⁷⁹ that:

- Development plans will establish the flood risk assessment requirements which may be supplemented by more detailed site-specific flood risk assessment.
- In the case of development on flood zones the risks should be mitigated and managed through location, layout and design of the development to reduce flood risk to an acceptable level.
- Applications for permission for such developments require a Site Specific Flood Risk Assessment.

171. It is clear that, in adopting the Bearna Plan and having complied with their statutory duty to have regard to these Guidelines (as I must presume), the Council members decided, as was their right, to zone these lands residential. That can only be understood as a decision, having had regard to the Guidelines, not to apply to those lands any aspect of the Guidelines inconsistent with such zoning.

172. Accordingly, it seems to me necessary that Objective CFF6 cannot be interpreted so as to provide a “back door” to upset that zoning decision of the members of the Council. That is so even if the authors of the SSFRA and the Chief Executive are correct in the view that the Bearna Plan contravenes the Guidelines. Indeed, one might say that their view, if correct, emphasises that in interpreting the Bearna Plan and in the case of any conflict between the bespoke text of the Bearna Plan and the Guidelines as incorporated into the Plan, the former must prevail.

173. It is important here to acknowledge that the Flood Guidelines 2009 strongly and repeatedly inveigh against development on Flood Zones. For example, *“Planning authorities will ensure that development is not permitted in areas of flood risk, particularly floodplains except where there are no suitable alternative sites available in areas at lower risk ...”*¹⁸⁰. The view that such development is to occur only where there is no alternative, is amplified by the opening words of the next sentence: *“Where such development has to take place ...”*. It is also clear from the Guidelines that they expect – indeed assume - that Development Plans adopted after the Guidelines were published will conform to the Guidelines. That assumption is made even though the statutory context – limited to a *“have*

¹⁷⁹ Page v

¹⁸⁰ Page v

regard to” obligation on Planning Authorities - could not assure such a result, as it did not in this case.

174. Thus, when the Guidelines are incorporated by reference in a Development Plan which itself reflects a departure from the guidance given in the Guidelines, as occurred here, it is predictable that the Guidelines and the Development Plan proper will differ and preferring the terms of the Development Plan, as I think correct, will tend to attenuate the incorporation of the Flood Guidelines 2009.

175. An obvious and relevant example here is that land-use zoning floodplain/Flood Zone lands for residential development, as occurs in the Bearna Plan in respect of lands forming part of the Site, is inconsistent with the proposition in the Flood Guidelines 2009 that *“Planning authorities will ensure that development is not permitted in areas of flood risk, particularly floodplains except where there are no suitable alternative sites available in areas at lower risk ...”*¹⁸¹. At least in this case, such zoning, not merely permissive but supportive of residential development, appears also inconsistent with the application to a development proposal on those lands of those elements of the sequential approach which ask whether residential development on those lands can be avoided or, if not, another more suitable form of development substituted. Put simply, those decisions have already been made in the zoning decision and despite the Guidelines. As I have said, the incorporation of the Guidelines in Objective CCF6 is not a back door to review of that zoning decision.

Inspector on Flood

176. The Board’s Inspector addresses the issue of Zoning/Principle of Development in some detail¹⁸² and, as to the area zoned R and overlaid with Objective CCF6, in which the pumping station is proposed, he says *“The uses proposed are compatible with the R zoning objective, subject to Objective CCF6 being applied”*. More generally as to the site she says: *“Overall, I consider the principle of development is acceptable and in accordance with the zoning objectives, subject to detailed considerations below.”* I see no error in these conclusions.

177. The inspector’s consideration of flooding issues, including the application of the Justification Test, demonstrates that the Inspector considered the relevant issues including but not limited to:

- That the Trusky East Stream Flood Study locates the new pumping station in Bearna Plan Flood Zones A & B but outside the Predictive Flood Extent predicted by Trusky East Stream Flood Study itself.
- The submissions of observers – inter alia as to the history, cause and extent, including locational extent, of flooding in the area and photographic evidence thereof.

¹⁸¹ Page v

¹⁸² §10.2

- The question of application Objective CCF6 and of the Flood Guidelines 2009 – including the application of the Justification Test.

178. The following is a regrettably lengthy¹⁸³ but nonetheless usefully indicative of the content of the Inspector's report in this regard.

§10 - Planning Assessment - §10.8 - "Infrastructural Services including Flooding".

10.8.4 I note the proposed application in its entirety, including all drawings, was circulated to Irish Water, as the body responsible for water and wastewater, for comment and the applicant engaged with Irish Water as part of the pre-application stage, as required by legislation, with a statement of design acceptance issued by Irish Water in relation to this application. I do not have any concerns in relation to Irish Water's ability to assess an application of this scale or to determine whether the water and wastewater treatment options set out are valid or workable. I note Irish Water has issued a statement of design acceptance in relation to the proposed development, and subject to third party consents being in place, considers the network connections can be accommodated.

10.8.5 This application removes the need for the onsite wastewater treatment plant and associated percolation area on the zoned open space lands in Flood Zone A & B currently serving Cnoc Fraoigh. The wastewater drainage infrastructure includes a new pumping station in an area of the site zoned 'R' where the Objective CCF6 applies, as per the Bearna Plan This area is also within Flood Zone A & B, as per map 4 of the Bearna Plan. The applicant has addressed this issue in the submitted SSFRA and Justification Test.¹⁸⁴ The Trusky East Stream Study has been undertaken as part of this application and indicates that the location of the pumping station is outside of the detailed predicted flood extent, i.e. Flood Zone A and B. It is considered that the location of the pumping system is not considered susceptible to flooding and has no impact on the floodplain.¹⁸⁵ The design of the pumping station has been considered in terms of the FFL of the above ground elements and I note the pumping station has been designed with an emergency storage tank providing 24-hour capacity, in accordance with Irish Water requirements and that these measures will mitigate the risk of flooding from the pumping station arising from a potential interruption of service. I note the nature and scale of the works relating to the pumping station and I consider the works are not so significant as to give rise to displacement of flood waters and the below ground element would be sealed. I consider the location and scale of the pumping station, as set out in the submitted reports, to be acceptable at the location proposed. Irish Water has raised no concerns in relation to design and location of the proposed pumping station and has issued a statement of design acceptance in relation to this application. All elements of

¹⁸³The relevant content runs from page 91 to page 104 at §10.8 of the Inspector's report

¹⁸⁴ Emphasis added

¹⁸⁵ Emphasis added

the development will be required to be carried out in compliance with Irish Water Standards codes and practices. Decommissioning methodology and works relating to the existing on-site wastewater treatment plant is addressed within the EIAR (see section 12 hereunder).

10.8.7 The Trusky Stream traverses the site from north to south and discharges to Galway Bay near Bearna Pier. The OPW flood maps database does not indicate any history of flood events in the area, however, photographic and video evidence of flooding in 2015 and 2017 has been submitted within the submissions received.¹⁸⁶ This evidence also formed part of council meetings and discussions on flooding which took place as part of the work on the draft Bearna Plan which was adopted, copies of which are included in the submission from the Heather Hill Management Company CLG. Submissions raise concerns that this evidence was not considered as part of the previous application on this site by the Board and should be considered as part of this application.

Surface Water Management and Flooding Issues

10.8.8 To confirm, I have reviewed all submissions made in relation to the issue of flooding, as well as all other issues, all documentation submitted by the applicant, and by the planning authority, and I have visited the site and the surrounds.

10.8.9 The Strategic Flood Risk Assessment for the Bearna Plan resulted in site specific objectives relating to uses/studies required as part of any development of the land. Some of the lands zoned 'R', as per the Bearna Plan, are subject to Objective CCF6, which requires that the development proposal 'will need to be accompanied by a detailed hydrological assessment and robust SUDS design which demonstrates the capacity to withstand potential flood events to maintain water quality and avoid potential effects to ecological features'. All the lands zoned 'OS'¹⁸⁷ are within Flood Zone A&B and are subject to Objective LU8 – Constrained Land Use Zone ('CL'). DM Guideline FL1 – Flood Zones and Appropriate Land Uses (as set out in the Bearna Plan, Variation 2(a)), applies to lands zoned CL.

10.8.10 An Engineering Report¹⁸⁸ has been submitted with the application. A Site-Specific Flood Risk Assessment (SSFRA) was undertaken by Tobin Consulting Engineers, a Trusky East Stream Flood Study has been undertaken by O'Connor Sutton Cronin as part of the SSFRA, and an Assimilative Capacity Modelling Study of Galway Bay by MSN Hydro has been undertaken.

Flooding Issues

10.8.12 The submitted SSFRA sets out the methodology applied, references the requirements of The [Flood Risk Management Guidelines] Circular PL2/2014 & the associated Development Management Justification Test, background documents are referenced, and

¹⁸⁶ Emphasis added

¹⁸⁷ Open space

¹⁸⁸ This is clearly a reference to the engineering services report.

surveys undertaken outlined. The SSFRA states that it accepts and applies the Indicative Flood Zones identified in the Development Plan, however, in order to ensure the most robust assessment, it was considered necessary to quantify the fluvial flood risk by detailed hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures. The Trusky East Stream Flood Study provides a detailed quantitative appraisal of potential flood risk. It is noted in the flood study that the existing flood maps, which formed the basis of the flood extents for Variation 2(a) of the development plan, did not include detailed flood modelling to determine the Indicative Flood Zones at the subject site. The submitted flood study 'quantifies the fluvial flood risk by detailed and robust hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures'. The analysis identifies the predicted flood extents for the 100-year and 1000-year return period flood events, i.e. Flood Zones A and B, based on a computational modelling. The methodology is set out in the submitted report. The predicted extent of Flood Zones identified by way of this report is mapped against Flood Zones A and B identified on map 4 of the Bearna Plan, with the development layout overlapping both these layers on figure 8¹⁸⁹ and in Appendix E¹⁹⁰ in the submitted report (page 16).

10.8.13 I note a number of submissions question the validity of the baseline information utilised in the modelling within the Flood Study submitted. It is contended that the video and photographic information submitted of flood events in 2015 and 2017 was not fully considered in the model and the assumption in relation to the cause of that flood event is inaccurately identified as being pluvial in nature. I have reviewed observer submissions in this regard, the detail within the Trusky East Flood Study, the Site Specific Flood Risk Assessment and the Engineering Report. I am satisfied that within the reports submitted in relation to flooding, that there is an awareness of the history of flooding on the site and while the photographs referenced in the SSFRA are missing from appendix g, where it is stated they are attached, I am satisfied that the report writer was aware of the previous flood events and, as stated, has taken them into account. I have no issue with the methodology utilised in the submitted SSFRA and The Trusky East Stream Flood Study.¹⁹¹

10.8.14 Section 4 of the SSFRA identified flood risks and mitigation measures. The Trusky East Stream Flood Study, includes a hydrological assessment and modelling of the subject site, considers and addresses the impact of climate change, and includes details of the proposed SUDS design. The Trusky East Stream Flood Study identifies the predicted flood extent for the 1% AEP and 0.1% AEP flood events, based on computational modelling. This updates the information contained in Figure 4 of the Bearna Plan

10.8.15 The SSFRA states all buildings will be located:

- exclusively within lands zoned 'R' (and not subject to Objective CCF6);
- within Indicative Flood Zone C (as identified in Variation No.2(a) Galway County Development Plan 2015-2021 Bearna Plan); and
- outside the predicted flood extent for the 0.1% AEP flood event.

¹⁸⁹ This is clearly a reference to the Trusky East Stream Flood Study Figure 8: Indicative Flood Zones and Predicted Flood Extents

¹⁹⁰ This is clearly a reference to the Trusky East Stream Flood Study Appendix E, Report Drawings

¹⁹¹ Emphasis added

The SSFRA states that uses proposed within Flood Zone A and B comprise (as confirmed by figure 7):

- open space/amenity as per OS zoning;
- open space, car parking, and a wastewater pumping station for the development on land zoned R with objective CCF6.

10.8.16 The applicant states that the uses on the lands subject to CCF6 and R zoned are ancillary to the residential development and are considered highly vulnerable, therefore a Justification Test has been undertaken.

10.8.17 The submitted SSFRA states that the wastewater pumping station will be largely below ground, with associated kiosks above ground, and the ground level at the location of the wastewater pumping station is more than 500mm above the adjacent 1.0% AEP flood level. However, it is stated that none of this area is located within the predicted flood extent (i.e. the flood areas identified within the detailed Trusky East Stream Study) and so it is stated that the proposed works will result in no displacement of flood storage and no further measure is stated to be required to manage fluvial flood risk at the pumping station.¹⁹²

10.8.20 Pluvial flooding has also been assessed. As per the Guidelines, pluvial flood risk is not taken into account in the delineation of flood zones but [flood zones¹⁹³] are a combination of fluvial and coastal risk areas. The area adjoining Cnoc Fraoigh where CCF6 applies was added to the flood zone area as a result of evidence of flooding submitted during the draft stage of Variation 2(a) and informed the flood risk management provisions. This area is subject to Objective CCF6. The SSFRA addresses issues raised by observers in relation to previously observed flooding on the site. The SSFRA considers the flooding in this area to be pluvial in nature. It is stated in the submitted SSFRA that topographical survey information for the existing Cnoc Fraoigh estate and the subject site shows that an area of high ground is located between the southeast corner of the existing Cnoc Fraoigh estate and the Trusky East Stream channel. It states that this high ground is visible in the photographs and would prevent water flowing from the Cnoc Fraoigh estate into the Trusky East Stream.

It is proposed in the SSFRA to re-profile the southeast area of the site as part of the development and it is stated that through the design and layout of the new development road levels, this flooding adjoining the Cnoc Fraoigh estate will be relieved by provision of an overland flow route along new development roads and open space to the stream. I have reviewed all information in this regard, and while residents dispute the cause of past flooding, based on the evidence before me and having regard to the design and layout of the proposed development, I consider that overland flow routes will guide flows away from the existing and proposed buildings and will not result in flooding of Cnoc Fraoigh and I am satisfied based on the Justification Test and engineering reports submitted (see section below), in accordance with The Planning System and Flood Risk Management Guidelines,

¹⁹² Emphasis added

¹⁹³ Words missing from Inspector's report, but context allows me to reliably supply them

that mitigation of the risk of pluvial flooding, in addition to fluvial flooding, has been adequately considered and addressed in the layout and design of the development.

179. The inspector next¹⁹⁴ considers the application of the Justification Test. I need not set it out save to observe that she says the following as to the Sequential Approach and as to her conclusion:

10.8.27 Box 5.1 of the guidelines¹⁹⁵ includes a note which references Section 5.27¹⁹⁶ in relation to major development on zoned lands where sequential approach has not been applied – the Variation to the development plan has considered the guidelines in its zoning and I consider a sequential approach has been adopted in the zoning of the lands in Bearna, with the proposed lands identified for Phase 1 development and their location, which adjoins existing residential development, within the development boundary of the town and proximate to/ within walking distance of the village centre and all its services, with this connection to be improved through provision of a footpath. Various objectives relating to flood risk are included in the zoned areas and these have been fully considered in the submitted documentation.

10.8.29 Overall, having considered all of the information before me, I am satisfied the applicant has adequately addressed the issue of flood risk in the submitted Site Specific Flood Risk Assessment and Justification Test, whereby it has been demonstrated that the proposed development will not increase flood¹⁹⁷ risk to other others¹⁹⁸, through the site design and mitigation measures. To mitigate the potential possible flood risk in the receiving watercourse, the surface water runoff will be reduced to pre-development green-field run-off rates.

180. The Inspector goes on to address flood risk to the development itself (addressed via location and floor levels), “level for level” compensatory flood storage having regard to reprofiling works and SuDS provision.

§12 - EIA - §12.8 "Water" & §12.16 "Reasoned Conclusion"

181. In her EIA, the Inspector considers Water, including flood risk, as follows:

"A summary of the flood risk assessment is set out in section 10.8¹⁹⁹ above and mitigation measures incorporated into the design and layout. It is estimated that the risk of flooding the

¹⁹⁴ From §10.8.22

¹⁹⁵ See above. Box 5.1 of the Flood Guidelines 2009 sets out the content of the Justification Test

¹⁹⁶ i.e. of the Guidelines

¹⁹⁷ The original says “food” which is clearly a typo.

¹⁹⁸ Emphasis added

¹⁹⁹ Planning Assessment - Infrastructural Services including Flooding

*proposed residential development will be minimal, and it is predicted that the development will not increase the risk of flooding elsewhere.*²⁰⁰

*Consideration is given to potential connections to European Sites, specifically at Galway Bay. I refer to section 11²⁰¹ of my report above for further detail in this regard.*²⁰²

There follows a listing of risks and, in turn, mitigation measures to a prediction in the EIAR that:

“..... there will be no net impact on the local hydrological regime, groundwater levels, or groundwater flowpaths during the construction and operational phase of the proposed development. There will be no perceptible direct or indirect hydrological impacts on designated sites, including the Galway Bay SAC²⁰³ or Galway Bay SPA.”²⁰⁴

The Inspector concludes that she has:

“... considered all of the written submissions made in relation to water. I am satisfied that potential effects would be avoided, managed and mitigated by the measures which form part of the proposed scheme, the proposed mitigation measures and through suitable conditions. I am therefore satisfied that the proposed development would not have any unacceptable direct, indirect or cumulative effects, on water.”²⁰⁵

182. In her Reasoned Conclusion for EIA²⁰⁶ the Inspector, inter alia, records the risk of “*Potential effects on water due to the location of residential development proximate to Trusky Stream and risk of flooding*” and concludes that:

“The information submitted in the EIAR and the other documentation submitted with the application regarding the proposed measures to mitigate this impact is sufficient to demonstrate that such measures are likely to be successful in protecting the proposed development from flooding and comply with the justification test for residential development within flood risk zones A and B, as set down in the 2009 Guidelines on The Planning System and Flood Risk Management.”

Application in this Case of the Flood Zones, Sequential Approach and Objective CCF6 – Some Conclusions

183. Counsel for the Board correctly conceded that there is no evidence that the Board, in applying the sequential test in this case, considered the question of avoiding development on the

²⁰⁰ Emphasis added

²⁰¹ Appropriate Assessment

²⁰² §§12.8.6&7

²⁰³ Also, and more accurately, referred to as the Galway Bay Complex SAC

²⁰⁴ §12.8.10 - Emphasis added

²⁰⁵ §12.8.12

²⁰⁶ §12.16

flood plain, even as to the pumping station. He submits that in light of the SSFRA showing no flood risk at that location the question of avoidance did not arise.

184. The Flood Guidelines 2009 say that the sequential approach is a precautionary approach which uses prior identification of flood zones, flood risk assessment and classification of the vulnerability to flooding of different types of development²⁰⁷. Each of these tools were used in the planning application in this case.

185. Thus, I agree with the Board and Burkeway when they say that the sequential approach was applied in the Impugned Permission in that the element of the sequential approach remaining capable of application consistently with the Bearna Plan, i.e. the Justification Test, was applied. Consideration of Sequential Approach questions of avoidance and substitution would have been in contravention of the residential zoning. That is not to say, of course, that elements of the Guidelines consistent with the text of the Bearna Plan need not be applied in application of Objective CCF6.

186. If I am wrong in that regard I take the point made by Burkeway that, as to avoidance, the entire Proposed Development save the pumping station is off the floodplain. True, the question of avoiding putting even the pumping station on the floodplain is not explicitly addressed in the application. Counsel for Burkeway observes that Burkeway must take the Cnoc Fraoigh sewage as it is and, as a function of gravity and the fall of the land to the south, the collection of the Cnoc Fraoigh sewage had to be in that general vicinity at the low point to which it falls. He agreed that there was no finding to that effect but says there was no need for one as it is patently obvious. He also suggests that, to comply with Irish Water standards requiring a pumping station to be at least 15m from the nearest house, it could not be put on Site 121.

187. I accept that it is obvious that the pumping station had to be in the general vicinity of the low point to which the sewage falls. While ancillary works such as the pumping station must be considered residential in terms of high vulnerability to flooding, nonetheless I think there is merit in the idea that locating all the residential units off the Indicative Flood Zones A&B while having to locate the pumping station on the Indicative Flood Zones A&B for “gravity” reasons reflects the sequential approach as *“applicable in the layout and design of development within a specific site at the development management stage”*.²⁰⁸

188. That the pumping station could have been put on site 121 was not pleaded – and specifically not by way of particulars of the alleged failure to apply the avoidance element of the sequential approach. Neither did it feature in the written submissions. Indeed, my review of the transcript confirms that counsel for Heather Hill did not make the point in oral submissions. It seems

²⁰⁷ Flood Risk Guidelines 2009 §3.3

²⁰⁸ Flood Risk Guidelines 2009 §3.2

It was raised - for the first time²⁰⁹ - by me during replying submissions by counsel for the Board. I am relieved to note that I did so expressly as “a bit unfair” and “maybe completely impractical”. Counsel for Heather Hill would have been remiss in not taking up the “judge’s point” and, if criticism is required, no-one but me is to be criticised for its intrusion in the case. But a judge and lawyers in a courtroom scaling maps and notionally relocating development elements is a perilous exercise. I have no technical evidence on the question from any party - which is entirely unsurprising as to a point not pleaded and so a point not requiring evidence or response. My first instincts were correct – it was unfair of me to raise the question whether the pumping station could have been put on site 121. I must ignore it.

189. It is important to state that to embark, as Burkeway did, on compliance with Objective CCF6 is necessarily to accept and have been bound by the Bearna Plan Indicative Flood Zones A&B and their location and extent. Objective CCF6 applies only to lands in Indicative Flood Zones A&B. Yet against a backdrop of Indicative Flood Zones A&B generated by a Stage 2, but not a Stage 3, SFRA, Objective CCF6 requires a detailed hydrological study and an SSFRA is also required. One must ask why?

190. It seems to me that these requirements recognise the indicative status of Flood Zones (though they have served their purpose in requiring further investigation and in that sense have bound, and not been amended by, Burkeway). In this case, these requirements recognise also that the SSFRA was to Stage 2 not Stage 3. That recognition requires more detailed site-specific assessment – much of which would be pointless if its outcome was predetermined as confirming the Bearna Plan Indicative Flood Zones in all respects.

191. Accordingly, I find that it was open to Burkeway to submit with the Planning Application material asserting that more detailed analysis than done in the SFRA demonstrated that the true flood risk differed in location and extent from that depicted on the Bearna Plan Indicative Flood Zones Map. To do so is not to reject the Bearna Plan Indicative Flood Zones, for reasons I have just given. Nor is it inconsistent with the decision of Simons J. in Heather Hill #1. The aspect of Objective CCF6 which Simons J. was considering was the discrete and focussed obligation to do a Justification Test. The Objective CCF6 obligation to comply with the Flood Guidelines 2009 is also mandatory. But to identify an obligation as mandatory is not the same as identifying its scope. The latter identification is an interpretive task, as to which I have set out my views above.

192. Of course, whether the Board accepted on their merits the contents of such documents submitted with the Planning Application or rejected them in favour of submissions by Heather Hill is a matter for planning judgment by the Board in which I may not interfere save for error of law.

²⁰⁹ Day 2 p109

Information Enclosed with the Planning Application

193. Amongst much else, Burkeway enclosed with the planning application various documents which I describe below.

Trusky East Stream Flood Study 2020²¹⁰

194. As noted by the Inspector at §10.8.12, the Trusky East Stream Flood Study ‘*quantifies the fluvial flood risk by detailed and robust hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures*’. It included site inspection, consideration of the OPW draft Preliminary Flood Risk Assessment (“PFRA”) of the area.

195. The Flood Study noted that the PFRA “*modelled only the excess flow in the floodplain and omitted the river channels entirely*” and explained the term “*Indicative*” by stating that PFRA maps “*are developed using simple methods, and generally national datasets, and are hence approximate, and not highly detailed, with some local anomalies*” and that they “*should not be used for local decision-making or any other purpose without verification and seeking the advice of a suitable professional.*” The Flood Study describes the Bearna SFRA, as to the area of the Site, as based on the “*PFRA flood mapping, historical indicators, site walkovers and submissions by members of the public including photographs of flooding*”, states that “*No detailed flood modelling informed the determination of Indicative Flood Zones at the subject site*”. It notes²¹¹ that the SFRA²¹² acknowledges that its compliance with the Flood Guidelines 2009 “*is currently based on emerging and incomplete data as well as estimates of the locations and likelihood of flooding.*” The Flood Study notes that the SFRA is²¹³ a Stage 2 Initial Flood Risk Assessment and not a Stage 3 Detailed Flood Risk Assessment. The latter would “*provide a quantitative appraisal of flood risk*”²¹⁴ and states that, the Bearna Plan “*Indicative Flood Zones alone are insufficient for a detailed assessment of flood risk: predicted flood water levels are required to determine proposed Finished Floor Levels (FFLs) with sufficient freeboard*”²¹⁵.

196. The Flood Study purports to provide the outstanding “*quantitative appraisal of flood risk*” stating:

“1.4.1 Whilst remaining cognisant of the Indicative Flood Zones identified in the Development Plan and bearing in mind the source data for the identified Indicative Flood Zones, it was considered necessary to quantify the fluvial flood risk by detailed and robust

²¹⁰ Exhibit GMG1 Tab 13 - To avoid confusion I repeat that the 2020 Study before me is not the 2018 version which was before Simons J.

²¹¹ §1.3.3

²¹² §1.5

²¹³ I would add “in its own terms”

²¹⁴ Extracts to this point are all from Chapter 1

²¹⁵ §3.5.2

hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures.

1.4.2 The assessment detailed in the current report provides quantitative analysis and predicted flood water levels, for use in scheme design. The analysis identifies the predicted flood extents for the 100-year and 1000-year return period flood events, based on a computational modelling.”

I note that the “*the source data for the identified Indicative Flood Zones*” included the “*emerging and incomplete data as well as estimates of the locations and likelihood of flooding.*” And it must also have included the Heather Hill photographs of flooding which informed the SFRA.

197. Chapter 1 confirms that this was not just a desktop study – it included inspection of the Site and the Stream. Chapter 2 and Appendix C of the Flood Study describe the hydrological assessment in general, technical and mathematical terms, including setting out the relevant formula, inputs and outputs. It identifies the assumptions made for purposes of making those calculations. Chapter 3 and Appendix D of the Flood Study similarly, and in some detail, describe the hydraulic analysis including a description of the computational model the output of which is depicted in Figure 6 below. Chapter 4 applies that output to analysis of flood risk to the proposed development in terms set out below as §§4.16 and 4.17 of the SSFRA.

198. Counsel for the Applicant suggested that the Trusky East Stream Flood Study, in describing Predicted Flood Extent, assumes flood plain re-profiling works by the developer: indeed, that the Notice Party relies on such works in its written submissions. He didn’t refer me specifically to the evidential basis for this assertion, which I cannot uphold. Counsel for the Board suggested the contrary, referring me to the “Compensatory Storage” drawing which he said was “pre-re-profiling”. This issue arose in the context of the view of Simons J.²¹⁶ (with which I agree) that it was impermissible to rely on re-profiling works to revise the Bearna Plan Indicative Flood Zones so that no “inappropriate” or “vulnerable” development would be deemed to occur in the Indicative Flood Zones as revised and so to absolve the developer from the Justification Test. In contrast, here the developer accepts the Bearna Plan Indicative Flood Zones and their consequence in requiring a Justification Test and the application of Objective CCF6. The Flood Study acknowledges, and does not purport to change, the Indicative Flood Zones.

199. In any event, I have failed to confirm counsel’s assertion that the Trusky East Stream Flood Study, in describing Predicted Flood Extent, assumes flood plain re-profiling works. They are not cited in the Hydrogeological Analysis. In considering “Model Extents – Cross Sections”²¹⁷ for purposes of the Hydraulic Analysis, the Study records a survey of the potential floodplain which extends across currently agricultural land on both banks of the river. The survey included detailed

²¹⁶Heather Hill #1 §108

²¹⁷ §3.3.et seq

topographical data of the surrounding lands and details of the existing structures within the study area. Figure 6 – “Plan Layout of River Model Geometry”, while directed primarily at the river channel, shows flood plain contours and is explained as follows²¹⁸:

“The potential floodplain extends across currently agricultural land on both banks of the river. Therefore, the cross-sections used in the model extend beyond the channel itself. Both sides of the river model, therefore, are defined by the ground profile. The layout of the model representing the existing river geometry is shown in Figure 6...”

While the predicted flood extent drawings are superimposed on a drawing of the intended development, it does not appear to me that the predicted flood extents were calculated on an assumption of the intended reprofiling works.

200. The next chapter²¹⁹ describes the Proposed Development. It refers to and locates the proposed pumping station on a map and explicitly “in lands zoned ‘R’ and Objective CCF6, within Flood Zones A&B.”²²⁰ It notes that ground level at the location of the wastewater pumping station is more than 500mm above the adjacent 1.0%AEP flood level and opining that no further measure is required to manage fluvial flood risk at the pumping station. It refers²²¹ to “some” reprofiling for a car park area roughly north of the proposed pumping station location. But as far as I can tell, it does not envisage the specific reprofiling which concerns the Applicants – that of a ridge along the 15m OD contour roughly south east of the pumping station and between the pumping station and the stream – roughly between the area to which objective CCF6 applies and the stream.

201. Chapter 5 – Conclusions – inter alia records that the extent of future floods, i.e. including the effect of climate change, have also been modelled to inform the design of the proposed development and encroachments into the predicted flood extents have been identified²²² and it is proposed to provide “level-for-level” direct compensatory storage to offset loss of floodplain storage.

Engineering Services Report²²³

202. Whereas the Trusky East Stream Flood Study assesses the stream, the Engineering Services Report provides a hydrological assessment of the Site. It considers Surface Water Drainage; Wastewater Drainage; Potable Water Supply and Road Design. It cites, inter alia²²⁴, The Bearna Plan,

²¹⁸ §3.3.3

²¹⁹ Chapter 4

²²⁰ §4.3.2 & figure 9

²²¹ §4.3.2

²²² See fig 6 below. They are not of direct present concern.

²²³ Exhibit GMG1 Tab 11

²²⁴ From a much longer list

Irish Water Code of Practice for Wastewater and the Flood Guidance 2009. Surface Water Drainage and Wastewater Drainage will be separated.

203. As to Surface Water Drainage, the proposed development adopts SuDS²²⁵ such that post-development run-off rates from up to a 1 in 100-year rainfall event, plus a 20% climate change allowance will be maintained at rates equivalent to, or lower than, pre-development levels. The calculations involved are set out and are complex to the layperson but, as SuDS is ubiquitous in new developments of any size, are likely well-understood by experts and are not challenged. Inter alia, two underground cellular storage units to temporarily attenuate surface water flow to the Trusky East Stream will be provided to assist in restricting discharge rates from the development's surface water network to the greenfield equivalent flow rate. The design criteria include River Water Quality Protection; River Regime Protection; Level of Service (flooding) for the site and; River Flood Protection and the report asserts they are met. Satisfaction of the flood criteria as to the Site is described in the SSFRA and satisfaction of the River Flood Protection criterion is described, inter alia by reference to relevant hydraulic modelling calculations of attenuation and flow control facilities set out in some detail.²²⁶

204. As to Wastewater Drainage, the sewers are designed to Irish Water's Code of Practice and Irish Water has confirmed feasibility of connection to its sewer network and provided a Statement of Design Acceptance²²⁷. The intention to decommission the WwTP is cited and it is stated that the proposed wastewater pumping station:

"... will be a Type 3 system (greater than 20nr. houses), which will be designed and installed in accordance with Irish Water's Code of Practice for Wastewater Infrastructure, and is to serve the existing 21nr. residential units along with the proposed single residential unit nr. 121.

The pumping system is to be sited at a distance greater than 15m from any residential property, as noted on the design drawings, and in accordance with Irish Water's requirements²²⁸. It is noted that the proposed location is within the indicative extent of the Trusky East Stream's Flood Extent, as per [the Bearna] Plan, however, a more detailed flood study of the Trusky East Stream's catchment and predicted flood extent indicates that this location is outside of the predicted flood extent. Therefore, the proposed location of the wastewater pumping system is not considered susceptible to flooding, and has no also impact on the floodplain.²²⁹

.....

All proposed wastewater infrastructure is to be carried out in accordance with the Building Regulations Part H and Irish Water's Code of Practice for Wastewater Infrastructure."²³⁰

²²⁵ Sustainable Drainage System

²²⁶ §3.11 & Appendix B

²²⁷ §4.1 & Appendix D

²²⁸ This text is also found in the EIAR Vol 1 Chapter 16 Schedule of Mitigation #61

²²⁹ Emphasis added

²³⁰ Engineering Services Report §4.3

Site Specific Flood Risk Assessment²³¹

205. An SSFRA, prepared by consulting engineers, was submitted by Burkeway with the planning application - as required by the Flood Guidelines 2009²³² and by Bearna Plan objectives CCF1, CCF6 and DMFL1. It records that it was done in accordance with those Guidelines and the Development Plan – of which the Bearna Plan is part. It was informed by, inter alia, site inspection and by Objectives CCF6, LU8 (Constrained Land Use) and DMFL1. It was informed by the Trusky East Stream Flood Study (done by the same firm of engineers) which it describes as including a detailed hydrological assessment of the stream catchment and by the Engineering Services Report (also by the same firm of engineers) which included a detailed hydrological assessment of the Site, a robust SUDS design and addresses Climate Change. It addresses the Flood Zoning of the Site and the vulnerability of the proposed development uses.

206. The SSFRA purports to demonstrate that the proposed development complies with the Flood Guidelines 2009 & the associated Development Management Justification Test and to demonstrate the manner in which the Board should apply that justification test – and do so, on a conservative basis, in relation to the proposed “highly vulnerable” development as a whole and not only those aspects of the development to be in Flood Zones A&B. It purports to demonstrate that the Proposed Development will not have adverse impacts on or impede access to a watercourse, or on floodplains or flood protection and management facilities, or increase the risk of flooding to other locations²³³.

207. Counsel for the Board drew my attention to SSFRA Appendix C – an OPW CFRAM²³⁴ Bearna Site Assessment of 2011 which post-dated the PRFA maps - as confirming the SSFRA assertion²³⁵ that the CFRAM report suggested that the risk of downstream fluvial flooding is as a result of blockage of a small culvert under the R336 Road but “*water would likely flow over R336 and only cause limited property impact.*” In that light, the SSFRA conclusion that the Proposed Development will not increase the risk of flooding to other locations is all the more comprehensible.

208. Notably, having regard to Simons J.’s rejection in Heather Hill #1 of the attempts to amend the Indicative flood Zones and also to regard ancillary aspects of the proposed development as non-residential and so non-vulnerable, the SSFRA²³⁶ recognises that the Proposed Development is partly in Indicative Flood Zones A&B of the Bearna Plan. It records that that part comprises, open space/amenity on lands zoned “OS”; open space/amenity, car parking and a wastewater pumping station ancillary to the residential development – all on lands zoned “R”. As so ancillary, it is considered as “highly vulnerable” development so a Development Management Justification Test is required under the Flood Guidelines 2009.

²³¹ Exhibit GMG1 Tab 12

²³² E.g. page V

²³³ §2.8

²³⁴ Catchment Flood Risk Assessment and Management

²³⁵ §4.1.2

²³⁶ §3.11

209. The SSFRA identifies the Indicative Flood Zones from the Bearna Plan – reproducing the relevant map. The SSFRA also states as to fluvial flooding:

4.1.3 Whilst accepting and applying the Indicative Flood Zones identified in the Development Plan and taking cognisance of the source data for the Indicative Flood Zones, in addition, in order to ensure the most robust assessment, it was considered necessary to quantify the fluvial flood risk by detailed hydrological assessment and hydraulic modelling in order to inform scheme design and flood risk management measures. OCSC undertook a flood study of the Trusky East Stream; report on same is provided under separate cover as part of the current planning application

4.1.4 The assessment detailed in that report provides quantitative analysis and predicted flood water levels, for use in scheme design. The analysis identifies the predicted flood extent for the 1.0%AEP and 0.1%AEP flood events, based on a computational modelling. The analysis shows that, at four locations within the subject site, the predicted flood extent²³⁷ actually extends into areas shown to be within Indicative Flood Zone C in the Flood Risk Management map (Variation No.2(a) Galway County Development Plan 2015-2021 Bearna Plan); these locations are in fact subject to flooding in the 100-year and 1000-year return period events and, accordingly, appropriate mitigation measures will be required – see Figure 7²³⁸.

I reproduce below, as figure 6 of this judgment, SSFRA Figure 7. SSFRA Figure 7 is itself a reproduction of Trusky East Stream Flood Study 2020 Figure 8.

²³⁷ Emphasis added

²³⁸ See below

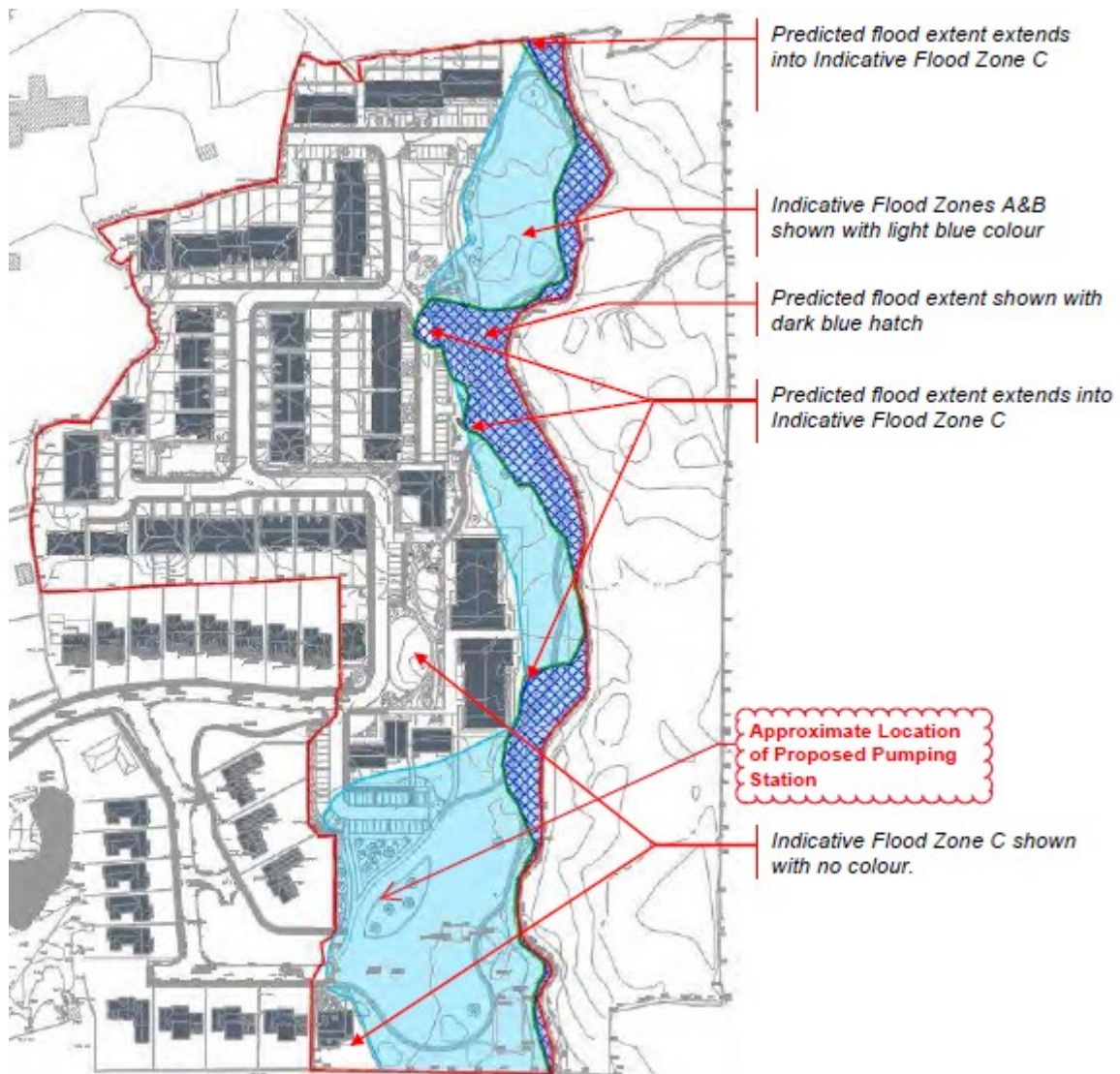


Figure 7: Indicative Flood Zones and Predicted flood extent

Figure 6 SSFRA Figure 7: Indicative Flood Zone and Predicted Flood Extent

- The Indicative Flood Zones A&B in light blue are those adopted in the Bearna Plan.
- The “Predicted Flood Extent” is the phrase used to describe the output of the Trusky East Stream Flood Study 2020.
- I have added an indication of the location of the proposed pumping station. It is inside Bearna Plan Indicative Flood Zone A (light blue) and outside the “Predicted Flood Extent” identified by the Trusky East Stream Flood Study (hatched dark blue).

210. The SSFRA continues:

“4.1.6 There are two areas within the subject site that are zoned ‘R’ where the Objective CCF6 applies. Both of these areas of lands are entirely within Indicative Flood Zones A&B identified in the Bearna Plan. The first, more northerly, of these two areas will be developed for open space amenity only;

4.1.7 *The second, more southerly, of the two areas zoned ‘R’ where the Object CCF6 applies will be developed for open space/amenity, car parking and wastewater pumping station ancillary to the residential development. The wastewater pumping station will be largely below ground, with associated kiosks above ground. However, none of this area is located within the predicted flood extent and so the proposed works in this area will result in no displacement of flood storage. The ground level at the location of the wastewater pumping station is more than 500mm above the adjacent 1.0% AEP flood level; no further measure is required to manage fluvial flood risk at the pumping station.”*

211. As to pluvial flooding, the SSFRA says²³⁹ that the Bearna Plan Flood Risk Management map identifies areas prone to such flooding – but shows none on the Site. The authors’ Site visit confirmed the potential pluvial flood risk as negligible. The SSFRA considers²⁴⁰ the photographic evidence of flooding submitted to the Board in the earlier planning application.²⁴¹ The SSFRA says these show flooding at the southeast corner of Cnoc Fraoigh - its lowest point - and refers to reports of ponding on the Site during heavy rain. SSFRA Figure 10 identifies this photographed flooding as in the low lying area just northeast of Site 121 where the Choc Fraoigh estate road ends - the southern point of the triangular area subject to Objective CFF6 in which the pumping station is to be put. The SSFRA as to topography identifies localised low spots that might become filled with water in heavy rain and high ground, visible in the photographs, between the southeast corner of Cnoc Fraoigh and the Trusky East Stream which would prevent water flowing from the estate to the stream. The SSFRA says that by careful design of new development road levels, this flooding in Cnoc Fraoigh will be relieved by provision of an overland flow route along new development roads and open space to the stream. The SSFRA states that:

“The proposed layout ensures that there are clear overland flow routes and that there are no low points on the site in which run-off can become trapped and pond, causing flooding. Hence the risk of pluvial flooding is negligible and no further mitigation measures are required.”²⁴²

Source of Photographed Flooding

212. It is convenient to dispose here of an issue arguably relevant to a dispute as to the source of this photographed flooding. The “Drainage Strategy Masterplan” and “Wastewater Network Layout” drawings²⁴³ opened to me show the existing Cnoc Fraoigh:

- surface water drainage system terminating at a dead end roughly in the area described in the SSFRA as the location of the photographed flooding.

²³⁹ §4.3

²⁴⁰ §4.3.3

²⁴¹ The SSFRA refers to the photographs as in its Appendix G. But they were not in fact included in the SSFRA. The inspector had the photographs however – see her report §10.8.7.

²⁴² §4.3.4&5 – See also §§6.1.8 & 6.1.9

²⁴³ Respectively drawings 0500 & 0502

- foul water drainage system extending roughly east south east to the “WwTP” (to be decommissioned).

However, the “Existing Site Layout Plan – Demolitions”²⁴⁴ also opened to me shows:

- this location not as a WwTP but as a rectangular storm water²⁴⁵ attenuation tank in the south-east corner of the Site. It can be faintly seen in Figure 1 above as a “broken” rectangle. This may suggest that the Cnoc Fraoigh surface water drainage system does not terminate at a dead end but extends to the attenuation tank, which would make sense.
- the WwTP as a smaller squarish feature at a different location - roughly east north east of the western end of the Cnoc Fraoigh estate road and north north west of the storm water attenuation tank and roughly mid-way between Cnoc Fraoigh and the stream.

This apparent discrepancy between the drawings and any question of effect it might have, or have had, on the understanding of, or disagreement as to, the nature or source of flooding at the location illustrated in the photographs or the view taken by the inspector or the Board of those issues, is not pleaded and was not the subject of written or oral submissions. It was not mentioned at all at trial. Indeed, I may have misunderstood the drawings – seeing a discrepancy where perhaps there is none. It would clearly be wrong of me to allow it to affect my disposal of these proceedings.

213. As to Proposed Drainage Infrastructure the SSFRA states²⁴⁶ that:

- To mitigate potential flood risk in the Trusky East Stream, a SuDS system will reduce surface water runoff to predevelopment green-field run-off rates.
- The pumping station will have duplicate pumps in an alternating duty-standby arrangement and an emergency 24-hour capacity storage tank to Irish Water requirements; these measures effectively mitigate the risk of flooding from the pumping station by interruption of service. (this must refer to flooding by escape of sewage).
- The proposed drainage system achieves self-cleansing velocity throughout, minimising the potential for blockage leading to flooding.
- Assuming “*the proposed drainage system is constructed as designed (in accordance with the relevant standards and regulations), the flood risks arising from the proposed drainage infrastructure will be negligible and no further mitigation is required.*”

214. Chapter 5 of the SSSFRA describes and applies the Development Management Justification Test mandated by the Flood Guidelines 2009²⁴⁷ and by the Bearna Plan – the application of which test in was an obligation identified in **Heather Hill #1**. Conservatively, the Test was applied to the entire development – not just the elements in Flood Zones A & B. Heather Hill, did not challenge the manner of application of the Development Management Justification Test - their criticism was of the

²⁴⁴ Drawing 924- MDO-XX- XX-DR-00201 - Exhibit GMG1 Tab 20

²⁴⁵ Storm water and surface water are the same, at least for present purposes.

²⁴⁶ §4.4

²⁴⁷ Flood Guidelines 2009 §5.15 & Box 5.1

Board's alleged failure to apply the other elements of the sequential approach. So, I will not cite Chapter 5 of the SSFRA in extenso. The following may suffice:

- The subject lands are zoned for the particular form of development in the Bearna Plan.
- As to Bearna Plan Indicative Flood Zones A&B:
 - There are no proposals to raise ground levels.
 - It is not proposed to put buildings in this area.
 - The lands subject to Objective CCF6 and requiring mitigation measures lie entirely in Flood Zones A&B.
- As to the southern of the two Objective CCF6 areas:
 - The pumping station will be largely below ground, with associated kiosks above ground.
 - Ground level at the pumping station²⁴⁸ is more than 500mm above the adjacent 1.0%AEP flood level; no further measure is required to manage fluvial flood risk at the pumping station.
 - None of this area is in the Predicted Flood Extent²⁴⁹ and so works in this area will not displace flood storage.
- A detailed SSFRA:
 - identifies and recommends mitigation measures to avoid increase in flood risk elsewhere.
 - demonstrates measures to minimise flood risk to people, property, the economy and the environment as far as reasonably possible (details are given).
 - measures to ensure that residual risks to the area and/or development can be managed to an acceptable level.
- Conclusion: The proposed development passes the Development Management Justification Test.

Assimilative Capacity Modelling Study²⁵⁰ & NIS²⁵¹

215. Prepared by experts MSN Hydro Ltd., the stated purpose of the Assimilative Capacity Modelling Study²⁵² ("ACMS") was to determine by computer modelling the capacity of Galway Bay to assimilate a pollutant discharge from the Trusky East Stream. No such study had been submitted in the SHD planning application considered by Simons J. in Heather Hill #1. The EIAR²⁵³, summarising the ACMS, says it modelled an accidental spill of 300L of diesel during a 0.1% AEP flood event - assertedly highly unlikely and representing a precautionary approach – and making identified conservative presumptions. The EIAR says of the model: *"The peak of a large flow event will bring the pollutant load to Galway Bay in the shortest time and hence in a highly concentrated mass; this is a conservative approach to specifying the pollutant load"* and *"In order to ensure a robust appraisal of the assimilative capacity of Galway Bay, it was conservatively assumed that the pollutant is not diluted along the stream as it travels from the site to the confluence with Galway Bay. Moreover,*

²⁴⁸ This refers to the plinths on which the kiosks will sit

²⁴⁹ As delineated in the Trusky East Flood Study

²⁵⁰ Exhibit GMG1 Tab 10

²⁵¹ Exhibit GMG1 Tab 19

²⁵² Submitted to the Board as Appendix 1 to the AA Screening Report and Appendix 6-4 to the EIAR

²⁵³ §6.4.1.1

conservative pollutant and hydraulic loads were specified to the model and the model was run for 2 full 14-day spring-neap tidal cycles”.

216. The ACMS states²⁵⁴ that the pollutant plume tends to spread out along the northern side of Galway Bay and is not transported widely. Either no pollutant or very low levels of pollutant are observed in large parts of Galway Bay. Concentrations reduce rapidly with distance from the discharge location and concentrations reduce rapidly with time.

217. The ACMS states²⁵⁵ that, at the stream’s discharge to the bay at Bearna pier, the peak diesel concentration is 5 µg/l - *“a low value and after this peak the concentrations fall off rapidly”*. As I understand, “µg” is a microgramme - one millionth (1×10^{-6}) of a gramme so the peak diesel concentration is 5 millionths of a gramme of diesel per litre of water.

218. Importantly, the ACMS specifically identifies the question of pollutant transport towards the Galway Bay Complex SAC and Inner Galway Bay SPA and located analysis points at the nearest point of each of those sites to the stream discharge to Galway Bay. It concludes that, at the nearest points of those sites, peak concentration was approximately 0.0016 µg/l, with dilution factors soon after of 15,000. As I understand, 0.0016 µg/l equates to 0.000000016 g/l. It is stated that the dilution factors vary with tidal volume and transport of the pollutant plume. Given the figures stated are peaks, the latter observation must refer to variations to lesser pollution states.

219. Even though the criterion for adequacy is not explained in the ACMS (and should have been), given the measurements above, it comes as little surprise, even to the layperson and not discounting the possibility of significance of very small quantities of pollutant, that the ACMS concludes, in the expert opinion of its authors, that it appears that Galway Bay has adequate capacity to assimilate the modelled spillage. Given its context and expert authorship – not least the reference just above to pollutant levels at the nearest points of Galway Bay Complex SAC and Inner Galway Bay SPA, but also on reading the report as a whole - it is clear that this conclusion must be understood as significantly reassuring as to the question of risk to Galway Bay Complex SAC and Inner Galway Bay SPA. No countervailing evidence is before me.

220. However, I imagine it is fair to say that the ACMS was prepared by experts in pollutant dispersal rather than by experts in the ecological significance to European Sites of pollutant quantities as dispersed. And *“Following an extremely precautionary approach”* Galway Bay Complex SAC and Inner Galway Bay SPA were considered to require further assessment of potential for significant impacts²⁵⁶.

²⁵⁴ As summarised in EIA §6.4.1.1

²⁵⁵ As summarised in EIA §6.4.1.1

²⁵⁶ EIA §6.4.1.2

221. This element of the evaluation is provided by the AA Screening report and NIS, which were explicitly informed²⁵⁷ by the ACMS to the effect that, even in a highly unlikely pollution event, very low levels of pollutant had the potential to enter the relevant European Sites via Galway Bay, despite which, and adopting an extremely precautionary approach, the AA Screening Report identified a potential pathway for indirect adverse effects on those European Sites²⁵⁸.

222. Again adopting an extremely precautionary approach, the NIS described²⁵⁹ potential for such effects, including construction phase release of suspended solids or spillage of fuels and other pollutants, and operational phase discharge of untreated foul sewage and wastewater²⁶⁰, and the mitigation thereof²⁶¹ - inter alia considering the Engineering Services Report. The NIS Overall Assessment of Residual Effects²⁶² concludes in “*view of best scientific knowledge, and on the basis of objective information*” and the measures identified to be implemented to avoid potential water pollution, that the project will not have an adverse effect on the integrity of any European site. I have seen neither evidence nor argument to credibly impugn or raise an issue as to that conclusion.

EIAR²⁶³ & NIS²⁶⁴

223. I do not propose a comprehensive account here of the EIAR and NIS. By way of example I note that they do expressly cite the SSFRA and its conclusion flood risks arising from the proposed drainage infrastructure will be negligible²⁶⁵ and the EIAR²⁶⁶ and NIS²⁶⁷ describe the proposed rerouting of the Cnoc Fraoigh sewage to the Irish Water Sewer, via the new pumping station, enabling decommissioning of the WwTP.

²⁵⁷ NIS §3.2

²⁵⁸ NIS §2.1.1 & 2.2.1 & 5.1.2.1

²⁵⁹ NIS §5.1.2.1.1 & 5.2.1.1.2

²⁶⁰ Emphases added

²⁶¹ NIS §5.2.1 et seq

²⁶² NIS §6.3

²⁶³ Exhibit GMG1 Tab 6

²⁶⁴ Exhibit GMG1 Tab 10

²⁶⁵ EIAR §§ 2.4.5 & 8.3.5; NIS §3.2.5

²⁶⁶ EIAR §§4.4.5.1.1 & 4.5.6, 7.4, 13.2.4.4, 13.2.5.1 – and, as to mitigation, at Table 16.1 in terms taken from the Engineering Services Report as set out above

²⁶⁷ As to decommissioning the WwTP at §3.2.1 and as to mitigation, at CEMP Appendix 5 Table 51

Applicant’s Objection – Asserted deficiencies in Trusky East Stream Flood Study, SSFRA & Location of Pumping Station - & comment thereon

224. Heather Hill’s objection to the Board was per a planner’s report²⁶⁸ framed in terms of proper planning and sustainable development and asserting material contraventions of the Bearna Plan. The planner, citing Heather Hill as its source of information on flood issues²⁶⁹, submitted to the Board that the SSFRA ‘Predicted flood Extent’ model²⁷⁰ - on which siting aspects of the proposed development is justified - is at variance with recent fluvial flooding of areas, beyond the ‘predicted’ flood zones, of an extent consistent with the Bearna Plan Indicative Flood Zones. On the basis of such recent flood events, aspects of the proposed development, vulnerable and inappropriate to areas at risk of flooding, *“might be situated in areas in fact subject to periodic flooding”*. *“If this is the case”*, material contravention of Objective CCF6 by reference to the Flood Guidelines 2009 is alleged. Also²⁷¹, *“if as considered by the HHMC based on its understanding, that the areas of predicted flood risk do not reflect the areas of recent flood occurrences then the proposed development could give rise to significant effects to the natural environment and to European sites downstream as a result of potential contaminant discharge arising from surface water and/or wastewater generated by the proposed development.”* It is notable that, in these respects, the report is in rather diffident terms and does not purport to offer the professional opinion of the author on these questions: rather it recites Heather Hill’s instructions and opinion. No doubt that is perfectly proper as, though an expert planner, the author does not seek to establish his expertise in such issues.

225. Heather Hill, per Mr McGoldrick, made lengthy submissions in the planning application. I do not propose to set them all out, but they included submissions that the Trusky East Stream Flood Study and SSFRA were deficient. This submission highlighted photographic evidence of flooding in the south of the Site and the controversy on that issue in the Bearna Plan adoption process – including the views of the Council’s Chief Executive and the Bearna SFRA supportive of the Applicant’s views. Mr McGoldrick disputes the SSFRA’s attribution of this flooding to pluvial flooding in and from Cnoc Fraoigh and ponding on the south east of the site. He says it was fluvial flooding from upstream overtopping of the Trusky East Stream and encloses 2015 and 2017 photographs in support. He disputes the calibration of the Flood Study hydraulic model and cites the photos to the effect that it is clear that the Flood Study submitted does not accurately reflect the flood risk at the Site. This, he says, raises questions about the compensatory measures proposed in the SSFRA and the possibility that the development will increase flood risk to residences downstream. He says it would be irrational and perverse for the Board to accept the Site Specific Flood Risk Assessment when it does not acknowledge the flooding evidence. Mr McGoldrick says the location of the pumping station fails the Flood Guidelines 2009 justification test as it is in Flood Zones A & B.

226. I have set out the Inspector’s report as it bears on these issues raised in Heather Hill’s objection. Heather Hill are entitled to strongly disagree with the Inspector’s analyses and

²⁶⁸ HRA Planning Report (Gary Rowan) 13/11/20 §1.4

²⁶⁹ HRA Report §1.6

²⁷⁰ In fact, the modelling was done in the Trusky East Stream Study and is cited in the SSFRA, but nothing turns on that.

²⁷¹ HRA Planning Report (Gary Rowan) 13/11/20

conclusions in these regards. But it is clear that she explicitly considered and addressed in her report the issues raised in the objection.

227. The Inspector specifically considered²⁷² the proposal to reprofile part of the site and provide an overland flow route to the stream to guide flood waters away from Cnoc Fraoigh – and did do explicitly in the context of the dispute as to the cause of past flooding. She was satisfied that pluvial flooding risk mitigation was adequately addressed in the layout and design of the development. At trial, Counsel for Heather Hill criticised the inspector for not considering the question of site reprofiling and overland flow routes from another perspective: whether they would, by hastening the drainage of the flood plain, increase downstream flood risk. But that issue was not pleaded. It was in effect raised only at trial and by way of legal submission rather than on any evidential basis upon which it could be discerned whether the issue is of any materiality or none in the context of a downstream risk of which the CFRAM report suggested that the risk of downstream fluvial flooding is as a result of blockage of a small culvert under the R336 Road but *“water would likely flow over R336 and only cause limited property impact.”*

Some Conclusions on the “Trio” of Reports & the Adequacy of Information before the Board for Planning, EIA and AA purposes.

228. The SSFRA, Trusky East Stream Flood Study and Engineering Services Report have been fairly described at hearing as a “trio” of inter-related reports. On their face all three were prepared by the same firm of engineers. No-one has suggested they were other than expert and competent. Those engineers were aware of and addressed the photographic and video evidence of flooding circulated by Heather Hill and of the views of the authors of the Bearna SFRA - including as to the significance of that evidence and its implications for the location and extent of the Flood Zones. The inspector was in turn aware of these materials and was entitled to resolve the differences between the sides as she did.

229. To my mind, the trio of reports demonstrates that there is no inconsistency between, on the one hand, accepting the Bearna Plan Flood Zones as indicative and reflective of a Stage 2 SFRA and having prompted the procedural requirements of Objective CCF6, and, on the other hand, performing the more detailed and site-specific analysis on which they embark as required by the Flood Guidelines 2009 and the Bearna Plan itself. And as counsel for Burkeway observed and as Figure 6 above illustrates, the maps submitted to and considered by the Board identify flood zones A and B to their full extent. He says, and I agree that the Bearna Plan Indicative Flood Zones have not been revised by Burkeway, nor could they lawfully have been.

²⁷² §10.8.18

230. To my mind, that more detailed and site-specific analysis would be pointless if its result was predetermined by the location and extent of the Bearna Plan Indicative Flood Zones. That they should differ should be no surprise and does not impugn either the more detailed and site-specific analysis or the Bearna Plan Indicative Flood Zones which triggered the requirement for that analysis.

231. Accordingly, these reports, as in part summarised in Figure 6 above and as differentiating between the Bearna Plan Indicative Flood Zones and the “Predicted Flood Extent”, reflect legitimate expert evidence, on its face consistent with both the Flood Guidelines 2009 and the Bearna Plan as properly understood.

232. The adequacy of information provided in a planning application must be assessed in context and, for planning, EIA and AA purposes, is primarily a matter for the Board – whose expertise as to such technology greatly exceeds the modest extent of my judicial notice. But in my view, as a judge in the planning list with some past experience of planning law at the Bar, I can take judicial notice that sewage pumping stations are, at least in general terms, very common, long-established and well-understood technology. Sewage pumping stations are far from novel in practice or in planning applications. In this case it will handle the domestic sewage of a modest 22 houses. The Inspector and the Board were well aware of the concerns of the Applicants as to the location of the pumping station in the Bearna Plan Flood Zone. The Board was informed that the proposed Wastewater System was to be designed to conform to the Irish Water Code of Practice and had Irish Water design acceptance. Even if not expressly so told in terms, the Inspector was entitled to and did infer from the information provided that the pump chamber would be sealed²⁷³. The Board was informed that two pumps would be installed – operating on an alternating duty/standby basis and that a 24-hour emergency tank would be provided against the possibility of simultaneous failure of both pumps.

233. Though Heather Hill disagrees, it seems to me that the Inspector was entitled to conclude that the pumping station locus would not be susceptible to flooding and that the pumping station would have no impact on the floodplain – as being outside the predicted flood extent identified in the Trusky East Stream Study. She noted that the “trio” of documents which so concluded had acknowledged the photographic evidence of flooding - as had she.

234. As to the risk of sewage reaching the Trusky East Stream, no doubt one can conceive of scenarios in which the duty pump fails and in which the belt of the standby pump fails also and in which the braces of the emergency tank capacity would be defeated and an overflow ensue. One can further conceive of scenarios in which the Management Company regime required by Condition 24 of the Impugned Permission could fail expeditiously to deal with such a defeat - such that sewage would reach the stream in quantity of consequence. But scenarios of failure of environmental

²⁷³ Inspector’s report §10.8.5

protection can doubtless be conceived of no matter what preventative and mitigatory provision is made and the law does not require absolute failsafes or assume a perfect world.

235. Even the most stringent relevant environmental law – under the Habitats Directive - requires no risk to the integrity of European sites to a standard of reasonable, not absolute, certainty and acknowledges the necessity that to some degree, decision-makers will have to make subjective decisions - judgment calls - in such regards. That is not to say the standard is less than stringent – it is stringent - but as AG Kokott said in **Waddenzee**²⁷⁴:

*“107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Article 6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.”*²⁷⁵

236. As to EIA, **Tromans**²⁷⁶ cites a UK circular to the effect that while EIARs must contain the necessary information, *“it is important that they should be prepared on a realistic basis and without unnecessary elaboration”*. As McGovern J said in **Ó Grianna #2**²⁷⁷:

“..... the E.I.A. Directive should be given a purposive interpretation and should not be used to strike down consents where there has, in reality, been substantial compliance with its requirements, having identified with precision what those requirements are. The E.I.A. Directive attempts to achieve one of the objectives of the European Union in the sphere of the protection of the environment and the quality of life but not in absolute terms. It involves striking a balance between the requirements of E.U. law and such discretion as is allowed to Member States in this respect. I entirely agree with the opinion of Advocate General Sharpston in Antoine Boxus and Ors. v. Région Wallonne²⁷⁸ where she stated that the E.I.A. Directive is not about formalism but is concerned with providing effective E.I.A.s for all major projects and with ensuring adequate public participation in the decision making process. The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way.”

²⁷⁴ Case C-127/02 - Opinion 29 January 2004

²⁷⁵ See also R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy - [2018] PTSR 1274

²⁷⁶ EIA 2nd Ed'n §4.40

²⁷⁷ Ó Grianna -v- An Bord Pleanála [2017] IEHC 7

²⁷⁸ Case c.128.09; 19 May 2011

237. In the **M28** case²⁷⁹, as to the respective roles of the Board and the Courts in considering the adequacy of information informing both EIA and AA, MacGrath J cited **Ó Gríanna #2** and also **People Over Wind**²⁸⁰ to the effect that, subject to challenge or irrationality based on an Applicant's having established that the Board "*had before it no relevant material which would support its decision*".

"It has been consistently held in the courts that it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate."

MacGrath J cited also **Craig v. An Bord Pleanála**²⁸¹ to the effect that:-

"The adequacy of an EIS is thus clearly a matter for the Board which is the decision-maker. The assessment of the adequacy of the EIS is a factual matter involving considerable expertise in planning. It is classically especially a matter upon which an expert body must decide. The test for this court in examining such an assessment is thus the O'Keeffe one."

238. In the same vein, in **Ratheniska**²⁸² Haughton J. emphasised that decisions of the Board enjoy a presumption of validity and the court extends curial deference to its decisions as those of a duly constituted expert body charged with determining issues particularly within its own area of expertise. This judicial review is not an appeal on the merits and those merits are for the expert Board, not me - **Ó Gríanna #2**²⁸³. And in **Dublin Cycling**²⁸⁴ McDonald J. expressed the same view – in that case as to AA Screening by the Board as competent authority: "*... these judicial review proceedings are in no sense an appeal from the decision of the Board on that issue. In contrast to the court, the Board is a body with significant expertise and experience of carrying out such assessments.*" So, he considered, an applicant in judicial review had to establish an identifiable failure by the Board in its screening and that such failure was in breach of its legal obligations as to AA screening. And in his conclusion on the AA Screening issue²⁸⁵ McDonald J. was clear that the onus of proving error in screening was on the Applicant.

239. The foregoing observations as to deference to the Board's expertise and the Court's not deciding the merits have particular force where the expert disciplines in question are, in greater or lesser degree, arcane and esoteric. In this case and as the Flood Guidelines 2009 explicitly state: "*The science is complex*"²⁸⁶. This also calls to mind comments by Clarke CJ in **Connelly**²⁸⁷ - an AA case. He was speaking of reasons for decisions but as one of the functions of reasons is to illuminate the prospect of judicial review, his remarks seem to me apt as to the onus on the participating public to

²⁷⁹ M28 Steering Group v. An Bord Pleanála [2019] IEHC 929

²⁸⁰ People Over Wind v. An Bord Pleanála [2015] IEHC 271, Haughton J. §98

²⁸¹ [2013] IEHC 402

²⁸² Ratheniska Timahoe and Spink (RTS) Substation Action Group and Another v. An Bord Pleanála [2015] IEHC 18

²⁸³ Ó Gríanna -v- An Bord Pleanála [2017] IEHC 7

²⁸⁴ Dublin Cycling Campaign CLG v. An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §104

²⁸⁵ §139

²⁸⁶ p7

²⁸⁷ Connelly -v- An Bord Pleanála & ors [2018] IESC 31 [2018] 2 I.L.R.M. 453

take the necessary steps to understand expert reports of importance such that criticisms of them will have substance:

“9.3 But it must also be noted that, in at least certain types of applications for planning consent, the issues involved may themselves be complex. The reasons put forward either in favour or against a proposed project may involve detailed scientific argument or complex calculation. If such issues arise then it will inevitably be the case that the reasons themselves may be complex and scientific. Where a party wishes to engage with the planning process in a case which raises complex issues of that type (whether at the stage of the application for permission or in the context of mounting a court challenge to a permission granted) then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues.”

240. In my view, the Board was entitled to accept, or attribute greater significance to, the content of this trio of reports over the Heather Hill submissions and evidence on the flooding issues.

REPROFILING IN SOUTHEAST OF SITE

241. As I have recorded above, Counsel for the Applicant submitted at trial that, in EIA and AA, the Board had failed to consider that proposed reprofiling in the southeast of the Site and the provision of overland flow routes to relieve the photographed flooding adjoining the Cnoc Fraoigh estate would expedite conveyance of flood waters to the Trusky East Stream and so risk, he says, increased fluvial flooding risk downstream due to increased peak discharges in the stream. The issue was raised by way of legal submission rather than on any evidential basis upon which it could be discerned whether the issue is of any materiality or none in the context of a downstream risk of which the CFRAM report suggested that the risk of downstream fluvial flooding is as a result of blockage of a small culvert under the R336 Road but *“water would likely flow over R336 and only cause limited property impact”*.

242. In any event this case was not pleaded. Counsel for the Board expressly took that pleading point and the point that the issue was not canvassed in the Applicant’s written submissions and was raised for the first time in oral argument. So, I cannot consider the point.

243. The importance of pleadings as circumscribing the scope of judicial review is clear. **Order 84 Rule 20(3)** of the Rules of the Superior Courts provides that:

“It shall not be sufficient for an applicant to give as any of his grounds ... an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground”.

244. The Supreme Court in **Casey v Minister for Housing, Planning and Local Government**²⁸⁸ - a judicial review action - observed that pleadings ensure fairness in the process. They set the parameters of, and define and fix, the issues in dispute which may be determined by the court. They define and limit the jurisdiction of a court because a court obtains its jurisdiction from the issues the litigants, by their pleadings, bring before it for decision. A decision *“made ... without pleading ... cannot be sustained ...”* In an adversarial system this is entirely fair. Each party is free to choose to argue, or not, whatever (arguable) position it pleases. The role of the court is to determine the correctness of the position of one or other party. It is entirely fair to require each party to plead its position, so the other party may have a fair chance to consider and meet it. Also, Baker J. in **Casey** noted the chilling effect of judicial review proceedings on administrative activity. Comparing judicial review to other types of proceedings she observed that *“... the statement of grounds does perform the same function as pleadings generally, and in the case of judicial review, having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as more strict”.*

245. The foregoing was presaged by the Supreme Court in **Keegan v Garda Síochána Ombudsman Commission**²⁸⁹ in which O’Donnell J. concluded that the purpose of pleadings is *“particularly important in judicial review, which is a powerful weapon of review of administrative action”.* In **Ballyboden Tidy Towns Group v An Bord Pleanála**²⁹⁰ Humphreys J. noted that Barniville J. in **Rushe v An Bord Pleanála**²⁹¹, regarded O.84 R.20(3) RSC as the express articulation of the requirement of specificity in judicial review pleadings laid down by Murray C.J. in **A.P. v Director of Public Prosecutions**.²⁹² *“In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground*²⁹³ *upon which such relief is sought. The same applies to the various reliefs sought.”* Barniville J. commented, *“It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O.84, r.20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court.”* He considered this particularly important in *“the complex field of EU planning and environmental law”* such as the Habitats and the EIA Directives.

²⁸⁸ [2021] IESC 42 §22 et seq (Baker J)

²⁸⁹ [2015] IESC 68

²⁹⁰ [2021] IEHC 648

²⁹¹ [2020] IEHC 122

²⁹² [2011] 1 I.R. 79, at para. 5

²⁹³ Emphasis added

246. In **Clifford & Sweetman v An Bord Pleanála**²⁹⁴, Humphreys J. said that *“the pleadings are absolutely vital.”* To *“ensure that there is no doubt, ambiguity or confusion as to what the applicant’s case is before the High Court”*. And *“if there is a potentially viable point, but it isn’t adequately pleaded, then it just isn’t going to be a basis for relief”*.

AA ISSUES

The Case Pleaded

247. The Applicants allege lacunae in the AA. They may rely only on pleaded lacunae. Those, as pursued at trial, relate to:

- Alleged risk that sewage overflows from the pumping station, if it malfunctions, would enter the Trusky East Stream.
- Alleged risk that the digging up of the L1321 to lay the sewer would result in discharge of soil or silt to the Trusky West Stream.

In both cases the alleged resultant risk is, via potential hydrological link, to the Inner Galway Bay SPA and the Galway Bay Complex SAC. In **Heather Hill #1** Simons J. observed that *“..... there is a potential hydrological connection between the application site and the European sites, via the Trusky stream. The stream enters the sea at Bearna pier, some 1.4 km to 1.5 km east of the Galway Bay SAC and SPA”*. This refers to the Trusky East Stream only but both streams share, from their confluence near Bearna, the same potential hydrological connection to the identified European sites.

The Law on AA

248. By Article 6(3) of the Habitats Directive, as glossed by the caselaw, the competent authority/decision-maker in AA must perform AA as to any project *“likely to have a significant effect”* on a European Site and may not grant development consent for a project unless satisfied beyond reasonable scientific doubt that it will not adversely affect the integrity of a European site having regard to its conservation objectives.

249. Unlike in **Heather Hill #1**, where AA was not done and Simons J. quashed the AA Screening for erroneous reliance on mitigation, in the present case AA was “screened in” and done. Though AA

²⁹⁴ [2021] IEHC 459

Screening and AA are distinct processes, the question they pose is ultimately the same. As the EU Commission observe²⁹⁵ the same level of certainty of conclusion - no reasonable doubt as to absence of likely significant effects - is required in both AA Screening and AA. They differ in essence as to the process required to arrive at that conclusion, if it is to be arrived at.

250. As the caselaw has evolved²⁹⁶ it is clear that the requirement for AA is triggered in AA Screening by a possibility (as opposed to a probability) of a significant such effect on a European Site – a low threshold but not of merely “*any effect whatsoever*” having “*no appreciable effect*”²⁹⁷. As AG Kokott said in **Waddenzee**²⁹⁸ “*it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment*”.

251. In **Connelly**, Clarke CJ cited **Kelly** in extenso and identified distinct requirements of a valid AA. I hope I may be forgiven for reconfiguring them slightly in light of the caselaw. The AA must:

1. Identify, by examination and analysis in light of the best scientific knowledge in the field, all aspects of the project capable, by itself or in combination with other plans or projects, of having a significant adverse effect on the integrity of a European site in light of its conservation objectives, the characteristics and specific environmental conditions of the site concerned²⁹⁹, the likelihood of harm occurring and the extent and nature of the anticipated harm³⁰⁰.
2. Make complete, precise and definitive findings by analysis in the light of the best scientific knowledge in the field.
3. Based on those findings, draw complete, precise and definitive conclusions by evaluation in the light of the best scientific knowledge in the field.
4. Based on those findings and conclusions, determine whether no reasonable scientific doubt remains as to the absence of the identified potential effects.
5. If no such reasonable scientific doubt remains, determine that the proposed development will not adversely affect the integrity of any relevant European site in light of its conservation

²⁹⁵ Commission notice: Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC Brussels, 28.9.2021 C (2021) 6913 final p10 Box 1

²⁹⁶ Waddenzee Case C-127/02; Judgment 7 September 2004; Case C 258/11; AG Sharpston in Sweetman, Ireland, et al v An Bord Pleanála, Galway County Council, Galway City Council; 22 November 2012.; Kelly (Eoin) v. An Bord Pleanála & Aldi [2019] IEHC 84, §68(6); Case C-323/17 People Over Wind & Sweetman v Coillte Teoranta: CJEU 12 April 2018; Alen-Buckley v. An Bord Pleanála (No. 2) [2017] IEHC 541; Orleans v Gewest Joined Cases C-387/15 and C-388/15

²⁹⁷ Kelly (Eoin) v. An Bord Pleanála & Aldi [2019] IEHC 84, §68(6)

²⁹⁸ Case C-127/02, §72

²⁹⁹ For the phrase “characteristics and specific environmental conditions of the site concerned”, see Orleans v Gewest Joined Cases C-387/15 and C-388/15

³⁰⁰ For the phrase “likelihood of harm occurring and the extent and nature of the anticipated harm” see AG Kokott in Waddenzee Case C-127/02, §108 & 73 as cited by McDonald J in Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888

objectives, the characteristics and specific environmental conditions of the site concerned, the likelihood of harm occurring and the extent and nature of the anticipated harm.

6. Record the foregoing steps in its determination.

252. Since this case was tried, the Supreme Court (Hogan J.) in **Kilkenny Cheese**³⁰¹ has revisited the requirements for a valid AA by reference to the decisions in **Sweetman & Ireland**³⁰², **Kelly**³⁰³ and **Connelly**³⁰⁴. Hogan J. records that the Board's obligation to perform a valid AA goes to its jurisdiction to grant planning permission and the general test of validity of an AA is as stated in **Sweetman & Ireland – AA**:

“.... cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.... It is for the national court to establish whether the assessment of the implications for the site meets these requirements”.

Heather Hill #1 – AA Screening

253. Having set out the law on AA Screening, Simons J. in **Heather Hill #1** turned to apply it to the facts in the context that the Board had adopted the inspector's AA screening finding in deciding that AA under the Habitats Directive was unnecessary. As required by Objective CCF6³⁰⁵ Burkeway had submitted an ecological impact assessment by the same ecologist who wrote Burkeway's AA screening statement submitted separately. The inspector's AA screening finding, was based on the view, as to potential effects on the Galway Bay Complex SAC and Inner Galway Bay SPA, that *“the only potential pathways for effects on the SPA and SAC are through hydrological connections, i.e. the Trusky Stream discharging to Galway Bay at Bearna”*. The inspector's AA screening finding continued: *There will be no run-off from the site directly to any SAC or SPA. Best practice measures will be undertaken to minimise emissions to the Trusky Stream during the construction and operation of the development. These measures will ensure the protection of water quality and fisheries resources in the Trusky Stream. Emissions into Galway Bay at Bearna from the Trusky Stream will be negligible and any slight emissions that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents.”* Essentially this passage reflected the content of Burkeway's AA screening statement, which had also stated that *“Neither the construction nor the operation of the proposed development will result in any emissions to the identified SACs or SPA. There will be no run-off from the site directly to any SAC or SPA”*.

³⁰¹ An Taisce v. An Bord Pleanála [2022] IESC 8 (Supreme Court, Hogan J, 16 February 2022)

³⁰² Sweetman & Ireland v An Bord Pleanála, Galway County Council and Galway City Council (Case C-258/11, EU:C: 2013: 220) – the Lough Corrib Case

³⁰³ Kelly v. An Bord Pleanála [2014] IEHC 400

³⁰⁴ Connelly v. An Bord Pleanála [2018] IESC 31; [2018] 2 ILRM 453

³⁰⁵ The fourth bullet point of CCF 6 reads: “Any development proposals submitted for this site will require a detailed ecological report(s), carried out by suitably qualified personnel for the purposes of informing Appropriate Assessment Screening”

254. As Simons J. put it, there were two strands to the inspector’s reasoning in AA Screening: (i) best practice measures will minimise emissions into the stream; and (ii) any slight emissions from the stream that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents. Simons J. did not engage in his decision with the second strand (save to discern that it was not the sole reason for the screening decision) as the focus of the dispute in **Heather Hill #1** was the inspector’s reliance on “*best practice measures*”. But as to that second strand it bears observing that an ACMS had not been before the Board in the decision quashed by Simons J.

255. Simons J. held the inspector’s reliance on “*best practice measures*” to have been erroneous reliance in AA Screening on measures in mitigation of risk - “*Insofar as the board thought it necessary to rely on “best practice measures”, it should have proceeded to a stage 2 appropriate assessment.*” Simons J. held that “*The structure of the screening determination, and the fact that the inspector thought it necessary to make reference to “best practice measures”, in what is a very short determination, indicates that the inspector was relying upon the combined effect of the “best practice measures” and dissipation by tidal currents in reaching her determination.*” And “*The reference to “best practice measures” can only be understood as referring to the “mitigation measures” as enumerated in §6 the ecological report.*” Accordingly, “*The screening determination is invalid in that it improperly relied upon these “best practice measures”*” and Simons J. quashed the permission on this account.

256. As stated above unlike in **Heather Hill #1**, in the present case AA was “screened in” and done – and it was proper to take mitigation into account in that AA.

Inadequacy of AA – Scientific Doubt

257. The cases gloss the concept of reasonable scientific doubt in various ways – asking whether a doubt is “real” or whether the decision maker is “convinced” or “certain” as to the absence of risk to the integrity of the European sites in question. While absolute certainty is not required, proof beyond reasonable scientific doubt is. But any doubt must be reasonable, not merely theoretical. In **Sliabh Luachra**³⁰⁶ McDonald J., in rejecting a challenge to a finding in AA discounting the risk of peat slippage noted the applicability of the precautionary principle in Habitats law. Having considered the decisions in **Monsanto**³⁰⁷ and **Waddenzee**³⁰⁸ (which applied the precautionary principle in Habitats law) as to the standard of reasonable scientific doubt, McDonald J. observed that it was stringent but did not require absolute certainty. McDonald J. also observed that “*decisions should not be*

³⁰⁶ Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)

³⁰⁷ Case C-236/01 Monsanto [2003] ECR I-8166

³⁰⁸ Case C-127/02 Waddenzee [2004] ECR I-7448

*made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified.*³⁰⁹.

258. This view seems consistent with the view of the precautionary principle expressed in **Bayer v European Commission**³¹⁰ that “a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.” Nor can adoption or withdrawal of a preventive measure be made conditional on “proof of the lack of any risk, in so far as such proof is generally impossible to give in scientific terms since zero risk does not exist in practice”. Bayer was not a Habitats case, but these views are expressed with reference to the precautionary principle as a general principle of EU law. Similarly, a high level of protection (required in environmental protection by Art 191.2 TFEU) does not necessarily have to be the highest technically possible and institutions may not take a purely hypothetical approach to risk and may not base their decisions on a ‘zero risk’ approach – **France v Commission**.³¹¹ The Supreme Court has expressed similar views of the precautionary principle in **Hygeia Chemicals Ltd v Irish Medicines Board**.³¹²

259. In **Reid #2**³¹³ Humphreys J. considered the question in terms of whether “there was any material before the board to create real doubt”. The words “real doubt” have a useful antecedent in **Mynydd Y Gwynt**³¹⁴ in which it was said, as to the certainty required of a decision-maker in AA, that ““Certain”, here, also has a particular meaning. For a competent authority to “have made certain that [the project] will not adversely affect the integrity of the [European] site”, it must be satisfied that there is no real (as opposed to merely hypothetical) risk to the integrity of the site.” The contradistinction “no real (as opposed to merely hypothetical) risk” seems to me to usefully anticipate the consistency of the views of and language used in **Sliabh Luachra** by McDonald J. and in **Reid #2** by Humphreys J.

Inadequacy of AA – Scientific Doubt – Raising the Issue - Burdens

260. Given the presumptively valid decision by a competent expert authority, given that judicial review is not an appeal on the merits, much less a hearing de novo of the planning application and given that a purely hypothetical approach to risk is not required, it would be no surprise that some, even if relatively undemanding, burden of proof were placed on an applicant in judicial review who asserts failure of the competent authority, in AA or AA Screening, to properly satisfy itself of the absence of reasonable scientific doubt.

³⁰⁹ Citing Case C-236/01 Monsanto [2003] ECR I-8166

³¹⁰ Joined Cases T-429/13 and T-451/13; Bayer CropScience and others v Commission Judgment of 17. 5. 2018

³¹¹ Case T-257/07; Judgment of the General Court (Third Chamber, Extended Composition), 9 September 2011

³¹² [2010] IESC 4

³¹³ Reid v An Bord Pleanála #2 [2021] IEHC 362 §50

³¹⁴ R (Mynydd Y Gwynt Limited v The Secretary of State for Business, Energy & Industrial Strategy [2016] EWHC 2581 (Admin); Upheld [2018] EWCA Civ 231 - [2018] PTSR 1274

261. Heather Hill in this case alleges that the AA by the Board was invalid as it failed to consider two specific risks to European Sites. This it attempts to do solely by way of legal analysis of the documents exhibited and legal argument accordingly. Unlike in **Heather Hill #1**, Heather Hill has in this judicial review adduced no evidence and specifically no expert evidence in these regards. Heather Hill raises these issues at a high level of abstraction - in the sense at least that it does not identify, much less engage with or analyse the significance of, the conservation objectives of the sites in question - much less again the prospect of adverse effect on the integrity of those sites by reference to those conservation objectives. Nor does it identify or engage with the characteristics and specific environmental conditions of the site concerned. Nor does it identify or engage with the question of likelihood of harm occurring and the extent and nature of the anticipated harm. In fact, the Applicant takes its submission no further along the putative sequence of events than to point to the potential hydrological link and assert that the ACMS is not reassuring as it did not model a specifically sewage pollutant. I am reminded of the observation of MacGrath J., obiter, in **M28**³¹⁵ *“that there is much merit in the submission of the notice party that the applicant appears to go no further than raise the fact of a hydrological link between the quarry and the SPA, but without advancing any evidence of any likely effects.”* This raises the question whether and, if so to what extent, an Applicant in judicial review asserting inadequacy of an AA can raise such issues in the manner adopted in this case.

262. As AG Kokott said in **Waddenzee**³¹⁶ of both AA and Screening for AA and as cited by McDonald J. in **Sliabh Luachra**³¹⁷:

“... to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm”.

This is significant in this case as the Board had before it the ACMS and the consideration of that ACMS in the NIS. In my view, on the information before it the Board was entitled to be certain, in the degree required by law, of the absence of adverse effect even in the event of pollution of the Trusky Stream. And no other material was placed before the Board or the court as to the *“conservation objectives”* of either site, *“the characteristics and specific environmental conditions”* of either site, *“the likelihood of harm occurring and the extent and nature of the anticipated harm”* or the significance of any harm to either site or the risk to the integrity of either site by reference to those considerations. Apart from not adducing expert evidence of those issues – as it had in **Heather Hill #1** – Heather Hill did not in these proceedings point to any other evidence before the Board on these issues or address them in submissions.

³¹⁵ M28 Steering Group v. An Bord Pleanála [2019] IEHC 929

³¹⁶ Case C-127/02, §108 & 73

³¹⁷ Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888

263. Hogan J. in **Kilkenny Cheese**³¹⁸ considered how **Sweetman, Kelly** and **Connelly** and the resultant AA regime bear on the approach to proof and evidence in judicial review of an AA. Hogan J. held that the regime:

*“.... does not as such mean that an applicant for judicial review is obliged to adduce scientific evidence challenging aspects of the developer’s NIS or, for that matter, the assessment carried out by the Board’s Inspector. While the legal burden of demonstrating the invalidity of any grant of planning permission in cases arising under the Habitats Directive will always rest with the applicant, the evidential burden rests with the Board to demonstrate that it has conducted an AA which meets the requirements of Article 6(3)”.*³¹⁹

264. By way of elaboration on this view, the Supreme Court in **Kilkenny Cheese** explicitly approved the approach as to onus and evidence (and the substantive decision) of **Humphreys J.** in his two judgments in **Kilkenny Cheese**³²⁰. I understand the approach of Humphreys J. to be as follows:

- The Board is entitled to carry out AA on the materials before it.
- The Board is not obliged to accept an NIS simply because it is uncontradicted.
- An objector may place before the Board materials, including scientific evidence, in an attempt to show a reasonable scientific doubt as to the absence of adverse effect. Or the objector may, without adducing materials, argue to the Board that, on the materials which are before it, a reasonable scientific doubt subsists as to the absence of adverse effect.
- In judicial review, the absence of scientific doubt in AA is normally judged on the basis of the materials which were before the Board. An applicant in judicial review will not succeed in arguing that the Board acted in a way which left open scientific doubt if there was no such doubt on the materials which it had before it.
- In judicial review an applicant can argue that the Board acted in a way which left open scientific doubt by arguing that there was such doubt on the materials which the Board had before it. The applicant need not adduce any additional evidence in the judicial review in order make that argument

265. Since the Supreme Court decision in **Kilkenny Cheese** Humphreys J. in **Flannery**³²¹ referred to after-the-fact expert evidence introduced by the applicants in judicial review regarding points not specifically made to the Board. Citing **Reid #1**³²² Humphreys J. said he had “generally not regarded any new expert evidence as permissible, save insofar as it comes within a recognised category such as by drawing attention to matters that it is contended should have been evident to the board on the face of the material.”

³¹⁸ An Taisce v. An Bord Pleanála [2022] IESC 8 (Supreme Court, Hogan J, 16 February 2022)

³¹⁹ Emphases in original

³²⁰ An Taisce v. An Bord Pleanála - Dismissing the application for judicial review: [2021] IEHC 254. Refusing leave to appeal to the Court of Appeal: [2021] IEHC 422.

³²¹ Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors [2022] IEHC 83

³²² Reid v An Bord Pleanála (No. 1) [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April 2021),

266. As to whether and to what extent an applicant in judicial review may adduce evidence which had not been before the Board, with a view to generating scientific doubt as to adverse effect, the position may await further refinement. Humphreys J. says in **Kilkenny Cheese #1**³²³ that an Applicant in judicial review may not “*reconfigure the evidence*”. In **Reid #1**³²⁴ he said that the issue in judicial review is “*whether there was doubt by reference to the material before the decision-maker, not by reference to new matters the applicant thought of after the event.*” So, Humphreys J. says that if the objector wants the decision-maker to take into account something positive additional to anything the other party is obliged to put forward (whether or not that party actually puts it forward), then the objector must positively raise that additional matter (before the decision-maker) in order to have a case later (in judicial review). He says that if the issue is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process (before the decision-maker) that raises such a doubt, if doubt wouldn’t otherwise arise. That “something” may consist only in argument based on the materials already before the Board or it may include placing additional materials before the Board. But Hogan J. in emphasising that the applicable regime “.... *does not as such*³²⁵ *mean that an applicant for judicial review is obliged*³²⁶ *to adduce scientific evidence challenging aspects of the assessment carried out by the Board’s Inspector*” seems to leave open the possibility that the applicant for judicial review may adduce such evidence and the words “*as such*” may imply that in some circumstances such an applicant is obliged to do so to have hope of success. And that Hogan J. was referring to evidence adduced to the Court, as opposed to material adduced to the Board, is clear from his reference to a challenge to the Inspector’s assessment - the only forum in which the Inspector’s assessment can be challenged is in judicial review. The implication would seem to be that the applicant in judicial review may adduce scientific evidence which had not been before the Board in an attempt to show that the Board ought to have seen a scientific doubt. Of course, in the present case, the Heather Hill adduced no such additional evidence in this judicial review.

267. In **Kilkenny Cheese #1**³²⁷ Humphreys J., cited his own decision in **Reid #1**³²⁸ in which he had upheld the right of an objector to not “*correct the other party’s homework or to point out omissions the correction of which during the process would enable the application (which is being opposed) to be corrected and improved. An objector is entitled to rely on the decision-maker to identify such gaps or omissions and retains an entitlement to complain to the court (for the first time) if that is not done.*” That does prompt the question on what evidential or other basis can the objector, once an applicant in judicial review, “*correct the other party’s homework or point out omissions*”. It must also be remembered that in AA the doubt at issue is specifically scientific. The Board is expert: The Court is not. McDonald J., though in **Sliabh Luachra** considering a risk discounted by an expert as “negligible”, took what seems to me a general view that “*As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk is sufficiently remote to be*

³²³ An Taisce v An Bord Pleanála [2021] IEHC 254 §29

³²⁴ Reid v An Bord Pleanála #1 [2021] IEHC 230 Unreported, High Court, 12th April 2021

³²⁵ Emphases in original

³²⁶ Emphases in original

³²⁷ Dismissing the application for judicial review: [2021] IEHC 254

³²⁸ Reid v. An Bord Pleanála #1 [2021] IEHC 230 Unreported, High Court, 12th April 2021

discounted in the context of an Article 6 (3) appropriate assessment of risk.” If an objector can correct the Board’s homework or point out lacunae for the first time in judicial review, how is the Court, at the disadvantage identified by McDonald J., to discern if the objectors’ criticisms are valid?

268. An NIS is not an encyclopaedia. An objector will almost always be able to point to some fact not recorded or alleged issue not addressed in an NIS. How is the court to discern whether such an absence (to use a neutral term) from the NIS constitutes a “lacuna” of legal significance? The absence of particular information from an NIS does not constitute a lacuna save by reference to the purpose of AA. The Applicant cannot just point to a supposed lacuna in a sense unrelated to a prospect of adverse effects on the integrity of a European Site having regard to its conservation objectives. The difference between a mere absence and a “lacuna” must turn on the question whether it is such as to raise a reasonable scientific doubt as to the absence of adverse effect on the integrity of a European site in light of its conservation objectives and of the characteristics and specific environmental conditions of the site concerned and of the likelihood of harm occurring and the extent and nature of the anticipated harm. Or, conversely, is the absence one likely to have “no appreciable effect” given “it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment”? In a sense, the question posed by an applicant in judicial review alleging a lacuna in AA in the form of an issue allegedly not addressed is an AA screening question. To paraphrase AG Sharpston in **Sweetman & Ireland**: ought the Board have bothered to check that issue? How, and on what materials, is the non-expert court to answer that question without reference to scientific evidence and discern whether such a scientific doubt does or does not exist by reference to such alleged “gap or lacuna” when the premise of the inquiry is that the issue was ignored in the AA?

269. Or does the evidential burden on the Board imply that all an objector need do is point to any absence from an NIS, call it a “lacuna” without any analysis or evidence of its significance by reference to potential adverse effect on the integrity of a European site having regard to its conservation objectives and then adopt the supposed approach of Lyndon Johnson – “Make the Board³²⁹ deny it”? That seems unlikely.

270. It must also be remembered that, by ss 50 and 50A PDA 2000, an intending applicant for judicial review requires leave to seek it and to get that leave must show “substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed” – failing which the Court “shall not” grant leave.³³⁰ And the “substantial grounds” requirement, that the grounds be “weighty”³³¹, imposes a higher burden on an applicant for leave than is imposed in non-planning judicial reviews: **Morris**³³². This clearly requires that, to get leave by reference to alleged inadequacy of AA, the applicant for judicial review must show substantial grounds for contending that the AA

³²⁹ For the avoidance of doubt, it is not suggested that Mr Johnson used the word “Board”.

³³⁰ S.50A(3) PDA 2000

³³¹ *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125; *Morris v. An Bord Pleanála* [2020] IEHC 276 (High Court (Judicial Review), McDonald J, 8 June 2020

³³² *Morris v. An Bord Pleanála* [2020] IEHC 276 (High Court (Judicial Review), McDonald J, 8 June 2020 §11

was inadequate. This must impose a burden of some degree – consistent with Hogan J.’s imposing the legal burden on the Applicant. Indeed, if there was no burden on the Applicant at that point, the leave application would be pointless in AA cases as its grant would be virtually automatic.

271. Of course, it could be suggested that where, as here, leave to seek judicial review has already been granted and there was no application to set it aside, we are past any point at which the Applicant would bear a burden. But that seems inconsistent with:

- the fact that leave to seek judicial review is precisely that – permission to start proceedings as opposed to determination of any issues in those proceedings.
- the general principle of fair procedures (*audi alteram partem*) that decisions made *ex parte* can be revisited *inter partes*.
- the generally applicable presumption of validity of impugned administrative decisions.
- the confirmation by Hogan J. in **Kilkenny Cheese** that the legal burden of proof of invalidity of an AA always remains on the Applicant for judicial review.

272. In **Kelly (Eoin)**³³³ Barniville J. as to AA Screening held³³⁴ that the applicant had *“failed to discharge the onus of proof which rests on him to show that there were gaps or lacunae in the screening report relied on by the Board’s inspector to screen the application for this development for appropriate assessment.”*

273. More generally, the question of the burden on an applicant for judicial review of an AA is to be considered in the context of the observation of McDonald J. in **Sliabh Luachra**³³⁵ to the effect that *“decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified.”*³³⁶ and AG Kokott’s observation in **Waddenzee** that *“it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment”*.

274. All this, set out at perhaps excessive length, raises the question, what, in practical terms, does it mean to say that, as to the validity of AA, the legal burden remains with the Applicant for judicial review but there is an evidential burden on the Board?

275. **McGrath**³³⁷ describes the distinction between the legal burden of proof and an evidential burden of proof.

³³³ Kelly (Eoin) v. An Bord Pleanála & Aldi [2019] IEHC 84

³³⁴ Citing Harrington v. An Bord Pleanála [2014] IEHC 232 and An Taisce v. An Bord Pleanála [2015] IEHC 633

³³⁵ Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019) McDonald J, in rejecting a challenge to a finding in AA discounting the risk of peat slippage and having considered Case C-236/01 Monsanto [2003] ECR I-8166 and Case C-127/02 Waddenzee [2004] ECR I-7448

³³⁶ Citing Case C-236/01 Monsanto [2003] ECR I-8166

³³⁷ McGrath Evidence 3rd Ed. 2020, Chapter 2 - The Burden of Proof §2.02 et seq

“The “legal burden” is a burden of proof properly so called and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. Where the legal burden is borne by a party in relation to an issue, he or she is required to persuade the tribunal of fact to civil standard of proof, in relation to that issue. If the party fails to discharge this burden, then he or she will lose on that issue. It can be seen, therefore, that the legal burden allocates the risk of failure in proceedings.”³³⁸

The “evidential burden”³³⁹ is the burden borne by a party of adducing sufficient evidence to satisfy the trial judge that an issue should be left to the tribunal of fact. The evidential burden performs what is effectively a filtering function and involves a determination of whether a party could possibly succeed in relation to an issue.³⁴⁰

The evidential burden is discharged when the party on whom it is placed adduces sufficient evidence to prevent the trial judge withdrawing the issue from the tribunal of fact. In civil proceedings, the burden will be discharged when a party makes out a prima facie case, i.e. when the evidence adduced is such that the tribunal of fact would be entitled to make a finding in favour of that party. ...³⁴¹

Where a trial judge finds that the evidential burden has been discharged, and a prima facie case made out by the prosecution in a criminal case, it does not follow that the jury must convict if the defence does not call any evidence. The legal burden remains with the prosecution to prove the guilt of the accused beyond a reasonable doubt and it is open to the accused to attempt to persuade the jury that they should not convict.”³⁴²

276. The foregoing as to evidential burden suggests that all the Board need do is show a prima facie case that its AA was valid. But that seems to sit uneasily with Hogan J.’s statement that the evidential burden on the Board is “to demonstrate” that it has done a valid AA – though one can demonstrate something on a prima facie basis. And if the Board does demonstrate – not merely on a prima facie basis - that it has done a valid AA what is left for the Applicant to discharge of his legal burden? For present purposes and perhaps more importantly, that still leaves the question of what, if anything, the Applicant in judicial review must show (to use a neutral word, rather than “prove”) in order to impose the evidential burden on the Board?

277. I do not think the caselaw is directed at licensing applicants to simply point to a hypothetical risk not addressed in an AA and thereby impose a “Johnson” burden on the Board. I bear in mind the observations of O’Neill J. in **Harrington**³⁴³ - a case of allegedly inadequate AA - in which he

³³⁸ §2.02 - The legal burden has been described, in an illustrative phrase, as that upon the party bearing “the risk of non-persuasion” McGrath §2-02 fn2 citing *Hutch v Dublin Corporation* [1993] 3 IR 551 at 558 (per McCarthy J)).

³³⁹ generally referred to in the United States as the “burden of producing evidence”.

³⁴⁰ §204

³⁴¹ §205

³⁴² §206 – Though relating to criminal cases I have set this text out as usefully describing how the respective burdens work in practice.

³⁴³ *Harrington -v- An Bord Pleanála* [2014] IEHC 232

recognised both the onus of proof of illegality is on the Applicant and the duty on the Board to conduct appropriate enquiries in AA and continued:

“But there has to be a reason for those enquiries. In my opinion, such reason must be based on credible evidence. It is not sufficient for an objector to a planning permission merely to make a bald assertion, and no more, and thereby place on the respondent a duty to carry out such enquiries as would be necessary to counter that assertion. It would be unfair to applicants for planning permission if they were put to the considerable expense in meeting an objection to their application for planning permission, in an appeal before the respondents, of having to assemble expert evidence to counter mere assertion by an objector.

I am quite satisfied that the duty of the respondent to make appropriate enquiries does not go so far as to require them to respond to assertions unsupported by any credible evidence.

The making of a bald assertion without any evidence to support it could not be said to give rise to “a scientific doubt” which would require, in the case of a site potentially qualifying as a priority habitat, the respondents to do, by way of enquiry, whatever was necessary to eliminate that doubt. Thus, in my view, the applicant’s reliance upon the extensive line of authority open to the court relating to the obligations of public authority, when confronted with a situation of “scientific doubt” relating to the status of either a “European site” or a site in the process of consideration for such status, is misconceived.”

The foregoing is a description of the process before the Board. And if a “bald assertion” does not suffice before the Board, a fortiori it should not suffice in judicial review.

278. In **Reid #2**³⁴⁴, Humphreys J. identified the test as “*whether the applicant has demonstrated that a “reasonable expert” (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site.*”. This passage, first, reflects the position that in impugning AA, as in all other areas of judicial review of presumptively valid decisions, the onus to demonstrate error lies on the Applicant. The legal burden rests with the Applicant. While the “reasonable expert” standard may not, strictly, require expert evidence, or any evidence, of the applicant in judicial review, it is easy to see how in practice and in most cases, it could most obviously be met by such evidence.

279. It seems to me that to resolve the foregoing authorities is to acknowledge, that, as Humphreys J. says, the validity of the AA is in general to be judged in judicial review on the basis of the evidence which was before the Board. And an Applicant for judicial review generally may not adduce new factual evidence as to scientific doubt. But an Applicant for judicial review may adduce expert opinion evidence that, on the basis of the material which was before the Board, the Board

³⁴⁴ [2021] IEHC 362

ought to have had a reasonable scientific doubt as to adverse effect. But even to this limitation on adducing new factual evidence there must be exceptions. For example, if the allegation is that the Board failed to have regard to best scientific knowledge, presumably the Applicant can place before the Court what it alleges is in fact the best scientific knowledge, thereby to demonstrate that the Board failed to take it into account.

280. And where, as here, the allegation is that the AA contained a lacuna, not in the evaluation or analysis of a risk recognised in the AA, but by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the Applicant to persuade the court that the putative risk is not merely “hypothetical” or “conceivable” but is one with which the Board should have “bothered”. That may be a light burden but, being a burden nonetheless, presumably must involve at least some consideration of the questions of the “conservation objectives” of the site “the characteristics and specific environmental conditions” of either site, “the likelihood of harm occurring and the extent and nature of the anticipated harm”. An applicant is entitled to attempt to make such cases on the basis of legal argument alone but, given the essentially scientific nature of the inquiry as to doubt, is likely to run an appreciably higher risk of failure than if (s)he does adduce expert evidence.

The AA Done & its Adequacy

281. Having in mind, in particular, McDonald J. as to theoretical risk, I put to counsel for Heather Hill that to undermine an AA there had to be a realistic threat to European sites. He replied that the absence of such a risk had not been so obvious that the AA Screening in **Heather Hill #1** had survived challenge. But the focus of the judgment in **Heather Hill #1** was not on the presence or absence of risk but on the error in taking mitigation into account in AA Screening in purporting to demonstrate the absence of risk. And the second plank of the inspector’s view in **Heather Hill #1** – that pollution would dissipate in Galway Bay - was not informed, as was the AA in this case, by an ACMS. So, I do not think Counsel’s skilful reply, though initially impressive, on analysis answers my question.

282. The Impugned Permission, as to AA, records that the Board was satisfied that it had sufficient information before it to complete an AA and adopted the AA in the Inspector’s Report as based on a complete assessment of all aspects of the proposed project.

283. The inspector notes³⁴⁵ that Burkeway had submitted both an AA Screening Report and an NIS, both supported by associated reports including ecological surveys, an expert Assimilative Capacity Study of Galway Bay³⁴⁶, the SSRA, the Trusky East Stream Flood Study, the Engineering Services Report and a CEMP³⁴⁷. The AA Screening Report concluded that AA was required as to the

³⁴⁵ §11 et seq

³⁴⁶ Appendix 1 to the AA Screening Report

³⁴⁷ Construction and Environmental Management Plan

Galway Bay Complex cSAC and the Inner Galway Bay SPA only and the NIS was submitted accordingly. The Inspector was satisfied that the information before her allowed for a complete examination and identification of any potential significant effects.

284. The inspector recounts the AA Screening report in terms which indicate consideration of the Trusky East Stream. But she does not by name refer to the Trusky West Stream. I got some impression indeed that “Trusky West Stream” was a name understandably adopted to identify an otherwise innominate stream for convenience in these proceedings - as opposed to representing common usage. But I may be wrong. In any event, nothing turns on that as in her section on Third Party submissions she describes comments from observers, including the following³⁴⁸:

- *“A tributary of the Trusky Stream runs along the L-1321 and the site for the footpath, road realignment and sewer connection. The environmental impacts and impacts on Galway Bay SAC, of the construction of the footpath have not been assessed.”*
- *“A significant tributary of the Trusky Stream runs along the L1321 and the site for the footpath, road alignment, and sewer connection. It crosses the L1321 underground (twice). The tributary is connected to Galway Bay SAC. The application does not assess the impact the construction of the footpath (or sewer connection) will have on the Galway Bay SAC. Undeniable evidence of flooding has been provided”*

285. The inspector, in her section on AA, returns to the observers’ comments as they relate to European Sites³⁴⁹. She cites, inter alia, their comments as follows:

- Potential impact from flood risk and pumping station on downstream designated sites has not been adequately assessed.
- WwTP and potential impacts on Galway Bay SPA³⁵⁰ should untreated waste flow from the pumping station into the SPA.
- Impact of the construction of the footpath and sewer connection on L1321 on the Galway Bay SAC.
- Surface water runoff from works to L1321 and potential impacts on Galway Bay.

It is clear, therefore, that the Inspector was aware, both generally and in the specific context of AA, of the question of untreated waste flow from the pumping station into the SPA (and by implication the SAC). And remembering that the Inspector was in possession of the Bearna Plan Flood Risk Management Map excerpted at Figure 4 above, she can only have understood the observers’ comments as to risks at the L1321 and as to the “*significant tributary of the Trusky Stream*” as referring to the Trusky West Stream.

³⁴⁸ Inspector’s report §7.2 p37 & 41

³⁴⁹ Inspector’s report §11.3.11 – I have reordered the list for exposition purposes

³⁵⁰ Also referred to and more accurately as the Inner Galway Bay SPA

286. The inspector accepts the AA Screening report to the effect that there is no direct, but is potential for an indirect, hydrological link to Galway Bay SAC and Inner Galway Bay SPA, the qualifying interests/conservation objectives of which the Inspector briefly describes. Inter alia, it is noted that *“Construction works could result in water quality issues”*. This phrase is broad enough to encompass the intended works on the L1321 and in the Cnoc Fraoigh estate. In any event, having identified those risks as to the Trusky East Stream, and having noted in her report that she had allegedly similar risks brought to her attention as to the Trusky West Stream (albeit as to far less extensive nearby works) it is difficult to conclude that the inspector ignored them, not least as the potential hydrological connection to the European sites is essentially the same for both streams.

287. The conclusion of the AA Screening report, Table 1 Screening Summary Matrix, and possibility of significant effects as to the Galway Bay Complex SAC, as recorded by the Inspector³⁵¹, was that the ACMS demonstrates that even in a highly unlikely pollution event, very low levels of pollutant have the potential to enter this designated site via Galway Bay. However, adopting an *“extremely precautionary approach”*³⁵², a potential pathway for indirect effects on a number of aquatic QIs of the Galway Bay Complex SAC has been identified via the Trusky Stream in the form of deterioration of surface water quality resulting from potential pollution associated with the construction and operational phases of the development. A very similar conclusion is recorded as to Inner Galway Bay SPA. It does seem that the Matrix refers to only the Trusky East Stream. In agreement with the AA Screening report, the Inspector’s AA Screening determination³⁵³ is that AA is required as to the possibility of significant effect on the Galway Bay Complex SAC and the Inner Galway Bay SPA.

288. The Inspector then moves to AA and considers the NIS³⁵⁴ – again as informed, inter alia, by the SSFRA and the ACMS. Of the latter, she states: *“The stated purpose of this study is to assess the capacity of Galway Bay to assimilate a potential pollutant discharge from the proposed development to the Trusky Stream, which drains the proposed SHD lands.”* She summarises the ACMS as follows:

*“A model was constructed and a hypothetical oil spill from the site during a high rainfall event with no mitigation measures analysed to see what impact it would have on three European Sites (Inner Galway Bay SPA, Galway Bay Complex SAC, and Black Head-Poulsallagh Complex SAC). Based on the analysis arising from the model it is concluded that the study demonstrates that even in a highly unlikely pollution event, very low levels of pollutant have the potential to enter designated sites via Galway Bay.”*³⁵⁵

³⁵¹ §11.3.13 et seq

³⁵² Matrix at p116 of Inspector’s report

³⁵³ §11.4

³⁵⁴ §11.5 et seq

³⁵⁵ §11.5.3

289. The Inspector briefly summarises the content and conclusion of the NIS that: *“in view of best scientific knowledge, on the basis of objective information that the Project will not adversely affect the Qualifying Interests/Special Conservation Interests associated with any European Sites, including the following: Galway Bay Complex SAC Inner Galway Bay SPA”*³⁵⁶.

290. The Inspector next sets out her AA³⁵⁷. Inter alia, and as now relevant, she states that:

- *All aspects of the project which could result in significant effects are assessed and mitigation measures designed to avoid or reduce any adverse effects are considered and assessed.*

I observe that, viewed in light of her recitation of the objections cited above as they relate to the works on the L1321, the phrase *“all aspects of the project”* seems apt to include consideration of those works.

- The European sites in question are the Galway Bay Complex SAC and Inner Galway Bay SPA.
- *“The main aspects of the proposed development that could adversely affect the conservation objectives of the European sites assessed include: Construction related pollution events and/or operational impacts on water quality of the Trusky Stream from surface water.”*

I observe that the inspector does not mention potential sewage pollution here but does do so in her substantive consideration of potential operational phase impacts.³⁵⁸

- *“.. there is no direct hydrological pathway from the site to European Sites. The hydrological pathway to the nearest European Site involves travelling circa 690m down the Trusky Stream and a total distance of at least 1.5km through the open waters of Galway Bay to the Galway Bay Complex SAC and Inner Galway Bay SPA”*. She describes this as a potential pathway for indirect [effects]³⁵⁹ on those sites but adopts the description of the consequent AA as based on an *“extremely precautionary”* approach.

291. Given the terms of the Heather Hill challenge, I will set out in extenso the Inspector’s consideration of Potential Impacts³⁶⁰:

“Potential Construction Phase Impacts”

“The construction of the development will involve excavations and earth moving which creates the potential for pollution such as the generation of suspended solids and the potential for spillage of fuels associated with the refueling of excavation machinery. There is

³⁵⁶ §11.5.5

³⁵⁷ From §11.6

³⁵⁸ Inspector’s report §11.6.12 – see below

³⁵⁹ The word “effects” does not appear, but its omission is clearly a typo and the meaning is clear.

³⁶⁰ Inspector’s report §11.6.9 et seq

also a risk of surface water runoff from bare soil and soil storage areas during construction works.

The Trusky stream is separated from the development by a natural vegetation buffer, with only the proposed outfall works occurring adjacent to the stream. The stream discharges to Galway Bay approximately 690m downstream of the development, approximately 1.5km to the west of Galway Bay Complex SAC and Inner Galway Bay SPA.

Notwithstanding the result of the Assimilative Capacity Modelling Study which demonstrated that even in a highly unlikely pollution event, very low levels of pollutant have the potential to enter designated sites via Galway Bay, an extremely precautionary approach has been adopted in relation to the potential for the release of suspended solids or spillage of fuels and other pollutants which could potentially affect the water quality of Galway Bay Complex SAC and Inner Galway Bay SPA. In the absence of mitigation, and following an extremely precautionary approach, there is potential for adverse effects on a number of QI features which may affect the overall integrity of the identified European Sites.”

“Potential Operational Phase Impacts³⁶¹

During the operational phase and in the absence of mitigation measures, there is potential for deterioration of water quality as a result of untreated surface water run-off from the proposed development. In addition, the proposed development will result in the production of foul sewage and wastewater, which could, if discharged untreated, result in the deterioration of water quality in the Trusky Stream, which following the precautionary principle, provides a link to the identified European sites of Galway Bay Complex SAC and Inner Galway Bay SPA. In the absence of mitigation, and following an extremely precautionary approach, there is potential for adverse effects on the integrity of the identified European sites.”

292. The Inspector concludes her AA³⁶² to the effect that it has been ascertained that the proposed development, individually or in combination with other plans or projects would not adversely affect the integrity of the Galway Bay Complex SAC and Inner Galway Bay SPA, or any other European site, in view of the sites Conservation Objectives. This conclusion is stated to be based on:

- A full and detailed assessment of all aspects of the proposed project including proposed mitigation measures and ecological monitoring in relation to the Conservation Objectives of Galway Bay Complex SAC and Inner Galway Bay SPA.
- Detailed assessment of in combination effects with other plans and projects including historical projects, current proposals and future plans.
- No reasonable scientific doubt as to the absence of adverse effects on the integrity of Galway Bay Complex SAC and the Inner Galway Bay SPA.

³⁶¹ Inspector’s report §11.6.12

³⁶² Inspector’s report §11.6.28

293. The Board, as competent and expert decisionmaker performed AA and in doing so adopted the Inspector's report and has concluded in a presumptively valid decision, that there is "No reasonable scientific doubt as to the absence of adverse effects on the integrity of Galway Bay Complex SAC [and] Inner Galway Bay SPA".

AA – Sewage Pipe on the L1321

294. As part of her AA, under the heading "Mitigation", the inspector does consider the Trusky West Stream, though not by that name, and she does so in the specific context of the objections as to the risk posed by works on the L1321 as follows³⁶³:

"Concern has been raised that the works proposed along the L1321, which include the construction of a footpath and sewer connection under the L1321 have not considered the potential impact on the Trusky Stream and consequential impact on the Galway Bay SAC. I note the Trusky Stream is located east of the L1321 traversing the application site, with a tributary also to the west of the L1321. From the EPA and information submitted relating to a permitted application south and west of the L1321, it appears that the Trusky Stream traverses the L1321, which the applicant also refers to on the submitted drawings, where it is stated that the presence of the culvert under the existing road will be confirmed prior to commencement of any works to verify surface water drainage design. The L1321 currently discharges surface water via what is described in the submitted RSA Report as 'over the edge' drainage into the existing verges, which will be removed with the proposed footpaths and associated works. Detailed surface water drainage design relating to the footpath and associated road works are proposed to be applied at detailed design stage, which will be subject to condition, should the Board be minded to grant permission. The proposed works to the road are relatively minor and given the contained nature of the work, along a metalled³⁶⁴ road with no direct in-flow to either stream, no likely significant effects are predicted to occur from such works. Any surface water as may arise during the construction phase would be very minor and once in place, surface water will be managed by a drainage system. There is no uncertainty as to the operation of such a standard system. I note the results of the submitted Assimilative Capacity Modelling Study (by MSN Hydro Environmental Engineering Consultants, dated September 2020) which assessed the capacity of Galway Bay to assimilate a potential pollutant discharge and demonstrated that even in a highly unlikely pollution event, very low levels of pollutant have the potential to enter designated sites of Galway Bay Complex SAC and Inner Galway Bay SPA via Galway Bay."³⁶⁵

295. Counsel for the Board submits that that assessment meets Habitats Directive requirements and the conclusion that there are no likely significant effects from those works explains and justifies why they are not separately treated of in the Inspector's subsequent section on EIA: the EIAR is

³⁶³ Inspector's report §11.6.20 et seq

³⁶⁴ sjc

³⁶⁵ Emphasis by underlining added

required to describe likely significant effects. The Board has concluded that this is not a likely significant effect.

296. I agree with that submission by Counsel for the Board. Here, the inspector clearly considered the question of potential risk posed by the works on the L1321 to the European Sites via the “tributary” - the Trusky West Stream - and the mitigation of any such risks. The inspector explicitly considered that the pipelaying on the L1321 would be “*relatively minor*” and “*contained*” such that “*no likely significant effects are predicted*”. That is a judgment within the competence of the Board and the inspector, to which I defer. Such works can only be described as works of a kind with which the Board and its inspectorate must be very familiar. However, and for what it is worth, I think I can properly take judicial notice that pipelaying in a public road is relatively routine, well understood by contractors and construction professionals and can be relatively easily done and managed taking reasonable and predictable precautions. While it is for the Board, not me, I confess that the resultant conclusion, that from these relatively minor and contained works “*no likely significant effects are predicted to occur*”, comes as no surprise to me.

297. In addition, the inspector clearly considered the ACMS reassuring in undermining the practical reality of the potential hydraulic link to the European Sites. That seems to me a matter for her judgment and the Board’s. For what it’s worth it also seems sensible inasmuch as the approach, analysis and mitigation requirements which the potential hydraulic link prompted were recorded as “*extremely precautionary*”³⁶⁶ by reference to the possibility of risk posed by the main construction works. In that context, it seems to me entirely unsurprising that she would be reassured by the ACMS as to the question of risk posed by the “*relatively minor*” and “*contained*” pipelaying works on the L1321.

298. The ACMS modelled a diesel spill as opposed to a spill of construction spoil, silt or the like from the digging of the trench for the pipelaying. But that study was clearly done by experts in contemplation of a project in respect of which the question of a spill of construction spoil, silt or the like had been acknowledged as arising. I have been invited by the parties, respectively to opposite effects, to consider that spill of construction spoil, silt or the like can be assumed to be more or less pollutant, than a diesel spill. No doubt any such conclusion, either way, could turn on many variables such as the volume of the spill, its duration, the potency of the pollutant weather conditions, flow rate of the stream and no doubt others. I respectfully decline all such invitations. In my view the Board, as a tribunal expert in the conduct of AA, was entitled to and did consider the ACMS reassuring as to the question of spills of potential pollutants from the L1321 pipelaying works to the Trusky West Stream.

299. The question can be taken further. The obligation was to consider significant risks: by my calculation the nearest point of the pipe to be laid in a cut trench in the metalled surface of the

³⁶⁶ §11.6.11

L1321 will be roughly 2km from the nearest point of a European site - of which 2km about 1.4 km is in the open water of Galway Bay. I am again reminded of the observation of MacGrath J., obiter, in **M28**³⁶⁷ *“that there is much merit in the submission of the notice party that the applicant appears to go no further than raise the fact of a hydrological link between the quarry and the SPA, but without advancing any evidence of any likely effects”*.

300. As I have said, it does not seem to me that Simons J. in **Heather Hill #1** specifically attributed importance to a very similar hydrological connection via the Trusky East Stream: his criticism was that its importance was ruled out in AA screening (not in AA) unlawfully on the basis of mitigation measures. Also that was in the context of considering the risk posed by of a major housing development on a greenfield site adjacent and on the flood plain of the Trusky East Stream - as opposed to a single pipe to be laid in a trench to be cut in an existing metalled road. Nor did the Board or Simons J. in **Heather Hill #1** have the benefit of the reassuring ACMS of Galway Bay.

301. Without finding an onus on Heather Hill to produce expert evidence, I can envisage that my analysis might have been different had expert evidence contradicted the inspector. But as the evidence and argument stand – both having regard to what was before the Board and what it decided and in particular as the argument does not address conservation objectives, the characteristics and specific environmental conditions of the sites concerned, the likelihood of harm occurring and the extent and nature of anticipated harm - I see no reason to conclude that the Board erred in this regard.

AA – Risk to the Trusky East Stream

302. According to the Applicant and as to the Trusky East Stream, the risk is supposedly posed by the prospect that, in the pumping station, not merely one pump but both will fail and that the 24-hour holding tank will be defeated such that an overflow to the flood plain of sewage of 22 houses will enter the Trusky East Stream in sufficient quantities before the overflow is found and stopped such that, having travelled 690 metres to Galway Bay and through 1.5km of open water in Galway Bay to the edge of the European sites, inevitably being diffused and diluted en route as demonstrated by the ACMS, the sewage could adversely affect either of the European sites in their integrity having regard to their conservation objectives (which the Applicant has not identified or addressed). On the basis that such a proposition, merely by being stated, suffices to raise a reasonable doubt, I am invited to hold that the Board, in the presumptively valid exercise of its statutory competence as an expert decisionmaker, could not properly have concluded to a standard of reasonable scientific doubt that the project would, in respect of that asserted risk, not have an adverse effect on either of the two European sites in question. It appears to me that McDonald J.’s observation in **Sliabh Luachra** that *“decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified”* accurately describes the

³⁶⁷ M28 Steering Group v. An Bord Pleanála [2019] IEHC 929

approach to risk which the Applicants invite me to take. I refer again to the views of O’Neill J. in **Harrington**. I respectfully decline the Applicants’ invitation.

303. On the facts of this case, I gratefully adopt the view of McDonald J., that *“As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk is sufficiently remote to be discounted in the context of an Article 6(3) appropriate assessment of risk.”* While there must be a limit to that deference, I do not consider that it has been reached in this case. By reference to the question posed in **Reid #2** by Humphreys J., I do not see that the applicant has demonstrated by evidence or argument that a *“reasonable expert”* could have a reasonable scientific doubt in this regard.

EIA ISSUES

304. Essentially, Heather Hill applied its AA arguments also to EIA.

EIA – Sewage Pipe on the L1321

305. I have considered above the Inspector’s treatment for AA purposes of what she describes as the relatively minor and contained works involved in laying this sewer. Counsel for the Board submits that that treatment for AA purposes illuminates the reason for and justifies the absence of explicit consideration of the issue for EIA purposes: simply put, by reason of these relatively minor and contained works there were no likely significant effects on the environment requiring consideration and the issue had been adequately considered in the Inspector’s treatment of the AA issue. In my view, reading the Inspector’s report as a whole, the EIA is not incomplete in this regard and an argument to the contrary is formalistic in the sense deprecated by AG Sharpston in **Boxus**³⁶⁸ by McGovern J. in **O’Grianna # 2**³⁶⁹ and McDermott J. in **Fitzpatrick**³⁷⁰.

EIA – Risk to Trusky East Stream

306. I repeat here as to EIA the views and conclusions I have expressed above as to AA regarding the alleged risk of sewage overflows to the Trusky East Stream and so reject the Applicant’s case in this regard.

³⁶⁸ Antoine Boxus and Ors. v. Région Wallonne

³⁶⁹ O’Grianna v. An Bord Pleanála (No. 2) [2017] IEHC 7

³⁷⁰ Fitzpatrick -v- An Bord Pleanála [2017] IEHC 585 (High Court, McDermott J, 12 October 2017)

307. I have already dealt above also with the point raised at trial as to alleged downstream flood risk due to the ground reprofiling and the provision of overland flow routes to relieve the flooding photographed by the Applicant.

308. Also and as recorded above, in her Reasoned Conclusion for EIA purposes³⁷¹, the Inspector recognises, inter alia, *“Potential effects on water due to the location of residential development proximate to Trusky Stream and risk of flooding”* and states that the information submitted as to mitigation demonstrates likely success in *“protecting the proposed development from flooding and comply with the justification test for residential development within flood risk zones A and B, as set down in the 2009 Guidelines on The Planning System and Flood Risk Management.”*

Comprehensibility of EIA Information & Data

309. Counsel for Heather Hill asserts that under the EIA Directive, the information and data supplied by the developer must be in a form the public can understand – by which I believe he meant, understand without expert assistance. He cites **Nordrhein-Westfalen**³⁷². Neither that proposition nor its specific breach were pleaded and it did not seem to be proffered as a stand-alone argument. I am not entirely sure how counsel mapped that proposition onto issues specific to this case or alleged deficiencies in the information provided by Burkeway. I do not see that the issue properly arises and reject the point on that account. However, lest I am wrong, I will address it briefly.

310. At a general level, that the information and data supplied by the developer be in a form the public can understand is consonant with the right of public participation. However there is an inevitable tension between that desideratum and the reality that projects requiring EIA are often highly complex (for example, Annex 1 to the EIA directive lists nuclear power stations as requiring EIA). As anyone who has read EIARs will know, even a relatively simple residential development, as this case demonstrates, requires often highly technical contributions in many and varied expert fields. The notion that their contributions can be made adequately to their purpose - for example, of a high level of environmental protection - yet in a form completely comprehensible to the intelligent layperson without expert assistance is unrealistic. For example, in the present case the ACMS presents readily comprehensible conclusions but they are necessarily and properly based on highly complex analysis and computer modelling. The same can be said for the Trusky East Stream Flood Study based on hydrological assessment and hydraulic modelling. The competent authority is properly required to be expert precisely so that it can assess such complex information – if needs be retaining consultant expertise. That tension and reality are recognised and addressed (if inevitably imperfectly) in the stipulation in the EIA Directive that an EIAR contain a non-technical summary. To state the obvious, it must be both a summary and non-technical. Its purpose is clearly to assist the

³⁷¹ §12.16

³⁷² Case C-535/18

layperson but its very name recognises that the remainder of the EIAR will be more detailed and is likely to be technical in varying degrees and so comprehensible to the layperson in varying degrees.

311. **Nordrhein-Westfalen** is authority that, by reference to Article 5 of the EIA Directive, the developer must supply “*in an appropriate form*” the information and data necessary to the assessment and that such information and data must enable effective public participation and enable the public to get an “*accurate impression*” of the effects of the project. It cannot be “*incomplete*” or “*scattered incoherently across a multitude of documents*”. Interestingly, the CJEU in that case interpreted Article 5 as requiring that information and data be provided “*within the limits of what may reasonably be required of a private operator*”. And clearly the EIAR must translate the information and data into findings and conclusions comprehensible to the public. Members of the public need not accept and can interrogate those findings and conclusions and the information and data underlying them. But **Nordrhein-Westfalen** is not authority that such information, data, findings and conclusions must be such that the public can interrogate them without expert assistance. That is generally very desirable and, in particular cases, may be possible. One might argue that as a matter of law any such possibility must be realised. And gratuitous impenetrability would not impress. But, as the premises of expertise include skills and the capacities of judgment not held by laypeople, it is clear that there can be no general proposition of law that such information, data findings and conclusions must be such that the public can interrogate them without expert assistance.

312. As Clarke CJ in **Connelly**³⁷³ observed as to the understanding of reasons in a passage I have already cited but bears repeating and which to me seems to apply more generally to public participation in the planning process:

“... in at least certain types of applications for planning consent, the issues involved may themselves be complex. The reasons put forward either in favour or against a proposed project may involve detailed scientific argument or complex calculation. If such issues arise then it will inevitably be the case that the reasons themselves may be complex and scientific. Where a party wishes to engage with the planning process in a case which raises complex issues of that type .. then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues.”

313. Perhaps in a clear case of unnecessary incomprehensibility of information a remedy might ensue but that does not arise in the present case.

³⁷³ Connelly v An Bord Pleanála [2018] IESC 31

The SSFRA and Trusky East Stream Flood Study “Data” issue

314. Heather Hill raised in oral argument an issue that the SSFRA and Trusky East Stream Flood Study failed to provide the “data” required by the EIA Directive - alleging that only outputs, not inputs, were provided. On that basis, counsel said the EIA did not “*identify, describe and assess the impacts*” of the development and so was not the “*complete assessment*” required by the Directive. This point as to data not provided is similar to but somewhat different from the more general point just addressed above as to the comprehensibility of data as provided.

315. At one point in submissions counsel for Heather Hill said, “*It is an incorrect input, leading to an incorrect output.*” In fairness to him, I may be citing that observation shorn of context. In truth, I think his point was not the positive assertion that the inputs were wrong but was rather that, not having sight of them, the Applicants couldn’t interrogate whether they were right. But for the avoidance of doubt there is no evidence that inputs to the SSFRA and Trusky East Stream Flood Study were wrong. Nor was there any evidence that data was, as counsel for Heather Hill suggested, “*plucked from the air*”.

316. The legal context is that recital 32 of the EIA Directive records that “*Data and information*” in the EIAR “*should be complete and of sufficiently high quality*”. The operative articles of the Directive do not specifically mention data but Article 3 requires that EIA “*identify, describe and assess in an appropriate manner*” the effects of a project. By Article 6 the public’s right of effective public participation includes that of access to information – but specifically “*the information gathered pursuant to Article 5*”. Article 5 and Annex IV impose requirements as to the “*information*” in, and the “*completeness and quality*” of, an EIAR. Article 5 sheds light on the role of a competent authority such as the Board in that it must, if requested, “*scope*” EIAR as to the “*level of detail of the information to be included*”. So it is clear that the requirements for detail are functional not infinite and scoping implies entitlement of a competent authority to make judgements as to what information is required – and, by necessary implication, what is not required. By Article 8a development consent must include a reasoned conclusion³⁷⁴ on the significant effects of the project on the environment, taking into account the results of its examination of the EIAR and other information provided by the developer³⁷⁵ and the information provided via public consultation³⁷⁶ and where appropriate, its own supplementary examination.

317. I reject Heather Hill’s argument in this respect.

- a. First, no allegation of such data deficiency was pleaded and that suffices to dispose of the issue. However, I will address it further.

³⁷⁴ Referred to in EIA Directive Article 1(2)(g)(iv)

³⁷⁵ In accordance with EIA Directive Article 5(3)

³⁷⁶ in accordance with EIA Directive Article 6

- b. Second, the assertion was made only by way of legal argument that these reports were incapable of proper interrogation by Heather Hill due to failure to provide data. No evidence was adduced to that effect – or even that Heather Hill had in fact failed in an attempt to comprehend or interrogate the reports or of any prejudice resulting. No evidence was adduced that an engineer could not have comprehended or interrogated the reports.

It is not clear to me that no inputs were provided or that specific inputs were not provided such as rendered the information which was provided incapable of proper interrogation. I confess to having found Heather Hill's submission in this regard theoretical rather than functional.

Insofar as counsel for Heather Hill made the argument specific, it related to the application of the Institute of Hydrology Report No. 124 Method of calculating peak flows in small river/stream catchments. It requires inputs to a complex mathematical formula as described at Appendix C to the Flood Study. While the Appendix is entitled "IH124 Outputs" it clearly identifies the inputs such as catchment area, Standard Annual Average Rainfall and the Catchment Wetness Index. The values of each are given and I see no reason to hold that they were incapable of interrogation. Likewise, the "Manning's N" input values used in the channel flow analysis are given. And Heather Hill adduced no evidence that specific inputs were missing or that those given were incapable of interrogation.

- c. Third, output is "data". And relentlessly requiring inputs can be a never-ending inquiry as, often, inputs are themselves the output of prior inputs. Indeed, I don't think Counsel for the Board was unfair in suggesting that Heather Hill's complaint about failure to identify the inputs became a complaint about the lack of information about how the inputs were arrived at. EIARs need not explicitly go back to basic research and Newton's Laws.
- d. Fourth, I refer again to the law as to adequacy of information supplied by a developer and the Board's role in deciding on its adequacy as set out in the materials considered above.³⁷⁷
- e. Fifth, counsel for Heather Hill agreed with me that he was saying that complete EIA essentially required that the Board should have been in a position to, first, get all the data which had been input to the model; second, interrogate the presumptions made in respect of that data; third, run the model itself; and fourth, see if the same outputs resulted, and if it disagreed with any of those, as it were, processes along the way. He cited **Case C-50/09**³⁷⁸ for that proposition. It obliges a competent environmental authority to "*undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project*". While **Case C-**

³⁷⁷ Tromans, Waddenzee Ó Gríanna #2, M28, People Over Wind, Craig, Ratheniska, Connelly.

³⁷⁸ Commission v Ireland Case c-50/09

50/09 certainly imports a significant and demanding obligation, it must be understood in terms of Article 3 of the EIA Directive which required assessment *“in an appropriate manner, in the light of each individual case”* and Article 5 which recognises the exercise of judgment as to the level of detail required. I have not before heard it suggested that, as the submission of Counsel for Heather Hill seems to me to imply, in respect of every expert report in any discipline – or at least every expert report questioned by an objector – the Board should in effect embark on a reconstruction of the report from its base data – starting by seeking to verify that data by, for example, conducting its own site investigations. Consideration of even a reasonably simple EIA and the variety, and the number, of contributing expert disciplines, will quickly reveal Counsel’s prescription as one for unnecessary, costly and wasteful duplication of effort and for paralysis in decision-making. It has a logic, but a logic carried to formalistic and highly impractical, time-consuming and burdensome excess - to no real purpose. As McGovern J. said in **Ó Gríanna**³⁷⁹ citing **Tromans**, *“...the principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible”*. No doubt, in a particular instance, the Board may consider it necessary to interrogate a particular report especially closely and perhaps retain an independent expert for the purpose. But that is not a general necessity and whether it is necessary in a particular instance is a matter for the Board, whose expertise encompasses the recognition of such necessities. While I would not rule out a Court’s differing from the Board in such a decision, such differences would be exceptional. I need not consider what criteria might apply to such a question as in this case I simply see no basis in the evidence or legal argument for such a course. Nor do I see any basis for a referral to the Court of Justice on this issue – as counsel for Heather Hill suggested but he did not develop that proposition.

- f. I have not overlooked that Heather Hill cites **Nordrhein-Westfalen**³⁸⁰ as to Articles 5(3)(c) and 6 of the EIA Directive requiring the developer to provide the data required to identify and assess the main effects which the project is likely to have on the environment. One purpose of this requirement is to enable effective public participation in EIA by way of conveying *“an accurate impression of the project”*³⁸¹ and the data must be accessible, not scattered incoherently across the file. I do not see that Heather Hill has shown a deficiency in this regard in this case. And Heather Hill has adduced no evidence that it was even discommoded in finding, much less failed to find, any data which was on the file or discommoded in participating in the planning and environmental process as a result. The argument was high-level and theoretical and based on legal submission not evidence. It is not open to an applicant, by reference only to a legal analysis of the file done after the Impugned Permission was granted, to argue that had it gone looking for such data while participating in the process, it would have been so discommoded. Nor was there any clarity in Heather Hill’s argument as to what in substance was the data that was missing or scattered or how its absence or inaccessibility undermined the identification and assessment of the main effects which

³⁷⁹ Ó Gríanna -v- An Bord Pleanála [2017] IEHC 7 (High Court, McGovern J, 18 January 2017)

³⁸⁰ IL & Others v Land Nordrhein-Westfalen Case C-535/18

³⁸¹ IL & Others v Land Nordrhein-Westfalen Case C-535/18 §84-86, inter alia

the project is likely to have on the environment. As counsel for the Board observed, it is permissible for an applicant in judicial review to adduce expert evidence to establish that there is a gap in the information which was before the Board. That has not been done in this case.

- g. Neither have I overlooked that on this issue the Applicant cites **Altrip**³⁸² as to the burden of proof in a challenge to an EIA in some respects being on the competent authority not the challenger. But Altrip related to very particular aspects of German law which made standing to litigate dependant on proof of impairment of a right of the challenger³⁸³ and on a finding, as to causation, that an alleged procedural defect in EIA could have caused the substantive development consent decision to be different than it would have been but for the procedural defect. The CJEU in Altrip held that on such a causation issue the burden of proof cannot be on the challenger. I cannot see that as a general proposition as to burden of proof in EIA cases generally or, in any event, as applicable to this issue. In my respectful view, MacGrath J. was correct in **M28**³⁸⁴ and Noonan J. was correct in **Aherne**³⁸⁵ in seeing the onus being on the Applicant in challenging the adequacy of an EIA. Article 5(3) is directed at ensuring the “completeness and quality” of an EIAR. In **Holohan**³⁸⁶ AG Kokott said: “For the purposes of a judicial challenge to a development consent on the basis of an infringement of Article 5(3) of the EIA Directive, this means that an applicant must show which potential significant effects of the project concerned the developer has not adequately assessed and discussed” and she described this as an “onus”.

In **Halpin**³⁸⁷ Simons J. stated that “An applicant bears the onus of proof in judicial review proceedings, and the Applicant in the present case has failed to discharge this onus.” He considered that proposition unaltered by Altrip, which concerned the separate question whether an applicant must demonstrate that the decision would have been different but for a procedural error.

In **Ardragh Wind Farm**³⁸⁸ Simons J. cited Altrip for the unsurprising proposition that an applicant for judicial review need not prove that a procedural error affected the substantive outcome of the decision-making. But he added “there is nevertheless a minimum standard which must be met.” He would have refused relief, it seems as a matter of discretion “on the basis that the Developer has failed to put forward even an arguable case for saying that the outcome of the decision-making before An Bord Pleanála might have been different had the (allegedly omitted) EIA been carried out.” By that, I understand Simons J. to indicate a low-bar onus on the Applicant to show the possibility that the decision might have been different but for the error – if not as a

³⁸² Gemeinde Altrip v Land Rheinland-Pfalz (2013) C-72/12, ECLI:EU:C:2013:712, [2014] PTSR 311, [2013] All ER (D) 102 (Nov).

³⁸³ As envisaged by Article 10a of the Directive

³⁸⁴ M28 Steering Group v. An Bord Pleanála [2019] IEHC 929 (High Court MacGrath J, 20 December 2019)

³⁸⁵ Aherne -v- An Bord Pleanála [2015] IEHC 606 (High Court, Noonan J, 6 October 2015)

³⁸⁶ Holohan v An Bord Pleanála ECLI:EU:C:2018:649, EU:C:2018:649, [2018] EUECJ C-461/17_O

³⁸⁷ Halpin v. An Bord Pleanála [2019] IEHC 352 (High Court, Simons J, 24 May 2019)

³⁸⁸ Ardragh Wind Farm v An Bord Pleanála [2019] IEHC 795 (High Court, Simons J, 22 November 2019)

formal requirement for a finding of illegality, at least as against the risk of refusal of certiorari on a discretionary basis.

318. While I reject this “data” issue on pleadings grounds, as I hope the foregoing demonstrates, I would also reject it on substantive grounds.

DECISION INCONSISTENT WITH HEATHER HILL #1 - GROUND 6

319. The Applicants plead in Ground 6 that the Board failed to make the Impugned Permission in accordance with law – in particular the judgment in **Heather Hill #1** - in three respects.

320. The Board, in its written submissions, points out that Heather Hill did not address Ground #6 in its written submissions.

Failure to Treat Ancillary Works as Residential

321. First, the Applicants plead failure to treat ancillary development such as car parking and domestic sewers as residential works and hence vulnerable and unsuitable in a flood plain. I see no basis for that assertion. As is clear, the entire development, indeed not just that in the Objective CCF6 area but even that outside Flood Zones A&B, was subjected to the Justification Test set out in the Flood Guidelines 2009, with the application of which Heather Hill takes no issue.

Failure to Treat the Flood Zones as those defined in the Bearna Plan

322. Second, Heather Hill plead failure to treat the flood zones as those defined in the Bearna Plan³⁸⁹. I have explained above why that assertion is incorrect. Briefly put, such Flood Zones are indicative and not definitive as to the actual extent of flood risk and in this case served their function, together with Objective CCF6, of requiring the more detailed studies contained in the “trio” of documents described above.

³⁸⁹ The Statement of Grounds refers to the Local Area Plan. There is none. The reference is clearly to the Bearna Plan and in the Applicant’s favour I read it as such.

Failure to address the Method of Decommissioning the WwTP

323. Third, Heather Hill plead that the Impugned Permission is invalid because the Board failed to address the method of decommissioning the WwTP. They plead that the application documents say the existing sewers will be connected to the new pump and rising main before decommissioning, that the old plant will be filled with concrete and that this will avoid any risk of pollution. They plead that the application documents do not address:

- The risk of a discharge when disconnecting the existing sewers and reconnecting them to the proposed pumping station;
- The risk of a discharge of material already within the treatment plant prior to disconnection.

324. No basis was laid in evidence or argument for a belief that any more detailed treatment of the issue in the application was required, that the supposed risks identified had any reality, or that they could not reasonably be considered to have been in contemplation in the application document's assertion of avoidance of a risk of pollution. Significantly, this issue was not argued in the Applicant's written submissions nor was it pursued orally at trial.

CONCLUSIONS

325. I would like to thank all counsel for their helpful and erudite submissions.

326. For the reasons set out in (considerably) more detail above, I respectfully reject Heather Hill's challenge to the Impugned Permission and refuse the reliefs it seeks. More specifically:

- a. I reject the challenge based on **want of consents or title**. Burkeway had adequate consents to validate the making of the planning application as neither frivolous or vexatious. That does not imply that those who consented, or Heather Hill, have consented also or must consent to the development works and the proper forum for resolving the title dispute as to the beneficial ownership of the Cnoc Fraoigh Estate roads is in the Circuit Court proceedings, not before the Board or this Court.
- b. I reject the allegation of material contravention of the Bearna plan based on alleged **failure to apply the Flood Guidelines 2009** as incorporated into Objective CFF6 of the Bearna Plan. Inter alia, on a proper interpretation of the Bearna Plan, the Board did not fail to apply the sequential approach found in the Flood Guidelines 2009.
- c. I reject the allegation, by reference to Heather Hill #1, of **failure to accept the Bearna Plan Indicative Flood Zones**. Burkeway did not attempt to amend them but accepted and applied them in their function of requiring application of the Justification Test and

prompting more detailed and site-specific consideration of flood risk. If there is to be a point to such site-specific consideration, and not least given those Flood Zones are indicative, it should be no surprise that site-specific conclusions may differ from the Indicative Zones as to flood risk. The view taken of any such difference is a matter for the Board not the courts.

- d. I reject the challenge based on alleged inadequacy of **EIA or AA** as to the risk of sewage pollution of the Trusky East Stream by reason of **failure of or flooding of both sewage pumps** and associated emergency storage tank. I consider that the Board was entitled to conclude beyond reasonable scientific doubt that no adverse effects on the integrity of European Sites in view of their conservation objectives would occur by reference to such a risk. Heather Hill's assertion of such doubt was, to quote McDonald J., made "*on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified*".
- e. I reject the challenge based on alleged failure to consider in EIA or AA the possibility that the laying of the **sewer in the L1321 Road** will pollute the Trusky West Stream and thence European sites in Galway Bay. The inspector did consider that risk and deemed the works minor and contained and found that no likely significant effects are predicted to occur from those works. Again, Heather Hill's assertion of such doubt was made "*on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified*".
- f. I reject, as not pleaded, the challenge based on alleged failure to consider the effect of **reprofiling works and creation of overland flood routes** on the risk of downstream flooding of the Trusky East Stream.
- g. I reject the challenge, by reference to Heather Hill #1, based on alleged **failure to treat ancillary works such as car parking and domestic sewers as residential works** unsuitable to a flood plain. The Application and the Board clearly treated all elements of the development as residential and hence highly vulnerable for flood risk assessment purposes. This assertion was without basis.
- h. For the reasons set out above I reject as not argued or substantiated the challenge based on alleged failure to consider **risks in decommissioning the WwTP**.
- i. For the reasons set out above I reject the issues canvassed above as to the **provision and comprehensibility of data** provided by the Burkeway in the planning process.

327. As this judgment is delivered electronically I will list the case for mention with a view final orders on 4th April 2022.

David Holland

16/3/22