THE HIGH COURT

PLANNING AND ENVIRONMENT

[2024] IEHC 599

RECORD No. 2022 / 437 JR

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

AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT, 2016

BETWEEN:

PAUL LEECH AND FRANK McDONALD

Applicants

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

HPREF HSQ INVESTMENTS

Notice Party

Judgment of Ms. Justice Emily Farrell delivered the 12th day of November 2024:

Introduction:

1. An application was made to An Bord Pleanála (ABP- 311591-21) for permission for a development comprising five blocks, primarily of residential use, which range in height from

3 to 18 storeys over a double basement at the Heuston South Quarter, St John's Road West/Military Road, Kilmainham, Dublin 8.

2. The site is within the designated Strategic Development and Regeneration Area SDRA 7 – Heuston Station and Environs and is zoned with Zone Objective Z5. The objective of City Centre - Zone Z5 is set out at para. 14.8.5 of the CDP as follows:
"*To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity. The primary purpose of this use zone is to sustain life within the centre of the city through intensive mixed-use development.*"

3. The site of the proposed development is approximately 1.08ha and forms part of the wider Heuston South Quarter urban block which has been partly built upon and is bounded by Military Rd. to the east, St. John's Road West to the north and by the grounds of the Royal Hospital Kilmainham to the south and west. The Royal Hospital Kilmainham (or 'RHK') is identified in the Record of Protected Structure in Volume 4 of the Dublin City Development Plan 2016-2022. In the SHD Architectural Heritage and Visual Impact Assessment submitted as part of the application, the RHK is described as "*indisputably Ireland's most significant public building, a fact recognised by its inclusion on both the Record of Protected Structures and the NIAH, which deems it to be of international significance….*" The site shares a common boundary with the RHK. The ground levels on the site had previously been reduced and the formal gardens of the RHK are elevated above the site.

4. The development as proposed comprises five blocks which varied in height from 3 to 18 storeys, over podium (Blocks A, B and C) and over basement (Blocks D and E). The plans included an arch or bridge between Block A (12 - 18 storeys) and Block C (part of which is 12 storeys). Block B is 8 - 12 storeys and Blocks D and E were designed as 5 storey buildings. Blocks D and E are close to the perimeter of the Royal Hospital's Gardens, and Block B is furthest from the RHK. Permission was sought for a mainly residential development which would have comprised 399 build to rent residential units (46 studio apartments, 250 1-bedroom apartments, 90 two-bedroom four person apartments and 13 two-bedroom three-person apartments) internal communal ancillary residential services and amenities including a shared co-working area, lounges, a gym, a TV room and foyer. An independent retail unit was proposed within Block B. The application included the provision of a double basement providing carparking and bicycle parking areas, and alteration of pedestrian crossings and

realignment of a footpath. Communal outdoor amenity space proposed by way of rooftop terraces and the creation of a public plaza and games and play areas for children are also included.

5. The application was made as an SHD application under the Planning and Development (Housing) and Residential Tenancies Act, 2016 and was therefore made directly to the Board and subject to the provisions of that Act. One of the characteristics of the SHD process is that the Board was not entitled to seek or receive additional information from the Developer, who is the Notice Party to these proceedings after the application was made.

6. Third party submissions were made to An Bord Pleanála by 14 individuals and organisations including the Applicants, the Department of Housing, Local Government and Heritage, the Heritage Council, An Taisce, the Office of Public Works, the National Architect, Irish Water and the NTA. The Chief Executive prepared a report under section 8(5) of the 2016 Act, taking account of the submissions made. It was recommended that the Board grant permission subject to certain conditions, including the setback from the boundary with the RHK of Blocks D and E or a reduction in their height, and the reduction of the height of Block A to 13 storeys together with the omission of the arch between Blocks A and C.

7. The Board's Inspector recommended that the permission sought be granted subject to conditions, which included the following, at condition 3:

- The height of Blocks D and E shall be reduced by two floors (L03 and L04 omitted) to a maximum of three storeys over lower ground level;
- The heights of proposed Blocks D and E shall not exceed the maximum height of the adjoining RHK boundary wall; The height of Block A shall be reduced by five storeys to a maximum height of 13 storeys;
- Omission of proposed arch between Blocks A and C.

8. The reason given by the Inspector for this proposed condition was "*in the interests of the protection of the architectural heritage of the adjacent Royal Hospital Kilmainham; in the interests of the protection of visual and residential amenities; to safeguard the amenities of future occupants; in the interests of protecting ecology and in the interest of proper planning and sustainable development of the area*."

9. On 31st March 2022, the Board granted permission subject to 31 conditions. In doing so, the Board expressly adopted the reasoning in the Inspector's Report in relation to Environmental Impact Assessment and Appropriate Assessment. The Board's decision was made "*generally in accordance with the Inspector's recommendation*", but the Board declined to accept the Inspector's recommendation that Block A be reduced by five floors to thirteen storeys. The Board considered that, subject to compliance with the 31 conditions imposed, the proposed development constitutes an acceptable residential density in the urban location in question with respect to the existing character and architectural heritage of the area, would not seriously injure the residential visual amenities of the area, and would be acceptable in terms of urban design, height and quantum of development, and pedestrian and traffic safety. Condition 3 requires agreement to be reached between the Developer and Dublin City Council, the relevant planning authority, in respect of revised details arising from a number of amendments to the proposed scheme, including the reduction height of Blocks D and E by two floors, by the omission of L03 and L04, and the removal of the proposed arch linking blocks A and C is to be omitted.

10. The first named Applicant is a well-respected architect, an ecotect with degrees in architecture and engineering. He is a member of the Royal Institute of British Architects and a member of the Institution of Engineers Ireland. He resides close to the proposed development, but it is not visible from his residence. He states that he is a member of IMMA and uses share green amenity areas of HSQ and the gardens at the RHK frequently. The second named Applicant is an award winning writer and author on architecture and urban planning and an honorary member of the Royal Institute of Architects of Ireland. He is also a fellow of the Royal Institute of British Architects and an honorary life member of the National Union of Journalists and fellow of Royal College of Surgeons in Ireland. Both Applicants made submissions to the Board expressing concerns in respect of the proposed development and urging the Board to refuse permission.

11. Leave to apply for judicial review was granted by Humphreys J. on the 29th of June 2022, and the Statement of Grounds was also amended. Leave has been granted to seek *certiorari* and a number of declarations, on the grounds set out at paragraph E of the Statement of Grounds, which runs to 86 paragraphs. The determination of the issues raised in respect of reliefs 6 and

7, grounds 73 – 86 have been adjourned generally, to await the determination of the domestic issues together with the challenge based on the EIA and AA. (Order of 22nd July 2022).

12. The reliefs sought at para. D6 and D7 have already been modularised and adjourned generally. The second and third named Respondents ('the State Respondents') urge the Court to determine the issues grounding reliefs D3 - D7 only if that becomes necessary to determine the proceedings when the Court has determined the issues advanced in respect of the Board's decision. (see para. 4 SOO).

13. The first named Applicant, and Mr. Reddy, a well-respected and experienced architect who was the lead architect on the design of the scheme the subject of the planning application, were cross- examined on their affidavits. The scope of the cross-examination had been limited by Order of Holland J. made the 23rd of March 2023. As Counsel for the Board noted, the role of the Court in a case such as this is "*not to referee those subjectively held views on architectural and planning merits*" expressed by the architects who gave evidence for the applicants and the developer.

Jurisdiction to determine an SHD Application on this site

14. The Applicants contend at para. 4 of the Fourth Amended Statement of Grounds that the Board erred in law in accepting an application for strategic housing development on lands with the zoning Z5 as that zoning is not primarily for residential use and residential use is not specifically alluded to.

15. Section 3 of the 2016 Act defines strategic housing development as follows:

"*strategic housing development" means—*

(a) the development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses,

(b) the development of student accommodation units which, when combined, contain 200 or more bed spaces, on land the zoning of which facilitates the provision of student accommodation or a mixture of student accommodation and other uses thereon, ..

16. Section 9 (6)(c) of the 2016 Act provides that the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37 (2) (b) of the Act of 2000 were to apply, it would grant permission for the proposed development.

17. The Applicants submit that in order for the Board to have jurisdiction to accept and determine an SHD application, the zoning for the site must be primarily residential. I do not consider that this is what is required by the 2016 Act. Section 3(a) provides that a development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses. Zoning Z5 is a zoning objective which provides for a mix of uses; themix may include residential use. That the word "house" in section 3 includes apartment or flat is clear from section 2 of the 2000 Act.

18. Section 2.2.3 of the Development Plan provides:
"*For the inner city, the plan seeks to strengthen and consolidate the robust city-centre mixed-use zoning (Z5), with active promotion of the inner city as an attractive place for urban living, working and visiting; the delivery of housing regeneration projects, the emergence of spatial clusters of economic specialisms, public realm improvements and the strengthening of the retail core, all supported by multiple levels of public transport accessibility in the city centre. It is part of this settlement strategy to fully regenerate the Docklands (via the approved SDZ scheme), and the western end of the central city area including Grangegorman, Heuston environs, and the St James's Hospital campus and environs."*

and

"*2.3.11 Zonings and Standards*

The zoning and standard provisions of this plan have been devised to support the delivery of the core strategy. In particular, the zoning provisions ensure adequate land to meet the population targets and economic role of the city as the national gateway; intensification along public transport corridors and a mixed-use approach to zonings (Z4, Z5, Z6, Z10, Z14) to underpin a compact and sustainable city. The standards reinforce this approach with clear guidance for quality residential development, successful neighbourhoods and green infrastructure as essential elements of the intensification of the city."

19. Zoning Z5 is provided for at section 14.8.5 of the Plan as follows:

"***14.8.5 City Centre – Zone Z5 Land-Use Zoning Objective Z5:***

To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity.

The primary purpose of this use zone is to sustain life within the centre of the city through intensive mixed-use development (see also Chapters 6, 7, and 16 for policies, objectives and standards). The strategy is to provide a dynamic mix of uses which interact with each other, help create a sense of community, and which sustain the vitality of the inner city both by day and night. As a balance and in recognition of the growing residential communities in the city centre, adequate noise reduction measures must be incorporated into development, especially mixed-use development, and regard should be given to the hours of operation (see Chapter 16, Section 16.36 – Noise). Ideally, this mix of uses should occur both vertically through the floors of the building as well as horizontally along the street frontage. While a general mix of uses e.g. retail, commercial, residential etc. will be desirable throughout the area, retail will be the predominant use at ground floor on the principal shopping streets.

Zoning Objective Z5

Permissible Uses

Amusement/leisure complex, bed and breakfast, betting office, buildings for the health, safety and welfare of the public; car park, car trading, childcare facility, civic offices, community facility, conference centre, cultural, creative, artistic, recreational building and uses, delicatessen, education, embassy office, enterprise centre, funeral home, guest house, home-based economic activity, hostel, hotel, industry (light), internet café, live-work units, media-associated uses, medical and related consultants, motor sales showroom, nightclub, office, off-licence, open space, part off-licence, place of public worship, public house, public service installation, residential, restaurant, science and technology-based industry, shop (district), shop (neighbourhood), shop (major comparison), take-away, training centre, veterinary surgery, warehousing (retail/non-food)/retail park.

…"

20. The Chief Executive stated that in the opinion of the planning authority, an almost exclusively residential proposal may be the subject of an SHD application. The Chief Executive found that

the scheme of the development would contribute a significant residential component to the broad mix of uses within SDRA 7 and that it "*can be considered to comply with the zoning objective as there is currently a vibrant mix of uses, existing or proposed, within the wider area*."

21. The Inspector found that the application, which has predominately residential use but which includes a retail unit within Block B, generally accords with the zoning objective for the site. (para. 11.2.5). I agree, having regard to the provisions of the Plan in particular, sections 2.2.3 and 14.8.5.

22. I am satisfied that the zoning of the site is for mixed use, including residential and that it comes within the scope of an SHD development as defined by section 3. This ground must fail.

Adequacy of the Pleadings – Cone of Vision

23. A core issue before the Board related to the cone of vision. The Board and the developer argued that the issue of the cone of vision was not properly pleaded and that, accordingly, leave had not been granted to seek relief on that ground.

24. The Statement of Grounds is the fourth amended Statement of Grounds and despite having separate headings and 86 particulars of grounds, it is not a straightforward exercise to identify the individual grounds relied upon and the particulars relating thereto. The Statement of Grounds has certainly not benefited from prolixity. It is not surprising to me that the Respondents and the Developer have each raised issues regarding the clarity and adequacy of the pleas raised in the Statement of Grounds in their opposition papers and that this issue was raised in written and oral submissions.

25. Order 84, rule 20(2) requires the Statement of Grounds to include "*a statement of each relief sought and of the particular grounds upon which each such relief is sought*". Sub-rule (3) provides that "*It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) 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*."

26. A Statement of Grounds should identify the grounds on which it is contended that an applicant is entitled to relief – it is not necessary, or appropriate to set out the full argument for or reasoning behind each ground, but the defect or error which is asserted to exist must be identified, together with the facts necessary to make out that ground.

27. Ground 6 (as amended) pleads:

"*The Respondent Planning Appeals Board erred in law and had no jurisdiction to permit the proposed development which amounts to a material contravention of the plan in circumstances where this said contravention relating to impacts on the Royal Hospital Kilmainham were ~~was~~ not included as required within the statement of material contravention accompanying the application*." (Original markings)

28. The Material Contravention Statement did not consider that there was a material contravention arising in relation to the cone of vision, and a proposed justification was not put forward to cover a situation where the Board might have considered that there was such a material contravention. However, para. 6 of their Statement of Grounds, in referring specifically to impacts on the Royal Hospital Kilmainham, is not sufficient to advance the argument that the Board lacked jurisdiction by reason of the absence of a justification put forward for a material contravention in relation to the cone of vision.

29. At para. 29 of the Statement of Grounds, the Applicants plead:

"*The Respondent Planning Appeals Board acted ultra vires and other than in accordance with the Planning and Development (Housing) and Residential Tenancies Act 2016 in permitting the proposed development which amounts to a material contravention of the Dublin City Development Plan 2016 to 2022 and in particular by virtue of the impact of the development of the Royal Hospital which in itself, its curtilage and the cone of vision is specifically provided for in the Development Plan. There is significant encroachment from the proposed development into the identified cone of vision view from the north front of the Royal Hospital and as a consequence has a significant adverse impact on this pre-eminently important 17th century Royal Hospital building, which is a protected structure for the purposes of the Dublin City Development Plan and its historic natural landscape setting attended buildings which in and of itself and its ensemble amounts to a nationally and internationally significant building up achieving the highest level of protection possible within the said Plan*."

30. At Paragraph 30 the Applicants identify submissions to the Board which raised issues regarding the impact of the proposed development on the Royal Hospital Kilmainham and the views between it and the Phoenix Park, which are described as an integral part of the building's setting. The Applicants also refer to the cone of vision at para. 31 of the Statement of Grounds.

31. The Board and the Developer complain that the allegation of material contravention in the Statement of Grounds is insufficiently pleaded and particularised and lacks proper identification of the relevant provisions of both the Development Plan and 2016 Act.

32. At para. 32 of the Board's Statement of Opposition it is denied "*that … the Board acted* ultra vires *and other than in accordance with the 2016 Act in permitting the proposed development which amounts to a material contravention of the City Development Plan* "in particular by virtue of the impact of the development on the Royal Hospital Kilmainham, which in itself, its curtilage and cone of vision specifically provided for in the said development plan*." The plea that there was a material contravention of an unidentified provision of the city development plan is not particularised.*" It is also pleaded, at para. 34, that the plea at para. 29 is a complaint as to the merits of the Board's decision. The Developer pleads at paragraph 32 that the Applicants have failed to particularise the plea at paragraph 29 that the Board granted planning permission in material contravention of the Dublin City Development Plan. They complain that the Applicants have failed to identify which provisions of the CDP are alleged to have been materially contravened and have further failed to specify how the proposed development contravenes the Plan. The Developer complains that it is not aware of the Applicants' case in this respect.

33. The purpose of an applicant setting out clearly and precisely the grounds on which relief is sought in the Statement of Grounds is the need to ensure that the respondents and/or notice parties are "*clearly aware prior to the hearing of the application what the case is.*", *per Barniville J.* in *Rushe v. An Bord Pleanála* [2020] IEHC 122 (para. 113). As Baker J held in *Casey v. Minister for Housing* [2021] IESC 42 (para. 22), "*the pleadings in a case set the parameters and fix the issues in dispute between the parties and those to be determined by the court*."

34. In *Treascon & Clondoolsk v. An Bord Pleanála* [2024] IESC 28 Murray J. stated, at para.43:

"*… The parties are expected to identify the alleged legal frailties in a challenged decision before they seek leave for judicial review and, where they have not done so in some respect and the justice of the case so requires, the Court may in certain circumstances enable the pleadings to be amended…. The purpose of proceedings by way of judicial review is thus to enable a party who has identified a legal error in a decision of, or process undertaken by, a public body to challenge the legality of that decision on the basis thus identified. The grant of leave is the extension of a permission to pursue that ground of challenge, not the opening of an investigation into whether the decision or process is unlawful on any grounds that might subsequently present themselves in the course of the ultimate hearing of the matter*."

35. The situation in *Treascon & Clondoolsk* is very different to the instant case. In that case, as appears from para. 48 of the judgment of Murray J., "*while the Appellant's case as pleaded with regard to the 2011 Regulations was in the context of ABP's actions, it now seeks to impugn the Regulations themselves*". The Supreme Court was not satisfied that the applicant identified with particularly the claim which was being made. Murray J. stated, at para. 55 that:

"*… the Respondents were, in those circumstances, entitled to have the appeal against them dismissed and entitled to insist on the Appellant being held to its pleaded claim. That this should happen is proper for a number of reasons – by determining these issues on the merits now, the Court does so without the benefit of relevant findings by the trial Court and contrary to its own jurisprudence around hearing arguments on issues for the first time. At a systemic level, it is wrong that the impression should be given that parties are free before this Court to raise and obtain a determination on issues that have not been duly pleaded because, inevitably, that will be said to suggest that parties are free in all Courts to depart from their pleadings. As is clear from what I have said earlier, parties are not so free.*"

36. The pleading requirement as explained by Humphreys J. in *Eco Advocacy* v. *An Bord Pleanála* (No. 4) [2023] IEHC 713 (para. 39) is

"*merely that applicants plead their case (including EU law points) in terms which make it acceptably clear to the other side and the court as to what the point is. That does not require that "the provisions at issue be enumerated" or any other specific rule, as long as the point is acceptably clear. The demand for enumeration is a fictitious standard confected by the applicant to create an appeal – a standard which, as the developer points out, is being*

maintained despite the fiction having already been exposed. There is no doubt about this issue."

37. Similarly, in *Kennedy & Anor v. An Bord Pleanála* [2024] IEHC 570 (para. 132), Humphreys J. stated that "*Acceptable clarity is the standard, not express recital of specific statutory provisions*". This is consistent with the terms of Order 84 rule 20, the authorities and the rationale for the requirement therein.

38. Having considered the authorities relied upon by the parties, including *Treascon & Clondoolsk v. ABP* [2024] IESC 28, *Eco Advocacy* v. An Bord Pleanála (No. 4) [2023] IEHC 713, *Kennedy v. An Bord Pleanála* [2024] IEHC 570 and *Four Districts v. ABP* [2022] IEHC 335, I am satisfied that on a fair and reasonable reading of the Statement of Grounds the issue of material contravention as regards the cone of vision has been pleaded with adequate particularity – I do not consider that the failure of the Applicants to refer to the particular section or paragraph number within the Development Plan or to section 9(6)(c) in the Statement of Grounds renders the plea at para. 29 inadequate. The only part of the Written Statement of the Development Plan which refers to the 'cone of vision' or the 'cone' is Guiding Principle 8 at para. 15.1.1.10 which applies to SDRA 7 Heuston and Environs. It is clear from the submissions made to the Board and the Inspector's Report that that was a significant issue before the Board. The Inspector stated "*I highlight to the Board that one of the primary matters for consideration in this application relates to the impact of the proposal on the designated* 'cone of vision' (CoV). *This 'cone of vision', as set out in the 2003 Heuston Framework Plan and subsequently in the operative City Development Plan represents a significant view between, the Royal Hospital Kilmainham and the Phoenix Park…."* (para. 11.7.8)

39. Whilst the Respondents and the Developer are entitled to insist the Applicants be held to their pleaded claim, I am satisfied that the claim as pleaded includes the issue of material contravention regarding the cone of vision. Therefore, this was a live issue in the proceedings.

40. Despite the Statement of Grounds containing a myriad of grounds under a variety of headings, it could not be said that the Respondents or the Developer were not on notice of the Applicants' complaint that the Board granted permission in material contravention of the Development Plan

in respect of the cone of vision and that, in so doing, the Board had failed to make its decision in accordance with the 2016 Act.

Substance of issue –Material Contravention, including as to Cone of Vision

41. Material contravention is a significant issue – it is undoubtedly the case that the Board has jurisdiction under the 2016 Act to grant permission for a proposed development which materially contravenes the development plan or local area plan, unless that material contravention related to the zoning of lands.

42. In *Byrne v. Fingal County Council* [2001] IEHC 141; [2001] 4 IR 565, McKechnie J. agreed with the characterisation of a development plan as an environmental contract between the planning authority, the council and the community embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan. In *Attorney General (McGarry) v. Sligo County Council* 1989 WJSC-SC 1891; [1991] 1 IR 99. McKechnie J. (at 580):

"*In my opinion, a development plan, founded upon and justified by the common good and answerable to public confidence, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many adversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good*."

43. As Woulfe J. stated in *Sherwin v. An Bord Pleanála* [2024] IESC 13 (para.90): the Development Plan

"*regulates the future development of property by setting out, inter alia, policy objectives which indicate the parameters within which permission may be granted or refused. The development plan informs the public of the approach that will be followed by the planning authority (and the Board) in decision-making, unless there is good reason to depart from it as may be permitted by the planning legislation, subject to particular procedures being followed*.

44. In *Sherwin*, Woulfe J held that where the Board does not address the question of a material contravention in respect of the particular matter which does amount to a material contravention the Board's decision would constitute a breach of section 9 (6) issue and would thus be invalid.

45. Therefore, the first question to be considered is whether the proposed development does materially contravene the Development Plan. In doing so, it is important to have regard to the degree to which the Development Plan allows "*appreciable flexibility, discretion and/or planning judgment to the decision-maker may be a difficult question in a particular case*." Woulfe J. stated:

"*For my part, I would also highlight in particular the need to remember that the issue under consideration is the standard of review by the court. Whatever standard should apply, the first question must be the nature of the determination (if any) actually made by the decision-maker, "as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan", (per Costello J. in SWR), in circumstances where there has been the required focus by the decision-maker on the specific provision of the plan allegedly materially contravened. In my opinion that question is the crucial starting point, before one gets to the questions as to the standard of review by the court.*" (para. 105)

46. Judicial review is not an appeal on the merits of the impugned decision and "… *the Board's decisions enjoy a presumption of validity until the contrary is shown*": *Ratheniska v An Bord Pleanála* [2015] IEHC 18, per Haughton J. (para. 67). Similar observations were made by the Court of Appeal in in *Redrock* v. *An Bord Pleanála* [2019] IEHC 792.

47. The interpretation of a development plan is a question of law and deference is not due to the Board on questions of law. Therefore, if the Board has not interpreted the Development Plan correctly, it has not been considered adequately. However, as is clear from *Jennings v. An Bord Pleanála* [2023] IEHC 14 (paras. 112 - 113) and *Sherwin* (paras. 90 - 105) the nature of the review conducted through judicial review varies based on the extent of flexibility, discretion, and/or planning judgement that the development plan affords to the board.

48. In *Sherwin v. An Bord Pleanála* [2024] IESC 13, Woulfe J. held:

"*96. It is well established that the interpretation of a development plan is ultimately a matter for the courts. Any misinterpretation of the development plan by the relevant planning authority is an error of law which goes to jurisdiction. It is also well established that the development*

plan is not to be treated as if it were a piece of primary or secondary legislation emanating from killed draughtsmen, and inviting the exceptive canons of construction applicable to such material. Instead, a development plan falls to be construed in its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless the document, read as a whole, necessarily indicates some other meaning."

49. The findings of Holland J. in *Jennings* in relation to the interpretation of a development plan were endorsed by Woulfe J. in *Sherwin.* Holland J. stated (at para. 69):
"*The requirements of development plans vary widely on a spectrum from the highly prescriptive, clear, and quantified, to the expression of broad and general policies allowing considerable flexibility and the application of planning judgment in their application, with myriad gradations in between. Counsel for the Board ultimately agreed that, at the highly prescriptive, clear, and quantified end of the spectrum, the contravention/non-contravention question will be a matter of law for the court. But, counsel argued, in the application of broad and general policies allowing considerable flexibility and the application of planning judgment, the O'Keeffe irrationality standard applies. Though he did not say so, the logic of his argument was that, between those extremes, on which side of the line a particular set of facts lies would be a matter of judgment on a case by case basis*."

50. Section 9(6) of the 2016 Act permits the Board to grant permission for an SHD even if it materially contravenes the relevant development plan other than as to the zoning of the land. But, even in the case of such a "non-zoning" material contravention, the Board may grant permission only in accordance with S.37(2)(b) PDA 2000. Neither provision was invoked by the Board.

51. As appears from para.9 above, the Board decided to grant permission generally in accordance with the Inspector's recommendation, by a Board Direction dated the 29th of March 2022. The Inspector had found that no material contravention existed in relation to any of the matters addressed in the Developer's Material Contravention Statement (para. 11.1.3). The Direction stated that, in coming to its decision, the Board had regard to various matters, including the policies set out in the Development Plan. The Board considered that the proposed development would respect the existing character of the area and the architectural heritage of the site and that it would accord with the proper planning and sustainable development of the area.

Development Plan – cone of vision

52. The Policies of Dublin City Council, as set out in the Development Plan include SC7 which provides "*To protect and enhance important views and view corridors into, out of and within the city, and to protect existing landmarks and their prominence*."

53. The Objectives of the Plan include SCO4 - "*To undertake a views and prospects study, with the aim of compiling a list of views and prospects for protection and/ or enhancement which will be integrated with and complement the urban form and structure of the city*."

54. The cone of vision is referred to at 15.1.1.10 SDRA 7 Heuston and Environs of the Development Plan. It states:

"*An urban design land-use framework plan for the regeneration of the Heuston area was produced in 2003. This plan provided a regeneration framework for key development sites addressing issues of spatial layout, urban grain, massing, height and land-use and the need to interface such sites successfully with the Phoenix Park, the River Liffey and cultural institutions. The vision for the area as set out in this study is: 'to create a coherent and vibrant quarter of the city that captures the public imagination with high quality services, development, design and public spaces that consolidate and improve the existing strengths of the area.' Since the publication of the 2003 report, this area has undergone significant redevelopment, including much of the Heuston South Quarter and development at Clancy Barracks. A number of significant land banks still remain to be developed and for these the following guiding principles shall apply:*

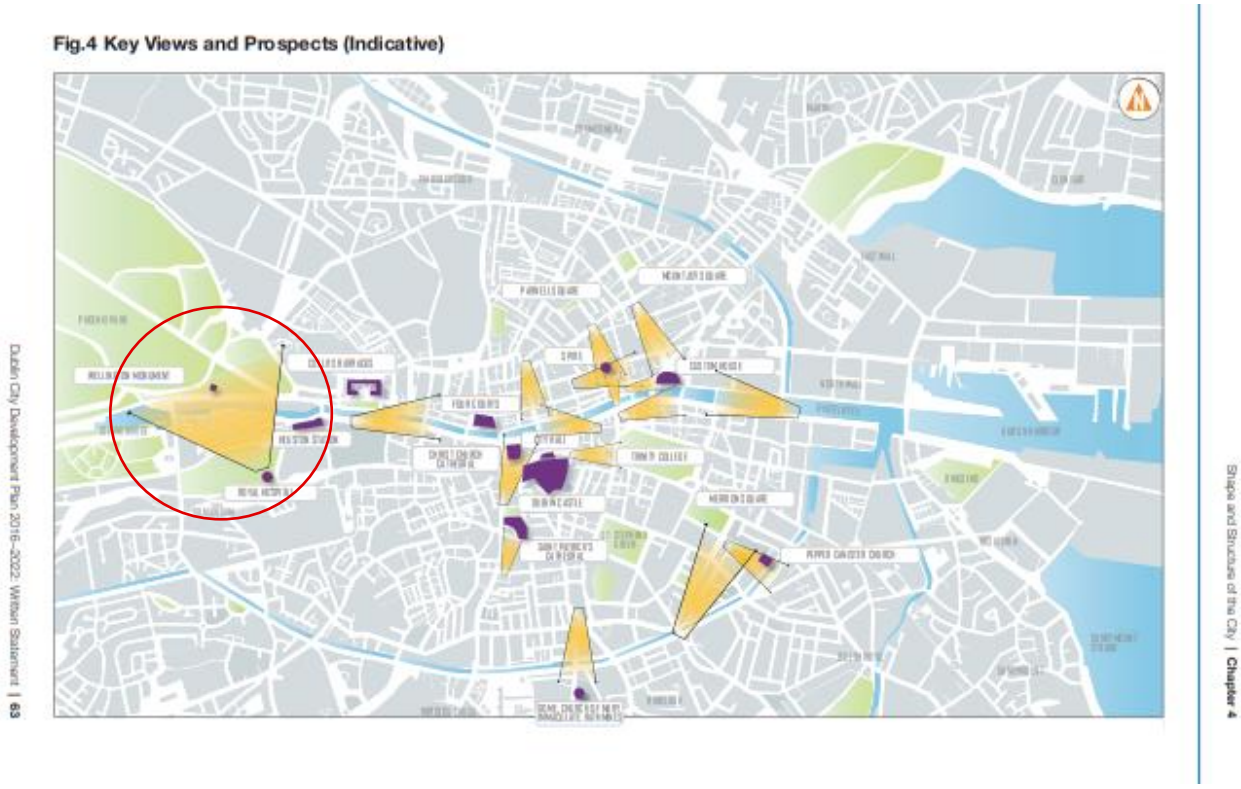
….

7. As a western counterpoint to the Docklands, the Heuston gateway potentially merits buildings above 50 m (16-storeys) in height in terms of civic hierarchy. Sites particularly suited for tall buildings include: OPW building: corner site on OPW lands adjacent to Dr Steevens' Hospital and Park, and opposite the south façade of the station building. CIE building: site to the north of the station building on the river relating to the West Terrace and River Terrace. Any new mid or high-rise buildings must provide a coherent skyline and not disrupt key vistas and views.

8. The 'cone of vision', as set out in the 2003 Heuston Framework Plan, represents a significant view between, the Royal Hospital Kilmainham and the Phoenix Park extending from the west

corner of the north range of the Royal Hospital Kilmainham, and the north-east corner of the Deputy Master's House to the western side of the Magazine Fort and east edge of the main elevation of the Irish Army Headquarters (former Royal Military Infirmary) respectively. Any new developments within this 'cone' shall not adversely affect this view. A visual impact analysis shall be submitted with planning applications to demonstrate this view is not undermined."

55. As noted above, this is the only reference to the cone of vision in the Development Plan. The position and extent of the cone of vision are set out in Guiding Principle 8. Whilst it is not defined by reference to any map or plan within the Development Plan, it is depicted in Fig. 4. The Heuston Framework Plan 2003 is not before the court and is not publicly available otherwise than on request from the planning authority. For this reason, I have not considered it save insofar as it is referred to in the Development Plan and submissions made to the Board.



What the Developer said about the Cone of Vision

56. The Planning Report / Statement of Consistency and the Architectural Design Statement acknowledge that there are a number of constraints on the site as it is partially within the cone

of vision. The Statement of Consistency considered that the proposed development was consistent with the cone of vision, as established in the SDRA 7 principles. It is stated therein that:

"*the relevant policy 'test' in respect of any development within the cone of vision is set out under Point 8 of the SDRA principles:*
'Any new developments within this zone shall not adversely affect this view. A visual impact analysis shall be submitted with planning applications to demonstrate this view is not undermined.'

The submitted Architectural Heritage and Visual Impact Assessment (AHVIA) provides a comprehensive assessment of the impact of the proposed development on the COV and the setting of the RHK and its formal gardens. The Assessment identifies the Royal RHK as 'indisputably Ireland's most significant public building, a fact recognised by its inclusion on both the Record of Protected Structures and the NIAH, which deems it to be of International significance for its qualities'."

57. The Architectural Heritage and Visual Impact Assessment concluded that:

"*The proposed development screens the irregular forms and materiality of the first phase of the HSQ development and other large more recent structures in the COV – that have so fundamentally altered the RHK's historic setting. The proposals respond to its formality and materiality while maintaining the visual link between the Royal Hospital and the Gandon Cupola from the central axis. Accordingly, there is no adverse impact on the cone of vision*."

58. The Material Contravention Statement addressed a number of issues in respect of which the the Developer considered there may be a material contravention. These did not include the cone of vision. The approach taken in the Material Contravention Statement was described therein as "*An abundance of caution approach*." None of the issues raised therein as potential material contraventions were found by the Inspector to amount to a material contravention. (para. 11.1.3) The Board accepted the Inspector's recommendation in that regard.

Submissions and observations

59. As the Inspector noted, at para. 11.7.4, almost all submissions from the third parties, including the prescribed bodies, raised concerns regarding impacts of the proposal on visual amenities and concerns regarding impacts on the RHK. The planning authority, Department of Housing, Local Government and Heritage, OPW, the Heritage Council, ICOMOS and An Taisce as well as other third parties all raised concerns in relation to the visual impacts of the proposal and its impacts on the RHK, its gardens and on the identified cone of vision.

60. An Taisce considered there to be a "massive encroachment" into the cone of vision in its submission. It was also submitted that the proposed development was inconsistent with the objectives of the Heuston Framework Plan (2003). The OPW considered that there would be an adverse effect on the historical visual connection between the RHK and the Phoenix Park which forms an integral part of the buildings setting and wider relationship. It was also submitted that unlike the previous applications on the site, the proposed development was not set back to protect the cone of vision and it recommended that the Board consider omitting the buildings proposed to be located within the cone of vision. The Heritage Council considered that the development would have an overbearing impact on the historic gardens and the cone of vision of the RHK. ICOMOS Ireland and the National Scientific Committee on Cultural Landscape observed that the proposed development would breach the cone of vision and would practically obliterate any picturesque views north to the Phoenix Park and the Royal Military Infirmary from the eastern Terrace Walk. Other submissions in relation to the cone of vision included that of the second named Applicant who submitted that "*the proposed development would irrevocably damage the setting of the Royal Hospital Kilmainham, "its cone of vision" towards the Phoenix Park and, in particular, its formal garden*."

61. Having considered the application and the submissions and observations made to the Board, the Chief Executive considered the cone of vision. The importance of the role of the Chief Executive in an SHD application is clear from– *Environmental Trust v. an Bord Pleanála* [2022] IEHC 540 (Holland J.) (para.111) and *Sherwin* (Woulfe J.) (para 66 - 82). Deference is not due to the Board, nor to the Chief Executive in relation to its findings on questions of law, including as to the interpretation of a development plan. The nature of the review by the High Court depends on the degree of flexibility, discretion and/or planning judgement which the Plan leaves to the planning authority and the Board. Therefore, save where flexibility, discretion or

the need to exercise planning judgement is left to the decision maker, deference is not given by the court to the opinion of the Chief Executive.

62. In its submissions the Board emphasised the significance of the Chief Executive's Report.

63. The Chief Executive stated:

"*the site's location directly adjoining the Royal Hospital Kilmainham and within the 'cone of vision', as set out in the 2003 Heuston Framework Plan means that Guiding Principle 8 of SDRA 7 is therefore pertinent to the assessment of this application. It seeks to ensure that "Any new developments within this 'cone' shall not adversely affect" the cone of vision. It should be noted that the impact of the proposal on the cone of vision was a recurring issue throughout the pre-application consultation process. Furthermore, The ABP Pre-Application Consultation Opinion dated 22 April 2021 identified it as a matter that required further consideration and justification (item 2).*

The submitted Architectural Heritage Visual Impact Assessment (AHVIA) provides an assessment of the proposal's impact on the COV, it advises that:

· The area within the COV, in particular the Royal Infirmary Building has been significantly altered over the past 150 years due to natural tree growth, infrastructure development and additional of numerous large developments.

· The most significant view is from the central axis and not the extremities where the views are compromised with the distant landmarks unseen.

· Viewpoints to either side of the central axis are therefore less significant as they are effectively creating new and different cones of vision."

64. The Chief Executive considered that the Board should have regard to a number of key points in relation to the manner in which the issue of the cone of vision had been approached in the AHVIA including:

· The perception that the cone of vision should be reduced contravenes the City Development Plan and its provisions to protect the cone of vision, the RHK and its setting.

· The cone of vision should not be reduced to a static viewpoint but a transient view across the frontage of the RHK and the former Deputy Masters House.

· From this range the Gandon cupola of the former Military Hospital is visible, as shown by Baseline View 05 of the submitted photomontages.
· The CGI of the proposal when viewed from View Point 5 shows that the proposal would intrude into the COV to the extent that the protected views towards the Royal Military Infirmary to the east would be compromised.
· The impact of permitted developments within the wider area is noted, however this should not perpetuate further erosion of the COV.

65. The Report stated that:

"*the Planning Authority is not satisfied that the proposal complies with the relevant policy 'test' in respect of any development within the cone of vision as set out under Point 8 of the SDRA principles: '*Any new developments within this zone shall not adversely affect this view. A visual impact analysis shall be submitted with planning applications to demonstrate this view is not undermined. "'

66. The Chief Executive stated:

"*whilst it is accepted that the proposed development is acceptable in principle in this location, this is a significant and sensitive place in the city. The site lies in a prominent position within the Heuston Station and Environs where the COV also represents a significant view which should be protected. Furthermore, the site is located within a conservation area, as designated in the development plan, wherein it is the stated policy of the planning authority to protect the character and historic fabric and to ensure that new buildings complement the character of the existing architecture in design, materials and scale.*

Whilst the need to secure more compact growth in urban areas is articulated at both national and local policy level and increased building height is identified as a measure to achieve this, it is also acknowledged that there are constraints that need to be taken into consideration in assessing any proposal for a high building, including the protection of key views and the historical environment in architecturally sensitive locations. In this regard, both the submitted Planning report/Statement of Consistency and the Architectural Design Statement acknowledge that there are a number of constraints with the site as it contains a number of protected structure elements and is partially within the COV."

67. The Chief Executive also considered the Statement of Consistency which was submitted as part of the application and stated that the "*Planning Authority has considered the Statement of Consistency and is satisfied that the application is consistent with the relevant National, Regional and Local Policies*." The Report also concluded that "*On the basis of the information received, it is considered that the development as proposed is consistent with the relevant provisions of the Dublin City Development Plan 2016-2022*."

68. The recommendation of the Chief Executive was to grant the permission sought, subject to conditions, which included as proposed condition 2:

"*The proposed building line / alignment of the residential Blocks E & D shall be reduced in height or set back in order to retain the views of the east edge of the main elevation of the Irish Army Headquarters (former Royal Military Infirmary) from the Deputy Master's House within the Cone of Vision.*

The development shall not commence until revised plans, drawings and visual impact assessment showing the above amendments have been submitted to, and agreed in writing by the Planning Authority.

Reason: To ensure that the development does not adversely impact on protected views within the Cone of Vision as designated in the Dublin City Development Plan 2017-2022."

Inspector's Report and Decision of the Board

69. The Inspector rejected a number of contentions of the Developer as expressed in the AHVIA. In particular, the Inspector found that the cone of vision could not be reduced to a static viewpoint but did accept that the view from the central axis of the RHK gardens was the most significant view.

70. At paragraph 11.7.12, the Inspector noted the planning authority's opinion that any reduction in the cone of vision contravenes the Development Plan. She stated:

"*In response to this, the planning authority are of the opinion that any reduction in the Cone of Vision (CoV) contravenes the City Development Plan and its provisions to protect the Cone*

of Vision, the RHK and its setting. They are of the opinion that the CoV should not be reduced to a static viewpoint but should instead be a transient view across the frontage of the RHK and the former Deputy Masters House. From this range the Gandon cupola of the former Military Hospital is visible, as shown by Baseline View 05 of the submitted photomontages. The planning authority state that the CGI of the proposal when viewed from View 05 shows that the proposal would intrude into the CoV to the extent that the protected views towards the Royal Military Infirmary to the east would be compromised. The planning authority acknowledge the impact of permitted developments within the wider area. However, they are of the opinion that this should not perpetuate further erosion of the CoV. In these terms, the Planning Authority is not satisfied that the proposal complies with the relevant policy 'test' in respect of any development within the cone of vision as set out under Point 8 of the SDRA principles. Other Prescribed Bodies have set out similar concerns and in the interests of brevity I shall not reiterate."

71. The importance of the RHK complex is acknowledged by the Inspector at paragraph 11.7.13. She acknowledged, at paragraphs 11.7.14, the desire to keep the lines of vision uninterrupted and protect the range of view. The Inspector did not disagree with the assertion by the Applicants that the conurbation had been significantly altered over the past 150 years due to natural tree growth, infrastructure development and the addition of numerous large developments. She stated:

"*11.7.14 In terms of impacts on CoV, I acknowledge the concerns of the planning authority and other Prescribed Bodies including the Department and other third parties. I note that this CoV has been in place since 2003. I acknowledge the desire to keep these lines of vision uninterrupted and protect this range of view. The applicants contend that the area within the CoV, in particular the Royal Infirmary building has been significantly altered over the past 150 years due to natural tree growth, infrastructure development and the addition of numerous large developments. I would not disagree with this assertion. I agree with the planning authority and other Prescribed Bodies that the cone of vision should not be reduced to a static viewpoint. However notwithstanding this, I consider that there is merit in the point made by the applicants when they contend that the most significant view is from the central axis and not the extremities. I would agree that the view towards the Phoenix Park and the Royal Military Hospital cupola is at its best from the central axis. Given the distances involved and the level of development in the intervening area, as one moves east from the central axis the view of the Military hospital and cupola is lessened. I would not agree with the applicants (sic) assertion*

however that by the time one reaches the Deputy Master's House, they are no longer visible. They are visible until one is standing at the far eastern side of the Deputy Master's House. However, they are no longer visible when viewed from the podium level alongside the eastern side entrance to the Deputy Master's House (Garden Galleries entrance). What is more clearly visible however from in front of the Deputy Master's House is development within the intervening area. The proximity of the Telford building to this structure is noted. I also note from the documentation that there is no formal planned arrangement between the RHK, the Military Hospital and the Magazine Fort. I also note that the Magazine Fort has already been obscured from this view due to development at the Clancy Barracks. The proposed development will not have any impacts on views of the Magazine Fort or Wellington Monument from within the designated CoV."

…

11.7.15 The Department state that the RHK as originally envisaged and evidenced by historical images was considered as a landmark building, a focal point in the city and its urban context. They acknowledge that the extent of its reach and influence on the developing city has been greatly reduced over time as the city has expanded. Its surviving integrity and understanding of its cultural landscape significance is critical/prerequisite to future planning proposals. I would concur with this opinion of the Department insofar as its cultural landscape significance is critical in the evaluation of any planning application that may have the potential to impact upon this complex of international significance. I acknowledge that it was originally envisaged as a landmark, a focal point in the city. While the extent of its reach and influence may be lessened by modern urban development, I consider that it remains a landmark today, irrespective of the fact that development has expanded greatly around it. It is a landmark by virtue of its archaeological, architectural, artistic, historical, social and technical significance. The proposed development does not physically impinge on the grounds of the RHK. Concerns regarding the visual impingement of Blocks D and E are dealt with below. The proposed development is located on lands that were considered appropriate for development and zoned for such within the operative City Development Plan. Contrary to opinions expressed within the submissions, I am satisfied that the documentation before me carries out sufficient assessment of the proposal and that there is adequate information before me to comprehensively assess the proposal."

72. At paragraphs 11.7.18 – 11.7.21, the Inspector considered the impact of Blocks D and E on the RHK, and the cone of vision in particular. She recommended that the height be reduced, and that Blocks D and E be stepped back from the boundary of the RHK gardens. The recommendation that Block A be reduced from 18 to 13 storeys was not based on the cone of vision.

73. The Inspector stated:

"*11.7.19 In terms of Blocks D and E, while I acknowledge that they are the blocks of lowest height, I am of the opinion that given their height and location in such close proximity to the Formal Garden, they have the greatest potential to detract significantly from the character and setting of the adjoining RHK complex, to impact on the aforementioned 'Cone of Vision' (CoV) and on the visual amenity as viewed from the gardens of the RHK. From an examination of the Chief Executive report, it appears that it is these two blocks with which the planning authority also have greatest concern in terms of impacts on the CoV and in their recommended conditions, they advise a reduction in their height/relocation. As stated elsewhere in this report, their recommended reduction in height of Block A relates to other planning matters as opposed to impacts on CoV or architectural heritage.*

11.7.20 I agree with the opinion of the Department that this element of the design is not a sensitive response to the international cultural significance of the site. I agree with the third parties when it is stated that the height of these blocks should be reduced. In my opinion, it is the top two storeys that have the potential to have the greatest impact. I am also of the opinion that the covering of these elements in green foliage in the submitted drawings/photomontages, together with the change in materiality at upper levels, indicates that the applicants themselves consider that this view requires softening. In my opinion, notwithstanding that the blocks further east are of greater height, they have greater separation distance and read as part of the existing HSQ development. Whereas, the height and location of Blocks D and E as proposed dominates the view from within the garden and reads from certain viewpoints as if they are in fact part of the gardens. They visually impinge upon the setting of the gardens and detract significantly from it. In my opinion, they give a sense of over-bearance and enclosure that was never intended.

11.7.21 Therefore, I consider that Blocks D and E should be reduced in height by two storeys, level with the top of the existing garden wall. In addition and notwithstanding that when

reduced by two storeys they will not be unduly visible when viewed from within the gardens, I am of the opinion that these proposed Blocks D and E should be relocated a further 5 metres in an easterly direction. This would provide for a greater separation distance between them and the protected gardens. .... Given the separation distances with proposed Blocks A and C, this relocation is achievable in my opinion without detriment to the amenities of any of these blocks. I am satisfied that this matter could be adequately dealt with by means of condition, if the Board is disposed towards a grant of permission.

....

11.7.24 The planning authority is also of the opinion that Block A should be reduced in height by the removal of five storeys to form a 13-storey building. This is related to concerns regarding how it will integrate with future development proposals and does not relate to concerns regarding potential impacts on the architectural heritage of the area. I have dealt with this matter above in the preceding section on Building Height. I am of the opinion that while this block may impinge marginally on the identified CoV, its impact would not be so great as to warrant a refusal of permission or amendment to its location/height for this reason.

...

11.7.30 I acknowledge the concerns expressed in the submissions received. The proposal, will without doubt, have impacts on views within the surrounding context and from various vantage points across the city. Views are ever-changing, often fleeting. Views within the CoV have been compromised over the years. In my opinion, it is the impacts on the historic, Formal Gardens that the proposal has the potential to have the greatest impact rather than on the hospital structure itself or other structures within the complex. I highlight to the Board that on reading some of the third party submissions, including those from some of the Prescribed Bodies, one could be forgiven for thinking that an undeveloped, pristine landscape surrounds the RHK complex with no development evident in the near or far distance. This is not the case. While within the Formal Gardens and wider RHK complex, the existing development within HSQ is clearly evident as is development in the distance including the Clancy Barracks development, the Criminal Courts, Heuston station infrastructure, the new Children's hospital, the Chocolate Factory development and many other developments. This is to be expected within a thriving, developing city.

11.7.31 I consider that subject to the amendments recommended above, any impacts on the CoV or on RHK complex would not be so great as to warrant a refusal of permission or further amendments.

…

11.7.32 …. I am of the opinion that while undoubtedly visible, the proposal (subject to recommended alterations) would not have such a detrimental impact on the character and setting of key landmarks and views within the city, including views within the CoV as to warrant a refusal of permission. … . I am satisfied that the proposed development will not impact negatively on the character or setting of historic structures; will add visual interest; will make a positive contribution to the skyline and will improve legibility within this city area and that, subject to recommended changes, its height, scale and massing is acceptable in townscape and visual terms. …

11.7.33 I am very cognisant of the balance that is required to be achieved between protecting architectural heritage whilst accommodating growth and development within a thriving city. When this architectural heritage is of international importance, as is the case in this current application, achieving this balance becomes even more difficult. Subject to the recommended revisions set out above, I am of the opinion that the proposal will make a positive contribution to the urban character of the city and will result in the appropriate, planned extension of this urban quarter. I am satisfied that, subject to recommended alterations, the proposal will comply with Policy SC7 of the operative City Development Plan, which seeks "To protect and enhance important views and view corridors into, out of and within the city, and to protect existing landmarks and their prominence". The proposal in its totality will contribute to the city's built environment and will become a positive addition to the skyline of the city. Subject to recommended revisions above, this will be achieved without detriment to the visual amenity or architectural heritage of the area."

74. The Board did not accept all of the recommendations of the Inspector. In particular, the Board did not accept the recommendation that Blocks D&E be relocated 5 metres further from the wall of the RHK, and that they be below the level of the wall, nor did it accept the recommendation that Block A be reduced by 5 Storeys. The Inspector had recommended that

Blocks D and E should not exceed the maximum height of the adjoining RHK boundary wall. That part of the proposed condition was not included in the condition imposed by the Board.

75. As the Board emphasised, the fact that the Board has expressly disagreed with the Inspector on one issue does not undermine the inference that it is otherwise in agreement with the Inspector: *Shadowmill Limited v. An Bord Pleanála* [2023] IEHC 157 (para. 86).

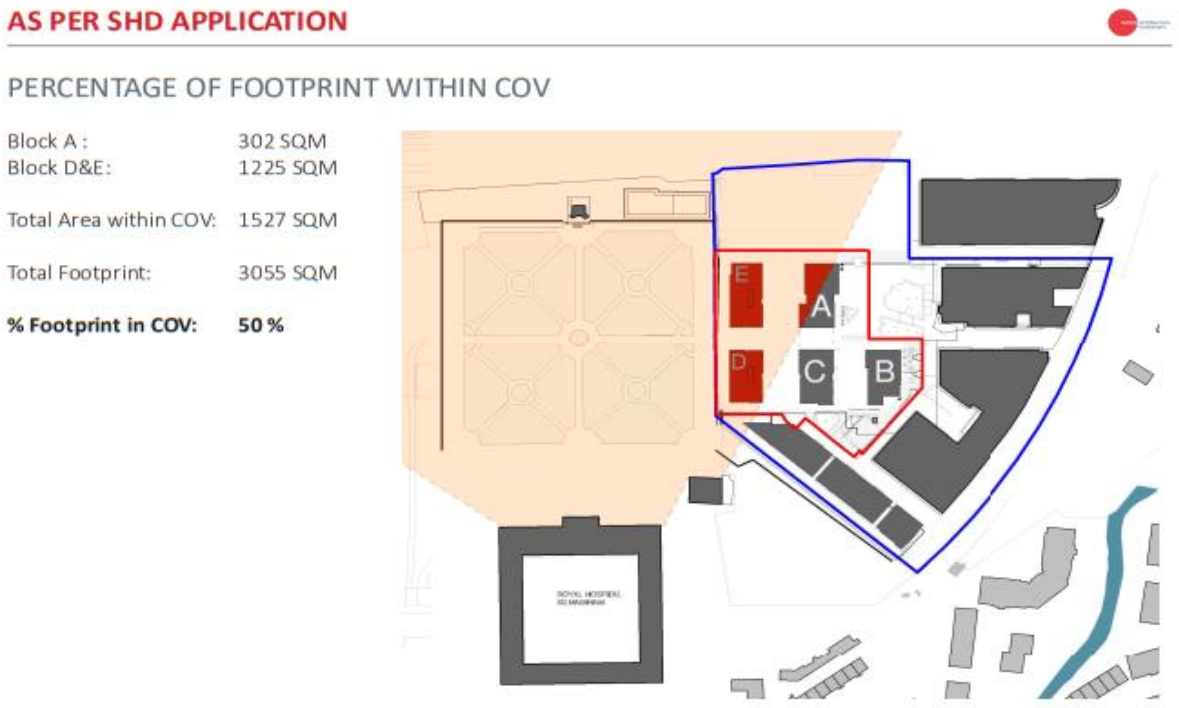
Did the Board decide the issue regarding the Cone of Vision lawfully?

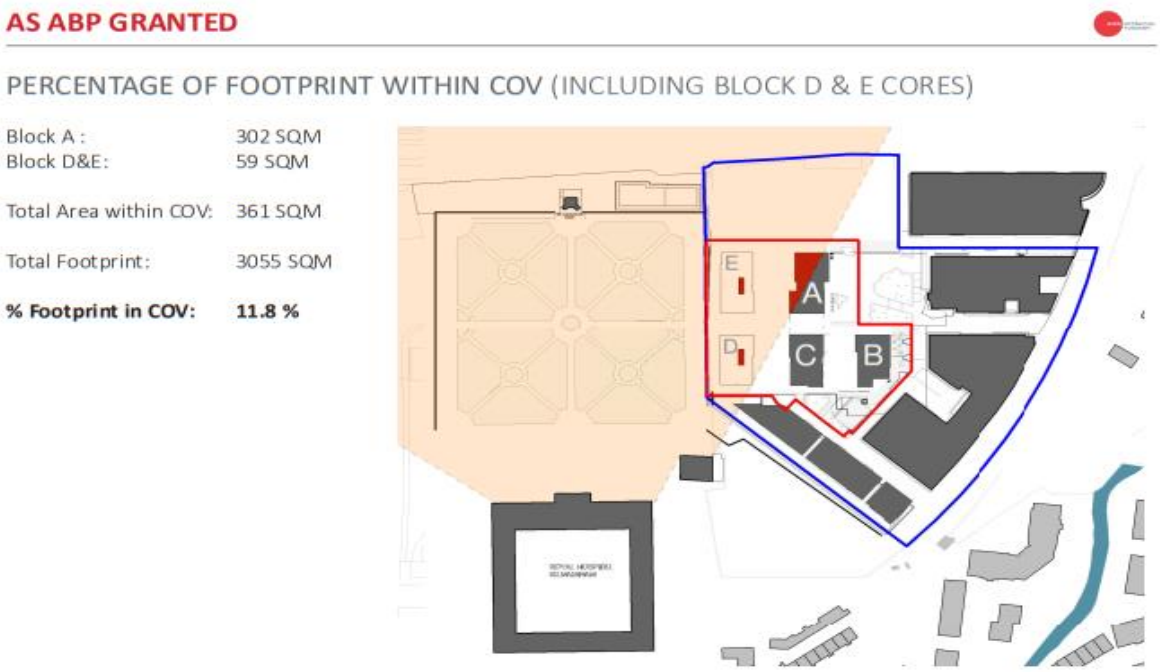
76. The parameters of the cone of vision are set out in the Development Plan. There is no discretion nor scope for the Board to exercise planning judgement in respect of the identification of the cone of vision.

77. It is not in dispute between the parties that part of the proposed development is within the cone of vision.

78. It is clear from the photomontages and table 7 of Appendix 14A of the EIAR submitted with the application, referred to at para. 11.7.9 of the Inspector's Report, that part of the proposed development is within the cone of vision. This was also accepted by Mr. Reddy in oral evidence (Transcript, Day 1 page 57-58).

79. A very clear visual aid was prepared by Mr. Reddy, on behalf of the Developer, for the purposes of the proceedings, in particular his cross-examination and that of Mr. Leech. At pages 24 and 25 of the document exhibited by him at "TR1" to his affidavit of 16th May 2023, the footprint of the proposed development within the cone of vision was identified as per the SHD application and as granted by the Board. It is clear the entirety of Blocks D and E and part of Block A are within the cone of vision. The part of Block A which is 18 storeys in height is furthest from the RHK building and is partly within the cone of vision.





80. The Board and the Developer emphatically argued that development within the cone of vision is not precluded by the Development Plan, in particular by Guiding Principle 8. This was accepted by Mr. Leech under cross-examination (Transcript, Day 1, page 119). Guiding Principle number 8 does not prohibit development within the cone of vision – it expressly envisages that there may be new development within the cone of vision. However, it is equally clear that new developments within the cone shall not adversely affect this view.

81. I am satisfied that, having regard to the importance which the Plan places on the cone of vision, that any development which is wholly or partly within the cone of vision, and which adversely affects it amounts to a material contravention. The policies expressed in the Plan include "*the protection and enhancement of important views and view corridors into, out of and within the city, and to protect existing landmarks and their prominence*". The cone of vision is undoubtedly one of the important views and view corridors protected by the Plan.

82. The materiality of a contravention of the Development Plan depends on the grounds on which the proposed development is, or might reasonably be expected to be, opposed by local interests: *Roughan v. Clare County Council*, unreported, High Court, Barron J. 18th December 1996. Barron J. found that the local population is entitled to the benefit of the right to be consulted during the procedure of making a development plan. He held that "*to allow any alteration of the plan which would not have been anticipated by those reading the plan would be in breach of the rights of the local population to such consultation*." (p. 6). This was followed by Baker J. in *Byrnes v. Dublin City Council* [2017] IEHC 19 (para. 23) and by Simons J. in *Redmond* (para. 74–76). While the procedures applicable to ensure public participation before a planning authority could grant permission in material contravention of its development plan do not arise in respect of an SHD application, the Board is only entitled to grant permission when the conditions in section 9(6)(c) apply. Hedigan J. held in *Ryan v. Clare County Council* [2009] IEHC 115(para. 42) "… *objections are only relevant when considering the materiality of a contravention as opposed to assessing whether one exists*." The issue of the cone of vision was raised in many submissions and observations and was found by the Inspector to be one of the key issues on the application. I am satisfied therefore, that any contravention of the Plan relating to the cone of vision is a material contravention.

83. Woulfe J. held in *Sherwin* that where the Board does not address the question of a material contravention in respect of the particular matter which does amount to a material contravention *"the Board's decision would constitute a breach of section 9 (6) and would thus be invalid*." (para.93) If there is an impact on the cone of vision, the Board must decide whether or not that impact is adverse in order to consider the Development Plan properly.

84. As the proposed development is partly within the cone of vision it is difficult to see how the Board could reasonably find that it has no impact. Therefore, only if the impact of the

development on the cone of vision is not adverse, would the development not materially contravene the Development Plan.

85. Having regard to the wording of Guiding Principle 8, the question is whether or not there is an adverse impact on the view in the cone of vision; it is not a question of degree.

86. The question whether a particular development adversely affects the view is quintessentially a question of planning judgement. This is clear from *Byrne & Ors v. Wicklow County Council* [2000] WJSC-HC 440; [1994] 11 JIC 0302, and indeed, this was accepted by Mr. Leech (Transcript, Day 1, page 119).

87. In the first instance, it is necessary to consider what finding was made by the Board in relation to the cone of vision and the protected view.

88. The Board did not apply the material contravention procedure under section 9(6) of the 2016 Act and section 37(2) of the 2000 Act.

89. The Board did not find that there was no adverse impact on the view protected by the cone of vision. The language used in the Inspector's Report, which was adopted by the Board decision, demonstrates that it found there was an adverse effect on the cone of vision. This was clearly not considered to be a very significant adverse impact, having regard to the Board's ultimate conclusion that the impact of the proposed development was not such as to warrant refusal of the application. This is particularly clear from para 11.7.17, 11.7.31 and 11.7.32 where the Inspector considered that "*impacts on such views would not be so great as to warrant refusal of permission.*" Further, at para. 11.7.24, the Inspector found that Block A marginally impinged on the cone of vision. The Board's Direction expressly agreed with this finding, stating "the board accepted and agreed with the Inspector's opinion "*that while this block (i.e. Block A) may impinge marginally on the identified CoV, its impact would not be so great as to warrant refusal of permission or amendment to its location/height for this reason*."

90. The Board continued by stating:
"*with the exception of views in respect of Block A, as outlined above, the Board agreed with the Inspector in her assessment of the potential visual impact and impact on the identified CoV,*

and impact on the architectural heritage of the surrounding area as a result of the proposed development, and subject to the amendments proposed by condition and is recommended by the Inspector, the Board was satisfied that the proposed development could be accommodated on the site, and that design was such as not to result in undue adverse impact on the amenity or heritage of the area, and subject to conditions attached is in accordance with the proper planning and sustainable development of the area."

91. It is clear therefrom, that the Inspector and the Board considered that there were detrimental effects on the cone of vision, even with the amendments proposed by her, but considered that they were not very significant and were not sufficient to warrant the refusal of permission. This is precisely the type of situation which would require the Board to invoke its power under section 9(6).

92. The Board did not accept the recommendations regarding Blocks D and E in full – whilst it was not included in the draft condition – the Inspector clearly recommended that Blocks D and E be stepped back by a further 5 metres (at para. 11.7.21 and 13.4.10). She also recommended, in the proposed condition, that their height be reduced to be no higher than the wall of the RHK. The latter part of the proposed condition was not included in the Board Order. The Board did not require the Developer to move Blocks D and E by 5 metres as recommended by the Inspector. However, the Board did not explain why neither recommendation was followed, nor did the Board depart from the Inspector's findings regarding Blocks D and E or the cone of vision.

93. The Board granted permission for the proposed development in accordance with the plans and particulars subject to the conditions set out in its decision. At p. 17 and 18 of the Board Direction, the Board noted that:
"*furthermore, the board accepted and agreed with the inspector's opinion "that while this block (i.e. Block A) may impinge marginally on the identified CoV, its impact would not be so great as to warrant a refusal of permission or amendment to its location / height for this reason."*

"*…with the exception of the Board's views in respect of Block A, as outlined above, the Board agreed with the Inspector in her assessment of the potential visual impact and impact on the identified CoV, on the architectural heritage of the surrounding area as a result of the proposed*

development, and subject to the amendments proposed by condition and as recommended by the Inspector, the Board was satisfied that the proposed development could be accommodated on the site, and that design was such as not to result in an undue adverse impact on the amenity or heritage of the area, and subject to conditions attached is in accordance with the proper planning and sustainable development of the area."

94. In the circumstances, I am satisfied that the Board did not find that there was no adverse effect on the cone of vision. The Board found that the proposed development would impinge marginally on and have a detrimental impact on the cone of vision, even as amended. Both of these terms are indicative of an adverse effect on the cone of vision.

95. Neither the Inspector nor the Board explained how they considered a marginal impact on the vision was consistent with the Development Plan nor was any finding made as to whether or not this amounted to a material contravention of the Plan. Having regard to the terms of the Development Plan, "*Any new developments within this 'cone' shall not adversely affect this view*", I am satisfied that the findings of the Inspector and the Board as to the effects of the proposed development on the cone of vision demonstrate that the Board found that the proposed development, part of which is within the cone of vision, did have an adverse effect on the view. The Development Plan does not only afford protection to the most important or significant aspects of the view, such as the view from the central axis.

96. The Board went no further than saying that it considered the detrimental impact, or marginal impingement on the cone of vision, did not warrant refusing permission. In light of the clear wording of Guiding Principle 8, which provides that "*any new development shall not adversely affect the cone of vision*", this is insufficient to justify the grant of permission without invoking the material contravention procedure. I rely on the findings made by the Board and do not express my own view, nor have I sought to form a view, as to whether or not the proposed development adversely affects the cone of vision.

97. Having regard to the findings made by the Inspector, and adopted by the Board, and the contents of the Board Direction, which amount to a finding that the proposed development would have an adverse effect on the view, albeit not extensive, I am satisfied that the Board did not address the question whether or not there was a material contravention of the Development Plan by reason of an adverse effect on the cone of vision appropriately.

98. Of course, development within the cone of vision is not prohibited by the Development Plan and it would be open to the Board to grant permission where there is an adverse effect on the cone of vision, in material contravention of the Plan, but this can only be done in accordance with section 9 (6) of the 2016 Act. This was not done.

99. Therefore, I find that the Board's decision to grant permission despite an adverse impact on the cone of vision is in breach of section 9 (6) of the 2016 Act and is unlawful.

Other Points

100. In view of the findings above, any other findings I make are *obiter* and therefore unnecessary to determine the proceedings.

101. As a matter of national law, I do not consider that the arguments advanced by the Applicants in relation to the power of the Board to amend the proposed development or on points of detail should succeed. Section 9(4)(b) expressly provides that the Board may decide to grant permission for the proposed SHD development "*subject to such modifications to the proposed development as it specifies in its decision*" and it may attach such conditions to the permission as it considers appropriate. Section 9(8) provides for the attaching of conditions requiring points of detail to be agreed between the relevant planning authority or authorities and the developer, or to refer the points to the Board if agreement cannot be reached.

102. Section 9(4) and (8) must be interpreted in light of the authorities in relation to points of detail, in particular *Houlihan v. An Bord Pleanála,* unreported, High Court (Murphy J.), 4th October 1999, *Boland v. An Bord Pleanála* [1996] 3 IR 435, and *Kenny v. An Bord Pleanála* [2001] 1 IR 565 (para. 9) as most recently considered in *Shadowmill v. An Bord Pleanála* [2023] IEHC 157. As Hamilton C.J. held in *Boland,* whether or not such a condition amounts to an abdication of the Board's decision-making powers depends on the nature of the matters which are left to agreement between the planning authority and the developer. Hamilton C.J. held that "*the Board is obliged to set forth the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement, to state clearly the reasons therefor and to lay down criteria by which the developer and the planning authority can reach*

agreement." If the nature of the matters left for agreement between the planning authority and the developer are such that a member of the public would have reasonable grounds for objecting to the work to be carried out having regard to the precise nature of the instructions laid down by the Board and therefore public participation would be required, it would be inappropriate to leave such matters to agreement. Blayney J, with whom the Chief Justice agreed, found that the first thing to be considered is the relevance of the conditions in the context of the overall planning permission being granted. In that case, it was considered that the details to be agreed were very peripheral and accordingly, public participation was not required.

103. In *Shadowmill*, Holland J. held (para 327 -329):

"*The concepts of exempted development and points of detail are not dissimilar — though not necessarily coterminous. Analogising examples of the former to the latter may be useful in a given case. Landscaping itself is a good example of a form of development which could be either, depending on circumstance.*

328 Analogy apart and as to identifying the applicable law, I prefer to simply apply Boland*,* Kenny *and* O'Connor *to the effect that the " limited degree of flexibility" is only as to " technical matters and matters of detail" and " to implement that which has already been decided in essence" — not being "such as to excite significant public interest and/or objection." And McKechnie J in* Kenny *was speaking of the validity of the condition but also of the validity of an agreement made under it when he said: " Whether such a requirement is intra vires is a matter of degree and depends on the nature of the matter left for resolution, the resolving of which must have regard to the nature and circumstances of each particular application and development."*

329 In my view, Lilacstone is correct in submitting that the observation by McKechnie J in Kenny cited above, as to faith and confidence in planning authorities, applies in the present case. The Court must trust and assume that, in agreeing landscaping works, the Council will stay within its vires as limited by Condition 2 and as limited more generally by the Impugned Permission of which it forms part and in which context it must be interpreted."

104. It is not possible for the Board to provide for public participation under the 2016 Act and therefore, the Applicants contend that the Board's decision to grant permission subject to condition requiring the agreement of points of detail, was unlawful. The main complaint by the

Applicants is that when the Board required the removal of the arch between Blocks A and C and the reduction in height of Blocks D and E, it was not possible to visualise the development as granted. I do not accept that it was beyond the competence of the Board to leave the details in respect of the modified development to be agreed between the planning authority. I do not consider that the nature and extent of the matters left for agreement between the Developer and the planning authority, or the Board on appeal, is greater than is permitted by the authorities.

105. The Applicants argument goes further – they contend that the imposition of such conditions, particularly condition 3, breached European law by reason of the absence of public participation and that the lack of scope for the incorporation of the EIA Directive and Habitats Directive. They argue that such a condition is beyond the statutory powers of the Board, when interpreted in accordance with European law and is unlawful. As I have found that the Board's decision was unlawful by reason of it having granted permission in material contravention of the Development Plan, as the Board had found that there were adverse effects on the cone of vision but did not comply with section 9(6) of the 2016 Act. It was not open to the Board to find that the extent of such impact or impingement was not such as to warrant a refusal of permission without invoking its jurisdiction under section 9(6). That is the mechanism for weighing whether such impact merits the grant or refusal of permission. Therefore, it is unnecessary for me to decide whether the Board's decision breaches European law for these reasons, and I consider it appropriate to leave the determination of such issues to a case where that issue might be determinative. It is also unnecessary to decide the other grounds on which the Applicants were granted leave to determine the proceedings for the same reason.

Conclusion and Order

106. Guiding Principle 8 under SDRA 7 provides protection for the views from the cone of vision which is described therein. Whilst development within the cone of vision is not precluded by the terms of the Development Plan, "*Any new developments within this 'cone' shall not adversely affect this view*". Having regard to the policies and objectives set out in the Development Plan, I am satisfied that the grant of permission for a development which would contravene this aspect of the Plan would amount to a material contravention. Whilst it was open to the Board to grant permission in material contravention of this provision of the Plan, that could only be done by applying section 9(6)(a) and (c), which was not done.

107. The proposed development is partially within the cone of vision. The findings of the Inspector, as adopted by the Board, and in the Board's Direction and Order indicate that the Board found that the proposed development would adversely affect the cone of vision and the protected view. While the Board found that this would not warrant the refusal of permission or that there was not an undue adverse effect on the cone of vision, the assessment of the extent of an adverse effect or justification for the grant of permission despite an adverse impact were matters which required the Board to invoke section 9(6). For this reason, I have found that the Board did not address the question of material contravention by reference to the cone of vision lawfully.

108. Therefore, I shall grant an order of *certiorari* quashing the grant of permission dated 31st March 2022 with reference ABP-311591-21.

Emily Farrell