THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 248 J.R.]

IN THE MATTER OF SECTIONS 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

DUBLIN CYCLING CAMPAIGN CLG

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DUBLIN CITY COUNCIL AND OXLEY HOLDINGS LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 19th November, 2020

1. In these proceedings, the applicant seeks an order of *certiorari* quashing a decision of the respondent (*"the Board"*) made on 5th February, 2020 to grant planning permission pursuant to s. 9 (4) of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (*"the 2016 Act"*) for the construction of a development comprising 741 *"build-to-rent"* apartments, retail space and associated site works on lands to the rear of Connolly Station and adjoining Sheriff Street Lower, Dublin 1.

2. The applicant's case is based on two principal grounds:

(a) In the first place, the applicant contends that the proposed development does not fall within the definition of *"strategic housing development"* within the meaning of s. 3 of the 2016 Act; and

(b) Secondly, the applicant makes the case that the Board erred in granting planning permission in circumstances where it screened out the possibility of significant effects on certain Natura 2000 sites in Dublin Bay as a result of the proposed development. The applicant argues that the Board incorrectly concluded that a Stage 2 Appropriate Assessment within the meaning of the Habitats Directive was not required.

3. It will be necessary, in due course, to consider the grounds of challenge in more detail. Before doing so, it may be helpful to first identify and briefly describe the proposed development which the notice party *("Oxley")* proposes to build pursuant to the decision of the Board.

The proposed development

4. Connolly Station occupies a site which runs diagonally from Amiens Street to Seville Place, Dublin 1. To the east of the station there are a series of railway sidings. To the east of the sidings lies a surface car park in the ownership of CIÉ which occupies the ground bordered by Sheriff Street Lower to the south, Oriel Street to the east and Seville Place to the north. The car park is currently used by Irish Rail staff and by visitors to Connolly Station and, more generally, by the public. The proposed development site takes in a part of the car park. It also extends above the existing sidings which will be kept *in situ* with the development constructed above them. The development forms part of a larger masterplan for what is described as the *"Connolly Quarter"* which will comprise, in addition to the residential development the subject of these proceedings, an office development and a hotel development. The development site for the proposed Connolly Quarter is irregular in shape

but is bordered by the station to the northwest, Seville Place to the northeast, Oriel Street to the east and Sheriff Street Lower to the south. The application for planning permission for construction of the office and hotel developments was separately made to Dublin City Council under s. 34 of the Planning and Development Act, 2000 (*"the 2000 Act"*). That application was submitted on 18th May, 2020.

5. Insofar as the residential development is concerned, the intention is to construct a number of multi-storey blocks on the site. Among the blocks to be constructed is Block B which will extend up to fifteen floors above street level and will comprise three residential *"finger blocks"* (which are described in the application as blocks B1, B2 and B3) with private open space integrated at podium and rooftop levels. For present purposes, it is important to note that Block B extends over the existing railway sidings and will be supported by a steel truss support arrangement. The applicant contends that, as part of Block B, a concrete deck will be constructed with a view to accommodating 135 spaces for the purposes of CIÉ car parking with this deck being accessed by means of a series of ramps leading from a motor vehicle entrance on Oriel Street. The applicant contends that the clear intention is that part of the site would be used not for residential purposes but for the purposes of this CIÉ car park and that the area of land to be occupied by the car park and related ramp (when taken with other non-residential uses proposed) exceeds the maximum 4,500 square metres gross floor space permitted by s. 3 of the 2016 Act for uses other than residential use. In making this case, the applicant refers to a number of the documents that were submitted to the Board in support of the planning application including documents which indicate that Oxley is under a contractual commitment to provide car parking spaces to CIÉ as part of the development.

6. Both the Board and Oxley reject the suggestion that a car park forms any part of the proposed development. While they accept that the plans show a *"void"* or *"Interstitial Deck"* which might in the future be adapted for use as a car park (subject to any necessary

consent that might be required) they argue that the application made to the Board under the 2016 Act does not seek permission in respect of any car park in this *"void".* It should be noted that the car park is not included in the application made by Oxley to Dublin City Council on 18th May, 2020 under s. 34 of the 2000 Act.

7. For completeness, it should also be noted that the proposed development includes a very small car park for residents which is intended to operate on a *"carpool"* basis. In light of the exceptional public transport links in the immediate vicinity of the proposed development, cars were not considered to be necessary for the majority of residents. No challenge is made in these proceedings to the inclusion of this small residents' car park.

8. Having briefly described the development, it is next necessary to identify the issues which arise in the proceedings having regard to the case made by the applicant in its statement of grounds and the responses of the Board and Oxley in their respective statements of opposition. It should be noted that, although Dublin City Council is named as a notice party to the proceedings, it did not participate in these proceedings.

The case made in the statement of grounds

9. In para. 11 of the statement of grounds it is alleged that the Board fell into error in the following respects:

(a) In the first place, it is contended that the proposed development does not fall within the definition of strategic housing development prescribed by s. 3 of the 2016 Act and, therefore, the decision of the Board to grant permission was *ultra vires* the powers of the Board under s. 9 (4) of the 2016 Act. This case is expanded upon in subsequent paragraphs of the statement of grounds. In para. 29, the case is made (*inter alia*) that the car-parking was *"erroneously regarded as a pre-existing use for the purposes of planning permission and was not counted for the purposes of the alternative use calculation required by Section 3 of the 2016*

Act". In para. 30, reference is made to the agreement between Oxley and CIÉ (discussed in more detail below) to provide for car parking spaces in the development. It is specifically alleged that the inclusion of these spaces and the associated access ramp within the development brings the gross floor space of *"other uses"* above the maximum 4,500 square metres allowed under the definition of *"strategic housing development"* in s. 3 of the 2016 Act. It is also alleged in para. 40 that the concept of *"other uses"* does not require such uses to be new uses in the development. It is therefore argued that Oxley was precluded from using the fast track planning procedures available under the 2016 Act and that the only avenue open to Oxley was to make an ordinary planning application to Dublin City Council under s. 34 of the Planning and Development Act, 2000 (*"the 2000 Act"*);

(b) Secondly, it is alleged that the application made by Oxley under the 2016 Act was invalid because the newspaper notice, site notice and application form did not comply with the mandatory requirements of the 2016 Act or the Planning and Development Regulations, 2001 (S.I. No. 600 of 2001) (*"the 2001 Regulations"*) and/or were inaccurate and incomplete. In later paragraphs of the statement of grounds (including para. 44) the case is made that Oxley omitted to make any mention of the car parking deck or the gross floor space of the car parking deck in the relevant notices and application form.

(c) In the alternative, the applicant contends that, if it is incorrect in its argument at (b) above, it must follow that the Board has unlawfully granted planning permission for a carpark that did not in fact form part of the development. In para. 45 of the statement of grounds, the case is made that this renders the decision *ultra vires* the Board's powers under s. 9 (4) of the 2016 Act.

(d) The applicant also makes a case that the reasons given by the Board did not engage with the submissions made to it by the applicant or by Dublin City Council and in particular the submission which the applicant contends it made to the effect that Oxley was legally obliged to seek permission for the proposed car park;

(e) It is also alleged that the Board incorrectly concluded that a Stage 2 Appropriate Assessment was not required. In making this case, the applicant noted the screening report completed by Openfield Ecological Services on behalf of Oxley which addressed the potential impact of the development on a number of Natura 2000 sites including the South Dublin Bay and River Tolka Estuary SPA, the South Dublin Bay SAC, the North Dublin Bay SAC and the North Bull Island SPA. The screening report noted that the development would generate 340 cubic metres of waste water daily. The report concluded that the additional load that this would generate for the Ringsend wastewater treatment plant would not be significant on the basis that there is no evidence that pollution through nutrient output is affecting the conservation objectives of the South Dublin Bay and River Tolka Estuary SPA and furthermore that the upgrading works at the wastewater treatment plant *"will address future capacity demand".* The applicant drew attention, in this context, to a submission made by the Parks Section of Dublin City Council, in the course of the planning application, which suggested that *"there are reasons to believe that the sewage effluent is contributing to further exceedances of the Nitrates Directives for the Lower Liffey Estuary and to the declining ecological status of the Bay in terms of impacts to protect its seagrass habitats and that the nutrient enrichment was leading to increased growth of algae which was forcing bird species such as the Light Bellied Brent Goose to feed inland rather than on the eelgrass beds".* Against that backdrop, the

applicant contended that the screening report submitted on behalf of Oxley did not establish beyond a reasonable scientific doubt, by reference to the best scientific evidence available, that effluent discharged from the Ringsend wastewater treatment plant would not have significant effects on the Natura 2000 sites. In addition, the applicant alleged that it was inaccurate to state that the wastewater treatment plant will have capacity once the upgrade is completed in 2025.

10. At the hearing, the principal submissions made on behalf of the applicant related to the first and fifth grounds summarised in para. 9 above. For completeness, it should be noted that, in the statement of grounds, it was also alleged that the housing element of the proposed development would be less than 85% of the gross floor area and, as a consequence, would not fall within the definition of strategic housing development set out in s. 3 of the 2016 Act. However, in the course of the hearing, counsel for the applicant confirmed that this element of the applicant's case was not being pursued.

The response of the Board

11. In its statement of opposition, the Board maintains that the application for permission made by Oxley in this case did not include an application for 135 car park spaces. In those circumstances, the Board contends that no difficulty arises with the site notice, application form or newspaper notice. The Board makes the case that no permission has been given by it for the 135 car park spaces. In para. 7 of the statement of grounds, reference is made to the way in which Block B will be constructed over the railway sidings which will remain operative. It is alleged that, in order to achieve this, the relevant Blocks are to be built with forms of steel trussing support *"which create a void space above the space directly incorporating the sidings and below the blocks."* While the Board acknowledges that certain of the drawings and materials submitted by Oxley described parking in this location, the Board contends that it was *"equally made clear by the Developer that no permission was*

being sought for car parking in this location and it was not part of the application before the Board". In circumstances where the Board contends that it did not grant permission for the car park, the Board makes the case that there can be no basis for the applicant's complaint that the Board failed to address, in its decision, the arguments made by the applicant or by the City Council.

12. With regard to the issues in respect of the screening exercise, the Board objects that the applicant made no submission to it regarding appropriate assessment. However, in the course of the hearing, counsel for the Board indicated that, in light of the views expressed by the Advocate General in the CJEU in Case C-826/18 *Stichting Varkens in Nood* ECLI:EU:C:2020:514 the Board did not propose, in this case, to maintain its objection to the applicant's standing to raise the Habitats Directive issue. It was made clear by counsel for the Board that this concession was made solely for the purposes of this case and, in circumstances where the judgment of the CJEU has not yet issued, it could not be taken as a precedent for the future.

13. In addition, the Board drew attention to the fact that the views expressed by the Parks Section of the City Council were not reflected in the report of the Chief Executive which stated that the screening report: *"has been subject to review by the Biodiversity officer in DCC. No objection has been raised in relation to the content, scope or conclusions of the study. Having reviewed the Screening report, which has been reviewed by Parks and Landscape Services, the Planning Authority concur with the conclusions reached and have no reason to deviate from the results of the assessment".*

The position taken by Oxley

14. Oxley took a similar position in its statement of opposition to that taken by the Board. In para. 13 of its statement of opposition, Oxley drew attention to the pre-application consultation opinion issued by the Board which required Oxley to satisfy itself (and to

demonstrate to the Board at the application stage) that the proposed development "*can be considered under the provisions of the SHD legislation noting inter alia the definition of other uses set out in Section 3 (ii) (I) of the [2016 Act] and specifically that a maximum of 4,500 sq. metres gross floor spaces for such other uses may be provided for in any development…".* In para. 14 of the statement of opposition, Oxley states that the application subsequently made for permission to construct the proposed development included *"a formal response to the Board's pre-application consultation opinion and a complete answer to the complaints about car parking that are made in the Statement of Grounds. Specifically, the application did not request permission, and therefore permission was not granted, for the car parking spaces complained about".* In para. 15, Oxley reiterates that *"there was and is no proposal for such car parking forming part of the application …".*

15. In para. 20 of its statement of opposition, Oxley clarified that the proposed development requested permission only for the residential blocks and did not request permission for the proposed office development in Block A, the hotel to be located in Block D3 or the office development to be incorporated in Block E. Oxley also highlighted that the Masterplan makes clear that those blocks would be the subject of an *"ordinary*" application for planning permission under s. 34 of the 2000 Act. In para. 20, it is confirmed that the s. 34 application has been made to the council in respect of those non-residential blocks. At this point, it might be noted that, on the evidence before the court, it has been established that the s. 34 application does not include an application for permission to use the *"void"* mentioned in the Board's statement of opposition as a car park for 135 of the 180 car parking spaces which Oxley is contractually committed to provide to CIÉ.

16. In para. 23 of the statement of opposition, Oxley deals with the masterplan under which, according to Oxley, car parking *"will ultimately be accommodated within the overall*

site…". In that context, the following is stated in para. 23 (c) in relation to the 135 car parking spaces in issue:

> *"It is proposed that these will be accommodated upon the Interstitial Deck. For this reason, the Interstitial Deck is fairly labelled by the Applicant as the 'third-floor deck' or the 'car parking deck'. The response to the Board's pre-application consultation opinion explains that 135 … of the 180 … total car parking spaces for CIÉ are envisaged as being accommodated on the part of the Interstitial Deck within the proposed development. These are the car parking spaces which are the subject of complaint in the proceedings …. Part of the Interstitial Deck is proposed as part of the section 34 application".*

17. In para. 28 of the statement of opposition, it is acknowledged that the structure of what Oxley describes as the Interstitial Deck is *"within the application and the Permission. However, no application was made for use of the Interstitial Deck for car parking".* A further elaboration of Oxley's case in relation to this issue is provided in para. 45 of the statement of opposition where it is stated that the application for the proposed development *"includes the Interstitial Deck, which is required to protect the rail sidings and to provide a necessary support for the residential development above. The Masterplan discloses how that … Deck might be used, but the application for the proposed development did not request permission for the 135 spaces within that structure…."* . In this context, it should be noted that, in the verifying affidavit sworn by Mr. Peter Halpenny on behalf of Oxley, a number of the drawings of the development are exhibited. These are the drawings which accompanied the planning application. They include two section drawings through Block B where the deck is shown and where it is described as the *"car park deck".* These drawings are addressed in more detail at a later point in this judgment.

18. In common with the Board, Oxley, in para. 51 of its statement of opposition (dealing with the adequacy of the screening exercise) highlights that the applicant did not make any submissions to the Board about the capacity of the wastewater treatment plant or the alleged requirement for a full appropriate assessment of the proposed development. However, during the course of the hearing, counsel for Oxley very helpfully confirmed that Oxley was prepared to follow the same approach as the Board and, accordingly, was not contesting the standing of the applicant to ventilate this issue in these proceedings. In its statement of opposition, Oxley addressed the substance of the complaint made by the applicant in relation to the screening exercise. The statement of opposition refers to an assessment made by the Environmental Protection Agency (*"EPA"*) that the status of the Lower Liffey Estuary is *"good"* and that the status of Dublin Bay is also *"good"*. With regard to the Light-bellied Brent goose, Oxley drew attention to material published by the National Parks and Wildlife Service (*"NPWS"*) that the species shows no evidence of deterioration. Similarly, material published by the NPWS establishes that eelgrass (a favoured food source of the Light-bellied Brent goose) had a *"favourable conservation status"* at Dublin Bay.

19. With regard to the wastewater treatment plant, Oxley states that the contractors for the upgrade work to the plant comprising a new 400,000 population equivalent extension were appointed in February 2018. According to Oxley, the work on this 25% increase in capacity is scheduled to complete in 2020, before the first wastewater discharge from the proposed development will take place. In addition, it is stated that Irish Water is working on infrastructure to achieve a population equivalent of two million by the end of 2022. Oxley further states that the upgrade to use of aerobic granular sludge (which allows for a greater amount of wastewater to be treated to a higher standard within the current plant) and other phased upgrades to achieve a population equivalent of 2.4 million is expected to be completed in 2025.

20. Oxley also relies on the determination reached by the inspector appointed by the Board that the potential for significant effects on the relevant Natura 2000 sites can be excluded and that the potential for *"in combination impacts"* was also excluded. In addition, Oxley relies on the subsequent determination by the Board in relation to the screening exercise by which the Board adopted the report of the inspector and concluded that a Stage 2 Appropriate Assessment was not required.

Consideration of the issues

21. The issues break down into two quite distinct parts – namely those relating to s. 3 of the 2016 Act, on the one hand, and those relating to the adequacy of the screening exercise undertaken by the Board, on the other. In this judgment, I will address the issues which arise under the 2016 Act first and will then consider the issues relating to screening for appropriate assessment.

Section 3 of the 2016 Act

22. In order to understand the case made on both sides in relation to the 2016 Act, it is necessary to consider the definition of *"strategic housing development"* in s. 3 of the 2016 Act. The definition is lengthy. The concept is defined by reference to five separate categories of development which are described in paras. (a) (b), (ba), (c) and (d) of the definition. For present purposes, the only one of those paragraphs which is relevant is para. (a). For the purposes of this judgment, I will therefore set out the relevant parts of the definition but excluding paras. (b) to (d):

> *"'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) …*
>
> *(ba) …*

(c) …

(d) …,

each of which may include other uses on the land, the zoning of which facilitates such use, but only if—

(i) the cumulative gross floor space of the … houses comprises not less than 85 per cent … of the gross floor space of the proposed development … , and

(ii) the other uses cumulatively do not exceed—

(I) 15 square metres gross floor space for each house … in the proposed development or to which the proposed alteration of a planning permission so granted relates, subject to a maximum of 4,500 square metres gross floor space for such other uses in any development, …".

23. It will be necessary, in due course, to consider the individual elements of this definition in more detail. At this point, it is sufficient to note that, in order to fall within the statutory definition of *"strategic housing development",* it is necessary that the following conditions are met:

(a) In the first place, there must be a development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses. There is no dispute between the parties that this element of the definition is met in the present case in relation to the residential development proposed to be constructed on the site adjoining Connolly Station. The statutory definition of *"house"* for this purpose includes a flat or apartment;

(b) Secondly, the development of 100 or more houses can include *"other uses on the land"* (where the land has been appropriately zoned for that purpose) if a number of conditions are met. For present purposes, not all of those conditions are relevant. Insofar as the conditions are relevant to the present case, they are that

> the other uses cumulatively must not exceed 15 square metres gross floor space for each house in the proposed development subject to a maximum of 4,500 square metres gross floor space for such other uses;

24. While there was a debate between counsel as to whether the definition should be given a restrictive interpretation, it appears to be quite clear that, to the extent that the development includes other uses on the land (i.e. non-residential uses) the conditions set out in paras. (i) and (ii) of the definition must be strictly observed. There is no scope for any discretion or latitude. That seems to me to follow from the use of the words *"but only if"* which appear immediately before those sub-paragraphs. Those words seem to me to convey the message that the Oireachtas was concerned to ensure that, for the purposes of the 2016 Act, non-residential uses are permissible only to the extent set out in paras. (i) and (ii) of the definition.

25. Counsel for the applicant placed some emphasis upon the way in which the words *"other uses"* are not stated to be uses for which planning permission is required. Counsel also submitted that the reference to *"other uses"* does not exclude existing uses on the land;

26. However, counsel for the Board and counsel for Oxley emphasised the words *"each of which…"*. Those words clearly refer back to the different species of development enumerated in paras. (a) to (c) of the definition (para. (d) is not relevant since it relates to alterations to an existing planning permission). Thus, counsel argued that unless the *"other uses"* are within the proposed development in respect of which an application for permission is made, they are not relevant to the Board's consideration of the application in question.

27. For completeness, it should be noted that s. 3 of the 2016 Act makes clear that car parking space which is ancillary to a strategic housing development is to be disregarded for the purposes of *"gross floor space"*. However, all parties were agreed that this does not assist in terms of any car parking to be provided for the benefit of CIÉ. The definition of

"gross floor space" in s. 3 only disregards floor space provided for the parking of vehicles by users of the building which can be said to be incidental to the primary purpose of the building (in this case a residential development). Thus, unless the car parking spaces were designed to be used by the residents themselves or by visitors to the residents, the car parking spaces would not be disregarded. All of this is very clear from the definition of *"gross floor space"* in s. 3 where it is defined as meaning:

> *"the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building".*

28. At a later point in this judgment, it will be necessary to assess and analyse in more detail the competing submissions as to the proper interpretation of the definition of *"strategic housing development".* The arguments of counsel are summarised in more detail in paras. 72 to 83 below and these are discussed and analysed further in paras. 84 to 96 below.

The principles applicable to the construction of planning documents

29. In light of the issues which arise, it will be necessary to carefully consider the application that was made by Oxley to the Board in this case. Before doing so, it is necessary to outline the relevant principles which govern the construction of planning documents. Those principles may be summarised as follows:

(a) In the first place, as the judgment of McCarthy J. in the Supreme Court in *Re. X.J.S. Investments Ltd* [1986] I.R. 750 makes clear, planning documents should be construed not as complex legal documents drafted by lawyers but in a way in which members of the public, without legal training, might understand them. More recently, in *Lanigan v. Barry* [2016] 1 I.R. 656 at p. 665, Clarke J. (as he

then was) described this process as an example of the *"text in context"* method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. On the same page, Clarke J. summarised the approach to be taken as *"requiring the court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them".*

(b) In *Lanigan v. Barry,* at p. 663, Clarke J. suggested that the starting point has to be a consideration of the grant of planning permission itself. However, at p. 664, he indicated that, in considering the use which may be regarded as permitted by a particular planning permission, it is possible to look at the development for which the permission has been granted *"together with any documents submitted in the context of the relevant planning application";*

(c) A planning permission should be interpreted objectively. Thus, in *Kenny v. Dublin City Council* [2009] IESC 19, Fennelly J. approved the following statement from Simons "Planning and Development Law" (2nd ed., 2007 at paras. 5.06-5.07):

> *"A planning permission is a public document; it is not personal to the Applicant, but rather enures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in light of subjective considerations peculiar to the Applicant or those responsible for the grant of planning permission.*
>
> *A planning permission is to be given 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 such documents, read as a whole, necessarily indicate some other meaning".*

(d) Fennelly J., in *Kenny*, also stressed that an objective interpretation is not a synonym of literal interpretation.

(e) It is also well established that where the planning permission incorporates other documents, those documents must be looked at in determining the proper scope of the permission. The relevant principle is summarised by Simons, *op. cit.*, at para. 5-09 as follows:

> *"Where the planning permission incorporates other documents, it is the combined effect of the permission and such documents which must be looked at in determining the proper scope of the permission. In practice, most planning permissions include a condition requiring that the development be carried out in accordance with the plans and particulars lodged as part of the application".*

30. These principles were restated and applied very recently by the Court of Appeal in *Camiveo Ltd v. Dunnes Stores* [2019] IECA 138. Having regard to these principles, I must now assess the materials available in this case by reference to the way in which an ordinary and reasonably informed member of the public would do so in considering the planning permission granted by the Board in the planning process before it. For this purpose, I must place myself in the position of such a member of the public and attempt to reach an objective construction of the relevant planning documents. This will require a careful but not legalistic consideration of the relevant planning permission construed in the context of the application for permission and supporting documents.

The relevant planning documents

31. I should commence my consideration of the documents by looking at the terms of the Board Order by which the Board decided to grant permission for the development. It is clear from the curial terms of the Order on p. 3 that the Board granted permission for the "*above*

proposed development in accordance with the said plans and particulars…". The reference to the *"above proposed development"* is a reference to the proposed development as described on pp. 1-3 of the Order. It is unnecessary for the purposes of this judgment to set out the full terms of the description given. However, it should be noted that para. 2 of the description describes the development as comprising the construction of 741 residential units in eight apartment blocks with a cumulative gross floor area of 68,535 square metres comprising a number of blocks which are identified and which include Blocks B1 to B3 (each of which are described by reference to their height, their total gross internal floor area and the apartment mix). There is no reference in the description of these blocks to a car park. However, as we shall see, the deck which the applicant says is intended to be used as a car park is an integral element of the construction of Blocks B1 to B3.

32. There is a reference to a car park in para. 5 of the description of the development but this is in relation to the residents' car park. Paragraph 5 is in the following terms:

> *"5. A basement of 7,253.4 square metres with a new vehicular access from Oriel Street Upper incorporating residents' car parking … plant rooms… waste management facilities…".*

33. It is quite clear from the description given in para. 5 that it refers solely to the proposed residents' car park. However, as noted above, the planning permission must be read in conjunction with the plans and particulars lodged as part of the application. This is precisely what the Board order requires. As noted in para. 31 above, the terms of the order are that permission was granted *"in accordance with the said plans and particulars…".* These include the plans exhibited by Mr. Halpenny in his affidavit verifying the statement of opposition submitted on behalf of Oxley. Those plans will be examined in more detail below. At this point, it is sufficient to note that the plans exhibited by Mr. Halpenny include a number of section drawings of Block B which specifically refer to the deck as the *"car park*

deck" and which show the ramp to the car park which is described as *"car park deck access".* It is also important, in this context, to bear in mind the specific terms of Condition 1 to the Board Order which requires that the proposed development *"shall be carried out and completed in accordance with the plans and particulars lodged with the application…".*

34. Para. 7 of the Order refers to other uses. There is no reference here to any use as a car park for non-residents. The other uses described in para. 7 relate to ten units providing retail, commercial and community use with a combined gross floor area of 3,142 square metres. Nonetheless, the significance of the fact that no reference is made to car park use in this paragraph is diluted by the detailed representation of the car park in the drawings submitted with the planning application.

35. Paragraph 9 of the Order refers to the vehicle access ramp from the Oriel Street entrance in the following terms:

> *"9. A service and emergency vehicle only access ramp from the Oriel Street Upper site entrance to serve Córas Iompair Éireann's transport needs at Connolly Station".*

36. Although the access ramp described in para. 9 of the Order is of some significance in the context of the present proceedings, there is nothing on the face of the Order to suggest that it has any role in relation to the provision of access to a car park for use by CIÉ. By its own terms, para. 9 is clearly confined to access for service and emergency vehicles only. However, the drawings exhibited by Mr. Halpenny include a north west to south east section of Block B which shows the deck described as a *"car park deck"* and which also shows the ramped access to the deck which is described as *"car park deck access".*

37. If one were to read the Order on its own, it might be thought, at first sight, that there is nothing in its terms to suggest that the development, in respect of which planning permission has been granted, incorporates any car park use for CIE's benefit. However, when read in conjunction with the plans and drawings submitted with the application (which

are addressed in more detail below) there are a number of very clear references to the deck as a car park and to the access ramp as a car park access. It will therefore be necessary to consider how the Order would be construed by an ordinary and reasonably informed member of the public when read in conjunction with the plans and drawings.

38. In addition, as the case law makes clear, the Board Order must be read in context. In particular, it must be read in the context of the documents that were lodged on 16th October, 2019 in support of the planning application. The relevant letter from Oxley's agents, McCutcheon Halley of 16th October, 2019 lists the documentation submitted with the application as required under Articles 297 and 298 of the 2001 Regulations (as amended). These included the application form itself, the architectural drawings, the Masterplan for the Connolly Quarter and the response of Oxley to an opinion issued by the Board in the pre-application phase under ss. 5 and 6 of the 2016 Act during which Oxley consulted with the Board.

39. In the strategic housing context, it should be noted that, before a developer can make an application for planning permission under s. 4 of the 2016 Act, the developer must first make a request to the Board under s. 5 of the 2016 Act to enter into consultations with the Board in relation to the proposed strategic housing development. Where the Board accepts such a request, a consultation process will take place under s. 6 of the 2016 Act. At the conclusion of that process, the Board must form an opinion as to whether the documents submitted by the developer under s. 5 of the 2016 Act constitute a reasonable basis for an application under s. 4 or require further consideration and amendment in order to constitute a reasonable basis for such an application. Where the Board forms the opinion that further consideration and amendment is required in order to constitute a reasonable basis for an application under s. 4, the Board must set out in a notice under s. 6 (7) (b) its advice as to the

issues that need to be addressed. Such a notice was issued in this case in which the Board stated (*inter alia*):

> *"**Compliance with SHD legislation***
>
> *The applicant should satisfy themselves (and demonstrate to the Board at application stage) that the proposed development can be considered under the provisions of the SHD legislation noting inter alia the definition of other uses set out in Section 3 (ii) (I)…and specifically that a maximum of 4,500 sq. metres gross floor space for such other uses may be provided for in any development noting (sic). This should be considered in the context of the proposal to include the car park at basement level that provides for car parking and floor space not specifically related to the SHD development".*

40. The terms of this opinion suggest that the Board had a concern about the potential impact of car parking for non-residents on Oxley's ability to utilise the machinery of the 2016 Act. It should also be noted that Article 297 (3) of the 2001 Regulations specifically requires that, where the Board has issued a notice under s. 6 (7) of the 2016 Act, the application for permission under s. 4 must be accompanied by a statement of the proposals included in the application to address the issues set out in the Board's notice. As outlined in more detail below, the applicant in this case submitted a response to the issue raised by the Board in its s. 6 (7) opinion as to how the development would comply with the condition set out in the s. 3 definition which imposes a maximum of 4,500 square metres gross floor space for non-residential use.

41. In addition, Article 297 (2) (c) requires that a location map of sufficient size should be submitted marked in red so as to clearly identify the land or structure to which the application relates and the boundaries thereof. There is a similar requirement (save that the scale prescribed is different) in Article 298 (1) (a) which also requires that features on,

adjoining or in the vicinity of the land or structure to which the application relates must be shown.

42. It is necessary to consider a number of the documents submitted on 16th October, 2019 to the Board. In the first place, it should be noted that the application for permission contains a description of the development which is consistent with the description given in the Board Order (as outlined above). No mention is made in the application of the intended use of any part of the development as a car park for the benefit of CIÉ.

43. In the response to the s. 6 (7) opinion of the Board, Oxley's agents, McCutcheon Halley addressed the non-residential uses at pp. 5-6. They explained that the 3,142 sq. metres gross floor area provided for the ten units at ground floor level (for retail and other uses) was well within the 4,500 square metres limit prescribed by s. 3 of the 2016 Act. They also dealt with the car parking spaces to be located for use by residents. Having done so, they then addressed the issue of the car parking required for CIÉ. Having referred to a written opinion of counsel (which was attached to the response) they stated:

> *"Currently, the subject site is used by CIÉ to provide for 390 carparking spaces to meet the operational needs of Connolly Station. This is an established and existing use. As is noted in the legal opinion that forms part of this Submission and Response …, the agreement that is in place between CIÉ and the applicants to develop the site is in the nature of a 'restrictive covenant running through the land'* (sic). *The provisions of Section 3 … refer only to developments that are 'proposed', and as stated in the Opinion attached, the existing established use is not included in this application proposal, nor is it necessary, as the authorisation to allow this existing use is already in place.*
>
> *Under the terms of this Development Agreement the applicant is required to maintain 180 carparking spaces exclusively for the use of CIÉ. The masterplan which*

accompanies this … application demonstrates how this will be achieved, with 135 spaces within the SHD component, and 45 spaces within the proposed subsequent Section 34 non-SHD applications. Combined, a total of 238 spaces (180 CIÉ and 58 SHD) will be provided for in the overall development when completed. This figure is a substantial reduction from the current existing capacity of 390 spaces".

44. Counsel for the applicant stressed the reference in this passage to 135 car parking spaces being provided *"within the SHD component".* He also highlighted the reference to the car park as an *"existing use"* which is stated to be *"already in place".* He argued that these passages clearly demonstrate that the car park use in the *"void"* or *"interstitial space"* is clearly envisaged as occupying a place within the proposed development. In contrast, counsel for the Board and counsel for Oxley stressed the use of language that the *"existing established use is **not** included in this application proposal"* (emphasis added).

45. There were also differing submissions made by counsel in relation to a further passage on p. 7 of the McCutcheon Halley response where they said:

"In the context of the Connolly Quarter, the proposed carparking arrangement is in effect, a rationalisation that will result in a significant decrease in the level of existing onsite carparking. While the proposed SHD application does not propose these 135 CIÉ carparking spaces for reasons outlined in the legal Opinion attached, the plans submitted do indicate where these spaces will be located. The area identified to maintain this existing carparking provision, i.e. 135 spaces, is in a void above the deck which must be constructed to accommodate the proposed residential blocks B1, B2, B3 which oversail the rail sidings. Rather than leave this void empty it is proposed to provide for the continuation of existing carparking use within the space as required by the legal agreement."

46. Counsel for the applicant submitted that this passage accepts that the plans show that the 135 car parking spaces earmarked for CIÉ *"will be located"* in the void above the deck. In contrast, counsel for Oxley and the Board emphasised the language used to the effect that the proposed SHD application *"does not propose these 135 CIÉ carparking spaces…"*. Counsel for Oxley also stressed that the relevant deck is an integral part of the structure which it is necessary to construct to allow blocks B1, B2 and B3 to oversail the railway sidings. Conversely, counsel for the applicant relied on the same fact to argue that it could not be denied that use of that integral part of the structure of the development as a car park was a non-residential use of a part of the development that required to be counted as part of the *"other uses"* for the purposes of s. 3.

47. Given the references to the legal opinion attached to the McCutcheon Halley response and the statement by the authors that the opinion *"forms part of this Submission"*, it is clearly necessary to read the above passage in combination with what is stated in the opinion. Before turning to the opinion, there is one further passage in the response which was highlighted by counsel for the applicant and which is clearly relevant to the carparking issue. This appears at p. 19 of the response as follows:

> *"Connolly Quarter is designed to be a pedestrian priority scheme. Residential carparking is non-priority given the proximity to Connolly Rail Station and other public transport connections. There are currently 390 existing carparking spaces on site for CIÉ use. The development agreement requires 180 spaces of these to be maintained for CIE's use. As part of the SHD submission, 135 CIÉ spaces are accommodated within the Block B podium deck. As was stated previously the legal Opinion obtained states that the development agreement between the applicant and CIÉ acts as a burden on the site and is in effect 'a restrictive covenant' on the site. As such these 180 spaces cannot form part of the proposed development and accordingly*

cannot be included as a use for the purposes of calculating the extent of other uses….".

48. Counsel for the applicant emphasised the use of the words *"As part of the SHD submission, 135 CIÉ spaces are accommodated within the Block B podium deck".* While counsel acknowledged that the passage also states that the spaces cannot form part of the proposed development, he suggested that there was no logical basis to suggest (as the passage does) that this arises on the basis of the legal opinion provided by counsel to the effect that the agreement between the applicant and CIÉ acts as a burden on the site and is in effect a restrictive covenant. He submitted that the existence of such a *"restrictive covenant"* cannot, of itself, have the result that the car parking spaces required for CIÉ cannot form part of the proposed development.

49. The opinion of counsel attached to the McCutcheon Halley response addresses a number of issues including the effect of the agreement between Oxley and CIÉ in relation to car parking. At para. 8 of the opinion, counsel expresses the view that the agreement in question is in the nature of a restrictive covenant running with the land *"which the prospective Applicant is bound to and intends to comply with".* That language was emphasised by counsel for the applicant in the course of these proceedings as clearly indicating an intention to use the deck mentioned in the McCutcheon Halley response as a car park.

50. In paras. 9-11 of the opinion, counsel states:

"9. There is no question that the prospective Applicant intends to do anything other than comply with its obligation to the owner of the lands, and indeed it is a condition precedent to the making of an application that the owner of the lands gives its consent subject to this obligation and will require to be satisfied that its rights are protected. There is no question therefore of any attempt to do other than comply with the

obligations of a contractual nature made between the owner of the lands and the prospective Applicant.

10. It should however be noted that these existing arrangements do not form part of the application proposal to be made. The existing car parking is the subject of the agreement, is a valid and subsisting operation and there is no requirement that, and indeed it would be inappropriate that these arrangements be included with the application. The existing established use proposed is not included in the application nor is it necessary that it be included because the necessary authorisation to allow this activity is already in place.

11. The requirements of Section 3 relate to the development proposed and the nature of the development that sought to be approved as part of the strategic housing development procedure. The other uses referred to in Section 3 (a) to (c) (i) and (ii) relate to 'other uses' sought to be approved as part of the application procedure and do not include those users (sic) which are existing, and which are not intended to be altered and the continuance of which does not require approval as part of the application procedure. The only 'other uses' for the purposes of these provisions therefore are those users which are other than residential uses and which are proposed as part of the strategic housing development and is limited to an area of 3,142 sq. m."

51. Counsel for the applicant, in the course of the hearing, suggested that the approach proposed by counsel in para. 10 of the opinion was "*radical".* More importantly, for present purposes, he submitted that these paras. of the opinion clearly proceed on the basis that the existing car parking use will continue and, moreover, that it must continue if Oxley's obligations to CIÉ are to be complied with. Counsel for the applicant argued that, while the opinion suggested that it was not necessary to include the car park use in the application for

permission under the 2016 Act, the opinion was incorrect insofar as it suggested that the only uses which fall within the ambit of *"other uses"* in s. 3 are those which are (to use the language of the opinion) *"sought to be approved as part of the application …".* He reiterated the argument (summarised in para. 25 above) that s. 3 simply uses the phrase *"which may include other uses on the land"* and does not go so far as to suggest that such other uses must be either new uses or alternatively, uses which require planning permission. He submitted that the reference in s. 3 to "*other uses"* does not exclude an existing use.

52. The McCutcheon Halley response also referred to a traffic impact assessment report prepared by O'Connor Sutton Cronin & Associates (*"OCSC"*) on behalf of Oxley. It was also among the documents submitted with the application to the Board under s. 4 of the 2016 Act. Counsel for the applicant drew attention to the statement made on p. 13 of the OCSC report where the authors noted that:

> *"The albeit reduced allocation of Irish Rail car parking will continue to be a trip generator but re-routed through the new access on Oriel Street. The associated revised trip patterns of the reduced Irish Rail car parking have been developed on a pro-rata basis using the traffic survey data from the existing car park entrance…".*

53. Counsel for the applicant submitted that this statement by OCSC clearly supported the applicant's contention that the car park use is, as a matter of fact, included in the development. Counsel for the applicant also drew attention to the provisions of the masterplan and associated drawings. The masterplan for the Connolly Quarter was one of the documents submitted with the application for planning permission. The version of the masterplan that was submitted is expressly described on the cover as *"SHD Submission October 2019".* On p. 5, the masterplan describes Block B as extending *"over the existing Irish Rail sidings and is supported by a steel truss support arrangement. This support deck creates the opportunity to accommodate 174 CIÉ car parking spaces on full buildout (**135***

spaces as part of the SHD application*) within the structural depth with this deck being accessed via a series of ramps/roadways from Oriel St."* (emphasis added).

54. Counsel for the applicant relied on the above passage (in particular that part of it which I have highlighted in bold) as evidence that the 135 car parking spaces for CIÉ are, as a matter of fact, within the strategic housing development. Counsel for the applicant also stressed that the only purpose of building a ramp or roadway up to the deck in question was for the purposes of the car park. There was no other explanation for it. In this context, he drew attention to p. 97 of the masterplan which shows a sketch of the proposed route of the access ramps leading from the Oriel Street vehicular entrance. This shows the route of the ramp from that entrance. The ramp to allow service and emergency access to Connolly Station is shown in a broken line in bold print on the sketch. In addition, the sketch shows that at a particular point on this ramp, the service and emergency access route turns left to allow access to Connolly Station. However, there is a fork in the route at this point. While the ramp continues to the left to enable access to Connolly Station, the ramp also continues up to a higher level and, in particular, to what is described in the narrative next to the sketch as the *"Podium Car Parking Deck".* The relevant narrative is in the following terms:

"***Connolly Station Access***

- *There is a contractual agreement to maintain existing fire tender and service access to the rear of Connolly Station (Platform 3).*

Podium Car Parking Deck

- *Car parking is accommodated within the depth of the structural truss which support Block B above and oversails the existing Irish Rail sidings.*
- *Ramped Access to this elevated car parking level is provided between the existing sidings and the rear of the Block B accommodation".*

55. Counsel for the applicant also highlighted what is said on p. 95 of the masterplan document where, under the heading *"Vehicle Access Strategy"* the document states that vehicle access and car parking strategy is informed by *"key criteria'* which, as far as car parking is concerned, is described in the following terms:

> *"*
> - *There is a contractual agreement to retain 180 Irish Rail car parking spaces within the proposed masterplan scheme (these spaces are currently accommodated at grade within the existing site).*
> - *It is proposed that all car parking is located at basement and podium level (above the Irish Rail sidings)".*

56. Counsel for the applicant also referred to a number of the drawings which were submitted as part of the application. These drawings are very important in circumstances where the Board Order requires the development to be constructed in accordance with the plans. In particular, counsel drew attention to drawing number 18135-RKD-B-03-DR-A-1103 described as *"Block B plan – Level 03"* which is dated October 2019 and is stated to be issued for the purposes of the planning application submissions. There is no doubt that this plan is one of the plans and particulars of the proposed development which were submitted by Oxley in support of the planning application and which are now referenced in the curial part of the Board Order and in Condition 1 to that order. In this context, this plan was also exhibited by Mr. Halpenny in his affidavit sworn on behalf of Oxley on 5th June, 2020. In para. 5 of his affidavit Mr. Halpenny confirms that the plans exhibited by him were part of 135 plan and elevation drawings submitted with the planning application. This plan shows what is described as *"SHD Carpark Deck".* It shows the deck in question laid out as a car park with each of the individual car parking spaces shown up to and including space number 135. Counsel for the applicant again emphasised that this drawing very clearly indicates that the use of the deck within Block B is as a car park. Counsel also illustrated, by reference to

the measurements shown on this drawing of the deck (laid out as a car park) that, in round terms, the floor area of the deck is of the order of 3,701.38 square metres. Counsel arrived at this calculation by reference to the lengths of the individual car parking spaces (given at 4.8 metres) together with the depth of the intervening carriage ways (given at six metres). In round terms, in the depth of the deck, there were four car parking spaces and two carriage ways. That adds up to a depth of 31.2 metres. Counsel then used the measurements on the map to demonstrate that the length of the car park was 118.634 metres. When that figure is multiplied by 31.2 metres, it gives a floor area of 3,701.38 square metres. While I am not convinced that this measurement is entirely accurate, I believe it clearly demonstrates that the floor area of the deck (when laid out as a car park) will manifestly exceed 1,358 square metres (which is the difference between the maximum allowed for other uses of 4,500 square metres and the combined gross floor area of non-residential uses described in para. 7 of the Board Order namely 3,142 square metres).

57. Counsel for the applicant also drew attention to drawing number 18135-RKD-B-ZZ-DR-A-1200 which shows a north east to south west section of Block B and is dated October 2019 and stated to be issued for *"Planning Application Submission".* Again, this drawing was also among the exhibits to Mr. Halpenny's affidavit. Thus, this drawing is also part of the plans and particulars of the development which are referenced in the curial part of the Board Order and in Condition 1 to that order. The section through Block B shows each of the three finger towers Blocks B1 to B3 with the deck immediately below the surface of the podium level and above the railway sidings and described as a *"car park deck"*. The section drawing also shows what is described as the *"car park deck access ramp".* Counsel for the applicant also highlighted OCSC drawing number 0635 dated 19th June, 2019 which shows the deck laid out with all of the car parking spaces and also shows what is described as the *"proposed ramp to third floor parking"* and the way in which that ramp proceeds up to the

car park deck from the fork in the ramp (previously described) where the ramp to Connolly Station turns to the left. Although not highlighted by counsel for the applicant, one of the section drawings of Block B exhibited by Mr. Halpenny is drawing number 18135-RKD-B-ZZ-DR-1201. This shows a north west to south east section through Block B with the *"car park deck"* and the *"car part deck access"* ramp clearly shown.

58. Counsel for the applicant also referred to a further report from McCutcheon Halley dated October 2019 which is described as a *"Planning Statement & Statement of Consistency with Dublin City Development Plan 2016-2022"* and which also carries the bi-line *"Proposed Strategic Housing Development 'the Connolly Quarter' rear of Connolly Station, Sheriff Street Lower, Dublin 1".* At para. 4.4 of that report, the following statement is made:

> *"**4.4 Car Parking Provision***
>
> *Currently there are 390 … car parking spaces operated by CIÉ. Development of this site is subject to an agreement that 180 … of these spaces … must be maintained exclusively for the use of CIÉ. This requirement is in addition to vehicular/pedestrian access arrangements for emergency and service vehicles being maintained to meet CIÉ's operational needs. The SHD proposal complies with this obligation.*
>
> *In addition, this SHD application provides for 58 … residential parking spaces for the 741 … apartments. The proposed residents parking spaces will be provided in the basement. …".*

59. Counsel for the applicant relied on this document (and in particular the statement that the strategic housing development proposal complies with the obligation to maintain car parking spaces to meet the operational needs of CIÉ) as further evidence of what he described as the fact that the car park deck is an inherent part of the development of the proposed residential development. However, in response, both counsel for the Board and counsel for Oxley reiterated that, as noted in para. 46 above, the McCutcheon Halley response to the s. 6

(7) opinion made clear that the proposal to use the deck as a car park *"is not included in this application …".*

The approach taken by the Board

60. For completeness, I should also refer to the manner in which the issue was addressed by the inspector appointed by the Board. While the Board, in its order, did not expressly adopt the entirety of the inspector's report, it is clear from the Board Direction dated 28th January, 2020, that the Board decided to grant permission *"generally in accordance with the Inspector's recommendation".* In such circumstances, the decision by the Board to grant permission must be read in conjunction with the report of the inspector.

61. In her report, the inspector dealt with the matter quite briefly in para. 11.2.1 in the following terms:

> *"The plans show 135…car parking spaces at a deck level in Block B (Level 03) to serve CIÉ. The submitted details state that the development agreement pertaining to the site requires 180…spaces to be maintained on the site for CIÉ's use and that this is 'a restrictive covenant' on the site. A further 45 … spaces are to be provided for CIÉ under a future Section 34 application. The response to the ABP opinion states that this floor area does not represent 'other uses' for the purposes of Section 3 of the [the 2016 Act] … as this use exists within the site and the proposed layout represents a rationalisation and consolidation of the existing use. The response is accompanied by a legal opinion that addresses this issue. I accept the argument presented by the applicant and am satisfied that the application before the Board falls within the definition of Strategic Housing Development".*

62. This passage in the Inspector's report must be read in conjunction with the response to the s. 6 (7) opinion previously issued to the Board (as described in paras. 43 to 50 above). It should be recalled that, in the McCutcheon Halley response, the authors referred to the

opinion of counsel to the effect that the development agreement between Oxley and CIÉ *"acts as a burden on the site and is in effect 'a restrictive covenant' on the site".* Having done so, the response stated:

> *"The provisions of Section 3… refer only to development that are 'proposed', and as stated in the Opinion attached, the existing established use is not included in this application proposal, nor is it necessary, as the authorisation to allow this existing use is already in place".*

This is consistent with what was stated in the opinion of counsel (furnished to the Board in support of the response) in which counsel stated:

> *"The existing established use proposed is not included in the application nor is it necessary that it be included because the necessary authorisation to allow this activity is already in place…. The other uses referred to in Section 3 (a) to (c) (i) and (ii) relate to 'other uses' sought to be approved as part of the application procedure and do not include those users (sic) which are existing, and which are not intended to be altered and the continuance of which does not require approval as part of the application procedure…."*.

This appears to be the argument presented by Oxley that was accepted by the Inspector in para. 11.2.1 of her report. In other words, the inspector accepted that the car park use was in existing use and that the floor area of the deck does not represent *"other uses"* for the purposes of s. 3 of the 2016 Act.

The view which an ordinary and reasonably informed member of the public would reach in relation to the ambit of the Board Order

63. Logically, it seems to me that the first question which I must address is whether the decision of the Board authorises the use of the deck as a car park. In order to answer that question, I must now consider how the documents described in paras. 31 to 62 above would

be understood by an ordinary and reasonably informed member of the public looking at the documents objectively. As McCarthy J. made clear in *X.J.S. Investments* this exercise is not to be undertaken in the same way in which Acts of the Oireachtas or subordinate legislation would be construed. The accepted canons of construction applicable to such material are not to be applied. As McCarthy J. explained, planning documents are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning.

64. I do not believe that an ordinary and reasonably well informed member of the public would be in any doubt but that planning permission has been granted for a development that includes the construction of a deck with a ramp leading up to it which, in accordance with drawing number 18135-RKD-B-03-DR-A-1103 is shown as a car park with 135 car parking spaces laid out in grid formation with space in between the rows of car parking spaces to allow the movement of vehicles around the deck. Anyone reading the Board Order and the plans referred to in that order would, in my opinion, very clearly form that view. In particular, anyone reading the Board Order would see that the development has to be constructed in accordance with the plans and particulars lodged with the application. That material clearly includes the plan showing the deck laid out as a car park in the manner described above. Indeed, for any member of the public to understand the meaning and effect of the order made by the Board, one would need to have regard to the plan. The narrative description of the development set out in the Board Order (consistent with the terms of the application form completed by the applicant) merely refers to the construction of blocks consisting of a specified number of blocks specifying their maximum building height, floor area and apartment mix. Thus, in order to form a picture of what the Board Order authorises, it would be essential to carefully inspect the plans. Those plans include not only the drawing

of the deck to which I have referred but also the drawings showing the north east to south west section of Block B and the north west to south east section of Block B. In both of those sections, the deck is clearly labelled as a car park deck. In addition, in the north east to south west section, there are representations of cars shown parked in the deck. Furthermore, on the north west to south east section drawing, there is a representation of a car on the ramp leading up to the deck. That ramp is also shown on the north east to south west section. In these circumstances, it would be obvious to any member of the public (looking at the plans with a view to understanding what is permitted by the Board Order) that the deck is not simply a structural element. It is intended for use as a car park. Not only is the deck so described as a car park but there is, in addition, a ramp leading up to the deck which is clearly designed to permit vehicular access. As noted above, the north west to south east section shows that the ramp will be sufficient to accommodate a vehicle. As previously noted, the ramp to the car park forks away from the ramp to Connolly Station and appears to have no other purpose other than to permit vehicular access to the deck.

65. As the case law demonstrates, the ordinary and reasonably informed member of the public would also have access to all of the other documents and would be presumed to read those also. Those documents include a number of statements which suggest that car park use of the deck is not included as part of the proposed development. However, the same member of the public would see that there are contradictory statements elsewhere in the documentation including the drawings discussed in paras. 56-57 and 64 above. Thus, for example, in the McCutcheon Halley response to the s. 6 (7) opinion, it is stated, on the one hand that, *"As part of the SHD submission, 135 CIÉ spaces are accommodated within the Block B podium deck",* while, on the other hand, the same paragraph of the document states that the car spaces earmarked for CIÉ *"cannot form part of the proposed development and accordingly cannot be included as a use for the purposes of calculating the extent of other*

uses…". The reader would undoubtedly be puzzled by this contradiction. The reader would also, however, see that, elsewhere in the documents submitted to the Board, it was presumed, for example, by OCSC that the Irish Rail car parking would continue to be a *"trip generator".* Similarly, on page 5 of the masterplan, the deck is described as creating an opportunity to accommodate 174 CIÉ car parking spaces on a *"full buildout"* or *"135 spaces* ***as part of the SHD application****…".* As noted above, p. 97 of the masterplan goes further and states that *"car parking* ***is*** *accommodated within the depth of the structural truss which supports Block B …".*

66. However, counsel for Oxley submitted that the passage from the McCutcheon Halley response quoted in para. 45 above was of particular importance. It will be recalled that, in that passage, the authors stated that the *"SHD application does not propose these 135 CIÉ carparking spaces for reasons outlined in the legal opinion of the Opinion attached, the plans submitted do indicate where these spaces will be located…".* Counsel for Oxley submitted that this passage emphatically makes clear to anyone reading the documents that planning permission is not being sought for use of the deck as a car park. He argued that Oxley was stating clearly that it is not seeking permission for such use. Counsel for Oxley also argued that the deck is a fundamental part of the structure which supports the residential blocks above it. He drew attention to the way in which the bulk of Block B will overhang the railway sidings and therefore the deck and associated trusses form an essential element which is ancillary to the residential use above.

67. Counsel for Oxley also argued that it is clear from the material submitted to the Board that the application was for the carrying out of works of construction and did not constitute an application for permission for any use of the deck. I do not believe that this would be immediately obvious to the ordinary and reasonably informed member of the public. Just as the ordinary member of the public would see that Blocks B1 to B3 were intended for

residential use, a member of the public would, in my view, also consider that the deck was intended to be used as a car park. That seems to me to follow from the terms of the Board Order when read in conjunction with the plans and drawings discussed in para. 64 above. Thus, absent anything else in the material submitted to the Board, I believe that an ordinary and reasonably informed member of the public would understand that the application included the proposed use of the deck for the purposes of a car park. There are, however, contradictory statements that appear elsewhere in the papers. These have been discussed in para. 65 above. That places the ordinary reasonably informed member of the public in a difficult position in trying to understand the effect of the Board Order. Does the statement (on which the Board and Oxley place reliance) in the McCutcheon Halley report trump the statements elsewhere to the contrary to the effect that the 135 car parking spaces form part of the *"SHD development".* In my view, the ordinary reasonably informed member of the public would have significant difficulty in trying to navigate his or her way through these inconsistencies in order to arrive at a conclusion as to the true ambit of the application and, in turn, the ambit of the Board Order.

Conclusion in respect of ambit of the Board Order

68. While I believe that the ordinary reasonably informed member of the public would have difficulty in attempting to make sense of these conflicting aspects of the materials before the Board, I believe that, ultimately, such a member of the public would reach the conclusion that the Board, by its decision, did not go so far as to purport to grant permission for the use of the deck as a car park. I believe that such a conclusion would be reached having regard to a consideration of the McCutcheon Halley response to the s. 6 (7) opinion and, in particular, the subsequent report of the inspector by which she accepted the argument presented by the applicant in the response document. As noted earlier, the Board Order must be read in conjunction with the inspector's report. As outlined above, the Board Direction

which preceded the making of the Order expressly records that the Board decided to grant permission generally in accordance with the inspector's recommendation. That recommendation was, in turn, based on the inspector's report. In para. 11.2.1 of her report (quoted in para. 61 above), the inspector accepted the argument that the floor area of the deck does not represent *"other uses"* for the purposes of s. 3 on the basis that the use *"exists within the site"* and the proposed layout represents a rationalisation and consolidation of the existing use. Thus, the ordinary well informed member of the public would see that, in this way, the inspector (and through her, the Board) accepted that part of the McCutcheon Halley response to the s. 6 (7) opinion in which the authors stated (having referred to the opinion of counsel) that the car parking spaces *"cannot form part of the proposed development and accordingly cannot be included as a use for the purposes of calculating the extent of other uses…".* This was based on the opinion of counsel (quoted in para. 50 above) to the effect that the existing established use of a car park was not included in the application *"because the necessary authorisation to allow this activity is already in place"* and the view expressed by counsel that the *"other uses"* mentioned in s. 3 do not include those uses which are existing and which are not intended to be altered and the continuance of which does not require approval as part of the application procedure.

69. This interpretation of the inspector's report is further supported by what she says later (in the context of traffic and transport) where she says, at para. 11.7.2., that:

> *"A total of 135 … car parking spaces are to be relocated from the existing surface car park to a deck level to serve CIÉ. The submitted details state that the development agreement pertaining to the site measures 180 … spaces to be maintained for CIÉ's use and that this is 'a restrictive covenant' on the site. Further spaces will be relocated for CIÉ use under the future Section 34 application. The Report of [the City Council] … Transportation Section states that the applicant has failed to provide*

details on the operation of the existing CIÉ car park and that its continuance as a commercial commuter car park would be contrary to Development Plan Policy. However, the applicant argues that the CIÉ car park is a long-established use at this location …".

70. Thus, while it would, by no means, be an easy or straightforward exercise for the ordinary and reasonably informed member of the public to cut through the contradictions in the material before the Board, I believe such a member of the public would ultimately come to the conclusion that Oxley had not sought and the Board had not granted permission for the use of the deck as a car park. That said, I believe the documents would clearly convey to the ordinary reasonably informed member of the public that Oxley intended to use the deck as a car park in accordance with its contractual obligation to CIÉ. Counsel for Oxley argued that the deck, as a structural element, should be regarded as having a "*nil use*". However, I can see no basis in the material before the court to suggest that the deck should be considered to have a *"nil use".* On the contrary, the plans (discussed above) and the other materials before the Board all told the Board that the intended use of the deck is as a car park albeit one which Oxley has been advised does not require a separate planning permission. This is evident from a number of the documents. In particular, it is evident from the response to the s. 6 (7) opinion quoted in para. 43 above. It is equally evident from the passage from the same response quoted in para. 45 above. It is also obvious from the passage quoted in para. 47**,** the OCSC traffic impact assessment report quoted in para. 52, the extracts from the masterplan (quoted in para. 53 above and from the passage quoted in para. 54) and, most particularly, it is evident from the drawings and plans discussed in paras. 56-57 above. This conclusion is strongly reinforced by a consideration of the terms of the opinion of counsel and from para. 4.4 of the McCutcheon Halley report of October 2019 addressing consistency with the Dublin

City Development Plan (quoted in para. 58 above). The relevant extracts from the opinion are set out in para. 50 above. It will be recalled that, in para. 9 of the opinion, counsel stated that there is "*no question that the … applicant intends to do anything other than comply with its* ***obligation*** *to the owner of the lands, and* ***indeed it is a condition precedent*** *to the making of an application that the owner of the land gives its consent* ***subject to this obligation*** *and will require to be satisfied that its rights are protected"* (emphasis added). While the instructions given to counsel as to the terms of the agreement with CIÉ are not set out in the opinion, it is clear that counsel had been instructed that it was a condition precedent to the making of an application for planning permission that the obligation owed by Oxley to CIÉ to provide the car parking spaces was protected and honoured. Again, it must be kept in mind that it was expressly stated in the McCutcheon Halley response to the s. 6 (7) opinion, that the opinion of counsel *"forms part of this Submission".*

71. Accordingly, on the basis of the documentation before the court, it seems to me to be clear that the deck is earmarked for use as a car park and that it was a precondition to CIÉ consenting to the making of the application for planning permission that the deck would be so used. That emerges very starkly from the opinion of counsel and, in turn, Oxley expressly relied on this opinion for the purposes of its argument (ultimately accepted by the inspector and, by inference, by the Board) that there was no need to include the car park in the application because it constituted an existing use. This seems to me to be the factual backdrop against which the debate in relation to the application of the definition of *"strategic housing development"* in s. 3 of the 2016 Act must be viewed. That said, for the reasons outlined in paras. 63 to 70 above, I have come to the conclusion that the Board Order does not purport to grant permission for the use of the deck as a car park. It follows that the newspaper notice, site notice and application form were not inaccurate and incomplete. However, that does not dispose of the entire of the applicant's case in relation to the use of

the deck as a car park. I must now consider the principal argument made by it in the course of the hearing namely that the decision of the Board to grant permission was *ultra vires* the powers of the Board under s. 9 (4) of the 2016 Act on the grounds that the car park use is required to be counted for the purposes of the 4,500 square metre limitation on "*other uses*" in the definition of *"strategic housing development"* contained in s. 3 of the 2016 Act. This is the issue to which I now turn.

Does the proposed use of the deck mean that the residential development proposed by Oxley falls outside the section 3 definition of *"strategic housing development"?*

72. The relevant text of the statutory definition of *"strategic housing development"* contained in s. 3 of the 2016 Act has already been set out in para. 22 above. In addition, some of the arguments made by counsel, on each side, have been summarised in paras. 25-26 above. Counsel for the Board argued that, unless a proposed use falls within the ambit of the development in respect of which permission is sought under s. 4 of the 2016 Act, such a use does not fall within the reference to *"other uses"* in section 3. Counsel for the Board submitted that the Board, in granting permission for the development of Blocks B and C on the site has not made any determination in respect of the status of the car park as an existing use or otherwise. She drew attention to the discrete jurisdiction which the Board has under s. 5 of the 2000 Act to determine whether something constitutes development requiring planning permission or is exempted development. That jurisdiction has not been invoked by anybody. Neither the applicant nor Oxley have sought a determination from the City Council in the first instance or from the Board (following referral or review) on the question as to whether the use of the deck as a car park would or would not constitute development requiring planning permission.

73. Counsel for the Board strongly argued that, not only had Oxley not applied for planning permission in respect of the use of the deck for any purpose, but also that there is no

legal requirement compelling Oxley to apply for planning permission for the use of the deck. In the absence of planning permission, there may be a legal requirement not to use a particular structure (such as the deck) in a particular way. However, she submitted that there is no free-standing obligation to make an application for planning permission. If such an application is not made, planning permission cannot be granted. The absence of planning permission may have legal consequences but it is not permissible to presuppose that an unauthorised use will be made of the deck. Counsel referred in this context to a number of decisions in which the courts had rejected a suggestion (in an EIA context) that there was an obligation to apply for planning permission for all phases of a development at the one time. In this context, counsel referred, in particular, to the decision of McGovern J. in *Ó Gríanna v. An Bord Pleanála (No. 2)* [2017] IEHC 7 and to the decision of the Supreme Court in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23. Accordingly, counsel submitted that there was no legal obligation on Oxley to apply for planning permission for car park use at the same time as the application made under s. 4 of the 2016 Act, on the basis that such use might be characterised as being linked or associated with the development for which permission has been sought. She also argued that there is nothing in s. 3 or in any of the case law to suggest that something for which planning permission is not sought must be included in *"other uses"* for the purposes of the s. 3 definition. Counsel for the Board argued that, in substance, this is the applicant's case – that the car park use should have been included in the application for permission.

74. The arguments of counsel for the Board were adopted, in turn, by counsel for Oxley who submitted that it was not the function of the Board to prejudge the issue in the context of an application *"where no such permission is actually being sought"*. Counsel for Oxley observed that the written opinion previously given by counsel and submitted to the Board in response to the s. 6 (7) opinion issued by the Board might be wrong or might be right but he

submitted that is not something that the court has to consider because it does not arise at this point. Counsel argued that the application made to the Board was an application for permission to carry out works and that it was not an application with regard to the use of the deck. Counsel for Oxley referred, in this context, to the definition of *"development"* in s. 3 of the 2000 Act and in particular to the use of the following words in that definition:

> *"the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land".*

It should be noted that this does not represent the full extent of the definition of *"development"* in s. 3 of the 2000 Act insofar as it is relevant to the issue under consideration here. As explained further below, the words quoted by counsel are expressly qualified by the words "*except where the context otherwise requires".* This is an issue which is addressed further below.

75. Counsel for Oxley also referred to the definition of *"works"* in s. 2 of the 2000 Act where the term is defined as including *"any act or operation of construction".* He highlighted that s. 2 also provides a definition of the term of *"use"* in relation to land which, he submitted, makes clear that *"use"* does not extend to the use of land by the carrying out of work. Counsel therefore argued that the concepts of *"works"* and *"use"* are quite different and mutually exclusive. The application made here was for the carrying out of works. That was the nature of the development proposed and, accordingly, any use of any part of that structure as a car park in the future was a matter to be addressed in the future. If planning permission was required for such use, an application could be made in the future under s. 34 of the 2000 Act.

76. Counsel for Oxley also argued that the term *"other uses"* found in s. 3 is used in the context of the zoning of land. He suggested that the other uses at stake are defined by reference to the zoning of the land and in particular the ability to use that land for purposes

other than residential use. He furthermore argued that the deck area within Block B is clearly ancillary to residential use in the sense that it is part of the building which is predominantly in residential use; that it is a necessary structural component of the building which, in the context of the significant overhang over the railway sidings, fulfilled a similar function to a foundation. He submitted that Block B could not be constructed without the steel truss arrangement incorporating the deck. The deck was therefore a necessary element and had to be regarded as ancillary to the residential use in the apartments to be constructed above it.

77. Counsel for Oxley further argued that it is wrong to suggest that there are only residential uses and "*other uses".* He reiterated, in this context, the submission made by him that there is nothing to say that there cannot be a *"nil use".* In this context, he submitted that the deck is an area that has *"not been authorised for any particular use and, therefore, it falls within the same category as an attic in a domestic context."* By way of analogy, he submitted that it could not possibly be suggested, for example, that, in constructing a residential building with a pitched roof, one would have to take into account the attic space as other uses. Counsel suggested that such a proposition would be *"nonsensical".*

78. As noted in para. 23 above, counsel for the applicant, in the course of his argument, stressed that the words *"other uses*" in the definition of *"strategic housing development"* in s. 3 of the 2016 Act are not stated to be uses for which planning permission is required. He also argued that the reference to *"other uses"* does not exclude existing uses on the land. He strongly argued that, on the basis of the material before the Board, it was clear that Oxley was proceeding on the basis that car parking was an existing use and that, for that reason, it had not been included in the planning application. Furthermore, he submitted that it was clear from the documentation before the Board that the deck on which this *"existing use"* is to continue forms part of the residential development which Oxley proposes to construct on the

site. Counsel submitted that, in those circumstances, the use of the deck as a car park fell squarely within *"other uses"* in the statutory definition.

79. Counsel for the applicant submitted that it was clear from the definition of *"strategic housing development"* in s. 3 that, while non-residential uses are not excluded entirely, they are significantly restricted and subject to a condition that one can never have more than 4,500 square metres gross floor space allocated to such uses in a development under the 2016 Act. That is not to say that one cannot have a mix of large-scale housing with more than 4,500 square metres gross floor space devoted to other uses in such a development. However, if that is the form of development that is proposed, it is necessary to follow the normal route and to apply under s. 34 of the 2000 Act for planning permission. On the other hand, if one wishes to utilise the fast-track strategic housing development route, then the development proposed must conform to the type of development that is substantially residential with no more than 4,500 square metres gross floor space earmarked for non-residential use.

80. In his reply, counsel for the applicant rejected the analogy drawn by counsel for Oxley with an attic space in a private house. He suggested that an attic space is a *"million miles away… from a ramp which is going to have capacity to carry vehicles up and down – and not just one or two vehicles, I mean there's space for 135 at any one time"*.

81. Similarly, counsel for the applicant rejected the suggestion that the deck merely performs an important structural function. He argued, if one were to take that to extremes, one could say that on a fifteen-storey building, residential housing could be situated on the top and one could say *"well, the other ones are just supporting the top floor, they're just supporting the fifteenth floor. We're not applying for permission for any use for them, that'll be dealt with later in some way"*.

82. Counsel for the applicant argued that it is clear from the material before the Board that there is going to be floor space in the support truss and that if floor space is created, it

had to be accounted for in the context of the definition of *"strategic housing development"* in section 3.

83. Counsel for the applicant also addressed, in his reply, an argument that had been made by his opponents that there was no difference between the proposed use of the deck (in respect of which the applicant takes objection) and the proposed development, as part of the masterplan, of hotel and office accommodation (to which no objection is made by the applicant on the grounds that such use has to be counted for the purposes of the s. 3 definition). Counsel for the applicant submitted that the difference between this aspect of the masterplan development and the car park is that *"the hotel element is not being put in as part of one of the buildings that's going to provide housing, the hotel element and the office element are being provided in completely different buildings which are part of a different application. But the car park is located in a building which is part of the strategic housing development. There can be no doubt whatsoever about that. It is quite literally in the proposed development, unlike the hotel and the other bits".*

Analysis and discussion in relation to section 3

84. The relevant text of the statutory definition has been set out in para. 22 above and it is therefore unnecessary to repeat it here. For present purposes, the most significant features of the definition are that there must be a development of 100 or more houses on land which is either zoned for residential use or for a mixture of residential and other uses. However, the definition allows that the development may include *"other uses on the land, the zoning of which facilitates such use"* but only if the other uses cumulatively do not exceed a maximum of 4,500 square metres gross floor space *"for such other uses in any development".* There are a number of other conditions but these are not relevant for present purposes and it is therefore not necessary to identify them here.

85. The definition refers to a number of concepts which are explained elsewhere in the Planning Acts. These include the zoning of land. Thus, for example, zoning is addressed in s. 10 (2) (a) of the 2000 Act. As noted above, counsel for Oxley sought to place some reliance on the reference to zoning in the context of *"other uses"* in the s. 3 definition. I do not, however, believe that the reference to zoning has any material bearing on the issue before the court in these proceedings. It seems to me that the references to zoning in the definition of *"strategic housing development"* in s. 3 are intended to ensure that a strategic housing development will only take place on lands which are either zoned for residential use or for a mixture of residential and other uses and, furthermore, where other uses are included, they fall within the ambit of the zoning of the land in question. Thus, for example, if land is zoned for a mix of residential and commercial use, a development on that land which is intended to be comprised of a mix of residential and commercial use would be capable of falling within the definition provided that the extent of commercial use did not infringe the restrictions set out in paras. (i) and (ii) of the definition (including the requirement that not more than 4,500 square metres gross floor space would be devoted to the commercial element of the development). On the other hand, a proposed development comprising a mix of residential and industrial use would not qualify as *"strategic housing development"* on those lands even where the industrial use proposed occupied less than 4,500 gross floor space and did not otherwise exceed the limits on other uses prescribed by paras. (i) and (ii) of the definition.

86. There are, however, a number of other words used in the s. 3 definition the meaning of which is potentially relevant for present purposes. These include the following:

(a) There is a definition of *"land"* in s. 2 of the 2000 Act where it is defined as including *"any structure and any land covered with water (whether inland or coastal)";*

(b) Similarly, there is a definition of *"use"* in s. 2 of the 2000 Act where, in relation to land, it is defined as not including *"the use of the land by the carrying out of any works thereon";*

(c) Section 3 of the 2000 Act contains a definition of "*development".* In particular, in s. 3 (1) *"development"* is defined as meaning:

"except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land";

(d) For completeness, the definition of *"works"* in s. 2 of the 2000 Act should also be noted where it is defined as including:

"any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal …".

87. As noted above, both the Board and Oxley have argued that the definition of *"strategic housing development"* should be read as referring solely to the development in respect of which an application for planning permission is sought. Counsel for both parties have highlighted the fact that "*development"* is a component part of the phrase *"strategic housing development"* and that the reference to *"other uses"* immediately before paras. (i) and (ii) of the definition refers back, through the use of the words *"each of which may include",* to the five species of development described in paras. (a), (b), (ba), (c) and (d) of the definition. The only application for development in this case was for the construction of Blocks B and C which includes the structural element represented by the deck and for the residential uses in the apartments and the intended retail commercial and community uses in the ten units described in para. 7 of the Board Order which have a combined gross floor area of 3,142 square metres. There was no application for permission to use the deck as a car park. Furthermore, counsel for the Board strongly argued that there was no legal requirement

to apply for planning permission for the use of a structure in a particular way. As she observed, the absence of planning permission may have legal consequences but one cannot presuppose that an unauthorised use will take place and, moreover, one cannot compel the making of an application for a particular use.

88. I have little doubt that, in many, if not most, cases, the question whether a particular use forms part of a development would be answered by reference to the terms of the application for planning permission. However, I can see nothing in the definition of *"strategic housing development"* which necessarily means that the development must always be considered solely by reference to the scope of the permission sought. It would have been a very easy matter for the Oireachtas to so prescribe if that had been the intention. However, the language used in the definition does not go so far. Furthermore, counsel for the applicant is correct, in my view, in suggesting that the reference to *"other uses on the land"* is not confined to other uses for which planning permission is required. There is nothing in the language of s. 3 or its wider context to suggest that those words exclude existing uses on the land. While counsel for Oxley has drawn attention to the statutory definition of *"development"* in s. 3 of the 2000 Act, and to the distinction between *"works"* and *"use",* the definition of *"development"* is expressly stated to apply *"except where the context otherwise requires".* In the context of the definition of *"strategic housing development"* in s. 3 of the 2016 Act, the definition expressly envisages that the development may include (subject to compliance with the condition as to maximum floor area) uses other than residential use. This seems to me to clearly envisage that, in the specific context of the 2016 Act, the definition requires consideration not only of the works of construction but also requires consideration of the uses which are intended to be made of the structures so constructed. In particular, where the structure is to include uses other than residential use, the Oireachtas clearly envisaged that consideration has to be given as to the extent to which those

uses are intended to take place on that structure. Where those other uses are intended to occupy more than 4,500 square metres gross floor spaces, the Oireachtas plainly intended that this fact would take a development outside the ambit of the definition of *"strategic housing development"* and therefore outside the scope of the 2016 Act. In this context, the fact that the definition permits such uses to be included *"only if"* the conditions set out in paras. (i) and (ii) of the definition are satisfied strongly reinforces this conclusion. It appears to me to be clear that the Oireachtas was concerned to ensure that the fast track planning consent facility established under the 2016 Act would only be available for developments which meet those conditions and which would, accordingly, be predominantly residential. The long title to the Act is relevant in this regard. The long title expressly signals that the purpose of the Act is to *"facilitate the implementation of … "Rebuilding Ireland – Action Plan for Housing and Homelessness".* The restrictions on other uses contained in the s. 3 definition must be read in that context. The Oireachtas intended that large housing developments should be prioritised over mixed developments.

89. In each case, it is necessary to consider whether the elements of the definition are met. This requires a consideration as to whether the development in question falls within one of the forms identified in paras. (a) to (d) of the definition and, if so, whether the development also includes one or more non-residential uses. If it does include any such non-residential (or *"other uses"* to use the language of the definition) it then becomes necessary to consider, in any individual case, whether the conditions set out in paras. (i) and (ii) of the definition have been satisfied. Thus, in any particular case, in order to form a view as to whether a development falls within the definition, it is necessary to consider the underlying facts in order to determine whether a non-residential use is to be made of any part of the development to be constructed and, if so, the gross floor space which will be devoted to that use.

90. Accordingly, in considering the underlying facts of this case, it is necessary to consider whether the development concerned includes *"other uses"* on the land where the zoning of the land is consistent with such use. Notwithstanding the level of debate which took place in this case, that seems to me to be a fairly straightforward exercise. It involves a consideration of the underlying facts of this case. Those underlying facts emerge from the materials before the Board. Those materials have already been examined by me in the context of what they would convey to an ordinary and reasonably informed member of the public. It is unnecessary to repeat that exercise here. As noted in para. 71 above, on the basis of the documentation before the court, it seems to me to be clear that the deck is earmarked for use as a car park and that it was a precondition to CIÉ consenting to the making of the application for planning permission that the deck would be so used. That emerges in stark terms from the written opinion of counsel which formed part of the McCutcheon Halley response. In turn, Oxley expressly relied on this opinion for the purposes of its argument that there was no need to include the car park in the application because it constituted an existing use. That argument was expressly accepted by the inspector and, by inference, by the Board. In this context, it is important to recall that Oxley, in submitting its application under s. 4 of the 2016 Act for planning permission for what it contended constitutes a *"strategic housing development"*, provided a detailed response to the s. 6 (7) opinion previously issued by the Board in the course of the pre-application consultation phase under ss. 5 and 6 of the 2016 Act. In the s. 6 (7) opinion, the Board specifically required Oxley to satisfy itself, in the context of *"other uses"* that the proposed development could be considered under the provisions of the 2016 Act. In response, McCutcheon Halley referred to the opinion of counsel and stated that *"the existing established use is not included in this application proposal, nor is it necessary, as the authorisation to allow this existing use is already in place".* In the next paragraph of the same document, the authors referred to the development

agreement between Oxley and CIÉ and in particular the obligation to maintain 180 car parking spaces exclusively for CIÉ's use. They then stated that the masterplan *"demonstrates how this will be achieved,* ***with 135 spaces within the SHD component*** *..."* (emphasis added). On the next page, the authors stated that, while the application does not propose the 135 car parking spaces in question, *"the plans submitted do indicate* ***where the spaces will be located****"* (emphasis added). In the same paragraph, the authors stated that *"it is proposed to provide for the continuation of existing carparking use within the space* ***as required by the legal agreement****"* (emphasis added). All of this material is, of course, consistent with the opinion of counsel furnished as part of the McCutcheon Halley response. It is also consistent with the drawings of the development where the deck is not shown simply as a structural element but is, in fact, laid out for use as a car park with 135 car parking spaces and carriageways in between those spaces to allow for the circulation of vehicles.

91. Thus, the Board was informed in plain terms that, although no application was being made for planning permission for car parking on the deck within the housing development, the deck would be used for this purpose and the reason why it was not being included in the application was not because it did not form part of the development but because it allegedly constituted an existing use and, moreover, that Oxley was legally obliged to provide these spaces under the terms of the development agreement in question with CIÉ. Against that backdrop, it is wholly implausible, in my view, to suggest that the proposed use of the deck as a car park does not fall, as a matter of simple fact, within the ambit of *"other uses on the land"* included in the proposed housing development. As noted previously, *"land"* for this purpose includes structures constructed on land. The materials before the Board clearly indicate that the deck is to be used as a car park. The car park is situated on the deck which has been described, in the materials before the Board and the court and in the submissions of counsel for Oxley, as an essential structural component of the residential development. I find

it impossible to see how, in those circumstances, it can be suggested that this use (which is clearly not aspirational but regarded as necessary in order to comply with an existing contractual obligation owed by Oxley to CIÉ) is not included in the proposed residential development comprised in Block B. In these circumstances, it is entirely understandable why, there are several references in the documents created on behalf of Oxley to the car parking being housed within the *"SHD development".* That reflects the reality of what was proposed in explicit terms to the Board in the material submitted with the application for permission. While Oxley stated that it was not applying for permission in respect of this use, the use was one which it envisaged would, in fact, occur on an integral element of the specific development in respect of which the application was made.

92. In my view, it is clear that this is how it was understood by the Board. I have already set out the relevant extract from para. 11.2.1 of the report of the inspector where, having referred to the fact that the plans show 135 car parking spaces at deck level in Block B to serve CIÉ, the inspector accepts the argument made on behalf of Oxley that *"this use exists within the site and the proposed layout represents a rationalisation and consolidation of the existing use".* In no sense did the inspector suggest that the 135 car parking spaces represent an activity or use that would take place in a different development or in an adjoining development or anything of that sort. She clearly regarded it as a use which already existed *"within the site".* As previously noted, the Board, by inference, adopted the report of the inspector and there is nothing in the Board Direction or Board Order which expresses any disagreement with what is said by the inspector in para. 11.2.1 of her report.

93. In my view, the proposed use of the deck as a car park is quite different to the other elements of the masterplan (such as the hotel and office development) which are now the subject of a separate application for permission under s. 34 of the 2000 Act. While those developments clearly adjoin the residential development and form part of the overall

masterplan, the office use and hotel use proposed in respect of those developments will take place in separate parts of the overall Connolly Quarter. As a matter of fact, it cannot be said that either the hotel use or the office use is included in the residential development. They are proposed alongside it. This is in marked contrast to the use of the deck as a car park which, as the drawings illustrate very well, is included in a structural element of the housing development.

94. It is, of course, true that, as counsel for Oxley emphasised, the deck is a structural element of the development. Had there been no intention to put it to use as a car park for non-residents no issue would be likely to arise. Had that been the case, counsel for Oxley might well be correct in suggesting that the gross floor area of the deck should be ignored. If it was not intended to use the deck as a car park or for any other purpose, there would be no reason to treat it as anything other than a structural element. However, in circumstances where it is clear, on the facts, that it is intended to be used as a car-park, I do not believe that its floor area can be discounted in the context of *"other uses"* when considering whether the development falls within the ambit of the statutory definition contained in s. 3 of the 2016 Act.

95. As outlined in para. 73 above, counsel for the Board also argued, by reference to the decisions in *Ó Gríanna No. 2* and *Fitzpatrick*, that there was no legal requirement which compelled Oxley to make an application for planning permission in respect of the proposed use of the deck as a car park. I do not disagree with the submission made by counsel for the Board. It was obviously a matter of Oxley to determine what form of application it wished to make. In this case, Oxley clearly took an informed decision to deliberately not include an application for use of the deck as a car park. The reason for that appears to be obvious. Had such an application been made, the Board would have been forced to conclude that the

proposed development did not fall within the ambit of *"strategic housing development"* as defined.

96. While counsel for the Board was correct in her submission, that does not seem to me to affect the conclusion as to whether or not the proposed residential development here includes a car park use on the deck. As previously outlined, the question whether or not the proposed use of the deck as a car park is included in the development for the purposes of the s. 3 definition depends on the underlying facts. In the present case, for all of the reasons previously discussed, it seems to me to be very clear from all of the materials before the Board (construed objectively) that the proposed car park deck is a use which is included in the proposed residential development. The subjective declaration or assertion by Oxley that it does not form part of the development is not borne out by the facts. As a non-residential use, it follows that this car park use falls within the scope of *"other uses"* in the definition. In circumstances where the floor area of the car park, in conjunction with the other non-residential uses proposed, clearly exceeds 4,500 square metres gross floor space, the condition as to the maximum allowable gross floor space permitted for *"other uses"* by para. (ii) of the definition has been exceeded. In those circumstances, it seems to me that the proposed development cannot fall within the definition of *"strategic housing development"* in s. 3 of the 2016 Act. Thus, the conclusion to the contrary effect in para. 11.2.1 of the report of the inspector is, in my view, wrong in law. It follows that Oxley was not entitled to apply for planning permission for this development under s. 4 of the 2016 Act. An application under s. 4 is confined to applications for permission for a strategic housing development which meet the statutory definition contained in s. 3. As a consequence, the Board had no jurisdiction to grant permission for the development under s. 9 of the 2016 Act. This means that the decision of the Board was *ultra vires* its powers under the 2016 Act and must be quashed for that reason.

Reasons

97. As outlined in para. 9 (c) above, the applicant also makes the case that the reasons given by the Board did not engage with the submissions made to it by the applicant or by Dublin City Council and, in particular, did not engage with the submission which the applicant contends it made to the effect that Oxley was legally obliged to seek permission for the proposed car park. In the written submissions delivered on behalf of the applicant, the case law on the obligation to provide reasons is addressed in some detail. However, the submissions address the application of that case law in very brief terms. Subsequently, the issue was addressed quite tersely in the course of the hearing. The basic point made by the applicant is that the Board was under an obligation to provide reasons as to why it rejected the case made by the applicant and by Dublin City Council. In para. 116 of the written submissions, the case was made that both the applicant and the City Council had submitted that Oxley was legally obliged to seek permission for a car parking deck for 135 spaces. In addition, in para. 118 of the written submissions, the case was made that the Board was under an obligation to explain why it had concluded that it was entitled to grant permission for a development that included the car park *"even though it did not form part of the planning application".*

98. In my view, for the reasons previously outlined in para. 70 above, the Board did not grant permission for a development including the car park. Thus, the argument made in para. 118 of the written submissions seems to me to be mistaken.

99. With regard to the submission made at para. 116 of the written submissions that the Board had failed to address the reasons why it rejected the argument that Oxley was legally obliged to seek planning permission for the car park, it seems to me that this argument was addressed in substance in para. 11.2.1 of the inspector's report. While the inspector does not there refer to the arguments made on behalf of the applicant and the City Council, it is clear

that she took the view that it was not necessary to seek planning permission for car park use in circumstances where such use constituted *"existing use".* While I have concluded that this was an erroneous reason, it nonetheless seems to me to address, in substance, the case which the applicant contends it had previously made to the Board. In those circumstances, I do not believe that there is any basis to conclude that the decision of the Board failed to address the arguments made to it by the applicant or by the City Council.

The Habitats issue

100. In light of the view which I have formed as to the invalidity of the application, it is, strictly speaking, unnecessary to go further and to reach any conclusion in relation to the Habitats issue. Nonetheless, since the matter was fully argued before me, I believe that I should set out my views in relation to this issue.

101. It is clarified in the written submissions delivered on behalf of the applicant that it does not go so far as to make the case that no additional input into the Ringsend Waste Water Treatment Plant (*"WWTP")* is possible. The applicant confines itself to submitting that, in this specific case, the screening determination was invalid. In making this case, the applicant draws attention to the language of s. 177U of the 2000 Act which addresses the national requirement for the carrying out of a screening test. Under s. 117U (1) a screening for appropriate assessment of *("inter alia"*) an application for consent for a proposed development is required to be carried out by the competent authority (in this case the Board) *"to assess, in view of best scientific knowledge, if that … proposed development, individually or in combination with another plan or project is likely to have a significant effect on a European site".* In the course of his oral submissions, counsel for the applicant suggested that the requirement in s. 177U to carry out such a screening assessment *"in view of best scientific knowledge"* goes further than the requirements of EU law. Counsel accepted that, under the well-established EU law test in the context of Article 6 (3) of the Habitats

Directive, best scientific knowledge must be applied at the appropriate assessment (i.e. in cases where adverse impacts cannot be screened out at the screening stage). There is no doubt that, in the case of an appropriate assessment, a competent authority such as the Board must, as a matter of EU law, conduct its assessment in light of the best scientific knowledge in the field.

102. Counsel for the applicant also placed emphasis upon the provisions of s. 177U (3) which provides as follows:

> *"(3) In carrying out screening for appropriate assessment of a proposed development a planning authority may request such information from the applicant as it may consider necessary to enable it to carry out that screening and may consult with such persons as it considers appropriate…."*

103. In my view, it is also important to keep the provisions of ss. 177U (4) and 177U (5) in mind. Under s. 177U (4), a competent authority is required to proceed with an appropriate assessment if *"it cannot be excluded, on the basis of objective information, that the … proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site".* Conversely, under s. 177U (5) a competent authority is not required to carry out such an assessment where it *"can be excluded, on the basis of objective information",* that the proposed development, will have such an effect. These provisions seek to give effect to EU law. Useful guidance has been given by Advocate General Sharpston in Case C-258/11 *Sweetman v. An Bord Pleanála* ECLI:EU:C:2012:743 as to the meaning of the *"likely to have a significant effect"* test in Article 6 (3) of the Habitats Directive. In para. 46 of her opinion in that case, she suggested that the test is *"simply whether the plan or project concerned is capable of having an effect"* on a European site. At para. 47, she confirmed that there is no need to establish such an effect. It is sufficient that there is the possibility of there being a significant effect. She also explained (at para. 48) that

the requirement that the effect be *"significant"* exists in order to lay down a *de minimis* threshold. Projects that have no appreciable effect on the relevant European site are excluded.

104. It must also be borne in mind that the competent authority under the 2016 Act for carrying out a screening exercise is the Board and 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. If the applicant is to succeed in relation to this element of its case, it will have to establish an identifiable failure on the part of the Board in the manner in which it carried out the screening exercise in this case and that such a failure constitutes either a breach of the Board's obligations under s. 177U or under the underlying provisions of the Habitats Directive.

105. In her report, the inspector describes the nature of the screening exercise carried out by her. She identifies at para. 13.1.3 that the development has a potential impact pathway to European sites within Dublin Bay via the combined surface water and foul water network. In para. 13.1.4, the inspector states that, in view of the potential hydrological connection to sites within Dublin Bay, she was of opinion that the potential for effects on sites within the Dublin waterbody needs to be considered at the screening stage. In para. 13.1.6 she identifies the four sites in question namely the South Dublin Bay and River Tolka Estuary SPA, the South Dublin Bay SAC, the North Dublin Bay SAC and the North Bull Island SPA. In the case of both SPAs, the light-bellied Brent goose is identified as a qualifying interest. In the case of both SACs, mudflats and sand flats not covered by seawater at low tide are identified as one of the qualifying interests. These intertidal flats are an important habitat for a number of marine grasses which, in turn, provide a food source for over-wintering waterfowl. Of the marine grasses, Zostra (commonly known as eelgrass) is a particularly important source of food for over-wintering birds including the light-bellied Brent goose. That said, as described

in more detail below, it appears to be clear from material generated during the course of the Board's consideration of an upgrade to the Ringsend WWTP, that the light-bellied Brent goose is now found in increasing numbers in the Tolka Estuary where eelgrass does not feature.

106. In her report, the inspector came to the conclusion that the potential for significant effects on the qualifying interests of the European sites as a result of surface and foul waters generated during the construction and operational stage *"can be excluded"*. In para. 13.1.7 of her report, the inspector explained that her conclusion was based on the measures proposed to be taken during the construction phase (which are not in issue in these proceedings) and, insofar as the operational phase is concerned, her conclusion was based on the following:

> *"• Foul and surface waters will discharge to the existing combined foul and surface water network and will travel to Ringsend WWTP for treatment prior to discharge to Dublin Bay; the Ringsend WWTP is required to operate under EPA licence and meet environmental standards, further upgrade is planned and the foul discharge from the proposed development would equate to a very small percentage of the overall licenced discharge at Ringsend WWTP and thus would not impact on the overall water quality within Dublin Bay …*
>
> - *I would also note that the EPA in 2018 classified water quality in Dublin Bay as 'unpolluted'".*

107. The inspector addressed the potential for *"in combination"* or cumulative effects in para. 13.1.8 of her report. She came to the conclusion that these could also be excluded. She based her conclusion on the following:

> *"• Coastal waters in Dublin Bay are classified as 'Unpolluted' by the EPA;*
>
> - *Sustainable development including SUDS for all new development is inherent in objectives of all development plans within the catchment of Ringsend WWTP;*

- *The Ringsend WWTP extension is likely to be completed in the short-medium term to ensure statutory compliance with the [water framework Directive]. This is likely to maintain the 'Unpolluted' water quality status of coastal waters despite potential pressures from future development;*
- *At the time of writing there was no proven link between WWTP discharges and nutrient enrichment of sediments in Dublin Bay based on previous analyses of dissolved and particulate nitrogen signatures; and*
- *Enriched water entering Dublin Bay has been shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of bay water."*

108. In the same paragraph, the inspector noted that her conclusion is consistent with the appropriate assessment screening report submitted by Oxley with its application. That screening report was prepared by Mr. Pádraic Fogarty of Openfield Ecological Services. On pp. 18-19 of that report, Mr. Fogarty stated:

> *"This development will add to the loading at the Ringsend Wastewater Treatment Plant. This plant is not compliant with its emission limit standards however work is underway to increase treatment capacity. According to the 2018 Annual Environmental Report for the plant, 'the discharge from the wastewater treatment plant does have an observable negative impact on the water quality in the near field of the discharge and in the Liffey and Tolka Estuaries".*
>
> *This report highlights that other sources of pollution also present from riverine inputs, sewerage overflows, misconnections and unsewered properties. The AER does not comment on whether, or how, these issues are affecting Natura 2000 sites in Dublin Bay and there is currently no evidence to suggest that such effects are occurring. It is therefore not considered that 'in combination' effects may arise from*

this source. The completion of upgrade works at Ringsend by 2023 will see greater compliance with quality standards of effluent and so an expected improvement in water quality in Dublin Bay...".

109. Furthermore, on p. 17 of his report, Mr. Fogarty stated that given that *"while the issues at Ringsend wastewater treatment plant are being dealt with in the medium-term evidence suggests that some nutrient is benefiting wintering birds for which SPAs have been designated in Dublin Bay (Nairn & O'Hallaran eds, 2012). Additional loading to this plant arising from the operation of this project are not considered to be significant based on two points:*

1. *There is no evidence that pollution through nutrient input is affecting the conservation objectives of the south Dublin Bay and River Tolka Estuary SPA.*
2. *Accepting that pollution is undesirable, regardless of the conservation objectives of the SPA, and would be contrary to the aims of the Water Framework Directive, then the upgrading works at Ringsend wastewater treatment plant will address future capacity demand".*

110. As noted previously, the applicant did not raise any issue in relation to the screening report in its submissions to the Board. However, the matter was addressed by Dublin City Council. In the report of the chief executive of Dublin City Council, it was confirmed that the screening report prepared by Openfield Ecological Services had been subject to review by the biodiversity officer in the City Council and that no objection has been raised in relation to the content, scope or conclusions of the study. The chief executive confirmed that:

"Having reviewed the Screening report, which has been reviewed by Parks and Landscape Services, the Planning Authority concurred with the conclusions reached and have no reason to deviate from the results of the assessment".

111. However, in its statement of grounds, the applicant relies on a number of materials (including a report from the Parks Section of the City Council which was annexed to the chief executive's report) to make the case that the Board was on notice that the information supplied by Oxley was *"inaccurate, incomplete and out-of-date"* such that the Board was not entitled to rely upon it in order to exclude the possibility of adverse effects at the screening stage. In making that case, the applicant also relied on material generated in the course of the application by the City Council in 2012 for planning permission for the expansion of the Ringsend WWTP and on further material that was generated during the course of an application made in 2018 by Irish Water for permission for upgrade works to the WWTP. On the basis of this material, the applicant contended, in its statement of grounds that the two conclusions reached by Openfield Ecological Services on p. 17 of the screening report (quoted in para. 109 above) are incorrect and that there is *"ample evidence that pumping significant amounts of sewage into Dublin Bay is having significant impacts on the Natura 2000 sites"* and furthermore, that the upgrading works to the WWTP will still not have adequate capacity upon completion which is not due until 2025.

112. In order to address this aspect of the applicant's case, it is therefore necessary to consider the additional materials cited by the applicant in its statement of grounds and exhibited by Ms. Forsythe verifying that statement.

The materials cited by the applicant in support of this element of its case

113. In the first place, the applicant has drawn attention to the report from the Senior Executive Parks Superintendent in the City Council in which she reviewed the screening report prepared by Openfield Ecological Services. In particular, the superintendent referred to the statement in that report that there is no evidence that pollution through nutrient input is affecting the conservation objectives of the South Dublin Bay and River Tolka Estuary SPA. Having done so, the superintendent continues as follows:

"However, there are reasons to believe that the sewage effluent is contributing to further exceedances of the Nitrates Directive for the Liffey Estuary Lower, to declining ecological status of the Bay under the Water Framework Directive and the Habitats Directive in terms of impacts to protected seagrass habitats of the … SAC… of the Bay. I refer to the EPA Guidance on Monitoring under the Water Framework Directive (Table 9.2…) which notes that seagrass, a bioindicator of water quality under the EPA Monitoring Programme, is sensitive to nutrient enrichment…. Ongoing research studies funded by the EPA and Dublin City Council suggest that nutrient enrichment is contributing to alteration (sic) the plant communities of the Natura 2000 sites and increased growth of algae at the expense of protected seagrass habitats. These seagrass habitats include plant species which are the key food resource for the protected birds of the Special Protection Areas of the Bay, particularly Zostera … for light-bellied Brent goose. Loss of these habitats results in protected migratory birds becoming increasingly reliant on inland feeding sites as their traditional marine feeding sites shrink due to seagrass habitat decline…. Further data collection will continue in 2020 in cooperation with ongoing studies by the EPA. However, the Precautionary Principle requires that the control of nutrient enrichment is essential for maintaining the Conservation Interests of the Special Protection Areas and Special Areas for Conservation in Dublin Bay. Sewage effluent outputs to Dublin Bay are clearly contrary to the legally binding Conservation Management Plans for the Natura 2000 sites. Seagrass habitats are also essential for addressing climate change impacts, as they are important globally to sequester carbon and are declining due to impacts by rising sea levels. The cumulative impacts of additional sewage effluent loading prior to 2023 will be to further increase the nutrient enrichment of Dublin Bay".

114. In the verifying affidavit of Ms. Forsythe sworn on behalf of the applicant, she exhibited the relevant EPA material which was cited by the superintendent in her report. This is a report published by the EPA on 22nd October, 2006 in which, at p. 127, it is noted that seagrass is susceptible to pressure from nutrient enrichment.

115. Ms. Forsythe also exhibited an extract from the Environmental Impact Statement ("*EIS")* prepared on behalf of Dublin City Council in March 2020 in support of the application made at that time in relation to a proposed upgrade to the Ringsend WWTP. In s. 8.3.4 of the EIS, modelling results are given for dissolved inorganic nitrogen ("*DIN")* and molybdate reactive phosphorus (*"MRP")* in respect of the then existing situation in Dublin Bay. In Figure 8.22, the results of the modelling are set out on a worst-case scenario. These results show a plume of DIN extending from the then existing Ringsend outfall into the Tolka Estuary and along Dollymount strand. Similarly, Figure 8.25 shows the then existing situation in respect of the MRP plume which extends from the then existing Ringsend outfall into the Tolka Estuary and potentially extending to the Bull Island lagoons and all along Dollymount strand to Howth Head. In the course of his submissions, counsel for the applicant submitted that this information contained in the 2012 EIS contradicts the conclusion reached by the inspector in the present case in her report to the effect that enriched water entering Dublin Bay has been shown to *"rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the Bay water".* Counsel also submitted that there is nothing in the inspector's report or in the underlying screening report conducted by Mr. Fogarty of Openfield Ecological Services which identifies any basis upon which such a conclusion could be reached.

The case made in relation to the planned upgrade to the Ringsend WWTP

116. In her affidavit, Ms. Forsythe also says that it is not accurate to state that the Ringsend WWTP will have capacity once the upgrade is completed. She avers that, as a matter of fact,

the WWTP will not have capacity. She says that the current upgrade (which received planning permission in April 2019) will increase capacity from 1.64 million to 2.04 million person-equivalent (*"PE").* According to Ms. Forsythe, this figure of 2.04 million PE is less than the 2.124 million PE which represents the current throughput handled by the WWTP and that it is also less than the 2.4 million PE which is forecast to represent the population of the catchment area between 2024 and 2027 as identified by the inspector appointed by the Board in the course of the 2018/19 application for a further upgrade at para. 6.1.18 of her report in respect of that upgrade.

117. At this point, I should record that counsel for the Board highlighted that Ms. Forsythe does not purport to have any scientific background or qualifications. Furthermore, counsel for the Board submitted that it is clear that Ms. Forsythe, in para. 34 of her affidavit, has misunderstood the effect of the relevant sequence of upgrades envisaged for the Ringsend WWTP. Counsel clarified that two separate upgrades have been permitted each of which have permitted improvements to the WWTP which will increase its capacity by 400,000 PE each or 800.000 PE in total. It appears from para. 34 of Ms. Forsythe's affidavit that the applicant is assuming that a 400,000 PE upgrade permitted in 2019 will increase the capacity from 1.6 million PE to 2 million PE and that this will not come on stream until 2025. According to counsel for the Board, the correct position is that the 2012 planning permission permitted an upgrade to increase the capacity of the WWTP from 1.64 million PE to 2.04 million PE. From the material placed before the court by Oxley, counsel submitted that it is clear that contractors were appointed in respect of this upgrade in February 2018 and that the works are due to be completed in 2020. The more recent planning permission granted by the Board in respect of the upgrade sought by Irish Water will increase capacity by 400,000 PE which will bring the capacity up to 2.4 million PE (in round terms). Those works are due to be completed between 2025 and 2027. Counsel also drew attention to the fact that there is

also a further regional WWTP proposed to serve north county Dublin which is scheduled to have a 500,000 PE capacity. If that additional WWTP proceeds, it will divert sewage that currently goes to Ringsend to the regional plant thereby freeing up additional capacity in Ringsend and ensuring that Ringsend will not be over capacity in 2025. Counsel for the Board stressed that, in the context of the application for permission in the present case, the Board (which was the body responsible for granting planning permission in respect of both upgrades to the Ringsend WWTP) was aware of the correct history of the matter and, in such circumstances, counsel argued that it was not possible to conclude, on the basis of the evidence before the court, that Ms. Forsythe was correct in her assumptions and assertions at para. 34 of her affidavit.

118. In response, counsel for the applicant argued that Ms. Forsythe had placed evidence before the court in para. 34 of her affidavit and that there was nothing on affidavit to support the submission made by counsel for the Board. I reject that submission. In my view, counsel for the Board was entitled to draw attention to the inconsistency between what is asserted by Ms. Forsythe in para. 34 of her affidavit, on the one hand, and the underlying material placed in evidence by Ms. Forsythe herself, on the other. In this context, Ms. Forsythe has exhibited the report of the inspector appointed by the Board in relation to the 2012 application in respect of the WWTP. She has also exhibited the report of the inspector in respect of the more recent application following which the Board granted permission for further upgrade works in April 2019. Paragraph 4.0 of the inspector's report in respect of the 2012 upgrade makes very clear that the development then proposed (and there is no dispute that this was granted by the Board) was to extend the WWTP to accommodate the treatment of an additional 400,000 PE. The inspector notes that the existing capacity coupled with this extended capacity of 400,000 PE would give a total treatment capacity of just under 2.1 million PE. While this is not entirely on all fours with the figures quoted by counsel for the

Board or the figures suggested by Ms. Forsythe, it confirms that the 2012 application was in respect of an additional capacity of 400,000 PE. In my view, counsel for the Board was correct in making the point that Ms. Forsythe appears to be unaware of the fact that the more recent upgrade (proposed in 2018/2019) will add a further additional 400,000 PE capacity to the plant. This is clear from para. 10.2.7 of the report of the inspector in relation to the upgrade application. In that paragraph, the inspector confirms that the proposals, the subject matter of that application, involved (*inter alia*) the retrofitting of new AGS technology over a phased basis with the intention of meeting the required nitrogen and phosphorus emission limit values. In the same paragraph, she confirms that, with the application of this AGS technology, the treatment capacity of 2.4 million PE in terms of total phosphorus and total nitrogen would be reached by 2028. This increase in capacity is not taken into account by Ms. Forsythe in para. 34 of her affidavit. She has therefore misinterpreted what is stated in para. 6.1.18 of the report of the inspector in relation to the upgrade. Her suggestion that para. 6.1.18 of the inspector's report suggests that the WWTP will be operating at over capacity is plainly based on the erroneous understanding that the total capacity will be 2.04 million PE while the actual throughput will be 2.4 million PE. In my view, Ms. Forsythe has clearly misread the underlying material. It is clear from the inspector's report in respect of the 2018/2019 proposal that the plant will have a capacity of 2.4 million PE once that upgrade is completed.

119. For completeness, the report of the inspector in respect of the 2012 application also provides support for the submission made by counsel for the Board in relation to the proposed additional regional WWTP in north county Dublin. In para. 1.0 of the inspector's report in respect of the 2012 application, he refers to the Greater Dublin Strategic Drainage Study (*"GDSDS")* which recommended the provision of a new regional waste water treatment plant in north county Dublin.

120. In summary, therefore, I am of the view that the assertions made by Ms. Forsythe in para. 34 of her affidavit are not borne out by the underlying objective material before the court. In light of that material, I do not believe that it is open to the applicant to make the case that the screening report prepared by Mr. Fogarty of Openfield Ecological Services is not correct insofar as it suggested that the upgrading works at Ringsend WWTP will address future capacity demand. It is therefore unnecessary to consider whether it was open to the applicant, as a matter of law, to advance such an argument in judicial review proceedings of this kind. As noted earlier in this judgment, the court, in proceedings of this kind, does not act as an appeal from the Board. It is therefore open to question whether the applicant is entitled to ask the court to involve itself in a review of the facts save where there is no material before the Board to support a particular factual conclusion reached by it. In any event, it is unnecessary to consider this question further in circumstances where, for the reasons outlined above, I have come to the conclusion that the assertion made by Ms. Forsythe in para. 34 of her affidavit as to the future capacity of the Ringsend WWTP is incorrect.

121. However, that does not dispose of the case made by the applicant in relation to the screening exercise. As noted above, the applicant argues that the report of the Parks Superintendent of the City Council and the information contained in the EIS lodged in support of the 2012 application for an upgrade to the Ringsend WWTP demonstrate that the Board, in excluding the possibility of *"in combination"* or cumulative effects, was not acting on the basis of best scientific knowledge and that the Board thereby acted in breach of its obligations under s. 177U (1) of the 2000 Act.

The case made in relation to the views of the Parks Superintendent

122. Insofar as the report from the Parks Superintendent is concerned, counsel for the Board emphasised that the views expressed by the Parks Superintendent were not shared by

the City Council itself. She highlighted the passage from the report of the chief executive of the City Council quoted in para. 110 above in which the City Council (based on input from its Biodiversity Officer) expressed itself to be in agreement with the screening report prepared by Mr. Fogarty of Openfield Ecological Services.

123. Moreover, when one analyses the views expressed by the Parks Superintendent on this issue (in the way suggested by counsel for the Board in the course of her submissions) no objective scientific material is identified by the superintendent in support of the view offered by her. In the first place, the superintendent referred to the fact that, currently, there are capacity issues in relation to the Ringsend WWTP. That is undoubtedly correct. However, her report does not take account of the information available in relation to the upgrade works currently being undertaken to the plant which I have sought to summarise above..

124. The superintendent also states that *"there are reasons to believe"* that sewage effluent is contributing to further exceedances of the Nitrates Directive and to the declining ecological status of the Bay under the Water Framework Directive and the Habitats Directive in terms of impacts to protect its seagrass habitats. However, this statement is not explained by her in any way save to refer to the EPA publication mentioned in para. 114 above. That document issued by the EPA simply identified that seagrass is sensitive to nutrient enrichment. It does not in fact say anything about the water quality in the Liffey Estuary or the extent to which nutrient enrichment arising from the operation of the Ringsend WWTP is (or is not) causing problems to any of the European sites in issue. In the circumstances, it is difficult to see how this expression or view on the part of the superintendent can be said to constitute an element of *"best scientific knowledge"* within the meaning of s. 177U (1) of the 2000 Act. Moreover, as discussed further below, there were other documents available to the Board (including the Environmental Impact Assessment Report (*"EIAR"*) prepared in respect of the 2018/2019 upgrade application in respect of the Ringsend WWTP) which demonstrated that the eelgrass

of particular relevance to the Light-bellied Brent goose is, in fact, situated in the South Dublin Bay SAC which is unaffected by effluent from the Ringsend WWTP. The EIAR also established that the nutrient enrichment which has taken place in the area of the River Tolka Estuary and in the vicinity of Bull Island (situated within the North Dublin Bay SAC) has been advantageous for the Light-bellied Brent goose. It has led to an abundance of macroinvertebrate communities which are a source of food for many ducks and wading birds including the Brent goose.

125. While the superintendent also refers to *"ongoing research studies funded by the EPA and Dublin City Council",* these studies are not identified. Moreover, as counsel for the Board argued, the difficulty with the reference to such material is that, unless the research is published or otherwise available to the Board, it can hardly be asserted to comprise best scientific knowledge by reference to which a decision of a competent body such as the Board could be made. In the same context, the superintendent refers to the potential impact on eelgrass. For the reasons already explained, the EIAR prepared in respect of the 2018/2019 application for a further upgrade of the Ringsend WWTP demonstrates that, contrary to the suggestion made by the superintendent, eelgrass is not situated in an area adversely affected by effluent from the plant. In this context, counsel for the applicant very properly accepted that a person in the position of an inspector appointed by the Board must be entitled, in the context of carrying out a screening exercise, to have regard to the corporate or institutional knowledge of the Board derived from its review of other relevant applications. Clearly, the application in respect of the upgrade of the Ringsend WWTP is highly material in the context of this aspect of the applicant's case and it would be absurd to conclude that the Board and its inspectors would not be entitled to have regard to the scientific information made available in the course of the Board's consideration of that application.

126. For all of these reasons, it does not seem to me that the report prepared by the Parks Superintendent of the City Council provides a basis to suggest that there was any failure on the part of the Board to apply best scientific knowledge as required by s. 177U of the 2000 Act or that it otherwise exposes a failure on the part of the Board in carrying out the screening exercise required under the Habitats Directive. In reaching this conclusion, I have deliberately not had regard to the additional materials which are exhibited to Mr. Fogarty's affidavit comprising a 2019 report of the National Parks and Wildlife Service (*"NPWS")* which suggests that the Light-bellied Brent goose is increasing in population and that the mudflats and sand flats habitat in Dublin Bay has a *"favourable conservation status".* While that material clearly undermines the case made by the applicant in relation to its concerns about these two conservation interests, there is nothing in the papers before the court to establish that this material was known to the Board at the time of its decision in this case. In circumstances where the task of the court in an application of this kind is to review a decision made at a particular time, I do not believe that it would be appropriate, in those circumstances, to have regard to the NPWS material. I will, however, have regard to an extract from the 2018 EIAR in respect of the most recent upgrade to the Ringsend WWTP which was exhibited by Mr. Fogarty. This comprises chapters 5 and 6 of the 2018 EIAR. It seems to me to be appropriate to have regard to this material in circumstances where it was made available to the Board in the context of the application for permission in respect of the upgrade in question. Moreover, the applicant, in these proceedings, has sought to rely on chapter 4 of the same document.

The case made in relation to the plume

127. As noted above, the applicant also seeks to rely upon the material contained in the 2012 EIS to suggest that there was a failure on the part of the Board to equip itself with best scientific information. In addition, the applicant calls into question the basis upon which the

inspector could conclude (as she did in para. 13.1.8 of her report) that enriched water entering Dublin Bay has been shown to *"rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the bay water".* In particular, the applicant suggests that this conclusion on the part of the inspector is inconsistent with the information contained in the 2012 EIS in relation to the plumes of DIN and MRP (as outlined in para. 115 above).

128. This aspect of the case made by the applicant was addressed in detail in the very helpful oral submissions of counsel for Oxley. In the course of his submissions, counsel for Oxley drew attention to a number of passages in chapter 4 of the EIAR submitted in respect of the 2018/2019 upgrade application in relation to the Ringsend WWTP (which had been exhibited by Ms. Forsythe in her affidavit) together with a further extract from the EIAR exhibited in the affidavit of Mr. Fogarty namely chapters 5 and 6. Those two extracts, in my view, very clearly establish the origin of the statement made by the inspector in her report in relation to the dispersal of the plume and, furthermore, establish that the information provided in the 2012 EIS no longer represents the best scientific information available.

129. In the EIAR prepared in June 2018, the status of the waters in the vicinity of Dublin Bay (by reference to the requirements of the Water Framework Directive) is set out in Figure 4-8. This shows that the status of Dublin Bay itself is *"good"* while the status of the Lower Liffey Estuary and the Tolka Estuary is assessed as "*moderate".* The latter classification is a mid-point on a five-category scale running from bad to poor at one end and good to high at the other.

130. In para. 4.4 of the EIAR it is confirmed that wastewater from the Ringsend WWTP is discharged into the Lower Liffey Estuary but with the potential to have an impact on adjoining water bodies including the Upper Liffey Estuary, the Tolka Estuary and the wider Dublin Bay. Thereafter, in s. 4.6 of the report, the authors examine the impact of the upgrade by reference to a number of different environmental criteria. In the case of biochemical

oxygen demand (*"BOD"*), the EIAR predicts that the improvement in effluent quality achieved by the upgrade will compensate for the increase in flow through the plant and will result in a 17.5% overall reduction in the average daily load of BOD discharged to the environment. Similarly, in the case of suspended solids (*"SS"*) the improvement in effluent quality achieved by the upgrade will also compensate for the increase in flow through the plant and will result in a 35.2% overall reduction in the average daily load of SS discharged to the environment. The upgrade will also have a substantial impact in reducing the levels of ammonia discharged to the environment. Paragraph 4.6.3 of the report confirms that the improvement in effluent quality achieved by the upgrade will not only compensate for the increase in flow from the plant but will result in an 86.3% overall reduction in the average daily load of ammonia discharged to the environment. There will also be a significant improvement in reducing the level of E.Coli concentrations in the final effluent which the report states will have a beneficial impact on the receiving water environment.

131. For present purposes, paras. 4.6.4 of the report (dealing with DIN) and 4.6.5 (dealing with MRP) are particularly relevant. While counsel for the applicant correctly observed that the unit of measurement used in the 2018 EIAR for DIN and MRP is different to that in the 2012 EIS, it is nonetheless clear from the EIAR that, notwithstanding the increased throughput envisaged for the Ringsend WWTP following the upgrade, there will be substantial improvements in the levels of DIN and MRP respectively discharged into the environment. In particular, at para. 4.6.4 of the EIAR, it is confirmed that the improvement in effluent quality achieved by the upgrade will compensate for the increase in flow through the plant and will, furthermore, result in a 19.1% overall reduction in the average daily load of DIN discharged to the environment. The report states that this indicates that there will be a *"positive effect on the receiving water environment in respect of DIN".* In addition, the same paragraph of the report (at p. 135) discloses that the *"chlorophyll and macroalgae*

concentrations in the Tolka Estuary are not determined by the DIN concentrations discharged from the Ringsend WWTP". It will be recalled in this context that one of the concerns expressed by the Parks Superintendent of Dublin City Council (by reference to the unpublished ongoing research studies mentioned by her) was that nutrient enrichment is contributing to the alteration of the plant communities and in particular to increased growth of algae at the expense of protected seagrass habitats. The 2018 EIAR provides evidence that this is not as a result of DIN discharges from the Ringsend WWTP. In this context, it is important to bear in mind that both the Liffey and the Tolka are significant sources of nutrient loaded waters. This is confirmed in para. 5.3.2 of the EIAR (which was exhibited by Mr. Fogarty).

132. In the case of MRP, the EIAR confirms that the improvement in effluent quality achieved by the upgrade will compensate for the increase in flow through the plant. In addition, it will result in a 60.2% overall reduction in the average daily load of MRP discharged to the environment. On p. 138 of the report, it is noted that the reduction in MRP is *"significant enough to make a noticeable difference in the levels of MRP observed in the Tolka Estuary, and hence assist the Tolka Estuary [to] meet the relevant compliance objective under the Water Framework Directive".*

133. Thus, the more up to date scientific information available in the 2018 EIAR paints quite a different picture to the modelling material contained in the 2012 EIS. It is also important to emphasise that the 2012 modelling material cited by counsel for the applicant expressly related to the then existing situation. What is clear from the 2018 EIAR is that the situation will be significantly improved by the upgrade. Furthermore, the 2018 EIAR demonstrates that, notwithstanding the increased flow through the Ringsend WWTP in the future, the upgrade will compensate for this increase in flow. In the circumstances, the most up to date scientific information in the material before the court strongly supports the view

taken by the inspector that the proposed development (insofar as it will increase the flow of foul water to the Ringsend WWTP) would not be likely to have any significant effects on any Natura 2000 site, either directly or indirectly or in combination with other plans and projects.

134. Chapter 5 of the 2018 EIAR provides further useful information in relation to DIN. Figure 5-16 plots the extent of the zone of influence of the effluent from the Ringsend WWTP on the predicted modelled output for winter depth averages for DIN. The zone of influence is shown to be largely confined to the area between the Great South Wall on the south side to the Bull Wall on the north side but it also extends into a small area in the inner part of Dublin Bay at Clontarf, a lagoon west of Bull Island and a small section of open sea to the south east of Bull Island. On p. 177 of the report, it is confirmed that, notwithstanding this zone of influence, the Inner Tolka Basin is host to macroinvertebrate communities as rich (if not richer) than those found in the north Dublin Bay and south Dublin Bay mudflats and sandflats. On p. 184, it is noted that the upgrade will improve the quality of effluent which will result in a positive improvement in water quality in Inner Dublin Bay. However, the report notes that, while the improvements in water quality are of value to the marine environment, the Upper Liffey and Tolka Estuaries will continue to be chiefly influenced by riverine outputs as the major sources of nutrient loads. As noted above, the EIAR confirms that both the Liffey and the Tolka are the principal source of enriched nutrients in this area. In chapter 6 of the report, it is confirmed, at p. 203, that South Dublin Bay is unaffected by the effluent from the WWTP at Ringsend. In chapter 6, it is also confirmed that bird populations in Dublin Bay are generally stable or increasing. Insofar as the Light-bellied Brent goose is concerned, numbers are shown to be increasing. The report confirms that the Brent goose is mainly concentrated on North Bull Island and the Tolka Basin. It appears from chapter 6 that the intertidal macroalgae growing in the nutrient rich waters has, counterintuitively, had a beneficial impact on the food sources for the Brent goose in this

location. While some concern is expressed in chapter 6 that a reduction in the nutrient loading as a consequence of the upgrade of the Ringsend WWTP may reduce the sources of food in this area, modelling and historical information suggests that *"geese will still have sufficient quantities of intertidal macroalgae even with the reduction in nutrient loading".*

135. The 2018 EIAR also contains a statement which is entirely consistent with the conclusion stated by the inspector in her report in this case to the effect that enriched water entering Dublin Bay *"has been shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the bay water".* A very similar statement is found on p. 186 of the EIAR as follows:

> *"Based on the modelled output for suspended solids, a reduction in suspended solids following the implementation of the [upgrade]… is very unlikely to have any effect in south Dublin Bay, in Dollymount Strand, the intertidal mudflats to the north and west of Bull Island or the outer bay,* ***which are currently not affected by the effluent, due to the rapid mixing and dilution.****"* (emphasis added).

136. Counsel for the applicant acknowledged that it was entirely plausible that the inspector's view, as expressed in her report in the present case, may well have been derived from the institutional knowledge of the Board arising from its consideration of the 2018 EIAR in the context of its review of the application in respect of the Ringsend upgrade. However, he submitted that, while it was a plausible explanation, the inspector had not explained her conclusion in those terms in her report. He also highlighted, in this context, the absence of any affidavit from the inspector explaining herself.

137. In my view, this submission on the part of counsel for the applicant is misplaced. As counsel for the Board stressed, in the course of her submissions, the applicant did not raise an issue before the Board in relation to the screening report submitted on behalf of Oxley. Counsel for the Board submitted (correctly, in my view) that it is inappropriate for the

applicant to criticise the lack of any explanation by the inspector in circumstances where no one had raised any issue in relation to plume dispersal in the course of the proceedings before the Board. As counsel for the Board submitted, no one suggested that the plume from the WWTP *"would travel as an entity rather than dispersing over the greater area….[T]his is part of the problem … the Applicant comes not having made any point to the Board, not having introduced any of this material and is then critical of the Inspector's Report for not treating of the concerns now being made but not raised at the time. If the Applicant wanted to raise an issue about plume dispersal, … then there may have been an obligation on the Inspector to expressly treat of that in more detail. But in circumstances where it wasn't raised and where the Board has a recent and detailed institutional knowledge of the Ringsend Wastewater Treatment Plant, deriving from the applications for upgrade … [counsel for the applicant] can't criticise the Board's decision for not referencing the particular source of knowledge for that point. If it was a point in dispute or a point on which the Applicant had taken issue, I accept that the position might be different. But it's manifestly unfair to remain silent on something, allow it be treated of in the decision and then come to court saying: 'I can't specifically identify why you said that'".*

138. In circumstances where the applicant did not raise the issue in the course of the proceedings before the Board in this case and in circumstances where there is a plausible explanation in the materials available to the Board (in particular in the 2018 EIAR in respect of the Ringsend WWTP) I do not believe that it is open to the applicant to call into question this conclusion on the part of the inspector that enriched water entering Dublin Bay was shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the water in the Bay. It should also be noted, in this context that the only attack advanced in the statement of grounds on this aspect of the inspector's findings is (as pleaded in para. E57) that the information available from the modelling submitted in respect of the

2018/2019 proposed upgrade of the Ringsend WWTP *"demonstrates as a matter of fact that the Inspector was wrong to state that enriched water rapidly mixes and 'is often indistinguishable from the rest of the bay water'. In fact, the opposite is the case."* That allegation is not borne out by reference to the terms of the 2018 EIAR as analysed in the submissions of counsel for Oxley and summarised above.

Conclusion in relation to the applicant's complaints in respect of the screening exercise

139. For all of the reasons discussed in paras. 100 to 138 above, I have come to the conclusion that the applicant has failed to demonstrate that there was a failure on the part of the Board to carry out a screening exercise in accordance with the best scientific information available and that the applicant has likewise failed to establish any other failure in the screening exercise undertaken by the Board in this case for the purposes of s. 177U of the 2000 Act and the Habitats Directive.

Overall conclusion

140. In my view, for the reasons explained in paras. 84 to 96 above, the applicant has succeeded in establishing that the proposed development does not constitute *"strategic housing development"* within the meaning of s. 3 of the 2016 Act and that, accordingly, the decision of the Board to grant permission for the development is *ultra vires* the powers of the Board under s. 9 (4) of the 2016 Act. It therefore appears to me to be appropriate to grant an order of *certiorari* in the terms set out in para. D1 of the statement of grounds together with the declaration set out in para. D2 of the statement. For the reasons outlined above, I have come to the conclusion that the applicant is not entitled to succeed in relation to the balance of its claim.

141. The parties may wish to address the precise form of order to be made. They may also wish to address whether any consequential orders should be made including orders in relation to the costs of the proceedings. I will accordingly direct that the parties should, in the first

instance, correspond with each other with a view to trying to agree the terms of the orders to be made (including any consequential orders such as orders for costs) such communications to be completed within fourteen days from the date of electronic delivery of this judgment. In the event that agreement has been reached within that fourteen-day period, the results of the agreement are to be confirmed by email by the solicitor for the applicant to the registrar not later than 3rd December, 2020. In the event that the parties have not been able to reach agreement by 3rd December, 2020, the registrar is to be so notified by email by the solicitor for the applicant by the same date following which I will give further directions, electronically, in relation to whether any further written observations or submissions are required in relation to any of the matters then in dispute between the parties.