[2025] IEHC 277

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.0000933]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL AND SOUTH DUBLIN COUNTY COUNCIL

RESPONDENTS

AND

ARDSTONE HOMES LIMITED

NOTICE PARTY

IV (No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 16th day of May 2025

1. Legislation provides for strategic environmental assessment (SEA) of general measures in certain circumstances, not expressly including decisions extending the duration of local area plans (LAPs). The applicant objects to a planning permission granted in reliance on an extended LAP, and challenges the legislation as incompatible with the SEA directive (directive 2001/42). However in the present case, this was raised without the applicant challenging the decision to extend, still less seeking an extension of time to do so, and instead the inconvenient procedure for such a challenge was circumvented by seeking a declaration that the plan was no longer in force. The main question is whether that exotic relief is a collateral attack on, because it necessarily involves an assertion as to the invalidity of, the unchallenged decision to extend, and if so, whether the legislative challenge even gets off the ground in the absence of a properly pleaded complaint about a specific decision affecting the applicant.

Judgment history

2. The applicant has instituted five sets of proceedings that have given rise to written decisions, and this is the eleventh such decision overall (and the seventh one unfavourable to the applicant). I will identify the other cases for ease of present and future reference.

(i) *Ballyboden I* was 2020 No. 816 JR, a challenge to a strategic housing development (SHD) on a site at Taylor's Lane and Edmondstown Road, Ballyboden, Dublin 16. *Certiorari* was granted by Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January 2022).

(ii) *Ballyboden II* was 2021 No. 89 JR, a challenge to flood relief works in South Dublin. That was dismissed in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2021] IEHC 648, [2021] 10 JIC 2003 (Unreported, High Court, 20th October 2021). Leave to appeal was refused in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors (No. 2)* [2022] IEHC 1, [2022] 1 JIC 0701 (Unreported, High Court, 7th January 2022). The Supreme Court granted leapfrog leave to appeal ([2022] IESCDET 42 (Dunne, Woulfe and Hogan JJ., 4th April 2022)) but then dismissed the appeal in a judgment by Woulfe J.: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IESC 47, [2022] 11 JIC 1502 (Unreported, Supreme Court, 15th November 2022).

(iii) *Ballyboden III* was 2021 No. 810 JR, a challenge to a development on a site at Stocking Avenue, Woodstown, Dublin 16. The board decided to concede the challenge, but the developer asked for liberty to defend it. I decided that such a defence should be permitted: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2023] IEHC 114, [2023] 3 JIC 1007 (Unreported, High Court, 10th March 2023). The applicant obtained leapfrog leave to appeal to the Supreme Court: [2023] IESCDET 90 (Dunne, Baker and Donnelly JJ., 10th July 2023), but in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2024] IESC 4, [2024] 2 JIC 2201 (Unreported, Supreme Court, Donnelly J., 22nd February 2024), the Supreme Court dismissed the appellant's appeal and held that a notice party was entitled to defend a decision where, in judicial review proceedings, the decision-taker had conceded that the decision ought to be quashed. The notice party decided subsequently not to pursue the defence of the proceedings.

(iv) The present matter is *Ballyboden IV*. In *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors IV (No. 1)* [2023] IEHC 722, [2023] 12 JIC 2107 (Unreported, High Court, 21st December 2023), Holland J. dismissed the non-State related grounds of challenge to a SHD of 114 build-to-rent apartments in six apartment and duplex blocks of up to six storeys on a 2.2 hectare site south of Stocking Avenue, Rathfarnham, Dublin 16. This judgment concerns the second module involving the State. I will give further details of this below.

(v) *Ballyboden V* was 2022 No. 304 JR, a challenge to the validity of an SHD decision permitting the construction of 131 residential units and associated works on lands off Stocking Lane, Ballyboden, County Dublin, and I granted *certiorari* in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2024] IEHC 66, [2024] 2 JIC 1304 (Unreported, High Court, 13th February 2024).

Module I

3. Module I of the present challenge impugned the decision of the board, a case originally made by reference to 10 core grounds. Prior to the hearing of module I, the applicant withdrew the challenge based on core grounds 2, 6, 7 and 8B and part of core ground 1.

4. By judgment delivered by Holland J. on 21st December 2023, the application for relief on foot of core grounds 1, 3, 4, 5, 8 and 8A was refused as recorded in the Order of the High Court of 12th January 2024. The applicant has confirmed that no application for leave to appeal will be made in respect of the judgment of Holland J.

5. Module II originally concerned core grounds 9, 10 and 11. By letter dated 23rd January 2024, the applicant confirmed it was no longer pursuing core ground 10. Further, in its legal submissions in respect of module II, the applicant has confirmed that it is no longer pursuing core ground 11.

6. Core ground 12 is purely procedural (seeking a stay).

7. Consequently, the sole remaining ground of challenge to be determined is core ground 9.

8. Holland J. did not propose retaining seisin of the matter so module II returned to the general list.

Geographical context

9. The development (https://www.pleanala.ie/en-ie/case/310398) relates to lands at Stocking Avenue, Woodstown, Dublin 16, involving 114 build-to-rent apartments and associated site works. The development site is adjacent to existing housing near Stocking Avenue, approximately here: https://maps.app.goo.gl/nCWPpZUVmC1ophVJA.

Facts

10. The Ballycullen Oldcourt Local Area Plan 2014 (the LAP) was adopted on 6th May 2014, and came into force on 3rd June 2024.

11. The LAP was amended on 8th May 2017, with the amendment coming into effect on 2nd June 2017.

12. On 7th May 2019, by resolution of the elected members of South Dublin County Council (the council), the LAP was extended for further period (in purported compliance with s. 19 of the 2000 Act).

13. The notice party applied for SHD pre-application consultation on 12th November 2020 (ref. 308642).

14. The board issued its opinion on 22nd February 2021 that the application required further consideration/amendment.

15. The notice party applied for SHD planning permission on 2nd June 2021.

16. The board granted planning permission on 16th September 2021.

Procedural history

17. The proceedings were issued on 9th November 2021.

18. An amended statement of grounds was filed on 25th November 2021.

19. I granted leave on 29th November 2021.

20. On 20th December 2021, relief 3 against the State respondents was struck out as there were no supporting grounds for it, and the matter was adjourned generally against the State and the council. The notice of motion was in progress, and the issue of costs was raised.

21. Some delay was then occasioned because opposing parties raised objections about costs protection and standing. The issue of standing was to be dealt with first, with a motion to be brought on 24th January 2022 returnable for 14th February 2022.

22. No motion regarding standing was filed on 14th February 2022.

23. The matter was listed for mention on 28th February 2022, and adjourned for one week on consent.

24. On 7th March 2022, the board was granted three weeks to file submissions on the proposed protective costs order sought by the applicant, with the notice party given one week.

25. On 4th April 2022, the board was given a further three weeks peremptorily, with one week for the notice party.
26. On 9th May 2022, the notice party suggested that the board should do a statement of opposition first.
27. The matter was adjourned for a week to allow for the latter to be filed, with the applicant to indicate their position as to whether it wanted the protective costs order motion heard.
28. We then moved on to opposition papers, with considerable further delay caused by the opposing parties not furnishing such papers in a timely manner. On 2nd June 2022, the matter was adjourned to 25th July 2022 for opposition papers with the board taking a pragmatic approach to costs protection subject to abuse of process. The developer also took a pragmatic approach insofar as opposition papers were concerned.
29. On 25th July 2022, the matter was adjourned to 10th October 2022 for board opposition papers.
30. On 10th October 2022, the matter was adjourned for eight weeks with two weeks for the board's opposition papers, two weeks for the notice party and three weeks for the applicant to reply.
31. On 23rd January 2023, the board filed its opposition papers. The notice party sought three weeks for opposition papers and affidavits, with the applicant to reply by 2nd March 2023.
32. The matter was listed on 6th March 2023, to make a formal order regarding costs protection.
33. On 27th March 2023, the applicant was given two weeks for affidavits, including the vacation period, until 11th April 2023.
34. On 24th April 2023, the matter was adjourned for certification with a view to a date being fixed.
35. On 8th May 2023, the matter was listed in the List to Fix Dates and a date was duly assigned.
36. The hearing in respect of module I took place before Holland J. between 28th and 30th November 2023, and judgment was reserved.
37. Judgment was delivered on 21st December 2023, dismissing core grounds 1, 3, 4, 5, 8 and 8A.
38. In relation to module II, the fourth named respondent filed its opposition papers on 29th February 2024.
39. The notice party filed written submission in relation to module II issues on 11th March 2024.
40. The notice party filed further written submissions in relation to module II issues on 11th April 2024.
41. The applicant filed written submissions in relation to module II issues on 11th April 2024.
42. The State respondents filed their opposition papers on 16th April 2024.
43. On 29th April 2024, the applicant confirmed that it did not intend to seek leave to appeal in respect of the judgment delivered by Holland J. in respect of module I.
44. The board filed a statement of opposition for module II on 30th May 2024.
45. The LAP expired on 2nd June 2024.
46. The notice party applied to amend its statement of opposition on 18th June 2024 and filed an amended statement of opposition on 25th June 2024.
47. Holland J. completed case management of module II in July 2024, and transferred the matter to the List to Fix Dates on 21st October 2024.
48. On that date, a hearing date of 1st May 2025 was fixed.
49. The notice party notified the parties that it was not participating in module II on 17th February 2025.
50. The applicant filed written submissions on module II on 24th February 2025.
51. The State respondents filed written submissions on 25th March 2025.
52. The council filed written submissions on 7th April 2025.
53. The board filed written submissions on 10th April 2025.
54. The matter was then duly heard on 1st May 2025.
55. Judgment was reserved at the end of that hearing. I would like to record my thanks to all of the lawyers involved for their unfailingly courteous, professional and helpful assistance. As I have previously sought to make clear, insofar as any points advanced are not being accepted in this or any other given judgment, that is solely to do with the inherent merits of such points and is no reflection on those instructed to convey such points, a distinction that most certainly should be, and I believe generally is in fact, self-evident to all concerned.

Relief sought

56. The reliefs sought in the amended statement of grounds are as follows:

> "1. An order of Certiorari by way of application for judicial review quashing the decision of the Respondent to grant planning permission to the Notice Party for the construction of 114 apartments and associated works on a site off Stocking Lane, Rathfarnham, Co. Dublin.

2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate.

3. A declaration that Articles 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No 477 of 2011) ('the Habitats Regulations') are ultra vires and invalid in that they constitute a mis-transposition of Article 12 of the Habitats Directive (Council Directive 92/43 on the protection of natural habitats) and/or the Second and Third Named Respondents have failed to properly transpose Article 12 of the Habitats Directive.

4. A declaration that (to the extent that it is not capable of bearing a conforming construction) section 19(1)(d) of the Planning and Development Act 2000 ('the Act of 2000') mis transpose and are incompatible with Articles 3(1), 3(2) and 4 of the Strategic Environmental Assessment Directive, Directive 2001/42/EC insofar as it permits the extension of the period of application of the Ballycullen and Oldcourt Local Area Plan 2014-2020 without the necessity for a new assessment of potential environmental effects pursuant to the SEA Directive and/or that the Plan is no longer valid since its period of application was unlawfully extended in breach of the Strategic Environmental Assessment Directive (Directive 2001/42/EC).

5. A declaration that (to the extent that it is not capable of bearing a conforming construction) the statutory pre-consultation procedures provided in section 6 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the '2016 Act') is incompatible with Article 6(4) of Directive 2011/92/EU (as amended) (the 'EIA Directive') and/or the requirements of fair procedures and natural and constitutional justice.

6. A declaration that (to the extent that it is not capable of bearing a conforming construction) the statutory consultation procedure provided in section 8 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 is incompatible with Article 6(3)(b)) of Directive 2011/92/EU (as amended).

7. An Order that Section 50B of the Planning and Development Act 2000 as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and / or Article 9 of the Aarhus Convention apply to the present proceedings.

8. Costs."

Ground of challenge

57. The only remaining core ground of challenge is as follows:

"9. The impugned decision is invalid as the Second and Third Named Respondents have failed to properly transpose Article 3(1), (2) and 4 of the Strategic Environmental Assessment Directive (Directive 2001/42/EC) as section 19(1)(d) of the 2000 Act allows for the effective extension of the period of application of the BOLAP without using the procedure provided in the SEA Directive and/or the BOLAP is no longer valid since its period of application was unlawfully extended in breach of the Strategic Environmental Assessment Directive (Directive 2001/42/EC), further particulars of which are set out in Part 2 below."

58. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 9 – Extension of Duration of the BOLAP in breach of the SEA Directive

Applicant

The extension of duration of the BOLAP is a modification of a plan and therefore a plan as defined in the SEA Directive and was invalid because it was adopted without an environmental assessment in breach of Article 3(1) of the SEA Directive or a determination under Article 3(5) of the SEA Directive. Section 19(1)(d) of the Planning and Development Act 2000 is invalid in light of the SEA Directive insofar as it permits the duration of a local area plan to be extended without such an assessment or determination. If the Court holds that the BOLAP was modified in breach of the SEA Directive it is required to revoke or suspend the planning permission granted to the Notice Party.

State Respondents

The Applicants case is that the term 'modification', as used in the SEA Directive, includes the extension of the duration / life of a local area plan made pursuant to a resolution of the elected members under section 19(1)(d) of the 2000 Act. As the term 'modification' is not defined in the SEA Directive and there is no case law on point, the Applicant seeks to rely on (a) case law under the EIA Directive; (b) case law under the Habitats Directive; (c) EU Commission Guidance and (d) relevant case law on SEA Directive and general principles of interpretation.

With regard to the case law under the EIA Directive, the State Respondents position is that the case law is of no assistance to the Applicant were the EIA Directive expressly provides that any change or extension to a project, where the change or extension itself met the

thresholds or itself may have significant effects on the environment, must be subject to EIA / EIA Screening.

As for the case law under the Habitats Directive relied on by the Applicant, the cases rely on the principle that if a particular activity is covered by the EIA Directive it must, a fortiori, be covered by the Habitats Directive. In particular, the fact that the extension of the development consent at issue in the cases relied on by the Applicant constituted a project for the purpose of the EIA Directive was instrumental in the Court's conclusion that it also considered it to be a project for the purpose of the Habitats Directive. The State Respondents maintain that no analogy can be drawn with the SEA Directive and the concept of a plan or programme, as defined in the SEA Directive.

Reliance on the EU Commission Guidance is also misplaced and the passage relied on by the Applicant, which uses the phrase 'rather than being prepared afresh', does not in fact say anything at all about a situation such as arises in the instant case where the duration / life of a plan has been extended with no changes to the provisions of that plan.

The case law of the CJEU has held that the total or partial repeal of a specific land use plan constitutes a 'modification' for the purpose of the SEA Directive provided that certain criteria are met (Case C-567/10 Inter-Environnement Bruxelles, para 38 to 42). In particular, the extension of the duration / life of a LAP does not involve a 'modification of the planning envisaged in the territories concerned' but rather involves the continuation in force of what has gone before and as such is not a 'modification'.

If however, the Court takes the position that extending the duration / life of a LAP is a 'modification' for the purpose of the SEA Directive, then the caveat at paragraph 42 of the judgment in Case C-567/10 Inter-Environnement Bruxelles applies and has been satisfied as the LAP falls within a hierarchy of town and country planning measures, in which the measures higher up the hierarchy lay down precise rules governing land use and are themselves subject to the requirements of the SEA Directive. Furthermore, a resolution can only be passed under section 19(1)(d) of the 2000 Act where the elected members have (i) sought and obtained an opinion from the Chief Executive that the LAP in question remains consistent with the objective and core strategy of the relevant development plan and (ii) sought and obtained an opinion from the Chief Executive that the objectives of the LAP have not been substantially secured. In addition, there are specific measures in the 2000 Act which ensure consistency between the LAP (including the LAP as extended) and the relevant development plan; regional spatial and economic strategy and / or the national planning framework and provide that the provisions of the LAP shall cease to have effect in the event of any inconsistency with the development plan (sections 18(4)(b), 19(1)(e), 19(2), 19(2B) and 20(5) of the 2000 Act).

Finally, if the Court takes the view that a 'modification' can or does include extending the duration / life of a LAP where there is no change to any of the provisions of the LAP, there is nonetheless no failure to properly transpose the SEA Directive on the basis of a conforming interpretation of the existing statutory scheme. It is specifically envisaged by a combination of section 19(1)(c) and 19(1)(d) that an LAP may remain in force for a period of up to 10 years. As such the legislation specifically envisaged that SEA or screening for SEA carried out at the time of the adoption of the LAP should take account of the possibility that the LAP could remain in force for up to 10 years without further SEA or screening for SEA carried out at the time of the extension under section 19(1)(d). As such there has been no failure to transpose the SEA Directive.

The Council

Without prejudice to the Council's preliminary objection that Module 2 involves an impermissible and grossly out of time collateral challenge to the Council's Decision to extend the BOLAP which, it is submitted, should dispose of Module 2 contra the Applicant, the complaint at Core Ground 9 is based on an incorrect premise in that the extension of the BOLAP does not constitute a 'modification' of same for the purposes of the SEA Directive and in this regard is not a 'modification' within the meaning of Article 2(a) of the SEA Directive. The Council's position is that the extension of the BOLAP is not a 'modification' for SEA purposes and same did not require SEA Screening or SEA.

'Modification' in this regard is not expressly defined in the SEA Directive, and insofar as the concept is one having an autonomous meaning at EU Law, the concept has not been determined/interpreted by the CJEU to encompass an extension of a plan or programme (such as the extension of the BOLAP at issue herein) that: (i) does not entail any actual modification or amendment or alteration to the text/provisions of that plan or programme, and (ii) does not allow derogation from any element of the framework for future development consent of projects.

The Applicant's submissions on the issue fail to properly consider or engage with the judgments of the CJEU in Case C-43/18 Compagnie d'Entreprises CFE SA at §§71-73 and Case C-567/10 Inter-Environment Bruxelles at §§38-42. Applying the relevant elements of those CJEU judgments to the facts here: (i) A local area plan, such as the BOLAP, undoubtably falls within a hierarchy of town and country planning measures, in which the measures higher up the hierarchy (in particular development plans, as well as regional spatial and economic strategies) lay down precise rules governing land use and are themselves subject to the requirements of the SEA Directive (and were subject to SEA); (ii) An SEA of the BOLAP was not mandatory under the Regulations insofar as it was a town with less than 5,000 persons and this reflects Article 3(3) of the Directive whereby that plans or programmes '…which determine the use of small areas at local level…', shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects; (iii) The extension of the BOLAP does not involve or result in a 'modification of the planning envisaged in the territories concerned' (Case C-567/10 at §38). The 'legal reference framework' was not modified (Case C-567/10 at §39) and the extension of the BOLAP did not modify 'the context in which planning permissions are issued' and did not 'amend the framework for consents issued for future projects' (Case C-567/10 at §13). The extension of the BOLAP involved the continuation in force, without any textual change to same, of what has gone before (and has been subject to SEA prior to its adoption in 2014 and to SEA screening prior to textual amendment to same in 2017). In applying the criteria in Case C-567/10 the clear conclusion is that the extension of the BOLAP is not a modification for the purposes of the SEA Directive. (iv) The current and relevant development plan (the 2022 CDP) expressly considered the BOLAP as extended, for SEA purposes. The 2022 CDP was subject to SEA, and any provision of the BOLAP that conflicts with the CDP ceases to have effect by operation of national law (per s.18(4)(b) of the 2000 Act). Thus, it can be considered that the interests which the SEA Directive is designed to protect have been taken into account sufficiently within the framework here.

In addition, having regard to §72 and §73 in Case C-43/18 Compagnie d'entreprises CFE SA, on the facts here, there is no point of substance arising in relation the extension of the BOLAP in the context of the SEA Directive, as an assessment of effects the BOLAP had already been carried out (as regards both its preparation in 2014 and its actual modification via textual amendment in 2017), it is part of a hierarchy of measures which have themselves been the subject of SEA (and the SEA for the 2022 CDP considered the BOLAP as extended as part of same), and it may reasonably be considered that the interests which the SEA Directive is designed to protect have been taken into account sufficiently within that framework, for the reasons outlined in the Council's written submissions.

Further, for the reasons addressed in the Council's written submissions, the Applicant's reliance by analogy on Case C-411/17 Inter-Environnement Wallonie and on Case C-254/19 Friends of the Irish Environment is misplaced. Neither of those cases relates to the SEA Directive and neither is authority for the proposition that, in circumstances such as those arising here, an SEA or SEA screening was required to be carried out by the Council prior to the extension of the BOLAP. The interpretation of those judgments that the Applicant purports to advance is mistaken and not properly contextualised by reference to the facts of those cases and the issues that were before the CJEU.

In addition, even if (which is not accepted) the Applicant were correct as regards their assertions in this regard, the complaint advanced is entirely formalistic and without substance and there are several factors that all militate against any relief being granted, in the exercise of the Court's discretion (addressed in the Council's written submissions and pleaded to in its Statement of Opposition).

The Board

The Board repeats its preliminary objections and submits that no relief can be obtained in respect of the decision of the Board on foot of Core Ground No 9 because of those preliminary objections.

Strictly without prejudice to the foregoing, in the event that the Applicant establishes that there is a prima facie basis for certiorari of the decision of the Board, the Court should exercise its discretion to refuse to grant certiorari having regard to the failure by the Applicant to argue before the Board that the BOLAP had been invalidity extended and having regard to the reliance placed on it by the Applicant in its submissions to the Board.

Further, in the event that it is established that the BOLAP was extended in breach of the requirements of the SEA Directive, it does not follow that certiorari must be granted. It is incumbent on the Applicant to go further that simply asserting that an SEA screening or SEA of the extension of the BOLAP ought to have been carried out. It must go on and show how the failure to do what it asserts was required makes a difference or creates a difficulty in

environmental terms vis-à-vis the decision to grant permission for this development, something which it manifestly has not done and cannot do in circumstances where it actually invoked and relied on the BOLAP in the process before the Board.
The validity of section 19(1)(d) of the Planning and Development Act, 2000 is a matter for the State Respondents."

59. The sub-grounds are as follows:
"1. The BOLAP was adopted for the period from 2014 to 2020. Section 19(1)(d) of the 2000 Act provides that a Local Area Plan shall be made every five years unless the Local Authority, by resolution opts to extend the period of validity of the LAP for a further period of five years. This the Local Authority purported to do by resolution at a meeting on 17th May 2019 which was subsequently advertised to the public. The effect of this resolution is that the BOLAP is automatically extended until 2024.
2. It is the Applicant's case that Section 19(1)(d) of the 2000 Act is contrary to and/or does not adequately transpose the SEA Directive as it makes no provision for a strategic environmental assessment of the effective extension of period of operation of the BOLAP. Article 2 of the SEA Directive defines a 'plan and programme' as including any modifications to them, and therefore within the scope of the directive. It is the Applicant's case that the requirement in Article 3(1) and (2) when read with Article 4 of the SEA Directive requires the SEA procedure to have been followed in relation to the decision to significantly extend the period during which the BOLAP was in to be in force. It is the Applicant's case that an assessment for the purpose of the SEA Directive such as that carried out in 2014 on the BOLAP cannot be relied upon for the purposes of satisfying the requirements of the Directive after 2020. The Applicant relies by analogy on the decision of the Court of Justice of the European Union in Inter Environmental Wallonie Case C-411/17 and Friends of the Irish Environment v An Bord Pleanála Case C-254/19.
3. In addition, since the period during which the BOLAP was in force was unlawfully modified contrary to the SEA Directive, this plan ceased to have effect from the date on which it was originally due to expire. Therefore, it is the Applicant's case that the Board erred in relying on an irrelevant factor, namely a development plan that had expired rendering the decision to grant planning permission unlawful.
4. Insofar as it may be argued that the 2016 Act specifically permitted the Board to grant planning permission in reliance on the BOLAP that had been extended without any new environmental assessment or any opportunity for public participation it is the Applicant's case that as a consequence of the primacy of EU law, the Board is obliged to ensure that EU law is fully effective and must (of its own motion if necessary and without requesting or requiring the prior setting aside of such provisions) to disapply any provision of national legislation that may be contrary to EU law (Case 378/17 - Minster for Justice v Workplace Relations Commission paragraph 50) as identified and relied upon by the Board itself in Save Cork City v An Bord Pleanála 2020/563 JR."

Preliminary objections

60. The parties' positions as recorded in the statement of case are summarised as follows:
"The State's Preliminary Objections
1. The State Respondents raise a number of preliminary objections arising out of the fact that the Applicant has not sought to expressly challenge the Section 19(1)(d) Resolution and that accordingly it is not open to the Applicant to bring a challenge to the legislation underpinning the Section 19(1)(d) Resolution on the basis of purported non-compliance with EU Law. The preliminary objections are dealt with below under the headings (i) judicial restraint; (ii) collateral attack; (iii) locus standi and (iv) mootness.
Judicial Restraint
2. The State Respondents rely on the principle of judicial self-restraint and the principle that the Court should only consider the question of whether there has been a failure to transpose in circumstances where such a determination is necessary for the purpose of resolving the litigation. The Applicant asserts that it has not challenged the Section 19(1)(d) Resolution and that the validity of the Section 19(1)(d) Resolution is not being questioned. If that is the case, which is not accepted by the State Respondents for the reasons discussed below under 'collateral attack', the Applicant cannot realistically contend that the Court's consideration of whether section 19(1)(d) properly transposes the SEA Directive is 'imperatively required' for the purpose of resolving the litigation. Consideration of the transposition issue would be an academic exercise and accordingly the Court should decline to consider the challenge to the alleged mistransposition of the SEA Directive.
Collateral attack
3. While the Applicant does not expressly challenge the Section 19(1)(d) Resolution, the Applicants plea at Core Ground 9 in effect constitutes a challenge and / or an

impermissible collateral attack on the Section 19(1)(d) Resolution. It is not open to the Applicant to collaterally challenge the Section 19(1)(d) Resolution as part of a challenge to the decision of the Board in respect of a SHD Application. The Section 19(1)(d) Resolution can only be challenged in accordance with the requirements of section 50 and section 50A of the 2000 Act and the Applicant is out of time to challenge the Section 19(1)(d) Resolution. Accordingly, on the basis of the well-settled principles as set out in Sweetman v An Bord Pleanála [2018] 2 IR 250, these proceedings constitute an impermissible collateral attack on the Section 19(1)(d) Resolution and should not be considered by the Court. Further, the defences offered by the Applicant in its Written Submissions are without merit: (1) it is well settled, based on the substance over form approach, that the fact that the Applicant is not seeking certiorari cannot avail the Applicant; (2) the judgment in An Taisce v An Bord Pleanála [2021] IEHC 422 does not assist the Applicant as that was not dealing with a measure which was subject to section 50 or another specific statutory time limit, and in any event the Section 19(1)(d) Resolution is not a measure of general application; (3) Case C-24/19 A and others and C-261/18 Derrybrien simply do not deal with this issue and cannot assist the Applicant.

Locus Standi

4. In the event that the State Respondents are correct that the Applicants cannot challenge the Section 19(1)(d) Resolution due to it being an impermissible collateral attack, then the Applicant lacks locus standi to challenge section 19(1)(d) as being a mistransposition of the SEA Directive as it has no tangible interest that has been, or is likely to be, adversely affected by the impugned legislation.

Mootness

5. The effect of the Section 19(1)(d) Resolution was to extend the duration/life of the BOLAP to June 2024. As of the hearing of Module 2, the BOLAP is no longer in force. As such there is no live controversy between the parties and the proceedings are moot.

The Council's Preliminary Objection:

6. Whereas no specific relief is expressly sought against the Council, notwithstanding it is named as a Respondent, the Applicant's pursuit of relief and Core Ground 9, in substance and reality, constitutes an impermissible and grossly out-of-time (by over two years) collateral attack on the Council's presumptively valid decision. This was made on 7th May 2019 by way of resolution, pursuant to s.19(1)(d) of 2000 Act to extend the duration of the BOLAP, being a decision made or other act done to which s.50(2)(a) and s.50(6) the 2000 Act applies. Relatedly, an extension of time under s.50(8) of the 2000 Act is required if the said decision of the Council to extend the BOLAP were to be challenged. No such extension of time was granted or even sought by the Applicant here. In the premises, the remaining aspect of the Applicant's case should be dismissed on this basis alone.

7. In order to have a route map to either the declaratory relief and an order of certiorari of the Board permission, the Applicant must impugn and have quashed/declared invalid: (1) The permission of the Board, (2) The decision of the Council to extend the BOLAP and (3) Section 19(1)(d) of the 2000 Act (aside from not challenging the relevant Regulations implementing the SEA Directive). The Applicant in their submissions have steadfastly denied that they are seeking to quash (2) above: the decision of the Council to extend the BOLAP, while paradoxically and illogically, expressly and repeatedly asserting the decision to extend was invalid. However, the scope of section 50 of the 2000 Act is engaged if a party is impugning the validity of a decision; irrespective of whether they are expressly seeking certiorari of that decision. The Applicant's position misunderstands and/or misstates the nature of collateral attack and is fatally undermined by their failure to consider or engage with the implications of the application of s.50(2) of the 2000 Act (which application is not altered at all by reason that the challenge relates to alleged breach of EU law requirements). The Applicant cannot assert that the BOLAP is invalid and then pretend that section 50 is not engaged because they are not seeking to quash the Council's decision to extend same.

8. A decision not quashed and/or declared invalid, such as the decision to extend the BOLAP, remains valid. If in fact the Applicant is not impugning the decision to extend the BOLAP, they cannot assert it is invalid and so there is no pathway to either the relief of certiorari against the Board or a declaration in respect of section 19(1)(b). The impugning of (2) above, is necessary to establish either (1) or (3). Insofar as the Applicant is self-avowedly not challenging the decision of the Council to extend the BOLAP on grounds relating to the SEA Directive, they have no standing to challenge section 19(1)(d) or any measure allegedly mis-transposing the same, and the abstract nature of the challenge to the legislation is further compounded not only through a lack of being tethered to the Board's decision via a challenge to the BOLAP, but also by the fact that the BOLAP has now itself expired (it expired in or around 2 June 2024).

The Board's Preliminary Objection

9. Core Ground No. 9 is maintained as both a challenge to the validity of section 19(1)(d) of the Planning and Development Act, 2000 as amended and the decision of the Board to grant planning permission for the proposed development.

10. The case for certiorari of the Board decision turns on the contention that the BOLAP is invalid and that, as a consequence of that invalidity, the Board had regard to an irrelevant consideration in reaching its decision. Having regard to section 9(2)(a) of the 2000 Act, the BOLAP was a mandatory relevant consideration for the Board in deciding whether to grant planning permission.

11. The BOLAP, having been adopted and extended in accordance with section 19 of the 2000 Act, benefits from a presumption of validity and there is no basis upon which the Applicant can impugn the decision of the Board by reference to a presumptively valid statutory document, in respect of which no challenge was brought within the time allowed by section 50(6) of the 2000 Act. Any challenge to the extension of the BOLAP is subject to section 50 of the 2000 Act.

12. The entire premise of the argument made is that the BOLAP is invalid (see, for example, the relief sought at D(4) and the terms of Core Ground 9 itself, as well as the Applicant's written submissions) and is therefore an irrelevant consideration. However, no such invalidity has been established, nor could it be having regard to the procedural requirements of section 50 of the 2000 Act.

13. As Core Ground 9 purports to impugn the decision of the Board by reference to an allegation that an earlier legal instrument is invalid, Core Ground No. 9 is, without doubt, a collateral attack on that earlier legal instrument."

61. I can deal with these points, to the extent that they arise and are necessary to decide, below.

Relevant statutory provisions

62. Section 18 of the 2000 Act provides for LAPs:

"18.—(1) Subject to section 19(2B) (inserted by section 12 of the Act of 2010) a planning authority may at any time, and for any particular area within its functional area, prepare a local area plan in respect of that area.

(2) Two or more planning authorities may co-operate in preparing a local area plan in respect of any area which lies within the combined functional area of the authorities concerned.

(3) (a) When considering an application for permission under section 34, a planning authority, or the Board on appeal, shall have regard to the provisions of any local area plan prepared for the area to which the application relates, and the authority or the Board may also consider any relevant draft local plan which has been prepared but not yet made in accordance with section 20.

(b) When considering an application for permission, a planning authority, or the Board on appeal, shall also have regard to any integrated area plan (within the meaning of the Urban Renewal Act, 1998) for the area to which the application relates.

(4) (a) A local area plan prepared under this section shall indicate the period for which the plan is to remain in force.

(b) A local area plan may remain in force in accordance with paragraph (a) notwithstanding the variation of a development plan or the making of a new development plan affecting the area to which the local area plan relates except that, where any provision of a local area plan conflicts with the provisions of the development plan as varied or the new development plan, the provision of the local area plan shall cease to have any effect.

(5) Subject to section 19(2B) (inserted by section 12 of the Act of 2010) a planning authority may at any time amend or revoke a local area plan.

(6) A planning authority may enter into an arrangement with any suitably qualified person or local community group for the preparation, or the carrying out of any aspect of the preparation, of a local area plan."

63. Section 19 provides for the procedure for making LAPs. It also allows for extension of an LAP, the procedure adopted here (emphasis added):

"19.—(1) (a) A local area plan may be prepared in respect of any area, including a Gaeltacht area, or an existing suburb of an urban area, which the planning authority considers suitable and, in particular, for those areas which require economic, physical and social renewal and for areas likely to be subject to large scale development within the lifetime of the plan.

(b) A local area plan shall be made, except for an area where a development plan of a former town council continues to have effect, in respect of an area which—

(i) is designated as a town in the most recent census of population, other than a town designated as a suburb or environs in that census,

(ii) has a population in excess of 5,000, and

(iii) is situated within the functional area of a planning authority which is a city and county council or a county council.

(bb) Notwithstanding paragraph (b), a local area plan shall be made in respect of a town with a population that exceeded 1,500 persons (in the census of population most recently published before a planning authority makes its decision under subparagraph (i)) except where—

(i) the planning authority decides to indicate objectives for the area of the town in its development plan under section 10(2), or

(ii) a local area plan has already been made in respect of the area of the town or objectives for that area have already been indicated in the development plan under section 10(2).

(c) Subject to paragraphs (d) and (e), notwithstanding section 18(5), a planning authority shall send a notice under section 20(3)(a)(i) of a proposal to make, amend or revoke a local area plan and publish a notice of the proposal under section 20(3)(a)(ii) at least every 6 years after the making of the previous local area plan.

(d) Subject to paragraph (e), not more than 5 years after the making of the previous local area plan, a planning authority may, as they consider appropriate, by resolution defer the sending of a notice under section 20(3)(a)(i) and publishing a notice under section 20(3)(a)(ii) for a further period not exceeding 5 years.

(e) No resolution shall be passed by the planning authority until such time as the members of the authority have:

(i) notified the chief executive of the decision of the authority to defer the sending and publishing of the notices, giving reasons therefor, and

(ii) sought and obtained from the chief executive—

(I) an opinion that the local area plan remains consistent with the objectives and core strategy of the relevant development plan,

(II) an opinion that the objectives of the local area plan have not been substantially secured, and

(III) confirmation that the sending and publishing of the notices may be deferred and the period for which they may be deferred.

(f) Notification of a resolution under paragraph (d) shall be published by the planning authority in a newspaper circulating in the area of the local area plan not later than 2 weeks after the resolution is passed and notice of the resolution shall be made available for inspection by members of the public during office hours of the planning authority and made available in electronic form including by placing the notice on the authority's website.

(2) A local area plan shall be consistent with the objectives of the development plan, its core strategy, and any regional spatial and economic strategy that apply to the area of the plan and shall consist of a written statement and a plan or plans which may include—

(a) objectives for the zoning of land for the use solely or primarily of particular areas for particular purposes, or

(b) such other objectives in such detail as may be determined by the planning authority for the proper planning and sustainable development of the area to which it applies, including the objective of development of land on a phased basis and, detail on community facilities and amenities and on standards for the design of developments and structures.

(2A) Each planning authority within the GDA shall ensure that its local area plans are consistent with the transport strategy of the DTA.

(2B) Where any objective of a local area plan is no longer consistent with the objectives of a development plan for the area, the planning authority shall as soon as may be (and in any event not later than one year following the making of the development plan) amend the local area plan so that its objectives are consistent with the objectives of the development plan.

(3) The Minister may provide in regulations that local area plans shall be prepared in respect of certain classes of areas or in certain circumstances and a planning authority shall comply with any such regulations.

(4) The Minister may, for the purposes of giving effect to Directive 2001/42/EC of the European Parliament and Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (No. 2001/42/EC, O.J. No. L 197, 21 July 2001 P. 0030 - 0037), by regulations make provision in relation to consideration of the likely significant effects on the environment of implementing a local area plan.

(5) An appropriate assessment of a draft local area plan shall be carried out in accordance with Part XAB.

(6) There shall be no presumption in law that any land zoned in a particular local area plan shall remain so zoned in any subsequent local area plan."

64. Section 20 provides for making of the plan, referencing SEA obligations in the context of material amendments (emphasis added):

"Consultation and adoption of local area plans.

20.—(1) A planning authority shall take whatever steps it considers necessary to consult the Minister, the Office of the Planning Regulator and the public before preparing, amending or revoking a local area plan including consultations with any local residents, public sector agencies, non-governmental agencies, local community groups and commercial and business interests within the area.

(1A) The Minister or the Office of the Planning Regulator may, in relation to a local area plan, make such recommendations as the Minister or that Office, as the case may be, considers appropriate.

(2) A planning authority shall consult Údarás na Gaeltachta before making, amending or revoking a local area plan under subsection (3) for an area which includes a Gaeltacht area.

(3) (a) The planning authority shall, as soon as may be after consideration of any matters arising out of consultations under subsections (1) or (2) but before making, amending or revoking a local area plan—

(i) send notice of the proposal to make, amend or revoke a local area plan to the Minister, the Office of the Planning Regulator, the Board and to the prescribed authorities (and, where applicable, it shall enclose a copy of the proposed plan or amended plan),

(ii) publish a notice of the proposal in one or more newspapers circulating in its area.

(b) A notice under paragraph (a) shall state—

(i) that the planning authority proposes to make, amend or revoke a local area plan,

(ii) that a copy of the proposal to make, amend or revoke the local area plan and (where appropriate) the proposed local area plan, or proposed amended plan, may be inspected at such place or places as are specified in the notice during such period as may be so stated (being a period of not less than 6 weeks),

(iii) that submissions or observations in respect of the proposal made to the planning authority during such period will be taken into consideration in deciding upon the proposal.

(iv) that children, or groups or associations representing the interests of children, are entitled to make submissions or observations under subparagraph (iii).

(c)(i) Not later than 12 weeks after giving notice under paragraph (b), the chief executive of a planning authority shall prepare a report on any submissions or observations received pursuant to a notice under that paragraph and shall submit the report to the members of the planning authority for their consideration.

(ia) A chief executive's report prepared for the purposes of subparagraph (i) shall be published on the website of the planning authority concerned as soon as practicable following submission to the members of the authority under subparagraph (i).

(ii) A report under subparagraph (i) shall—

(I) list the persons who made submissions or observations,

(II) provide a summary of—

(A) the recommendations, submissions and observations made by the Minister, where the notice under paragraph (a) of subsection (2) was sent before the establishment of the Office of the Planning Regulator,

(B) the recommendations, submissions and observations made by the Office of the Planning Regulator, and

(C) the submissions and observations made by any other persons,

in relation to the draft local area plan in accordance with this section,

(III) contain the opinion of the chief executive in relation to the issues raised, and his or her recommendations in relation to the proposed local area plan, amendment to a local area plan or revocation of a local area plan, as the case may be, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

(cc) In the case of each planning authority within the GDA, a report under subparagraph (c)(i) shall summarise the issues raised and the recommendations made by the DTA in a report prepared in accordance with section 31E and outline the recommendations of the

chief executive in relation to the manner in which those issues and recommendations should be addressed in the proposed local area plan.

(d)(i) The members of a planning authority shall consider the proposal to make, amend or revoke a local area plan and the report of the chief executive under paragraph (c).

(ii) Following consideration of the manager's report under subparagraph (i), the local area plan shall be deemed to be made, amended or revoked, as appropriate, in accordance with the recommendations of the chief executive as set out in his or her report, 6 weeks after the furnishing of the report to all the members of the authority, unless the planning authority, by resolution—

(I) subject to paragraphs (e) to (r), decides to make or amend the plan otherwise than as recommended in the chief executive's report, or

(II) decides not to make, amend or revoke, as the case may be, the plan.

(e) Where, following consideration of the [chief executive's report, it appears to the members of the authority that the draft local area plan should be altered, and the proposed alteration would, if made be a material alteration of the draft local area plan concerned, subject to paragraphs (f) and (j), the planning authority shall, not later than 3 weeks after the passing of a resolution under paragraph (d)(ii) (inserted by section 9 of the Act of 2002), publish notice of the proposed material alteration in one or more newspapers circulating in its area, and send notice of the proposed material alteration to the Minister, the Office of the Planning Regulator, the Board and the prescribed authorities (enclosing where the authority considers it appropriate a copy of the proposed material alteration).

(f) The planning authority shall determine if a strategic environmental assessment or an appropriate assessment or both such assessments, as the case may be, is or are required to be carried out as respects one or more than one proposed material alteration of the draft local area plan.

(g) The chief executive shall, not later than 2 weeks after a determination under paragraph (f) specify such period as he or she considers necessary following the passing of a resolution under paragraph (d)(ii) as being required to facilitate an assessment referred to in paragraph (f).

(h) The planning authority shall publish notice of the proposed material alteration, and where appropriate in the circumstances, the making of a determination that an assessment referred to in paragraph (f) is required, in at least one newspaper circulating in its area.

(i) The planning authority shall cause an assessment referred to in paragraph (f) to be carried out of the proposed alteration of the local area plan within the period specified by the chief executive.

(j) A notice under paragraph (e) or (h) as the case may be shall state that—

(i) a copy of the proposed material alteration of the draft local area plan may be inspected at a stated place and at stated times during a stated period of not less than 4 weeks (and the copy shall be kept available for inspection accordingly), and

(ii) written submissions or observations with respect to the proposed material alteration of the draft local area plan may be made to the planning authority within the stated period and shall be taken into consideration before the making of any material alteration.

(ja)(i) Written submissions or observations received by a planning authority under this subsection shall, subject to subparagraph (ii), be published on the website of the authority within 10 working days of its receipt by that authority.

(ii) Publication in accordance with subparagraph (i)—

(I) does not apply where the planning authority is of the opinion that the submission or observation is vexatious, libellous or contains confidential information relating to a third party in respect of which the third party has not, expressly, or impliedly in the circumstances, consented to its disclosure,

(II) does not apply where the planning authority has sought and receives, either before or after the period of 10 working days referred to in subparagraph (i), legal advice to the effect that it should not publish under that subparagraph or should cease to so publish, as the case may be, the submission or observation concerned,

(III) does not apply to the extent that the local authority has sought and received, either before or after the period of 10 working days referred to in subparagraph (i), legal advice that part of the submission or observation concerned should not be published on the website of the planning authority or should cease to be so published, as the case may be, or

(IV) does not apply where the submission or observation relates to matters prescribed by the Minister for the purpose of this provision or does not apply

to the extent that so much of the submission or observation relates to matters prescribed by the Minister.

(k) Not later than 8 weeks after publishing a notice under paragraph (e) or (h) as the case may be, or such period as may be specified by the chief executive under paragraph (g), the chief executive shall prepare a report on any submissions or observations received pursuant to a notice under that paragraph and submit the report to the members of the authority for their consideration.

(ka) A chief executive's report prepared for the purposes of paragraph (k) shall be published on the website of the planning authority concerned as soon as practicable following submission to the members of the authority under paragraph (k).

(l) A report under paragraph (k) shall—

(i) list the persons who made submissions or observations under paragraph (j)(ii),

(ii) provide a summary of—

(I) the recommendations, submissions and observations made by the Minister, where the notice under paragraph (a) of subsection (2) was sent before the establishment of the Office of the Planning Regulator,

(II) the recommendations, submissions and observations made by the Office of the Planning Regulator, and

(III) the submissions and observations made by any other persons,

in relation to the draft local area plan in accordance with this section,

(iii) contain the opinion of the chief executive in relation to the issues raised, and his or her recommendations in relation to the proposed material alteration to the draft local area plan, including any change to the proposed material alteration as he or she considers appropriate, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

(m) The members of the authority shall consider the proposed material alteration of the draft local area plan and the report of the chief executive under paragraph (k).

(n) Following consideration of the chief executive's report under paragraph (m), the local area plan shall be made or amended as appropriate by the planning authority by resolution no later than a period of 6 weeks after the report has been furnished to all the members of the authority with all, some or none of the material alterations as published in accordance with paragraph (e) or (h) as the case may be.

(o) Where the planning authority decides to make or amend the local area plan or change the material alteration of the plan by resolution as provided in paragraph (n)—

(i) paragraph (p) shall apply in relation to the making of the resolution, and

(ii) paragraph (q) shall apply in relation to any change to the material alteration proposed.

(p) It shall be necessary for the passing of the resolution referred to in paragraph (n) that it shall be passed by not less than half of the members of the planning authority and the requirements of this paragraph are in addition to, and not in substitution for, any other requirements applying in relation to such a resolution.

(q) A further modification to the material alteration—

(i) may be made where it is minor in nature and therefore not likely to have significant effects on the environment or adversely affect the integrity of a European site,

(ii) shall not be made where it refers to—

(I) an increase in the area of land zoned for any purpose, or

(II) an addition to or deletion from the record of protected structures.

(r) When performing their functions under this subsection, the members of the planning authority shall be restricted to considering the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

(4) The Minister may make regulations or issue guidelines in relation to the preparation of local area plans.

(4A) A local area plan made under this section shall have effect [6 weeks] from the day that it is made.

(5) A planning authority shall send a copy of any local area plan made under this Chapter to any bodies consulted under subsection (1), (2) or (3), the Board and, where appropriate, any prescribed body.

(5) In this section 'statutory obligations' includes, in relation to a local authority, the obligation to ensure that the local area plan is consistent with—
(a) the objectives of the development plan,
(b) the national and regional development objectives specified in—
(i) the National Planning Framework, and
(ii) the regional spatial and economic strategy,
and
(c) specific planning policy requirements specified in guidelines under subsection (1) of section 28."

65. Article 14A(1) of the Planning and Development Regulations 2001 provides for SEA screening of the plan itself (or an amending plan):

"14A. (1) This article applies to a local area plan or an amendment to a local area plan for an area the population or the target population of which is less than 5,000 persons or where the area covered by the local area plan is less than 50 square kilometres.
(2) Where a planning authority proposes to prepare or amend a local area plan referred to in subarticle (1), the planning authority shall, prior to giving notice under section 20(3) of the Act, consider whether or not implementation of the local area plan or amended plan would be likely to have significant effects on the environment, taking account of relevant criteria set out in Schedule 2A.
(3) Where the planning authority, following consideration under sub-article (2), determines that implementation of a local area plan or amended plan referred to in sub-article (1) would be likely to have significant effects on the environment, sub-articles (4) and (5) shall not apply.
(4) (a) Where, following consideration under sub-article (2), a determination under sub-article (3) has not been made by the planning authority, the authority shall give notice in accordance with paragraph (b) to the environmental authorities specified in article 13A(4), as appropriate.
(b) A notice under paragraph (a) shall—
(i) state that the planning authority intends to prepare or amend a local area plan.
(ii) state that the planning authority must determine whether or not implementation of the local area plan or amended plan would be likely to have significant effects on the environment and that, in so doing, it must take account of relevant criteria set out in Schedule 2A, and
(iii) indicate that a submission or observation in relation to whether or not implementation of the local area plan or amended plan would be likely to have significant effects on the environment may be made to the authority within a specified period which shall be not less than 4 weeks from the date of the notice.
(5) Following the period specified in sub-article 4(b)(iii), the planning authority shall determine whether or not implementation of the local area plan or amended plan would be likely to have significant effects on the environment, taking account of relevant criteria set out in Schedule 2A and any submission or observation received in response to a notice under sub-article (4).
(6) As soon as practicable after making a determination under sub-article (3) or (5), the planning authority shall—
(a) make a copy of its decision, including, as appropriate, the reasons for not requiring an environmental assessment, available for public inspection at the offices of the planning authority during office hours and on the website of the authority, and
(b) notify its decision to any environmental authority which was notified under sub-article (4)."

66. Article 14B provides for required SEA in certain circumstances:

"14B. Where—
(a) the population or the target population of the area of a local area plan is 5,000 persons or more, or
(b) the area covered by the local area plan is greater than 50 square kilometres, or
(c) the local area plan is being prepared for a town and its environs area, or
(d) where the planning authority determines under article 14A(3) or (5) that the implementation of a local area plan, an amended plan or an amendment to a local area plan would be likely to have significant effects on the environment,
the planning authority shall, prior to giving notice under section 20(3) of the Act, prepare an environmental report of the likely significant effects on the environment of implementing the local area plan, an amended plan or an amendment to a local area plan, and the provisions of articles 14C to 14J shall apply."

Whether the claim for a declaration that the plan is no longer in force is an impermissible collateral attack on the decision to extend

67. The fundamental problem with the applicant's case is well summarised by the council:

> "10. The Applicant's gymnastics in disclaiming any challenge to the Council decision but also asserting it is invalid, appears to be motivated by a desire to avoid the inconvenience of section 50 time limits and as well as to avoid exposure of their complete lack of any evidence seeking to demonstrate that the BOLAP is in some way outdated from an environmental assessment perspective. They have no evidence of the same. Nor is it enough to simply assert that this is a matter of European law. It is well established that claims of alleged breach of European law requirements, are subject to national procedural autonomy on matters such as time limits and also standing."

68. The council then delivers the *coup de grâce* to the thus mortally-wounded case:

> "22. At §23 of the Applicant's submissions, the Applicant baldly suggests that the 'fact that the Applicant did not challenge the extension of duration of the BOLAP when it was adopted cannot preclude it from arguing that the modification of the BOLAP was invalid…'. In fact it can - they are precluded by the express terms of section 50. The Applicant here is again expressly impugning and questioning the validity of the Council's decision to extend the BOLAP. More fundamentally, the Applicant's submission is incorrect as a matter of law and in the teeth of the prohibition contained in s.50(2) of the 2000 Act - which subsection has that exact preclusive effect and which, tellingly, the Applicants do not refer to at all in their submissions."

69. This isn't a mere drafting issue. An applicant who wants to make a case that necessarily involves the invalidity of a public law decision should seek the appropriate relief against that decision (normally *certiorari* in the case of a decision addressed to the applicant, and a declaration of invalidity in relation to a measure of general application). Where the statutory period for such challenge has expired, an extension of time must be sought. But that is secondary to the main point that a challenge has to be situated in the particular factual matrix applying to a particular public law decision. The applicant hasn't done that, let alone addressed the question of extension of time. One can't wander along and seek exotic declarations that have the logical implication that unchallenged public law decisions are invalid.

70. The applicant conceded that the decision to extend the plan was covered by s. 50. While the general rule is that measures of general application can be challenged from time to time as they are applied to new situations, there can be specific statutory impingement on that. Such impingement has to be read in a way that gives effect to the fundamental right of access to the court and the human right to an effective remedy. An applicant can't be lawfully shut out before her case is ripe for litigation – for example, legislation couldn't create a situation where a measure of general application was already unchallengeable prior to the making of a specific decision under such a measure, the making of which would create a reason for a given applicant to bring such a challenge. So the power to extend time must be read in that sense.

71. The applicant also conceded that time limits under s. 50 (or any statutory time limit) can't be circumvented by seeking declaratory relief – the Supreme Court has said as much in *Nawaz v. Minister for Justice* [2012] IESC 58, [2013] 1 I.R. 142 (Clarke J.) anyway.

72. There is almost unending authority to the effect that unchallenged decisions stand – the fallacious contrary misconception was best described in *U.T. (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 1095, [2019] 6 W.L.U.K. 379 by Coulson L.J. who referred at para. 38 to "the erroneous belief that every decision, no matter its provenance, nature or form, is always capable of being appealed or at least reviewed". The principle against collateral challenge applies even in an EU law context: *Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 (Keane C.J.) (Murphy, Murray, McGuinness and Geoghegan JJ. concurring); *Rachki v. Governor of Cloverhill* (Unreported, Supreme Court, 5th December 2011) *ex tempore* (Fennelly J.); *Shell E & P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 I.R. 147 (Clarke J.) (Denham C.J. and Fennelly J. concurring); *Smith v. Minister for Justice and Equality* [2013] IESC 4, [2013] 1 I.R. 294 (Clarke J.) (Denham C.J. and McKechnie J. concurring); *A.S. v. Bangladesh* [2015] IEHC 417 (Unreported, High Court, Stewart J., 7th July 2015); judgment of 17 November 2016, *Stadt Wiener Neustadt v Niederösterreichische Landesregierung*, C-348/15, ECLI:EU:C:2016:882; *K.P. v. Minister for Justice and Equality* [2017] IEHC 95, [2017] 2 JIC 2006 (Unreported, High Court, 20th February 2017); *Gayle v. Governor of the Dóchas Centre* [2017] IEHC 718, [2017] 10 JIC 2710 (Unreported, High Court, 27th October 2017); *K.R.A. v. Minister for Justice and Equality* [2017] IECA 284 (Unreported, Court of Appeal, 27th October 2017) *per* Ryan P. (Irvine and Hedigan JJ. concurring) at paras. 39 and 42; *Sweetman v. An Bord Pleanála* [2018] IESC 1, [2018] 2 I.R. 250, Clarke C.J.; *per* Kelly J. in *Goonery v. Meath County Council* [1999] IEHC 15, [1999] 7 JIC 1501 (Unreported, High Court, 15th July 1999); *M.A. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 95, [2018] 1 JIC 3011 (Unreported, High Court, 30th January 2018); *per* Hogan J. (Peart and Irvine JJ.

concurring) in *X.X. v. Minister for Justice and Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May 2018); *A.A.D. (Somalia) v. Chief International Protection Officer* [2018] IEHC 337, [2018] 5 JIC 1406 (Unreported, High Court, 14th May 2018); *S.S. (Pakistan) v. Governor of the Midlands Prison* [2018] IEHC 442, [2018] 7 JIC 1704 (Unreported, High Court, 17th July 2018); *Express Bus Ltd. v. National Transport Authority* [2018] IECA 236, [2019] 2 I.R. 680, [2018] 7 JIC 1804) (Hogan J.) (Birmingham P. and Irvine J. concurring); *P.N.S. v. Minister for Justice & Equality* [2020] IESC 11, [2020] 3 JIC 3101 (Unreported, Supreme Court, McKechnie J., 31st March 2020); *An Taisce v. An Bord Pleanála & Ors* [2020] IESC 39, [2021] 1 I.R. 119 *per* McKechnie J. at §153; *Narconon Trust v. An Bord Pleanála* [2021] IECA 307, [2021] 11 JIC 1701 (Unreported, Court of Appeal, Costello J. (Woulfe and Collins JJ. concurring)) at §45; *Minister for Justice v. Naoufal Fassih* [2022] IESC 10 (Unreported, Supreme Court, O'Malley J., 18th February 2022); *Killegland Estates v. Meath County Council* [2022] IEHC 393 (Unreported, High Court, 1st July 2022) at §42; *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 *per* Hogan J. at §§87-95; *Marshall v. Kildare County Council* [2023] IEHC 73 (Unreported, High Court, 17th February 2023) at §39(v) and *Jones v. South Dublin County Council* [2024] IEHC 301 (Unreported, High Court, 11th July 2024), para. 183.

73. The applicant's purported answer to this is that even if a decision is unchallengeable, EU law requires an ongoing remedial obligation to address effects of failure to conduct necessary assessments. The applicant places outsize reliance on paras. 43 and 44 of *Stadt Weiner* which it ambitiously says weren't referred to by the Supreme Court in *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303:

> "43 However, a national provision under which projects in respect of which the consent can no longer be subject to challenge before the courts, because of the expiry of the time limit for bringing proceedings laid down in national legislation, are purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment, which it is for the referring court to ascertain, is not compatible with that directive
>
> 44 As the Advocate General noted, in essence, in points 42 to 44 of her Opinion, Directive 85/337 already precludes, as such, a provision of that nature, if only because that provision has the legal effect of relieving the competent authorities of the obligation to have regard to the fact that a project within the meaning of that directive has been carried out without its effects on the environment having been assessed and to ensure that such an assessment is made, where works or physical interventions connected with that project require subsequent consent (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 37)."

74. While one can have no particular objection in principle to a solid argument that a court, even an appellate court, has overlooked something crucial, this particular exercise in *lèse-majesté* is misplaced because the applicant is over-interpreting the quoted statements. They don't have the effect of rendering otherwise valid decisions invalid. What they mean is that even the fact that a decision is valid (in the sense of unchallengeable) doesn't remove the necessity to remedy any *effects* of breach of EU law due to failure to carry out required assessments.

75. The applicant, unstateably, assumes that lack of the postulated assessment at the extension stage renders the decision to extend a nullity even in the absence of challenge, and means that the plan is no longer in force and that any given applicant can wander along at any time and seek a declaration to that effect. That argument is utterly misconceived in law or logic or on any other metric and is bound to fail. We can leave aside the question of whether assessment should have been carried out at the extension stage – I don't need to decide that because we can assume that in favour of the applicant for the purposes of the argument only. Even on such a (contested) assumption, an applicant who wants to condemn an extension decision has to challenge it. Failure to do so means that the decision is valid, but that there may be an ongoing remedial obligation. However even then there are some significant obstacles to such a claim:

(i) The remedial obligation would have to be properly pleaded.

(ii) The applicant would have to call on the decision-taker to give effect to it (because an open-ended retrospective obligation to review the validity of all past decisions relevant to the matter at hand is unworkable in the absence of such a request).

(iii) The applicant has the burden of proof to show that there are effects of the original non-compliance which remain to be remedied. The remedial obligation is not an automatic or knee-jerk response to lack of assessment – it only applies when that lack has had actual effects that need to be addressed. Pleading and then showing the existence of such effects is on an applicant.

76. Thus any breach would have the effect that the council and/or board and/or State should have done something additional by way of the remedial obligation, assuming somebody properly asked them to do so and that failure to do that was properly pleaded. It doesn't have the effect of undoing the validity of any decision that wasn't challenged within the time limit. Cases such as the

judgment of 12 November 2019, *Commission v Ireland*, C-261/18, ECLI:EU:C:2019:955 (Grand Chamber) and the judgment of 25 June 2020, *A and others (Wind turbines at Aalter and Nevelle)*, C-24/19, ECLI:EU:C:2020:503 (Grand Chamber) are about member states not being allowed to deem assessments to have been carried out if they haven't been, and thus are about the ongoing remedial obligation. They don't have the effect of rendering invalid that which is valid (including valid by reason of lack of timely challenge).

77. The applicant fails on the necessary ingredients of the remedial obligation, see *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27 (Unreported, High Court, 24th January 2024) – the point isn't pleaded and not only did the applicant not seek any action by reference to the remedial obligation but the applicant positively asked the board to rely on the LAP that they now seek to impugn. That smacks of abuse of process.

78. More fundamentally here, there is no plea whatsoever about the remedial obligation. The issue pleaded at sub-ground 3 is that the decision is invalid because the plan is no longer in force.

79. But as noted above, there is a further reason why the whole complaint collapses on the slightest examination. EU law does not require a mechanical duty to assess if there was no initial assessment. It is not an academic or formalistic procedure. What it requires is that any **effects** on the environment of failure to assess, if such was required, be remedied. There have to be such effects – otherwise the remedial obligation doesn't arise. No such effects have been pleaded still less demonstrated here.

80. The claim is manifestly a collateral attack on the validity of decision of the council to extend the plan, brought outside the time-limit and without an application to extend time. The time-limit is compatible in this respect with the principles of equivalence and effectiveness, because the applicant could have sought an extension of time when bringing the present proceedings. That would have been appropriate because an applicant can't be expected to anticipate the need to challenge such decisions prior to the grant of a permission to which the applicant objects – that grant is when the grounds of complaint first arise.

81. That decision is therefore valid and remains valid. If there was a remedial obligation in some way, the applicant never sought to activate that and hasn't pleaded a failure in that regard.

82. The predictable invocation of the judgment of 4 December 2018, *The Minister for Justice and Equality and The Commissioner of An Garda Síochána v Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979 (Grand Chamber) is not merely tedious but wholly irrelevant. The applicant hasn't pleaded that pursuant to that doctrine, an identified provision of national law should have been disregarded, but in any event there isn't such a provision. The statutory provisions on LAPs don't need to be disregarded in any event because they aren't positively inconsistent with the directive to an extent that requires to be disregarded – they merely don't deal with the situation the applicant complains of. The time-limits don't need to be disregarded because they aren't in breach of EU law in any relevant respect. But none of this even remotely arises in the first place for the reasons outlined.

Whether the challenge to the legislation gets off the ground in the absence of a properly pleaded and timely challenge to a specific decision

83. In the absence of a timely challenge to a specific decision (or a properly pleaded challenge to a failure to apply a remedial obligation which was sought to be activated), neither of which apply here, then an applicant is not entitled to challenge the underlying legislation because this would be impermissibly abstract and/or because an applicant doesn't have *locus standi* in the absence of a valid concrete complaint (see *e.g. Morris v. Ireland* [2022] IEHC 472, [2022] 7 JIC 2703 (Unreported, High Court, Barr J., 27th July 2022)).

84. The council summarises the position:

> "The challenge pursued in such circumstances would be clearly inconsistent with the principle of judicial restraint and in particular the point that the powers of judicial review of legislation should be confined to those case where the exercise of that power is 'imperatively required' (Habte v. Minister for Justice [2020] IECA 22 at §126 per Murray J.; citing B.G. v District Judge Catherine Murphy & ors [2011] IEHC 445 at §15 per Hogan J. See also generally and relevant by analogy, O'Meara v. Westmeath County Council [2025] IEHC 192 at §35 to §40 per Farrell J. and the case law cited."

85. I noted this point in *McGreal v. Minister for Housing, Local Government and Heritage of Ireland* [2024] IEHC 690 (Unreported, High Court, 6th December 2024) at §49: "[i]f an applicant is out of time for a challenge to an individual decision, she doesn't have standing to challenge the enactment or measure in the abstract merely because there was an unchallenged individual decision previously".

86. This is sometimes misunderstood by applicants in the prospective appeal context – an applicant can't successfully appeal a finding as to the validity of legislation if they have had a challenge to an actual decision definitively dismissed. They don't have standing in such a situation because the constitutional issue would be presented in a procedural context that doesn't involve the

prospect of a specific decision affecting the applicant being quashed. That is judicial restraint in action – an appeal from a decision that legislation is constitutionally valid, say, brought in a manner that is detached from any complaint as to the validity of a decision under the legislation, doesn't arise as it the putative appellant lacks *locus standi* to pursue such a procedurally abstract challenge. To put the matter another way – and this is the way the Supreme Court put it in *Nawaz* at para. 6.6 – an attack on a general measure that has as its real aim the invalidation of a specific measures is subject to the rules applying to the specific measure. In that case, the court held that a constitutional challenge which has as its purpose and effect the invalidation of measures subject to special judicial review rules (analogous to s. 50) is itself subject to such rules (that was in the context of the similar provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000).

87. In any event, the challenge has no substance because the legislation doesn't prevent SEA, it merely doesn't provide for it here, so at worst we are talking about declaratory relief as to a possible omission. The legislation is totally capable of a conforming interpretation, if such be required. It doesn't stop the council from conducting SEA. It is just silent about it. This is a practical illustration as to why an applicant shouldn't and can't be allowed to by-pass any factual investigation that would arise if the specific actions of a council or other decision-taker were challenged. An applicant can't simply side-step that process by complaining about the legislation in the abstract. The council's submission, quoted above, says it all in a few short sentences. The pleaded case is of "mistransposition" and incompatibility with the directive, not of lack of transposition. The distinction is not semantic – it is foundational to the approach to transposition challenges. A law that only partly implements a directive, but is valid insofar as it goes, may be the subject of declaratory relief but is not invalid. A law that mistransposes the directive by enacting something actually and positively contrary to it is potentially invalid. The applicant has pleaded the latter, but as the confused foundations of this argument began to give way during the hearing, tried to contend that maybe what it really meant was the unpleaded former. That isn't an interpretation that is acceptably clear, but in any event it doesn't matter because we never get to that point for the reasons outlined.

88. Furthermore declaratory relief would be inappropriate here in any event. As the council submits in particular:

> "(ii). The LAP expired in or around June 2024. The declaratory relief sought relates to a measure which is no longer in force.
>
> (iii). The Court's judgment on Module 1 of these proceedings and Core Grounds 1, 4 and 5 demonstrate the Applicant's positive reliance on the LAP and asserted material contravention of same in seeking to impugn the validity of the Board's Decision.
>
> (iv). There is no evidence that the complaint the Applicant makes in relation to extension of the LAP impinged on or impaired the Applicant's engagement with the planning application process before the Board.
>
> (v). The Applicant has failed to show that it is just and convenient that any declaration should be made, and such declaration would serve no useful or practical purpose (in this regard the Council relies on Order 84, rule 18(2) RSC, Shannon v. McGuinness [1999] 3 IR 274 at 284 per Kelly J., Lennon v. Cork City Council [2006] IEHC 438 at §55-§57; and Sweetman v An Bord Pleanála [2021] IEHC 259 at §44-§50)."

89. But it is unnecessary to get into this further.

90. There may be exceptions to the foregoing general approaches but they don't apply here.

91. Hence the applicant's request for a reference to the CJEU doesn't arise. The parties' positions as recorded in the statement of case on that issue are summarised as follows:

> "Applicant: Does a decision that extends a period of validity of a land use plan that was subject to SEA when it was adopted, constitute a modification of that plan for the purposes of Article 2 of the SEA Directive?"

92. The problem with that is that it doesn't arise given the foregoing. Indeed the very wording of the question – whether "a decision" is a modification that requires SEA, illustrates that the applicant can't make this point when that decision was never challenged.

93. In the light of that and of the No. 1 judgment the only conceivable order that can be made is one dismissing the proceedings.

Summary

94. In outline summary, without taking from the more specific terms of this judgment:

(i) The pleaded claim that the LAP had ceased to have effect as of the date of the board decision is an impermissible collateral attack on the decision to extend, which was unchallenged.

(ii) No complaint as to breach of a remedial obligation in the sense argued is pleaded. Rather the pleadings allege that the board's error was to rely on a plan that had ceased to have effect. That claim is unstateable – an unchallenged decision to extend a plan is not a nullity even if an assessment should have been carried out. In the absence of a properly pleaded challenge, the present proceedings have to be

determined on the basis that the plan did not therefore cease to have effect in the manner pleaded.

(iii) The applicant never called upon the opposing parties to carry out any remedial obligation so can't condemn those parties or any of them for failure to do something they weren't asked to do.

(iv) The remedial obligation doesn't have the effect of reopening the running of time or rendering the underlying decision invalid. It relates to an ongoing obligation to rectify effects, if any, of a breach of EU law assessment requirements.

(v) An applicant still has to plead such effects, and has the onus to show that there are such effects, an onus that is wholly undischarged here in terms of the evidence. Indeed even any unevidenced assertion of such effects is wholly unpleaded.

(vi) In the absence of a duly pleaded and timely challenge to the relevant specific decision, an applicant does not have standing to challenge the legislation in the abstract. The legislative challenge therefore does not arise.

(vii) In any event, the legislation is not invalid because the height of the applicant's case is a failure to make explicit provision for SEA of extensions, not any positive provision that prevents that from happening. The most the applicant could ever have hoped to get (assuming the other criteria were met, which they aren't) would be a declaration as to any alleged gap in the transposition, but not a strike-down of the legislation which would allow the applicant to march through the gap to claim *certiorari* of the planning permission.

(viii) Declaratory relief is inappropriate even if there was a hypothetical failure to conduct SEA or screening, *inter alia* because the applicant positively relied on the LAP in the proceedings before the board, and/or because the LAP has now expired and/or because the applicant has failed to show that the lack of SEA of the extension gave rise to any substantive issue so the complaint is a mere technicality.

(ix) As the claim fails even on assumptions as to the need for assessment favourable to the applicant, it is unnecessary to decide whether or to what extent a decision to extend an LAP requires SEA.

Costs

95. The costs context (subject to any correction the parties may wish to offer) is:

(i) the applicant has already picked up quite a number of costs orders against the board in previous proceedings referred to above;

(ii) I assume that the parties have agreed to apply s. 50B and if so I will do so but it isn't completely obvious that a non-transposition case against the State is covered by this provision because it isn't action or inaction pursuant to a statutory provision; and

(iii) I assume that Holland J. has already definitively disposed of the costs of module I by way of no order.

96. As regards the applicant's costs, I can provisionally propose no order without much anticipated controversy on the basis that losers have no general right to their costs.

97. As regards the costs of the opposing parties, one can certainly see an argument that the fact that the application as pleaded was bound to fail and/or contradicted the reliance on the LAP during the administrative process gives rise to grounds coming within s. 50B(3)(a) or (b), or indeed whether (on the basis of the Interpretation Act 2005 provision that singular includes plural (s. 18(a)), or on some other basis) a normal costs-following-the-event order can be made in one of a number of proceedings provided that it is applied by set-off (or the equivalent, e.g., that costs in favour of party A be paid out of costs awarded to an applicant against party B) such that there is no adverse costs order taking the multiple proceedings together as a whole.

98. That said, the court is not armed with knowledge of the parties' positions as to future steps that might incur further costs, so it seems best to offer, not a provisional order, but only a default order (*viz*., one that will apply in the absence of an application rather than one that provisionally appears the best). In other words, I don't know if a provisional order would help finalise matters in the longer term so I will leave it to the parties to work something out if that is an option or to square up for further combat if that is the best alternative. I would however take the liberty of pointing out that on the logic of *Nawaz*, *all* of the matters covered by this module are subject to s. 50 because they are relied on to impugn the development consent (otherwise the applicant wouldn't have had standing to raise them). That means that both the substance of the decision and any costs decision, whether complained about by the applicant or by the opposing parties, is also subject to that section, in terms of any additional procedures at a further level of the system.

99. The opposing parties that participated in this module might ensure that the notice party is made aware of the next listing date.

Order

100. For the foregoing reasons, it is ordered that:

(i) the proceedings be dismissed;

(ii) unless any party applies otherwise by written legal submission within 7 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and

(iii) the matter be listed on Monday 26th May 2025 to confirm the foregoing.