THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2018/391 JR]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE GOVERNMENT OF IRELAND, MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered electronically on 24th April, 2020

1. Introduction

1. In 2018 the Government published the National Planning Framework (hereinafter the NPF) and the National Development Plan (hereinafter the NDP) as part of its vision for Ireland over the following 22 years, known collectively as Project Ireland 2040.

2. In the course of preparing the NPF a strategic environmental assessment was carried out (hereinafter referred to as the SEA) and an appropriate assessment was carried out under the regulations implementing the Habitats Directive (hereinafter

referred to as the AA). In these proceedings the applicant challenges the validity of the assessments that were carried out by the respondents. The applicant alleges that due to shortcomings in the various assessments and due to the lack of certain monitoring and other provisions, the assessments themselves and the resultant NPF are fatally flawed and on that account an order of *certiorari* should be granted striking down the NPF. In addition, it is alleged that the NDP was adopted by the respondents contrary to the provisions of European Law, because no SEA or AA was carried out of it.

3. The applicant also argues that a determination that the plan would not adversely affect any European sites, which was required pursuant to Art. 6.3 of the Habitats Directive was not carried out prior to the adoption of the plan, in particular because no written determination was made by the respondent that the plan would not adversely affect the integrity of any European sites and that due to such omission, the respondents lacked the necessary jurisdiction to adopt the NPF at the time that it purported to do so.

4. Before coming to the specific grounds of challenge raised by the applicant in these proceedings, it will be helpful to set out in very brief terms a summary of the main provisions of the NPF and the NDP. It will also be of assistance to set out a chronology of steps that were taken in advance of the purported adoption of the NPF and NDP.

2. Overview of the NPF and the NDP

5. The NPF is a high level policy document. It is a macro spatial strategy which maps out general development goals for the country for the period up to 2040. It was brought about due to a number of stark projections that were provided as a result of

research conducted by the Economic and Social Research Institute in its paper "Prospects for Irish Regions and Counties: Scenarios and Implications", published in December 2017. The ESRI predicts that the population of Ireland will increase by approximately one million people, or by 20% over 2016 levels, to almost 5.7 million people by 2040. They estimate that the population aged over 65 will more than double to 1.3 million, or to 23% of the total, whilst those aged under 15 will decrease by around 10%, with numbers remaining at just below one million in 2040. The population growth will give rise to a need for at least an additional half a million new homes by 2040. The ESRI also projected the need for an additional 660,000 jobs to 2040. They stated that in line with international trends, the ongoing shift to a knowledge economy and the growing role of services will continue to change the nature of work, sustaining demand for a more highly skilled and educated workforce. New ways of working, new trade partners and new relationships between producers and consumers will continue to transform the business landscape.

6. To cater for the future growth and development of both the population and the economy, a set of ten National Strategic Outcomes were identified, as follows: Compact Growth – which provides that urban development will wherever possible be on infill and brownfield sites within the envelope of existing built-up areas; Enhanced Regional Accessibility – which provides that due to the more compact approach to urban development requirements there is a need for enhanced connectivity between centres of population of scale; Strengthened Rural Economies and Communities – through the 2017 Action Plan for Rural Development, there is provision for resource schemes and policies to drive the development and diversification of the rural economy, such as the national broadband scheme; High Quality International Connectivity – as an island, provision is made for enhanced connectivity between this

country and our nearest neighbour the UK and our other trading partners in the EU and further afield; Sustainable Mobility – this provides for a well-functioning integrated public transport system, thereby enhancing competitiveness, sustaining economic progress and enabling sustainable mobility choices for citizens; A Strong Economy supported by enterprise, innovation and skills – a competitive, innovative and resilient regional enterprise base is seen as essential to providing jobs and employment opportunities for people to live and prosper in the country; Enhanced Amenities and Heritage – attractive places include a combination of factors, including vitality and diversity of uses, ease of access to amenities and services supported by integrated transport systems and green modes of movement such as pedestrian and cycling facilities; Transition to Sustainable Energy – this provides that new energy systems and transmission grids will be necessary for a more distributed, more renewables focussed energy generation system, harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar and connecting the richest sources of that energy; Sustainable Management of Water, Waste and other environmental resources – investment in water infrastructure is seen as critical to the implementation of the NDP. The NPF provides that the current water services strategic plan by Irish Water will be updated in the light of the policies in the NPF addressing the requirements of future development, while also addressing environmental requirements such as obligations under the EU Water Framework Directive mandated River Basin Management Plan; Access to Quality Child Care, Education and Health Services – the framework provides that child care, education and health systems will need to plan ahead in order to meet the implications of an additional one million people by 2040.

7. Ultimately, the respondents chose an option known as Option 2 – Regional Effectiveness and Settlement Diversity, as the option which would best suit the needs of the country in attaining the National Strategic Outcomes, while at the same time taking account of the projected growth in population. For planning purposes, the country is divided into three regional assemblies; being the East and Midlands Regional Assembly, made up of Dublin and surrounding counties, the Southern Regional Assembly made up of the southern counties in the country and the North Western Regional Assembly made up of the counties along the western seaboard and the on the northwest coast. The chosen option provided for the following: (i) the level of growth in the NWRA and the SRA combined would be equal to that of the EMRA; (ii) focus the highest quantum of growth and rates of growth in five cities and a number of regionally important large towns through a tailored approach to settlement growth targets; (iii) deliver at least 40% of all new homes nationally on infill or brownfield sites within the built-up envelope of existing urban settlements; and (iv) provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially on a phased basis in tandem. Under this plan the level of growth in the areas outside the Dublin and eastern area would be the same as in the EMRA. The main growth would be in the five cities of Dublin, Cork, Waterford, Galway and Limerick, but there is also provision for targeted development of other urban sites in areas not serviced by the cities, such as Athlone in the midlands and Sligo in the northwest. There is also specific provision for growth and development of the two corridors between Drogheda, Dundalk and Newry and between Letterkenny and Derry.

8. The NPF also contains a number of National Policy Objectives, which are designed to guide the regional assemblies when drawing up the Regional Spatial and

Economic Strategies and the local authorities when drawing up the relevant City and County Development Plans. These are general objectives which have to be adhered to by the lower tier planning authorities when drawing up their plans. For example, NPO3a states "Deliver at least 40% of all new homes nationally, within the built-up footprint of existing settlements". NPO3b provides that at least 50% of all new homes that are targeted in the five cities should be within their existing built-up footprints. NPO3c provides that 30% of all new homes that are targeted in settlements other than the five cities and their suburbs, should be provided within existing built-up footprints. NPO6 provides "Regenerate and rejuvenate cities, towns and villages of all types and scale as environmental assets, that can accommodate changing roles and functions, increased residential population and employment activity and enhanced levels of amenity and design quality, in order to sustainably influence and support their surrounding areas". To that end, the NPF provides that a new body, the National Regeneration and Development Agency, will be established with a government mandate to work with local authorities, relevant departments and agencies and the OPW in identifying an initial tranche of publically owned or controlled lands in key locations and with both a city and wider regional and rural focus, with potential for master planning and repurposing for strategic development purposes aligned to the NPF. This is provided for in NPO12.

9. There are also a number of National Policy Objectives dealing with realising a sustainable future for development in the country. NPO52 provides "The planning system will be responsive to our national environmental challenges and ensure that development occurs within environmental limits, having regard to the requirements of all relevant environmental legislation and the sustainable management of our natural capital". NPO55 provides "Promote renewal energy use and regeneration at

appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050". NPO59 contains provisions in relation to enhancing the conservation status and improving the management of protected areas and protected species. Finally, NPO75 provides for the assessment of environmental impact of development by ensuring that all plans, projects and activities requiring consent arising from the NPF are subject to the relevant environmental assessment requirements including SEA, EIA and AA as appropriate.

10. That is an extremely brief synopsis of what the NPF attempts to do to guide spatial use and planning policy in the period up to 2040. It is a policy document that seeks to inform the choices that will be made by the regional assemblies and the planning authorities when they come to draw up their RSES's and City/County Development Plans respectively.

11. The NDP sets out how funding will be made available for certain projects which are considered essential to achievement of the national strategic outcomes identified in the NPF. The NDP operates for a ten-year period from 2018 to 2027. It sets out the level of investment of almost €116bn which will underpin the NPF and drive its implementation over that period. To that end, it identifies a number of projects for which funding may be made available to help achieve each of the national strategic outcomes. These projects must come within the strategic investment priorities that are identified under each of the NSOs.

12. The plans provide that the NDP and the NPF are closely integrated one with the other. It is noted that the government was committed to the delivery of the NPF as a blueprint for spatial planning in Ireland to 2040. The document provides that in setting out a strategic framework for public capital investment, the NDP will support

its delivery over the next ten years. The NDP provides that transitioning to a low-carbon and climate resilient society and achieving sustainable mobility are vital strategic outcomes identified in the NPF. It was with that rationale in mind that climate action has been identified as a strategic investment priority.

13. In chapter 5 of the NDP it provides that the NSO's represent the overarching priorities which the NPF was designed to achieve. A background to and rationale for each of the NSO's is set out in the NPF. The fundamental mission and purpose of the NDP set out the new configuration for public capital investment over the next ten years to secure the realisation of each of the NSOs. It was stated that that would improve the way public capital investment was planned and coordinated in a modern and growing society, leading to improved public services and quality of life. The NDP goes on to show how each of the projects that are identified as possibly qualifying for public funding, have been so identified because they are seen to be integral to the achievement of the NSOs set out in the NPF.

14. As the applicant has not challenged the content of the NDP as such, but rather has alleged that given its close integration with the NPF, an SEA and an AA should have been carried out of it, it is not necessary to say more about the content of the NDP.

3. Chronology leading to adoption of the NPF and NDP

October 2014	Government gives approval for commencement of preparation of the NPF.
December 2015	Publication of the NPF Roadmap.
June 2016	Preliminary stakeholder consultation on the NPF.

September 2016	Preliminary public engagement on the NPF.
29th November 2016	RPS appointed by the Department to be responsible for SEA, AA and SFRA in respect of the NPF.
2nd February 2017	Start of the pre-draft NPF consultation with statutory consultees and invitation of submissions from the public. Trans-boundary consultation undertaken with competent authorities in Northern Ireland. Documents published include: Issues Paper and SEA Scoping Report.
31st March, 2017	End of the pre-draft NPF National Consultation.
1st April, 2017	Start of preparation of the draft NPF and SEA Environmental Report. All submissions received from statutory and non-statutory consultation considered as part of the draft NPF preparation and environmental assessment processes.
5th May, 2017	SEA alternatives workshop held in Dublin.
August, 2017	The Department recorded an AA screening determination in August 2017. It concluded that the NPF would proceed to Stage 2 AA.
26th September, 2017	Publication of the draft NPF, the SEA Environmental Report, the pre-consultation Natura Impact Statement and draft SFRA. Start of public consultation on the draft NPF.
10th November, 2017	End of consultation period on the draft NPF and

	associated documents.
11th November, 2017	Start of process of making amendments to the draft NPF taking into account submissions and observations, being an iterative process, whereby amendments were screened and assessed by RPS, with written and verbal feedback given from RPS to the Department.
14th February, 2018	Post consultation amendments completed.
16th February, 2018	Adoption and publication of the NPF and NDP by the Government. The applicant challenges the legal efficacy of this adoption of the NPF and NDP.
23rd February, 2018	Circular FPS02/2018 issued to planning authorities and An Bord Pleanala informing them that the NPF was published on Friday 16th February, 2018 in tandem with the new 10-year National Development Plan, jointly named "Project Ireland 2040: Building Ireland's Future".
16th March, 2018	Letter from applicant's solicitors requesting publication of the SEA statement.
22nd March, 2018	Publication of the SEA statement.
5th April, 2018	Letter from applicant's solicitor requesting confirmation that the necessary determination was made by the respondents as part of the AA as required under Art. 42(18) (a) of the Habitats Regulations 2011.

	Letter also requests that the determination and the reasons for it be immediately published.
9th April, 2018	Further letter from applicant's solicitor stating that the determination should be readily available if it was in existence prior to 16th February, 2018.
16th April, 2018	Publication of post-consultation NIS.
14th May 2018	Written AA Determination made by the Minister. Order made by Noonan J. granting applicant leave to apply for judicial review of the NPF and the NDP.
15th May, 2018	Motion seeking judicial review issued.
29th May, 2018	The Government formally reaffirms its previous decision to adopt the NPF and adopts the AA determination alongside its associated SEA statement, the post-consultation NIS and the AA conclusion statement.
26th June, 2018	Publication on the Department's website of the AA conclusion statement, the post-consultation NIS and the written AA determination.
3rd July, 2018	Circular FPS04 2018 issued to planning authorities concerning implementation roadmap for the NPF, which notes that the NPF had been adopted and published by the Government on 16th February 2018 as a strategy to replace the National Spatial Strategy, for

	the purposes of Section 2 of the PDA 2000, as amended. That decision was reaffirmed by the Government on 29th May, 2018 in the context of its consideration of issues in relation to the implementation of the NPF.
30th July, 2018	Circular FPS06/2018 issued to planning authorities stating that on 29th May, 2018 the Government reaffirmed its previous decision to adopt and publish the NPF. Public notice in newspapers of the reaffirming decision to adopt and publish the NPF and its associated documents and publish the NPP.

4. The applicant's grounds of challenge – (a) The Timing Issue.

15. Under this ground of challenge, the applicant alleged that the purported adoption of the NPF and the NDP by the first named respondent on 16th February 2018 was void and was in breach of European Law, because no determination had been made by the first respondent as part of the AA, as required by Art. 6(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (hereinafter the Habitats Directive).

16. Article 6(3) of the Habitats Directive is in the following terms:

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's

conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of para. 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate after having obtained the opinion of the general public."

17. The Habitats Directive was transposed into Irish law in the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. 477/2011). The applicant maintained that the obligation on the first respondent was very clearly set out in Regs. 42(11) and 42(16) which provide as follows:

"(11) An Appropriate Assessment carried out under this Regulation shall include a determination by the public authority under this regulation pursuant to Article 6(3) of the Habitats Directive as to whether or not a plan or project would adversely affect the integrity of a European site and the assessment shall be carried out by the public authority before a decision is taken to approve, undertake or adopt the plan or project, as the case may be.

(16) Notwithstanding any other provision of these Regulations, a public authority shall give consent for a plan or project, or undertake or adopt a plan or project, only after having determined that the plan or project shall not adversely affect the integrity of a European site."

18. The applicant also relied on Reg. 42(18) (a) which provides that the public authority shall make available for inspection any determination that it makes in relation to a plan or project and provide reasons for that determination as soon as may be after the making of the determination and shall also make the determination or

notice available in electronic form including by placing the documents on the authority's website.

19. The applicant submitted that from a reading of the Directive and the implementing regulations, it was clear that in order for the first respondent to have jurisdiction to make or adopt the relevant plan or programme, it first had to have made the necessary determination as required by Art. 6.3 of the Directive and as required by Reg. 42 of the 2011 Regulations. It was clear that that determination had to be in writing having regard to the provisions of Reg. 42(18) (a). The applicant alleged that there was no evidence that that had been done prior to the purported adoption of the NPF and the NDP by the first respondent at its meeting held on 16th February, 2018. In these circumstances it was submitted that the first respondent did not have jurisdiction to adopt those plans on 16th February 2018.

20. In support of its submission, the applicant relied on the judgment of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 where the learned judge, then sitting as a judge of the High Court, held at para. 39, that if an appropriate assessment was to comply with the criteria set out by the CJEU, then it must include "an examination, analysis, evaluation, findings, conclusions and a final determination". The judge stated that for an appropriate assessment to be lawfully conducted it must do the following things:

> *"(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.*
>
> *(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive*

findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii) May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects."

21. The decision in *Kelly* was cited with approval by the Chief Justice in his judgment in *Connolly v. An Bord Pleanála* [2018] IESC 31, where he stated as follows at para. 8.16:

"The analysis in Kelly shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required. First the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the

proposed development will not adversely affect the integrity of any relevant European site."

22. The applicant submitted that in its statement of opposition, the respondent had put forward somewhat contradictory explanations for the decisions that it had taken at the meetings on 16th February, 2018 and 29th May, 2018. It was pleaded at para. 81 that the respondents acting on the advice of RPS, had made all necessary substantive determinations in respect of AA before the NPF was drawn up, initially adopted and published on 16th February, 2018. It was the written record of those substantive determinations, being the written AA Determination, which was made by the respondents after 16th February, 2018 and published further to the express statutory requirement in Article 6.3 of the Habitats Directive and Regulations 42(18) (a) of the Birds and Habitats Regulations. It was pleaded that in the circumstances, the Government was entitled to reconsider and reaffirm the adoption of the NPF, as it did on 29th May, 2018 and the respondents were entitled to rely on that decision as effectively constituting the adoption of the NPF.

23. At para. 77 of the statement of opposition, the respondent explained the reason why it had elected to reaffirm the adoption of the NPF at its meeting held on 29th May, 2018, by stating that on that date the Government considered the post-consultation NIS, adopted the AA determination made by the Minister and formally affirmed the previous government decision of 16th February, 2018 to adopt and publish the NPF. It was stated that the purpose of this further government decision was to ensure, for the avoidance of doubt, that the requirements of Article 6.3 of the Habitats Directive and Regulation 42 of the Birds and Habitats Regulations were strictly complied with and to ensure that there was full transparency in the approval

process, having particular regard to the appropriate assessment and the appropriate assessment determination.

24. Mr. Stein SC on behalf of the applicant submitted that the averment contained in the first affidavit sworn by Mr. Hogan on behalf of the respondents to the effect that the Government had considered the SEA environmental report and submissions and/or observations and/or consultations made or undertaken during the preparation of the NPF, the SEA screening and AA of changes that had been made to the draft NPF and took all these matters into account before adopting and publishing the NPF on 16th February, 2018, was hearsay evidence from Mr. Hogan, who had not been present at the cabinet meeting, and was inadmissible in the present proceedings. In this regard counsel relied on the decision in *Joint Stock Company Togliattiazot v. Eurotoaz Limited* [2019] IEHC 342, where Noonan J. held that affidavits should be confined to such facts as the witness was able of his own knowledge to prove, except on interlocutory applications, in which statements as to the deponent's belief with the grounds thereof may be admitted. He went on to state that hearsay evidence in interlocutory applications should not be admitted as of course, but only where it was unavoidable for genuine reasons of urgency or difficulty in procuring direct evidence: see para. 16 of the judgment. It was submitted that in this case, it appeared that the respondent was relying on a non-written determination in respect of which there was no evidence that it had ever taken place and/or if it had, that it discharged the requirements set down in the *Kelly* and *Connolly* decisions.

25. Counsel submitted that as the respondent was making the case that the decision to adopt the NPF and the NDP had been taken at its meeting on 16th February, 2018 and in the absence of any evidence that there was a written determination of the type required by Art. 6.3 of the Habitats Directive or Reg. 42 of

the 2011 Regulations, and that as such a determination was a necessary part of the AA which would give jurisdiction to the respondent to adopt the plans, that in the absence of such evidence, the court should strike down the NPF and the NDP as they had not been validly adopted by the Government on 16th February, 2018.

26. Counsel on behalf of the applicant further submitted that it was established in Irish law that public authorities were under a duty of candour when dealing with members of the public in relation to the questioning of administrative actions and decisions: see *Murtagh v. Kilrane & Ors.* [2017] IEHC 384. It was submitted that in this case where there had been no real engagement on the part of the respondents with the correspondence emanating from the applicant's solicitor seeking production of the determination allegedly made prior to the meeting on 16th February, 2018, that in those circumstances the court should find as a fact that there was no AA determination made either by the Minister or by the Government prior to the purported adoption of the NPF and NDP on 16th February, 2018.

27. In relation to the steps which were taken subsequent to February 2018 and in particular, the making of the written determination by the Minister on 14th May 2018 and the recording of the Government's reaffirmation decision of 29th May, 2018, it was submitted that the Government could not "mend its hand" by taking these steps, when it adhered to the position that the initial adoption of the plans on 16th February, 2018 was legally valid. If the court were to find that the decisions taken on 16th February, 2018 were invalid for the reasons put forward by the applicant, then the status of the NPF and NDP was not saved by the reaffirmation decision taken on 29th May, 2018, as that decision expressly was a reaffirmation of an earlier decision, which itself was invalid. In summary, it was submitted that because there had been no valid determination made by the Minister, or the Government, in advance of 16th

February, 2018, there was therefore no valid AA of the plans as of that date and therefore the respondents did not have jurisdiction to adopt the plans having regard to the provisions of Art. 6.3 of the Directive and Reg. 42 of the 2011 Regulations.

28. In response, Ms. Butler SC on behalf of the respondents stated that from the chronology given earlier in the judgment, it could not be credibly argued that the necessary assessments and evaluations as required by the SEA and AA had not been carried out. It was clear from the history of the matter that RPS had produced the environmental report on the draft NPF. That had been followed by public and stakeholder consultations and these had been taken into account in relation to the drafting of the final NPF. This was clear from the content of the SEA statement. All of that had been put before the Government at its meeting on 16th February, 2018. It was clear that a determination as required under Art. 6.3 and Reg. 42 had been made in advance of that meeting. In the SEA statement, it was clearly recorded at section 3.5 thereof, that based on the NIS and with reference to the scope of the NPF, the Department of Housing, Planning and Local Government had determined that the NPF was compliant with the requirements of Article 6 of the EU Habitats Directive as transposed into Irish law. It noted that that determination would be made available for public information. Counsel submitted that that was clear evidence that the required determination had been made in advance of the government's meeting on 16th February 2018.

29. It was submitted that both the Habitats Directive and the Irish regulations did not stipulate by whom the AA had to be carried out. It merely stated that such an assessment had to be carried out and the necessary determination had to be arrived at prior to adoption of the plan or programme. Both the SEA and the AA were a process whereby certain preliminary evaluations were carried out, that was followed by public

and stakeholder consultation and those were then considered and taken into account and the necessary changes made and if necessary, further screening was done in respect of those changes and then the necessary determination could be made. All of that had been done in advance of the meeting held on 16th February 2018.

30. Counsel submitted that the court was entitled to rely on the averments contained in the affidavits sworn by Mr. Hogan. Having regard to the principle of cabinet confidentiality, which was well established in Irish law, it was not possible for any of the cabinet Ministers to swear on affidavit as to what had actually been discussed at the cabinet meeting on 16th February 2018. In these circumstances it was submitted that it was appropriate for the court to have regard to the averments made by Mr. Hogan. It was the respondent's case that the decision taken on 16th February, 2018 was a legally valid decision and was one which was stood over by the respondents.

31. It was pointed out that the requirement for the determination to be in writing arose under the Irish regulations. It was not a requirement of the Directive. It was clear from the Irish regulations that the furnishing of the written determination could be done at a time subsequent to the date on which the determination itself had been made. The written determination had been made by the Minister on 14th May, 2018, which had clearly set out the various reports and assessments to which the Minister had had regard in reaching his determination. It went on to formally record that the Minister determined pursuant to Regulation 42 of the 2011 Regulations and for the purposes of Article 6.3 of the Habitats Directive, that the adoption and publication of the NPF as a replacement of the National Spatial Strategy for the purposes of s.2 of the PDA 2000, would not either individually or in combination with any other plan or project adversely affect the integrity of any European site. The reasons for the said

determination were set out in the appropriate assessment conclusions statement, the reasoning and conclusions of which had been adopted in full by the Minister. The appropriate assessment conclusion statement was to be published together with the determination.

32. Counsel submitted that further support for this contention was provided by the NIS, which had been prepared by RPS, which concluded that "Subject to the mitigation proposed in the NIS being incorporated, there would be no adverse effects on the integrity of any European sites as a result of implementation of the NPF".

33. In relation to the steps which had been taken subsequent to February 2018, it was submitted that for the avoidance of any doubt as regards compliance with the requirements of Article 6.3 of the Habitats Directive and Reg. 42 of the Habitats Regulations, once the Minister had executed the written AA determination, the Government decided to reaffirm the decision to adopt the AA determination and associated documentation and reaffirmed its decision to adopt the NPF. The reaffirmation decision had been undertaken to meet any concerns about any perceived frailty in the initial decision to adopt the plans and pursuant to the obligation to take all measures to remedy any failure to carry out a valid assessment. It was the respondent's case that the initial AA determination carried out prior the Government's adoption of the NPF on 16th February, 2018, followed by its subsequent reduction to writing and publication, satisfied the necessary legal requirements. It was submitted that all substantive determinations in respect of the AA had been made prior to 16th February, 2018; the written record was drawn up afterwards and the Government was entitled to reaffirm its decision on 29th May, 2018.

34. Finally, counsel submitted that this case did not come within the body of European case law which held that were invalid permissions had been given, there

should be a suspension of the operation of the permission while the position was regularised by carrying out the necessary assessments. If the court were to hold that the decision to adopt the plans was not validly taken at the meeting on 16th February, 2018, but that the position was regularised by the issuance of the written determination on 14th May, 2018, followed by the reaffirmation decision on 29th May, 2018, the fact that there had been a three month interval between the first decision and the second decision concerning adoption of the plans, had not had any significant practical effects, due to the fact that this was a high level policy document. In other words, the NPF only directed what general objectives should be followed by the lower tier planning authorities when drawing up their regional plans and county and city development plans. While preparation of those plans may have been initiated after February 2018, it would have taken some considerable time for them to come on stream and therefore nothing of practical significance happened in the period between February 2018 and May 2018. Thus, if the court was of the view that rectification of the situation was necessary, that had been done by May of 2018 and therefore the position was regularised as and from that date onward. In such circumstances it was submitted that the plans should not be struck down.

Conclusions

35. The criteria for a valid AA have been clearly set out in the *Kelly* and *Connolly* decisions. It is clear from these decisions that it is necessary for a determination to be reached in order for there to be a valid AA as required under the Directive and the regulations.

36. I am satisfied that in reality the necessary determination had been made by the Minister in advance of the Government meeting held on 16th February, 2018. Such

position is clear from the content of the NIS carried out by RPS and more particularly by the content of the SEA statement in section 3.5 thereof. While the Irish regulations provide that such determination must be made in writing, due to the fact that it must be made available to the public, the regulations do not say when the determination must be reduced to writing. Regulation 42(18) (a) of the 2011 regulations makes it clear that the public authority must make available for inspection any determination that it makes in relation to a plan or project and provide reasons for that determination "as soon as may be after the making of the determination or giving the notice, as appropriate". Thus, it is clearly envisaged that the determination and the reasons for making the determination can be reduced to writing after the date on which it is made.

37. It is clear that there was no written determination made by the Minister prior to the meeting held on 16th February, 2018. That was done by the written determination made by the Minister on 14th May, 2018. In that determination he reached the necessary determination that the plan would not adversely affect a European site. He also set out clearly the documentation which contained the reasons for reaching that decision.

38. It is clearly established in Irish law that there is a duty on public authorities to give adequate reasons for their decisions: see *Christian v. Dublin City Council* [2012] IEHC 63; *Kelly v. An Bord Pleanála* [2014] IEHC 400; *Connolly v. An Bord Pleanála* [2018] IESC 31; and *Balz v. An Bord Pleanála* [2019] IESC 90. Those decisions establish that once the reasons are clearly set out in documentation that is accessible to the public and interested parties, the decision makers are entitled to refer to such documentation as the reasons for their decision. In this case the written determination furnished by the Minister on 14th May, 2018 clearly referred to the documentation wherein the reasons for reaching his decision were set out. Accordingly, I am

satisfied that he complied with his obligation to make a written determination and to give reasons therefor.

39. I am satisfied that it was appropriate for the Minister to be the person who made the determination because under the 2011 regulations, it is provided in Reg. 42 that the appropriate assessment shall be carried out by the relevant "public authority". In Reg. 2 a public authority is defined as including a Minister of Government. Thus, it seems to me that it was entirely appropriate that it was the Minister who made the necessary determination in this case. Furthermore, as the Minister is a member of the Government, a determination made by the Minister is effectively a determination made by the Government.

40. For the reasons stated above, I am satisfied that the Government did validly adopt the NPF and the NDP at its meeting on 16th February, 2018. In so doing they were adopting not only the plans, but also the determination made by the Minister on their behalf in advance of adopting the plans. Even if I am wrong in that, I am satisfied that the court must adopt a realistic and logical approach to the issue of compliance with the necessary legal requirements in this case. It is abundantly clear that by the time the so-called reaffirmation decision was taken on 29th May, 2018, the necessary determination was in place in writing. While there was much debate at the hearing as to the meaning of the term "reaffirmation" I am satisfied that in effect, it is a re-adoption of the relevant plans. Accordingly, I am satisfied that even if the NPF and the NDP had not been validly adopted by the first respondent at its meeting on 16th February, 2018, it was validly adopted by them by virtue of the decision taken at its meeting on 29th May, 2018. Accordingly, even at the latest, the NPF and the NDP were validly adopted by the first respondent on that date.

(b) Alleged Inadequate Consideration of Alternatives.

41. The applicant's challenge under this heading rested on the provisions of Art. 5.1 of the SEA Directive which provides;

> *"1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1."*

42. The applicant's contention is that there was no adequate consideration given to alternatives in the environmental report. It was submitted that to be adequate, such consideration must be at a level comparable to that applied to the preferred option.

43. The applicant did not dispute that the respondents were entitled to a wide margin of appreciation in choosing the alternatives that were regarded as "reasonable" and that their obligation was only to provide outline reasons for making that decision. They conceded that it may even be that in respect of some plans, there was no reasonable alternative. But that was not the case here. In this case, five options (not counting the "business as usual option") were expressly found to be reasonable. Once that was done, it was submitted that the reasonable alternatives had to be assessed at the same level and on the same basis as the preferred option, in order to facilitate a proper comparison between them.

44. In support of this contention, Mr. Stein SC relied on the guidance issued by the Commission on the implementation of the SEA Directive. In particular, he relied on para. 5.12 thereof, which provided that in requiring the likely significant environmental effects of reasonable alternatives to be identified, described and

evaluated, the Directive made no distinction between the assessment requirements for the draft plan or programme and that required for the alternatives. It went on to state:

> *"The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report applied to the assessment of alternatives as well."*

45. Counsel also referred to a number of decisions of the courts in England and Wales, where it had been held that the assessment of alternatives must be carried out to a level comparable to that applied to the preferred option. In *Calverton Parish Council v. Nottingham City Council & Ors.* [2015] EWHC 1078, Jay J. interpreting Regulation 12 of the SEA regulations in the UK, held at para. 67 that alternatives must be subjected to the same level of analysis as the preferred option.

46. Counsel also referred to the decision of Sales J. in the High Court of Justice in *Ashdown Forest Economic Developments LLP v. Secretary of State for Communities and Local Government* [2014] EWHC 406, where the learned judge stated as follows at para. 97:

> *"A plan making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: See [Heard] at [71]). …"*

47. Counsel further referred to the decision of the High Court of Justice, Queen's Bench Division, in Wales in *Friends of the Earth England, Wales and Northern Ireland Limited v. The Welsh Ministers,* where Hickinbottom J. set out the relevant

principles in relation to the consideration of alternatives at para. 88 and stated as follows at principle (viii) thereof:

> *"Although the SEA Directive is focussed on the preferred plan, it makes no distinction between the assessment requirements for that plan (including all options within it) and any reasonable alternatives to that plan. The potential significant effects of that plan, and any reasonable alternatives, have to be identified, described and evaluated in a comparable way."*

48. Counsel submitted that in this case it was obvious that Art 5(1) had not been complied with. The rejected reasonable alternatives had been assessed on the basis of an incomprehensible matrix and a short narrative statement, which occupied only a few pages of text. By contrast, the preferred option had been subjected to extended analysis occupying some 57 pages of text in Chapter 8 of the SEA environmental statement. There was simply no comparison between the levels of analysis applied to the preferred option and to the reasonable alternatives.

49. In relation to the argument which had been put forward on behalf of the respondents, to the effect that it would not serve the public well to have a huge volume of material put before it in relation to assessment of alternatives that were not the preferred option, it was submitted that that argument did not stand up for the following reasons: firstly, compliance with the requirements of the Directive was an absolute obligation. If that obligation, as had been set out in the Commission guidance and as interpreted in the decisions of the courts of England and Wales, was to require a comparative analysis of the reasonable alternatives and the preferred option, the respondent was not free of its own accord to simply disregard that obligation, because it thought that it would be onerous on members of the public to comply with it. Secondly, it could not be said that the additional material which

would be provided by such analysis would be irrelevant. It was submitted that the Directive required and the public was entitled to, a comparable assessment of all reasonable alternatives. The material that was provided would enable stakeholders and members of the public to make well informed submissions in relation to the draft plan prior to its final adoption. Thirdly, leaving aside the legal obligation to provide such analysis, the argument put forward by the respondent was not in fact borne out in reality. The analysis of the preferred option was carried out over 57 pages. As there were four other reasonable alternatives (not counting the rejected "business as usual" option), that would only have amounted to a further 228 pages (4X 57), which could not be regarded as being unduly burdensome on members of the public. The additional assessment would give rise to a relatively insignificant addition to the many hundreds of pages of the plan, the pre-consultation NIS, the circulars, the screening reports, press releases, options reports, SEA environmental report, etc. none of which had dissuaded the public from making over 3,000 submissions over the public consultation phases.

50. It was submitted that on this basis the SEA was fatally flawed. It was submitted that while the court had been provided with ample justification for holding in favour of the applicant on that issue, if it were disposed to do otherwise, it ought not to do so without first having referred the issue of the proper interpretation of Art. 5.1 to the CJEU. This was necessary as there was no judgment of the CJEU on the correct interpretation of this sub-article.

51. As a second limb of that argument, the applicant contended that no adequate reasons had been given for selecting the preferred option. It was submitted that the assessment matrix was entirely incomprehensible. While it purported to evaluate the various options under a number of headings such as biodiversity, flora and fauna;

population and human health; soil; water; air quality; climatic factors; material assets; cultural heritage and landscape, it had done this by merely ascribing "+" , "-" and "0" to each of these headings to indicate either a positive impact, a negative impact or zero impact. It was submitted that the inadequacy of that assessment was shown by the fact that for options 3,4 and 5, which were said to have clear differences, they had been assessed in exactly the same way by giving the assessment "+/-" in respect of each of the SEO headings.

52. Counsel stated that the applicant did not dispute the strategic options chosen or the process that was followed in the selection of the alternatives. However, the applicant did criticise the assessment of those options after they had been chosen and the reliance on a matrix that made no sense and by reference to materials in the form of ESRI research that was not exhibited. In summary, it could not be said that a comparable or adequate assessment had been carried out of the reasonable alternatives.

53. In response, the respondent began by raising a pleading point to the effect that in its statement of grounds the applicant had merely raised the challenge on the basis that there was no adequate assessment of reasonable alternatives. In the oral hearing and in the supplemental submissions filed on behalf of the applicant, the case in this regard had been substantially refined and expanded to cover a two-pronged approach: firstly, that the matrix used was incomprehensible and more importantly that the assessment of the alternatives should have been at the same level as that carried out in respect of the preferred option. The respondent submitted that it was not in a position to adequately respond to that argument, as it had not been flagged as one of the grounds on which judicial review was sought at the outset. It was submitted that the argument now raised on behalf of the applicant did not come within the grounds

pleaded in the statement of grounds and therefore ought not to be considered by the court.

54. Without prejudice to that objection, it was submitted that when one had regard to the legislation from which the obligation was said to arise, it was clear that there was no obligation on the entity adopting the plan to carry out an assessment of the reasonable alternatives on a comparable basis to that carried out on the preferred option. It was submitted that Art. 3.1 of the SEA Directive was relevant because "reasonable alternatives" were not included within this "scope" provision, which was the key provision in the Directive, imposing the need to undertake an SEA of a plan or programme. It provided that an environmental assessment in accordance with Arts. 4-9, shall be carried out for plans and programmes referred to in paras. 2-4 which are likely to have significant environmental effects. Furthermore, Art 3.5 of the Directive made clear that the Annex 2 list of relevant criteria was required to be considered only in respect of a plan or programme as referred to in Art. 3.1 in respect of an assessment of "significant effects", as follows:

> *"Member States shall determine whether plans or programmes referred to in paras. 3 and 4 are likely to have significant environmental effects either through case by case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose, Member States shall in all cases take into account relevant criteria set out in Annex 2, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive."*

55. Counsel further submitted that Art. 4.1 of the SEA Directive only referred to the environmental assessment of the plan or programme, as follows: "The environmental assessment referred to in Article 3 shall be carried out during the

preparation of a plan or programme and before its adoption or submission to the legislative procedure."

56. Ms. Butler SC on behalf of the respondent also laid considerable emphasis on the provisions of Annex 1(h) of the SEA Directive which stipulates the list of information to be contained in the environmental report and in particular provides a specific requirement as regards the reasonable alternatives as follows:

> *"(h) An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know how) encountered in compiling the required information.*

57. It was submitted that on the face of the wording of the Directive thereof, there was no obligation to subject the alternatives to full strategic environmental assessment, such as was done for the preferred option. While there was no CJEU case law on the point, the respondents submitted that the court should apply common sense to the argument made by the applicant. If the applicant's interpretation of Art. 5.1 were to be followed, a full SEA would be required for all alternatives resulting in an unduly burdensome assessment and the provision of such a large volume of overlapping material that it would likely discourage rather than facilitate public participation.

58. In relation to the authorities from the courts in England and Wales, it was submitted that the most that could be said about them was that they required a comparable assessment of reasonable alternatives at an early stage, which had clearly happened in the present case. What was absolutely clear was that the level of assessment of the alternatives and of the preferred option was a matter for the decision maker. That corresponded with the ratio in the England and Wales authorities, which

concerned either no alternatives being presented by the plan maker, or no reasons being given for the selection of the preferred option. It was submitted that it could not be said that the respondents were guilty of either of those mischiefs in this case. Rather, what was being presented by the applicant was that once reasonable alternatives were identified, they should then have been subjected to a full SEA on the same basis as the preferred option.

59. Counsel further submitted that even within the English and Welsh decisions, there was authority for the proposition that there could be a difference in the level of analysis. Counsel referred to the dicta of Sales J. at para. 96 of his judgment in the *Ashdown Forest* case:

> *"...It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for pursuing particular alternatives to the preferred option are required to be given: [Heard] at [66] – [71]. As Ousley J. put it in Heard, in this sort of case 'the failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage'.* [70].

60. Counsel also referred to the decision in *R. (Richard Spurrier) v. The Secretary of State for Transport & Ors.* [2019] EWHC 1070 where Holgate J. stated as follows at paras 433 & 434:

> *"433. The information in Article 5(1) and Annex 1 which is to be included in an environmental report is that which 'may reasonably be required' (Article 5(2)). That connotes a judgment on the part of the authority responsible for preparing the plan or programme. Such a judgment is a matter for the*

evaluative assessment of the authority subject only to review on normal public law principles, including Wednesbury unreasonableness.

434. Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan making authority…"

61. It was submitted that in simple terms the applicant's criticism of the environmental report was that there was a lot more assessment of the preferred option than of the alternatives. That was simply not borne out in the document. It merely reflected the fact that the SEA was of such a high level strategic plan being the NPF. It was acknowledged in Chapter 3.3.1 and 3.3.5 of the environmental report that the absence of details concerning specific projects in specific locations and data gaps, limited the extent of quantitative assessment that could be undertaken at the strategic level of the NPF. It was submitted that that seemed to be the underlying basis for the applicant's complaint that there was an inadequate assessment of alternatives. If the data was not there, it simply could not be assessed. It was submitted that chapter 7 of the environmental report clearly outlined all reasonable alternatives that had been identified during scoping. It was clear that these had been assessed on a like for like basis and to the same level of detail as was appropriate to the strategic nature of the framework plan. Having identified the preferred alternative, chapter 8 went on to the next stage, to develop the plan with policies and actions supporting that preferred

alternative, i.e. the National Policy Objectives. This additional assessment of policy objectives was within its competence as the decision maker. It was submitted that chapter 7 of the environmental report spoke for itself and was easily understandable. It was only having identified the preferred alternative, that the national policy objectives were developed to express that preferred alternative.

Conclusions.

62. Firstly, in relation to the pleading point raised by the respondent, I am satisfied that there is no substance to this objection. While the pleading of this aspect of the case in the statement of grounds may not entirely cover the argument put forward by counsel on behalf of the applicant in the course of the oral hearing and in the supplemental written submissions, the court has taken account of the fact that there was a gap in the hearing due to the onset of the Covid 19 Pandemic, which enabled the respondent to put in supplemental written submissions on any additional aspects that had been raised by the applicant in the course of its submissions, or in its oral reply to the respondent's case. The respondent took that opportunity and submitted further written submissions on 27th March, 2020. In those submissions it dealt with the issue of the assessment of reasonable alternatives from p. 7-14 of the submissions. Accordingly, the court is satisfied that the respondent has had an adequate opportunity to address this aspect.

63. Turning to the substance of the issue, the Court is not satisfied that the wording of Art. 5 of the Directive mandates a comparable level of assessment of the reasonable alternatives and the preferred option. The court accepts the argument put forward by the respondent, that when one looks at the legislation as a whole, it is clear

that the requirement to carry out a full SEA only relates to the plan which it is proposed to adopt.

64. Furthermore, in Annex 1 of the SEA Directive, it is made clear at item (h) that an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken, including any difficulties (such as technical difficulties or lack of know how) encountered in compiling the required information, is what is required to be included in the environmental report.

65. While there are certain dicta in the decisions from the courts in England and Wales which indicate that a comparable assessment of reasonable alternatives and of the preferred option may be required, the Court is not convinced that it can proceed on the basis of those decisions in view of the fact that those courts were interpreting the regulations which implemented the Directive into the law of England and Wales. In addition, those cases by and large dealt with situations where either no reasonable alternatives were considered, or there was a lack of reasons given for choosing the preferred option. The guidance document which was issued by the Commission is not binding on this Court. It appears to deal with projects or plans that are far more concrete in nature, rather than being guidance relevant to a high level policy document such as the NPF.

66. The Court has also had regard to the wording of Art. 5.1 of the Directive which provides that an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme and reasonable alternatives "taking into account the objectives and the geographical scope of the plan or programme," are identified, described and evaluated. This seems to allow the Court to have regard to the fact that the NPF is a high level strategic policy document. It does not give permission for any particular project or land use. When

one looks at the NPF in detail, what it is trying to do is to accommodate the projected growth in population and allied employment and housing needs of that population over the following 22 years. The options that were selected as being reasonable alternatives were very similar to each other. The differences between them were in relation to the degree of growth that would be encouraged between the various regional assemblies. It was effectively whittled down to two options, being option 1 which focussed the growth on the five cities alone and option 2 which provided for focussed growth in the five cities, together with focussed growth in a number of strategically important regional centres, such as Athlone and Sligo and also made provision for particular relevant corridors, such as that between Drogheda and Dundalk and Newry and between Letterkenny and Derry. It does not prevent development outside of these areas. It provides that there should be a focus on population growth and allied development in a structured way, in particular so as to achieve compact growth in urban areas by means of infill and brownfield development and by provision of adequate infrastructure and in particular, public transport services so as to reduce greenhouse gas emissions. Such a plan is wholly different to the examples given in the Commission guidance document.

67. In these circumstances I am of the view that the assessment carried out in the environmental report was a reasonable and logical interpretation of the obligation that was cast upon the Government as the body ultimately responsible for adopting the plan. The environmental report looked at a number of options including the option of "business as usual". The document sets out clear reasons why, at a strategic level, the preferred option was chosen over the other reasonable alternatives. The reasons given were logical and understandable. It may be that at a lower planning level, where consideration is being given to a particular project, it would be appropriate to give a

more in-depth assessment of the reasonable alternatives so as to establish that the preferred option was in fact the better option and to give the public and stakeholders an opportunity to comment on those alternatives. I am satisfied that where one is dealing with a high level strategic plan, such as the NPF, sufficient information was given in relation to the reasonable alternatives and there was sufficient assessment thereof, to enable members of the public and other stakeholders to comment in a meaningful way on the draft NPF and the environmental report accompanying it.

68. In relation to the complaint concerning the matrix, I accept the point made by the applicant that the symbols alone give very little indication as to the analysis that was carried out. However, I accept the point made by Mr. Hogan in his affidavits that one has to read the matrix in the context of the narrative that accompanies it. I am satisfied that when both are read together there is a reasonable and comprehensive assessment that is understandable and logical of each of the reasonable alternatives. In relation to the criticism that there was reference to ESRI research that was not exhibited in the documentation, it seems to me that this complaint does not have substance because the ESRI research is referenced at p.18 of the NPF and the footnote reference referred to, is set out at item 11 of the list of references given in Appendix 4 at p.176. Thus, the ESRI research was available to people who wished to look at it.

69. Having regard to these findings I am satisfied that the assessment of the reasonable alternatives contained in the environmental report and the assessment of the preferred option contained therein, was in compliance with the obligation placed on the respondent by virtue of Art. 5 of the SEA Directive.

(c) Lack of Adequate Monitoring

70. The applicant contended that the respondents had failed to comply with the provisions of Regulation 17 of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (SI 435/2004) and in particular with Regulation 17 thereof, which contains provisions in relation to monitoring. It provides that the competent authority shall monitor the significant environmental effects of implementation of the plan or programme in order, *inter alia*, to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action and, for this purpose, existing monitoring arrangements may be used, if appropriate, with a view to avoiding duplication of monitoring. It was submitted on behalf of the applicant that the NPF includes no adequate provision for monitoring of the significant environmental effects of the implementation of the NPF and/or had no adequate provision for the identification at an early stage of unforeseen adverse effects, or appropriate remedial action to be taken in reference thereto.

71. It was submitted that the issue of monitoring, which was dealt with in chapter 7 of the SEA statement, was inadequate. It simply stated that the Department of Housing, Planning and Local Government will coordinate monitoring of the NPF, but without giving any details of how this monitoring would occur, who would do it and when it would be done; nor as to how the monitoring would be used and how any identified unforeseen adverse environmental effects would be addressed.

72. It was submitted that the SEA statement could not discharge the respondents' obligations under Reg. 17 by baldly stating that monitoring would be coordinated by the Department of Housing, Planning and Local Government.

73. It was submitted that the monitoring effort actually identified at table 7.1 of the SEA statement, contained no actual monitoring of the significant environmental

effects of the implementation of the NPF. Counsel for the applicant referred to Objective 2 – biodiversity, flora and fauna; the stated target was to require all county and local development land use plans to include eco system services and green/blue infrastructure provisions in their land use plans and have regard to the required targets in relation to conservation of identified sites. The indicator for that target was the number of plans that would include those provisions. Apart from the fact that neither element provided for a qualitative assessment of those plans, it was submitted that the indicator was simply irrelevant in terms of monitoring the significant environmental effects of implementation of the NPF. It was submitted that the respondent had failed to identify how the selection of the particular indicator would allow for identification at an early stage of unforeseen adverse effects and to facilitate appropriate remedial action as a result of the implementation of the plan. The chosen indicator, being the number of spatial plans which incorporated eco system services and green/blue infrastructure, was simply an indicator of the number of spatial plans which incorporate such matters. It was not an indicator of the environmental effects of the implementation of the NPF. Still less, in the complete absence of any metric for judging compliance, or the percentage of compliance, did it provide for any remedial action to be taken in the event that unforeseen consequences arose.

74. A similar observation applied to Objective 3 – soils, where the stated target was to retain the level of built-on surface cover at below 4% and to avoid or minimise adverse effects on mineral resources and important geological sites. The only indicator was the bald statement "percentage land cover change in Ireland" which presumably related, however loosely, to the first target and there was no indicator at all in relation to the second target. Beyond identifying EPA geoportal as the data source for this objective, no information was provided as to how the monitoring

would occur, who would monitor it, or what effect any monitoring might have to mitigate or ameliorate those effects. It was submitted that this monitoring, such as it was, was not relevant or related to the potential environmental effects of the adoption of the NPF.

75. Counsel further submitted that the same broad objection could be made in relation to Objective 4 – water, where the objectives were the outcomes anticipated in River Basin Management Plans by 2021, with no indication what the objectives were thereafter, or how this would relate to the environmental effects resulting from adoption of the NPF. Beyond identifying the EPA as the data source for this objective, no information was provided as to how the monitoring would occur, who would monitor it or what effect any monitoring might have to mitigate or ameliorate those effects.

76. The applicant submitted that the monitoring contained in the environmental report was not monitoring or adequate monitoring for the purpose of Regulation 17 of the Regulations and/or Article 10 of the SEA Directive. There was no provision for actual monitoring by any identified body or bodies, in order to identify at the earliest possible stage unanticipated environmental effects of the implementation of the NPF, or to consider remedial action, or any other use of the monitoring results.

77. It was further submitted that table 7.1 made it absolutely clear that the third parties identified were only data sources. The suggestion that there was some comprehensive programme of monitoring outside the confines of the NPF was not accurate and was not supported by any evidence.

78. It was submitted that the respondents could not discharge their obligations by simply stating that monitoring had clearly been addressed. The respondents were under an obligation to include a monitoring programme capable of discharging the

obligations pursuant to Art. 10 of the Directive. Counsel stated that this was not a merits based argument and no question of policy arose. It was a threshold requirement which, on its own evidence, the respondent had simply not complied with.

79. In response, counsel for the respondent emphasised that both Reg. 17 of the SEA Regulations and Art. 10 of the Directive, made it clear that existing monitoring arrangements could be used if appropriate, with a view to avoiding duplication of monitoring. Art. 10.1 required Member States to monitor the implementation of a plan in order to identify unforeseen adverse effects and take remedial action at an early stage. Manifestly, such monitoring could not be carried out or assessed until the plan had been adopted and was being implemented. Consequently, while there was a legal requirement under Art. 9(1)(c) to inform the public of the monitoring measures decided upon, they were not themselves measures which required extensive treatment in the SEA.

80. It was submitted that section 7 of the SEA statement contained the measures to monitor significant environmental effects of the implementation of the NPF. It was stated at p. 89 "Monitoring is carried out by reporting on a set of indicators, which enabled positive and negative impacts on the environment to be measured. The environmental targets and indicators of relevance to this NPF were identified from the SEA process. These targets and indicators will be used to identify unforeseen adverse effects from implementation of the NPF". It further stated that coordination of monitoring of the NPF would be carried out by the DHPLG.

81. It was submitted that contrary to the applicant's allegation that there were no details as to how the monitoring would occur, who would do it, when it would be done, or how unforeseen effects would be addressed, it was apparent that information

relating to existing monitoring arrangements was in fact contained in table 7.1 of the SEA statement in accordance with the requirements of Reg. 17 of the SEA Regulations.

82. Furthermore, in respect of the alleged deficiencies in the information as claimed by the applicant, the respondent pointed out that the commission's guidance on the implementation of the Directive stated at para. 5.29 in respect of the monitoring requirements of the Directive when preparing the environmental report that "It is obvious that no definitive statement about the final monitoring measures can be made when the environmental report is still being prepared, since the content of the plan or programme is not decided, and in any event the content of the environmental report is subject to the criteria laid down in Article 5(2). Likewise in some circumstances the monitoring arrangements may need to be adapted as implementation of the plan or programme proceeds. There appears to be nothing in the Directive to preclude this in appropriate cases". Furthermore, section 10.1 of the NPF made reference to the independent oversight of monitoring of the implementation of the NPF by the newly created Office of Planning Regulator, which will have an independent monitoring role, advising the Minister, the Government and the Oireachtas on implementation of the framework under the statutory planning process through new RSES's, local authority statutory planning processes and the decisions of An Bord Pleanála and using a new set of indicators to be developed to assist effective monitoring.

83. Therefore in summary, it was submitted that there was provision for monitoring of implementation of the NPF by the OPR and there was adequate monitoring provided for within the NPF itself as set out in table 7.1 of the SEA statement, where the various objectives were clearly set out, together with the target

that was going to be aimed for in respect of each objective and the indicator that would be used to measure achievement of that target and the fourth column gave the source from which the relevant data would be provided. The DHPLG had the role of monitoring the data sources so as to ensure that there was adequate monitoring of the matters set out in Art. 10 of the Directive and Reg. 17 of the Regulations.

Conclusions

84. In order to resolve this issue, one must look to the SEA statement and to the NPF as a whole to determine if the obligation in relation to monitoring has been complied with. The NPF provides for the establishment of the OPR which will monitor the overall implementation of the NPF itself. The SEA statement goes on to provide in relation to monitoring that the monitoring of the various objectives will be carried out by the DHPLG. Its job will be to coordinate the monitoring that is carried out by other bodies within their particular fields of expertise.

85. This is specifically provided for in the Directive and in the regulations, which provide that reliance can be placed upon monitoring carried out by other bodies so as to avoid duplication of monitoring. When one looks at the content of table 7.1 it is clear that in respect of each of the objectives identified in the first column, there are targets set out for that objective in the second column, together with indicators for assessing the achievement of the objective in the third column. The fourth column identifies each of the entities that will be responsible for monitoring the achievement of the particular targets. For example, in relation to Objective 4 – water, the objective is clearly stated, together with the targets that have been set out in the River Basin Management Plan and the expected targets of the MSFD are achieved or maintained by 2020. The indicators are clearly stated and the data source is the EPA monitoring

programme for the Water Framework Directive compliance and the Department of Housing, Planning and Local Government, Marine and Foreshore. It is entirely reasonable that the SEA statement should make provision for an overall monitoring position to be held by DHPLG relying on the expertise and experience of the bodies which have specific jurisdiction over the monitoring of various aspects such as air quality, water quality, etc. There is provision made that the Department will coordinate the monitoring of the various areas set out in table 7.1 and will take action if unforeseen adverse effects emerge.

86. It also has to be borne in mind that individual projects will require planning permission which will be subject to assessment by the relevant planning authorities and the relevant assessments will be carried out of the individual project at that level, which will incorporate the views of statutory bodies such as the EPA in relation to water quality, air quality and other such matters.

87. In the circumstances, the court is satisfied that the monitoring provided for in Chapter 7 of the SEA statement and in particular the monitoring provisions as outlined in table 7.1 is sufficient compliance with the obligations in respect of monitoring imposed upon the respondents by the Directive and the Regulations.

(d) Failure to Assess the Effects of the NF on Climate Change

88. The applicant submitted that the respondent was under an obligation to assess the environmental effects from its preferred option on climate change. It was submitted that it was clear from the statement of opposition and from the affidavit filed on behalf of the respondent, that the respondent had not done so and instead had provided only a description of the current position. There was no assessment at all of

the effect of the implementation of the impugned plan on climate change. The respondent was under an obligation to "identify, describe and evaluate the likely significant effects on the environment of implementing the plan" for the purposes of Art. 12 of the Regulations. There was an extensive discussion of CO2 emissions at p. 85-89 of the SEA statement. However, while that discussion addressed current emissions projections and the effect of the National Mitigation Plan, it did not address the climate implications of the implementation of the NPF. It merely demonstrated that Ireland was radically over target to meet its 2050 CO2 emissions reductions targets, but did not identify, describe or evaluate the contribution which would be made by the NPF to that situation. It was submitted that nowhere in the statement of opposition or in the affidavits sworn by Mr. Hogan, was any such exercise identified.

89. It was noted that the SEA statement contained an estimate of the extent of the emissions reductions required over the lifetime of the NPF from the electricity generation, built-in environment and transport sectors (EGBET), including taking account of the planned population increase over the same period. It noted in figure 6.1 that projected emissions from EGBET are currently significantly in excess of the 2050 target and are predicted to increase significantly from 2020 – 2035. It went on to identify that in order to comply with current policy of the respondents as set out in the National Policy Position, emissions from these sectors, which are those most directly affected by the NPF and the NDP, are required to be reduced by 80% in total by 2050. Over the period of the NPF to 2040, this would mean a reduction to about 8NtCO2e from a current total of about 31NtCO2e. Due to the increase in population over the period the per capita emissions reduction from EGBET sectors would have to be even greater, from about 6.3NtCO2e per person to about 1.4 NtCO2e per person per annum. Having noted this position, the SEA statement identified that the

"Evolving suite of measures listed in the National Mitigation Plan will require a significant step change" to achieve the emissions reductions, while facilitating the planned increases in population.

90. It was submitted that contrary to the requirements in the Directive to assess the likely significant environmental effects of the plan, there had been no assessment of the likely significant environmental effects from the point of view of climate change. It was submitted that the respondent was not entitled to identify increasing greenhouse gas emissions over the lifetime of the NPF, without assessing the likely significant environmental effects of that increase. Furthermore, the respondents were required to assess the impact of those emissions, including consideration of reasonable alternatives, in order to abate the adverse effects on the environment from those projected increased emissions.

91. In summary therefore, while the SEA environmental report had included an extensive section on the inadequacy of the national response to greenhouse gas emissions, there was no assessment at all of the effects of the implementation of the NPF on climate change. That was a mandatory statutory requirement that had not been complied with.

92. Counsel noted that in his affidavit, Mr. Hogan stated that while in addressing future growth and development in general terms, the NPF could influence a significant element of emissions associated with EGBET, but it was important to note that the overwhelming majority of future impact being mitigated against arises from development that was already in existence. He had gone on to observe that the NPF would result in the construction of 20% of the future built-in environment and this would be constructed on a near zero emissions basis. In argument, counsel for the respondent had suggested that the policies in the NPF were designed to be as close as

possible to carbon neutral. She maintained that the problem lay with existing development. It was submitted on behalf of the applicant that none of that was linked to statements in the environmental report, but even if it were supported, it would not meet the applicant's complaint. Counsel stated that while it may be that the NPF would not affect 80% of the built-in environment and that it will therefore, have very little effect on climate factors, what was required was that the report should actually say so. That was what was missing. It was submitted that it was not sufficient for Mr. Hogan and counsel for the respondent to try to shore up that deficiency after the fact.

93. In response, counsel for the respondent submitted that what the applicant was seeking was a merits based review of the respondents' decisions on this aspect. That was not an appropriate role for the court to undertake.

94. Counsel submitted that the issue had been dealt with in the environmental report by reference to National Policy Objectives on climate action e.g. the National Mitigation Plan, the National Climate Change Adaptation Framework, which had been put in place pursuant to the Climate Action and Low Carbon Development Act, 2015. It was submitted that it was not the court's function to interfere with policy made by the executive in the context of climate change policy. In this regard, counsel referred to the decision of Charleton J. in *GRA v. Minister for Finance* [2010] IEHC 78, where the learned judge observed:

> "The Government has the power to set policy on areas of national interest and to disperse funds in accordance with that policy. These decisions are, in my view, in a category beyond the scope of judicial review."

That statement of the law had been adopted by MacGrath J. in *Friends of the Irish environment GLG v. the Government of Ireland* [2019] IEHC 747.

95. Counsel noted that while the applicant complained that there was no quantitative analysis of likely future CO2 emissions as a result of the implementation of the NPF, Mr. Hogan in his second affidavit in paras. 17-21 had explained how the policies were designed to be as close to zero CO2 emissions as possible. The problem was actually in relation to existing buildings such as older houses. The applicant appeared to want a quantitative analysis of the future role out of carbon emissions and CO2 emissions over the following 20 years. That is provided for in the National Mitigation Framework, but the NPF was designed not to add to the problem which already exists on the baseline, which had been assessed in the environmental report.

96. Counsel pointed out that in the NPF climatic factors were dealt with in the section dealing with the development of strategic environmental objectives, targets and indicators. Climatic factors were dealt with at table 6.1 on p. 120, where it was identified as one of the SEOs and the relevant targets and indicators were given. Climatic factors was also one of the variables in the matrix that was used to assess the various options which were looked at in chapter 7 of the NPF. Options 1 and 2 were both positive for climatic factors, whereas the other options were recorded as having both positive and negative effects. The "business as usual" model was recorded as having either no effect, or having a negative impact in respect of climatic factors. So the issue of the effect on climate had been assessed in respect of each of the options.

97. Chapter 8 dealt with the assessment of the preferred option, where each of the NPOs were assessed under all of the headings including that of climatic factors. This was particularly addressed at p. 189 under the heading air quality and climatic factors, which were looked at under the heading of cumulative impacts, which dealt with cumulative impacts at the plan level which can occur from interaction with measures

within the NPF and interaction with policies and proposals in other related plans, programmes and policies.

98. Chapter 9 dealt with mitigation and monitoring and provided at table 9.4 how the environmental monitoring programme would work in particular in relation to Objective 5 - air quality and Objective 6 climatic factors; again setting out the relevant targets and indicators and the data source from which the monitoring would be done.

99. In the SEA statement, commencing at p. 32 there was an analysis of the submissions from the statutory public consultation. At section 4.3.3.7 on p. 45, it dealt with the topic of environmental challenge, in particular climate adaptation and mitigation. It set out a summary of the submissions that had been received on this topic and how those submissions had been taken into account and influenced the drafting of the final NPF.

100. Section 6.11.2 of the SEA statement looked at population increases and greenhouse gas emissions. On p. 87 it looked specifically at projections of future CO2 emissions on the basis of a one million growth in population. The monitoring programme already referred to above in relation to climatic factors was set out at table 7.1 at p. 91 of the statement. At p. 98/99 the changes made to the final NPF in relation to air quality and climatic factors were set out in extensive detail. These changes took account of data received in the latest EPA Air Quality in Ireland report for 2016.

101. Counsel also pointed out that in the NPF at section 7.4 there were provisions dealing with coastal environment and planning for climate change. Chapter 9 dealt with environmental and sustainability goals and on p. 117 there were provisions in relation to resource efficiency and transition to a low carbon economy. On the

following pages, section 9.2 dealt with resource efficiency and transition to a low carbon economy and in particular had a section on climate action and planning. At p. 122 under the heading Energy Policy and Planning there was a section on the transition to a low carbon energy future and its requirements. And at p. 125 there was information in relation to green infrastructure and on the following page, provisions in relation to biodiversity. Counsel also referred to NSO8 which provided for transition to sustainable energy, as set out at p. 147. Finally, chapter 11 dealt with the assessing of environmental impact. It noted that as part of the preparation of the NPF a number of environmental assessments have been carried out. These included an SEA, an AA and also a strategic flood risk appraisal (SFRA). Accordingly, it was submitted that climactic factors had been taken into account extensively throughout the process.

102. Counsel submitted that there was a mismatch between what the applicant was expecting and what the NPF was designed to do. It was a policy plan rather than a specific development plan. Accordingly, it was not possible to make definitive emissions predictions on the basis of the plan. It was a policy developed to minimise adverse climatic influences based on a population rise of one million in the coming years. It was submitted that the climatic aspect was extensively covered in the relevant documents. The applicant may not be happy with the amount or content of the information that was given in relation to climatic factors but that was a merits based argument, which was not justiciable by the court. It was submitted that there had been no error on the part of the respondent in its assessment of the impact on climatic factors which may arise as a result of implementation of the plan.

Conclusions

103. The environmental report, the SEA statement and the NPF contain extensive provisions dealing with climatic factors. The whole purpose of the NPF is to ensure

that future development is carried out in such a manner as to reduce to the lowest possible extent the adverse effects on the climate of such development as will be necessary to cater for the projected growth in population. The applicant wants a quantitative assessment of the likely effect of the implementation of the NPF on climatic factors. That cannot be given, as the NPF is a policy document. It does not give permission for any specific development or project. However, it is clear that climatic factors are one of the main drivers behind the features provided for in the NPF.

104. It is clear from the documents that the main focus of the SEA and the NPF was to cater for the physical growth in the population in the manner that was best designed to reduce if not eliminate CO2 emissions. That is specifically provided for in the National Strategic Outcomes, in particular in relation to the following NSOs :1. compact growth; 4. sustainable mobility; 8. transition to a low carbon and climate resilient society; 9. Sustainable management of water, waste and other environmental resources. It is also provided for in the National Policy Objectives and in particular in NPO's 52-65, which come in under chapter 9: Realising Our Sustainable Future.

105. The Court is satisfied from the portions of the documents that were opened and referred to by counsel for the respondent in the course of argument as outlined above, that the SEA, the A.A. and the ultimate NPF have had regard to climate change and climatic factors as directed by the Directive. It is not possible to provide a quantitative analysis of the effects of the implementation of the NPF in the future, as this is a policy document and one cannot say at this time what population growth will actually occur, where it will occur and what form of development may actually be carried out to accommodate it. All that one can say is that the provisions that are contained in the NPF are designed to reduce to the absolute minimum the effects on

climate change and on the environment generally, caused by implementation of the NPF.

(e) Inadequate Consideration of the Submissions of the Applicant.

106. The applicant contended that the submissions that had been made by members of the public, including the applicant, had not been adequately assessed or engaged with as part of the assessment process. At p. 6 of the NIS, reference was made to all submissions received having been taken into account. However, those submissions were simply referred to thematically followed by the blunt statement that they had been taken into account. An exception to that approach was the manner in which the submission from the Department of Culture, Heritage and the Gaeltacht was dealt with by way of a bespoke response at Appendix 2A of that document and three other government departments, whose submissions were briefly noted in the course of Appendix A.

107. A similar stance was maintained in the A.A. conclusion statement, which identified at p. 3 that all submissions had been taken into account and made reference to Appendix A of the NIS. Appendix A simply recounted the submissions received from the statutory consultees and government departments. It did not refer to, or acknowledge the existence of submissions apart from those listed in Appendix A.

108. In the written determination of the respondent, reference was made to the submissions and observations from the public, as one of the elements that had been taken into account, without further elucidation and elaboration on how they had been before the respondent in circumstances where neither the NIS, or the conclusion statement, made any reference thereto. The applicant submitted that the respondent was under a duty pursuant to Reg. 42 (11) of the European Communities (Birds and

Habitats) Regulations 2011 and also having regard to the applicant's rights to natural and constitutional justice, to engage with the submissions made by the public, including those made by the applicant, and to address areas of concern and to engage with the submissions made and/or provide a response as required.

109. It was submitted that at the very least a person making a submission which the respondent must take into consideration, was entitled to expect that it would be apparent from the decision that his or her submission had in fact been considered. There was nothing in any of the materials which suggested that the respondent had given any consideration to the concerns raised in the submissions. The applicant relied on the decision in *North Wall Quay v. Dublin Docklands Development Authority* [2008] IEHC 305, where Finlay Geoghegan J. noted that fair procedures required not only that an opportunity to make submissions be given, but that those submissions be actually considered: see para. 60 of the judgment.

110. It was submitted that there was no value to be given an opportunity to make submissions, unless those submissions were actually considered and there should be some evidence that they were in fact considered, beyond a bald statement to that effect.

111. It was submitted that the applicants and all other members of the public who made submissions had been left entirely at sea as to what, if anything, the respondent thought about the issues they raised, as there was simply no engagement with those submissions, nor any reasons given as to why the maker of those submissions had been unsuccessful in influencing the outcome.

112. Mr. Stein S.C. relied on the following dicta from the judgment of O'Donnell J. in *Balz v. An Bord Pleanála* [2019] IESC 90, at para. 57:

> *"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."*

113. Counsel submitted that in truth there was no reason why the individual submissions could not have been acknowledged. That would not have been an administratively unworkable solution. All that would have been required was to identify, in respect of each submission, the issues that it raised and to direct the reader to where the substance of those issues had been addressed. It would not have required repetition of the same point thousands of times. It would, however, have provided confidence to those making submissions that their submissions had been read, understood and responded to.

114. In response, Ms. Butler S.C. pointed out that the applicant's complaint was in relation to the difference in treatment between certain statutory consultees and members of the general public whose submissions had been treated thematically. However, the applicant had not referred to the submission which it had actually made in the course of the process. No submission had been made by it on the Habitat's Directive or on the issue of appropriate assessment. Accordingly, it was not possible for it to argue that it had not been properly treated in the consideration of submissions in the NIS. The court did not have before it any submissions from any other parties

and therefore it could not come to a conclusion that such submissions had not been treated properly.

115. Accordingly, the applicant was limited to its complaint about the consideration of the submission that it had made as part of the SEA. In relation to the complaint that the statutory consultees had been treated differently to the public, counsel submitted that this was not surprising because they were treated differently within the SEA Directive itself; it was not surprising that the statutory consultees were treated differently and treated extensively because they were specifically mentioned in the Directive.

116. Furthermore, there were over 3,000 submissions received from the public at the initial consultation phase, although it was accepted that many of those dealt with the boundary between counties Kilkenny and Waterford, rather than environmental issues. At the second consultation stage, there were still in excess of 1,000 submissions received. It was submitted that while the comments in *Balz* appeared to support the applicant's contention, it had to be borne in mind that that case dealt with an issue where a specific submission had been made on behalf of the applicant which had been disregarded completely by the inspector, who had held that it was not possible to raise the argument that the guidelines then in existence were outdated and outmoded and he held that the submission to that effect was simply irrelevant and therefore did not consider it. It was in those circumstances that the dicta of O'Donnell J. referred to by counsel for the applicant, were made by the learned judge in that case.

117. Counsel referred to the decision in *O'Brien v. An Bord Pleanála* [2017] IEHC 773, where Costello J. stated as follows at para. 81:

> *"In any appeal (or indeed application for planning permission) there may be a myriad of differing submissions and observations relating to a very considerable number of different aspects of the proposed development addressed in the submissions and observations filed by the public concerned or indeed the applicant for planning permission. Responding to each and every one of these submissions is clearly a task of a different order to giving reasons why the Board disagreed with the considered distillation and evaluation of these views by the Inspector in their report. In my opinion, acceptance of the submission of the applicants inevitably results in the extension of the obligation of the Board to give reasons for its decision far wider than is required by statute, notwithstanding the fact that the applicants stated that they did not contend that the Board is required to address each and every point in every submission. The applicants did not explain why the Board had an obligation to give reasons in this case for its rejection of the submissions of the applicants on the appeal but not to the submissions of the other participants in the appeal. Essentially the submission fails to appreciate that the Board is engaged in an administrative decision making process and not primarily in deciding disputes between parties."*

118. Counsel also referred to the decision in *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, where McDonald J. commented on the dicta of O'Donnell J. in the *Balz* case in the following terms at para. 38:

> *"I do not, however, believe that this always requires that every submission made to the respondent should be individually addressed in a decision of the respondent or in a report of an inspector which precedes such a decision.*

What seems to me to be crucial is that the points made in submissions should be addressed. In circumstances where there will frequently be an overlap between submissions made by one observer and another, it seems to me that it would not be necessary to address every submission by name so long as the substantive points made in the submissions are each appropriately addressed."

119. Later in his judgment, McDonald J. stated that he did not believe that it was necessary for the inspector to address every individual submission that was made to the respondent so long as the substantive points relevant to the particular issue were addressed. He stated that there would often be an overlap between the submissions of one observer and another. The crucial requirement was that the points should be addressed. If the points were without merit, that should be stated and the basis for that view should be explained.

120. Counsel pointed out that at section 4.3.3. of the SEA statement (p. 32 *et seq*) there was an extensive account of the submissions that had been received from the statutory public consultation, together with a statement as to how those submissions had influenced the content of the final NPF. While the submissions from the public had been grouped together and dealt with thematically under various headings, it was clear that those submissions had been considered as part of the SEA process and the necessary amendments or additions had been made to the final NPF.

121. In this regard, it was noteworthy that the submissions made by the applicant had in fact been considered and to a large extent adopted under the heading Governance and the issue of implementation of the plan at p. 35; under the heading Environmental Challenge and the issue of climate adaptation and mitigation at p.45; and under the heading Environmental Assessment Processes under the issue SEA

compliance at p. 47. In these circumstances, it was submitted that the respondent had dealt with the submissions received from members of the general public in an appropriate and reasonable fashion, that was both lawful and logical. In particular, the submissions made on behalf of applicant had been properly addressed in the manner outlined.

Conclusion

122. The court is satisfied on the basis of the decisions in *O'Brien v. An Bord Pleanála* and *Sliabh Luachra v. An Bord Pleanála* that it is not necessary for a decision maker to give an individual response to every submission received from a member of the public. This is particularly so where a large number of submissions are received from members of the public and where there may be a large element of overlap between the various submissions. As long as these submissions are addressed in a comprehensive and fair manner, it is appropriate for the decision maker to group them thematically and address them on an issue by issue basis.

123. Much will also depend on the type of decision that is being taken. Where the decision is at a developmental level, where a person is either being granted or refused permission for a specific project, then it may be incumbent upon the decision maker to give consideration to his submissions and furnish reasons as to why he has reached the decision that was made, which decision may affect the person in a profound manner, either in terms of their quality of life or in their financial affairs. However, where a plan is at a strategic level, which does not involve any specific development projects and is a national plan where there may be a large number of submissions from members of the public, as in this case, it is appropriate for the persons carrying

out the assessment to group similar submissions together and deal with them thematically.

124. I am satisfied from the content of the SEA statement that not only were the submissions made by members of the public generally considered in a logical and reasonable fashion and this is borne out by the fact that amendments were made to the final NPF to reflect the content of these submissions; I am further satisfied having regard to the treatment of these submissions as outlined above, that the actual submissions made by the applicant were addressed in a reasonable and comprehensive fashion. The respondent complied with its obligations under the Directive and the Regulations to give consideration to the submissions that were made by the statutory consultees and members of the public. The applicant has no cause for complaint under this head of challenge.

(f) Failure to Carry Out SEA and A.A. on the NDP

125. The applicant submitted that the NDP should have been assessed for the purposes of the SEA Directive. It was submitted that the NDP was an infrastructure and spatial planning document designed to "drive Ireland's economic, environmental and social progress over the next decade". It identified priority areas for spatial planning and development and included initiatives designed to promote regional and rural connectivity. It shared precisely the same priority NSOs as the NPF and included significant measures and objectives in relation to *inter alia* compact growth, enhanced regional accessibility, strengthened rural economies, tourism, telecommunications, housing, climate action and climate change, water infrastructure, transport, research and learning and provided for the establishment of a National Regeneration and Development Agency. Furthermore, it specifically identified

projects and set a framework for future development consent of projects. It was submitted that in these circumstances the NDP was clearly not a financial/ budget plan or programme and was therefore not exempt from the terms of the SEA Directive pursuant to Art 3.8. In this regard the applicant relied on the European Commission guidance document which identified the type of plans which come within that definition at para. 3.63 as "Budgetary plans and programmes would include the annual budgets of authorities at national, regional or local level. Financial plans and programmes could include ones which describe how some project or activity could be financed, or how grants or subsidies should be distributed".

126. In the alternative, counsel submitted that due to the close integration of the NDP with the NPF, that they in effect formed a single plan and that therefore there was a requirement for SEA and A.A. of both parts of the plan. It was not permissible to carry out "plan splitting" so as to avoid the necessity of carrying out SEA or A.A. on the NDP.

127. In this regard it was submitted that both documents shared precisely the same NSOs; they were jointly known as Project Ireland 2040 and were adopted and published on the same day and hosted on the same government website. The NDP essentially comprised the infrastructure investment strategy for the NPF, while the NPF was the spatial development strategy for the NDP. It was submitted that both documents were inseparable and were effectively two sides of the same coin. This was clearly evident from statements to that effect contained in the NDP, in particular in the introduction at p. 4 and in the graphic on p. 6 showing the interrelation between the National Strategic Outcomes and the Strategic Investment Priorities provided for in the NDP.

128. Counsel referred to the content of the foreword to the NDP and the statement at para. 1.11 thereof which highlighted the close integration between the NDP and the NPF. Similar statements were to be found in the NPF, both in its forward and at p. 138.

129. It was submitted that given the degree of integration and interdependency between the plans, that the NDP and the NPF constituted a single plan or programme for the purposes of the SEA Directive and therefore the respondent was obliged to subject both elements to assessment.

130. It was further submitted that the framework set by the NPF includes various infrastructure scenarios which must filter down into lower tier plans. Since the NDP is the plan through which the infrastructure is delivered, it had a role to play in the adoption of downstream plans and ultimately development consent. For example, if the NDP was not delivering the infrastructure in advance or in tandem with proposed projects, that would have a material effect on the scope of downstream plans. For example, if a regional connectivity measure was not adopted, then that would constrain a county development plan and reduce the capacity for residential development, having a material effect on downstream development. In addition, it was submitted that the NDP makes strategic choices around the types of projects envisaged; for example, under NSO2 there was a far greater focus on roads compared to rail, with numerous specific roads projects identified, compared with no specific rail projects, nor any other sustainable transport options considered for enhanced regional connectivity.

131. It was submitted that the respondents had not addressed the point that the NPF and the NDP were explicitly interlinked to such an extent that they were treated as forming one coherent vision and plan.

132. It was submitted that an assessment involving the NDP would not be duplicative of the assessment already carried out in respect of the NPF, as the NDP provided for a range of projects that were not specifically identified in the NPF. It was submitted that the NDP therefore supplemented the NPF in material respects, which had never been assessed.

133. With regard to A.A., it was submitted that the NDP was actually somewhat closer to the NPF in having "physicality", in that it provided for identified projects. The framework point had been answered in relation to SEA. For these reasons it was submitted that the State had breached its EU law obligations in failing to subject the NDP along with the NPF to SEA and A.A. The NDP was therefore liable to be quashed as was the NPF, since the failure to include the NDP in the assessment process also provided a further reason why the A.A. and SEA of the NPF was itself invalid.

134. In response, counsel for the respondents stated firstly, that there was no national law that prescribed the procedure for the adoption or publication of the NDP. The Commission's guidance on the implementation of the SEA Directive inferred at para. 3.15 that a voluntary plan that is not open "required by legislative, regulatory, or administrative provisions" (as per the second limb of the definition of "plans and programmes" in the SEA Directive) was not subject to the Directive. However, it was accepted that the CJEU had reached the opposite conclusion in its judgment in case c-567/10 Inter-environment Bruxelles at [28] to [32]. Counsel pointed out that that decision had proved to be somewhat controversial and was criticised in the UK Supreme Court in R (on the application of HS2 *Action Alliance Limited) v. Secretary of State for Transport* [2014] UKSC 3 at [175] to [189], as not reflecting the intention of the EU legislature.

135. Secondly, it was submitted that the NDP does not fall within the definition of "plan or programme" in the SEA Directive. Given the strategic high level nature of the NDP, it was submitted that it cannot be said that it defines criteria and detailed rules for the development of land, which was required by the SEA Directive, where the notion of "plan or programme" contemplated a measure directed towards the promotion or encouragement of development (a plan) or a scheme covering a set of projects in the given area (a programme).

136. Thirdly, it was submitted that the NDP is a financial or budgetary plan which falls within the exception to the SEA provided for in an Art 3.8 of the SCA Directive. In this regard counsel referred to the decision of Smyth J. in *Kavanagh v. Ireland* [2007] IEHC 296 where in considering a previous NDP, the judge stated that he was "satisfied and find as a fact that it is essentially a financial budgetary plan and even if, as is the case, a project of national significance is mentioned in the NDP such as for administrative purposes as indicative of the type of project that would be financed out of a particular financial "envelope"".

137. Fourthly, it was submitted that the NDP is too general to be considered as setting a framework for future development consents, or setting the framework for any category of development consent, not even for non-EIA projects, within the scope of Art 3.2 of the SEA Directive. Counsel referred to case c321/18 Terre Wallonne ASBL v. Region Wallonne, where the CJEU found that setting conservation objectives for European sites under the requirements of the Habitats Directive, did not set the framework for future development consents: see paras. 41 and 42 of the judgment.

138. It was submitted that the NDP does not contain a significant body of criteria and detailed rules for the grant and implementation of projects likely to have

significant effects on the environment, rather it is a flexible, high level financial and budgetary framework for the investment priorities identified in the NPF for the period 2018 to 2027. It is also a summary of the investment strategy for Ireland as a whole, rather than for individual sites. Therefore, it cannot be said to fall within the definition of "plan or programme". Furthermore, as stated as p.12 of the NDP, it "includes indicative exchequer allocations to support the delivery of the 10 NSO's identified in the NPF", which it was submitted were analogous to the indicative conservation objectives considered by the CJEU in the Terre Wallonne case.

139. It was further submitted that NDP does not come within Art. 9.3 of the SEA Regulations because it does not set the framework for any category of development consent, not even for non-EIA projects. There was no requirement for any screening exercise to be carried out under Art 9 of the Directive because *prima facie* the NDP was not a plan or programme that sets the framework for future development consent for projects.

140. Without prejudice to the foregoing, it was submitted that if it were held that the NDP ought to be subject to SEA under the Directive, such was not required given the complimentary natures of the NDP and the NPF having regard to the fact that an SEA had already been carried out of the NPF and Art. 4.3 of the SEA Directive specifically provided "where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of *inter alia* avoiding duplication of assessment, Member States shall apply Article 5(2) and (3)."

141. Finally, it was submitted that there was no exercise of "plans splitting" in this case, due to the fact that the NPF was concerned with setting a blue print for spatial

planning in Ireland up to 2040, whereas the NDP related to the financing of the NPF over a ten-year period. Therefore, it could not be said that (a) not assessing the NDP represented a division such that the "whole" was not subject to assessment because the NPF is the "whole"; (b) that the NPF is only part of a larger project with the NDP to be carried out subsequently or (c) that one could not exist without the other.

Conclusion

142. The court is satisfied that the NDP does not require SEA pursuant to the SEA Directive. This is due to the fact that it is not a plan or programme within the definition of same given in the Directive. In particular, it does not define the criteria and detailed rules for the development of land or for consents in relation to particular projects.

143. The court is satisfied that it is a budgetary plan which provides that certain designated projects are compatible with the NSO's set out in the NPF and the NDP and as such may be considered appropriate for public funding. This is made clear in the NDP itself which states as follows at para. 1.12:

> "The National Development Plan, as a budget and financial plan, is not part of the physical planning process. Projects funded under the National Development Plan will be subject to planning law and may require strategic environmental assessment. These requirements do not arise in relation to the National Development Plan itself. Each Government Department is responsible for ensuring that its proposed projects meet with appropriate regulatory requirements including those related to planning law and Environmental Impact Assessments."

144. The court is further satisfied that the NDP is a financial or budget plan which falls within the exception to SEA provided for in Art. 3.8 of the SEA Directive. In this regard, the court accepts the finding made by Smyth J. in the *Kavanagh v. Ireland* case in respect of a previous NDP. The court is content to follow that decision and make a similar finding in relation to the NDP in this case.

145. Accordingly, the court is satisfied that the NDP does not require either SEA or AA. As such, the issue of "plan splitting" does not arise.

Overall conclusion

146. Having regard to the findings made by the Court in respect of the six grounds of challenge made by the applicant herein, the Court is satisfied that the applicant has not made out an entitlement to any of the reliefs sought in the statement of grounds. Accordingly, the Court dismisses the applicant's application for relief in these proceedings.