Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

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Introduction

The Office of the Planning Regulator (OPR) is pleased to present the second edition of the '*Learning from Litigation*' bulletin. This bulletin has been prepared to highlight and disseminate key learnings from the continually evolving planning and environmental case law. It provides information on important precedents, court decisions and emerging trends with an overview of noteworthy planning cases.

The case selection for this edition of the bulletin was overseen by a Planning Law Steering Group consisting of nominees from the Law Society of Ireland's Environmental and Planning Law Committee, An Bord Pleanála, the OPR legal services provider Fieldfisher Ireland LLP and the OPR. A nominee has been sought for this Group from the local authority sector via the County and City Management Association (CCMA) and this nominee is expected to join the Group in Q1 2024.

The OPR envisages that the bulletin will be published on a quarterly basis.

Disclaimer: This document is for general guidance only. It cannot be relied upon as containing, or as a substitute for legal advice. Legal or other professional advice on specific issues may be required in any particular case and should always be sought before acting on any of the issues identified.

Clane Community Council v An Bord Pleanála [2023] IEHC 467

Case: Clane Community Council v An Bord Pleanála
Date delivered: 28 July 2023
Citation: [2023] IEHC 467
Judge: Humphreys J.

Background

In this case Clane Community Council (the Applicant) challenged the decision of An Bord Pleanála (the Board) to grant permission for 192 residential units and associated works at a site in Clane, Co. Kildare. Permission for the development was granted by the Board under the now repealed Strategic Housing Development (SHD) procedure provided for in the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act).

The Kildare County Development Plan 2017-2023 (CDP) and the Clane Local Area Plan 2017-2023 (LAP) were adopted in 2017 and were the relevant statutory plans in place at the time of the decision.

Grounds of Challenge

The issues to be decided in the judgment were:
• Material contravention in relation to:

- Settlement policy and housing allocation relating to Clane.
- Car parking requirements.
- Greenfield/edge of town development.

• The Board did not conduct a pre-application consultation procedure in respect of the proposed development as required under Sections 4, 5 and 6 of the 2016 Act.

• Unlawful reliance on pre-application consultations prior to planning permission being quashed.

Material Contravention Relating to Settlement Policy

The Applicant pleaded that the proposed development was a material contravention of the settlement policy and housing allocation for Clane in the CDP.

The LAP provided for an additional housing allocation of 145 dwellings in Clane. The Applicant stated that the proposal to develop 192 residential units would significantly exceed the total amount of residential units allocated to Clane town until 2023 leaving aside other permitted developments in the town.

Humphreys J. highlighted the cumulative issue of the total number of residential units permitted in the area but found that it was not pleaded by the Applicant and so he did not consider the issue in full. However, it was noted that permission had been granted for a total of 726 units in the area which significantly exceeded the provisions in both the CDP and LAP.

The Court found that the Board had a certain amount of latitude to exceed the population provision projection, which is not available to local authorities, but this was not an unlimited latitude. He further stated that the residential provision within the settlement strategy was a lynchpin of the whole development plan process.

The Court stated that there are four "*excuses*" offered by the Board for the material contraventions of the development plan, which are provided for under Section 37(2)(b) of the Planning and Development Act 2000 (the 2000 Act):

1. the proposed development was strategic in nature (Section 37(2)(b)(i));
2. there were conflicting objectives in the development plan (Section 37(2)(b)(ii));
3. permission should be granted having regard to national and regional policy (Section 37(2)(b)(iii)); and
4. permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan (Section 37(2)(b)(iv)).

In relation to the first justification, the Court found that the Board's reliance on the fact that in a housing crisis the provision of more housing is inherently strategic in nature was a political position which the Court could not endorse. It did find that there was nothing about the proposed development that was "*particularly pivotal or prominently important that makes it "strategic" in the sense of Section 37 of the 2000 Act*". The fact that such a development may be defined as strategic for separate purposes elsewhere, such as in the 2016 Act, did not make it strategic in terms of the 2000 Act.

The Court found that the second justification regarding conflicting objectives in the development plan was not well founded as the conflict was regarding densities, not the total number of units that can be provided for Clane. The Court found that the Board could not find any conflict whatsoever in the plan to justify materially contravening it in some way. Contravention of the plan must be in relation to the matter to which the conflict relates in order to come within the meaning and intention of the legislation.

In relation to the third justification, the national and regional policies the Board had regard to, were the Project Ireland 2040 National Planning Framework, the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031, and the Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities December 2022. Humphreys J. found that there was no relationship between the policies and the result being achieved. While all of these policies provide different objectives, there wasn't anything in itself which allowed settlement hierarchies in development plans to be overridden. The Court found that the Board gave no reasons at all for the material contravention in this regard.

Material Contravention of Car Parking Standards

The LAP contained provisions in relation to car parking standards and stated that the local authority will "*normally*" require the provision of the car parking spaces within the curtilage of the development. The Court noted the provisions in the LAP relating to parking and that the only word affording any flexibility was "*normally*". The Board relied on the flexibility in the term "*generally*" as recognised in *O'Donnell v An Bord Pleanála*,[1] but the Court found that discretion is only conferred in exceptional circumstances such as very large complex developments. Here, it was noted that there was nothing complex about the development and the Court presumed that the developer wished to maximise the number of residential units provided at the expense of the car parking standards required in the LAP.

Crucially, it was noted that the Board's Inspector's report never dealt with this issue and there was no finding that this development was complex or warranted a departure from the required car parking provision. The Court found on the basis of its own simply mathematical findings that there should be provision for 376 parking spaces in the proposed development including 137 for duplex apartments, and the development had a shortfall of 36 spaces (or a 26% deficit) with no justification.

1 *O'Donnell v An Bord Pleanála, Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2023] IEHC 381 (Unreported, High Court, 5th July, 2023).

Material Contravention Relating to Greenfield Development
This site was a greenfield site that was earmarked in the CDP for low intensity development towards the edge of the town providing a transition to the countryside. The Applicant submitted that duplex apartment blocks of three stories would not therefore be permitted, and the Board failed to address this. The Court held that this was a failure to take account of a matter that the Board was required to consider.

The Court found that once an Applicant had demonstrated that there is something not adequately considered, the burden falls on the decision-maker to demonstrate evidentially that the point was in fact considered and that the Board failed to do so here. The Court found that '*expressio unius est exclusio alterius*'[2] was the operative principle in this situation. A general reference to considering the development plan/local area plan was not enough, rather specific reference to the relevant provisions was required.

Unlawful Reliance on Pre-certiorari Pre-application Consultation
The decision made on the original application made further to the pre-application process had previously been overturned and that application had not been remitted to the Board. The point being made here was that the pre-application consultation procedure from the original planning application could not be relied upon for the purposes of a further application after the planning permission for the original development proposal was quashed without remittal. The Court stated that an academic argument is sometimes made that a decision-maker is entitled to make a new decision on matters that are quashed without remittal because they should be treated as if the decision were never made. The Court stated that this is a simplistic view that ignores the role of the Courts. It did not acknowledge the Courts' supervisory role and where the Court has the power to remit but doesn't do so, it is unlawful to proceed as if the matter had been remitted.

In this case, the Board and the development proceeded as if there had been remittal to immediately after the pre-application consultation stage. However, while the pre-application consultation stage was prior to what the legislation formally calls the application, it is still an interim step in the overall process. Therefore, it is also quashed along with the decision and the developer should have either asked the Court to remit the matter to after that point or gone back to square one. Furthermore, the Court stated that the order by the High Court overturning the original decision (*order of certiorari*) was against the Board and it therefore fell to the Board to seek clarification. The Court upheld all core grounds pursued and granted an *order of certiorari* quashing the decision of the Board for the reasons set out above.

Key Takeaways

1. Reliance on the provision of more housing during a housing crisis as inherently strategic does not necessarily mean it is a strategic development within the meaning of Section 37(2)(b)(i) of the 2000 Act.

2. In materially contravening the development plan pursuant to Section 37(2)(b)(ii) of the 2000 Act, where the Board relies upon a conflict between different provisions of the development plan, such provisions must be specifically related to the material contravention.

3. Government policies may have differing objectives but they do not necessarily justify the overriding of any contrasting element of the plan as per Section 37(2)(b)(iii) of the 2000 Act.

4. A material contravention of a plan in relation to car parking must be specifically addressed by the Board and reasons given for its justification.

2 Express mention of one thing excludes all others.

5. Once an Applicant has demonstrated that there is something not adequately considered in the application, the burden falls on the decision-maker to demonstrate evidentially that the point was in fact considered.

6. The assertion that a decision-maker is entitled to make a new decision on matters that are quashed without remittal because they should be treated as if the decision was never made is a simplistic view that ignores the role of the Courts. Where the Court has the power to remit but does not do so, it is unlawful to proceed as if the matter had been remitted.

A link to the full Judgment can be found **here**.

Mannix Coyne and Anne Coyne v An Bord Pleanála, Ireland and the Attorney General, and Enginenode Limited [2023] IEHC 412

Case: Mannix Coyne & Anne Coyne v An Bord Pleanála, Ireland and the Attorney General, and Enginenode Ltd
Date delivered: 21 July 2023
Citation: [2023] IEHC 412
Judge: Holland J.

Background

In this case the Court dismissed two judicial reviews challenging decisions of An Bord Pleanála (the Board) to grant permission for a development at a site at Bracetown and Gunnocks, Clonee, Co. Meath comprising:
1. a data centre and associated development.
2. a 220kV substation, two underground transmission cable connections to the national electricity grid and associated development.
(together the Proposed Development).

The Applicants live adjacent to the site and run an equine business at the family home. Meath County Council originally granted permission for the development which was appealed to the Board by the Applicants and others. Originally, the developer sought to generate its electricity onsite via a gas-powered energy centre but, following the appeals, it altered its plans and sought to source its electricity from the national grid.

The Applicants claimed that the Proposed Development would account for 1% of Ireland's CO_2 emissions when complete, requiring 180 megawatts of electricity every year.
The primary focus of the proceedings was on the alleged climate change effects of the alleged indirect Greenhouse Gas (GHG) emissions of the data centre (specifically CO_2) from the generation of electricity to power it.

Grounds 4, 5 and 6 – CO_2 Emissions and Environmental Impact Assessment (EIA)

Ground 4 – CLIMATE ACT 2015 – "HAVE REGARD TO"

The Court agreed with the Notice Party's plea that the Board is required to comply with the obligations placed upon it by the Climate Action and Low Carbon Development Act 2015 (the Climate Act 2015) but there is no more general requirement to have regard to that Act.

Section 15 of the Climate Act 2015 at the relevant time required[3] the Board, in the performance of its functions, to "*have regard to*":

(a) the most recent approved national mitigation plan,
(b) the most recent approved national adaptation framework and approved sectoral adaptation plans,
(c) the furtherance of the national transition objective, and
(d) the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

The Court noted that a decision-maker, obliged to have regard to something, must fully inform itself of that, consult the document and interpret it correctly but that regard generally does not require implementation or compliance. The Court further noted that the burden of regard is light and that "*regard*" and "*consider*" are synonymous.

3 Section 15 has since been amended by the Climate Action and Low Carbon Development (Amendment) Act 2021.

The Court agreed with the Notice Party's submission that what mattered in law was, not whether the Board explicitly mentioned Section 15 or the matters listed within it, but whether, in substance, the Board complied with it.

Whilst noting that the Board's Inspector's reports had mentioned the Climate Act 2015 only once, the Court found that the Inspector's reports and the Environmental Impact Assessment Reports (EIARs) clearly had regard to the central cause of climate change and the focus of the National Transition Objective which is the reduction of Greenhouse Gas emissions. This was found to have been viewed primarily through the Climate Action Plan 2019 and the Court agreed with the Board's assertion that this articulated the National Transition Objective. The Board did not refer to the National Mitigation Plan, however, this was quashed by the time of the Board's decision in 2021 and so there was no such plan to refer to. Therefore, it was concluded that the Board did have regard to the Climate Act 2015 and that ground of challenge was dismissed.

Ground 5 – Environmental Impact Assessment (EIA) and CO_2 Emissions
The Applicants claimed that the Board failed to identify, describe and assess the environmental impacts of CO_2 emissions due to the Proposed Development and that it also failed to do so cumulatively with those of all other approved data centres. Alternatively, it was claimed even if the Board was not obliged to examine its effect together with all data centres, it should consider the effect with another nearby data centre which, together, would have the effect that Clonee would be responsible for producing 2.5% of total national emissions.

It was claimed that the Board's decisions were contrary to Article 94 and Schedule 6 of the Planning and Development Regulations 2001 (the 2001 Regulations) read with Section 171A of the Planning and Development Act 2000 (the 2000 Act) and Annex IV of the EIA Directive, and/or Article 1(2)(g)(iv) of the EIA Directive. These provisions require a description of the aspects of the environment likely to be significantly affected by the Proposed Development in the EIA and require reasoned conclusions. The Applicants therefore alleged that the EIA in this case was insufficient to allow the Board to adequately consider the effects of the Proposed Development.

The Court concluded that there were no direct CO_2 emissions in relation to the Proposed Development and any emissions were secondary and should be considered as indirect effects in the EIA. The EIA, in question, described and assessed such indirect emissions as Scope 2 emissions in the manner required by the EIA Directive. The significance of cumulative effects of the Proposed Development was adequately considered in the EIA.

The Court highlighted the English case of *Goesa*[4] in supporting the position that the acceptability of environmental effect of emissions is a matter for the decision-maker and an EIA itself should focus on the significance of the environmental effect. Where there are no thresholds or criteria set to measure the significance of CO_2 emissions, the acceptability of those emissions is a matter for the decision-maker. In those circumstances, decision-makers can use whatever benchmarks they may deem appropriate in making their decision. Here, the Board had regard to the Government's policy on data centres as set out in Ireland's Enterprise Strategy 2018.

Ground 6 – Environmental Impact Assessment (EIA) and Human Rights and Constitutional Rights
The Applicants alleged that the Board "*breached*" their rights to life and bodily integrity and to a healthy environment consistent with human dignity as guaranteed by Article 40.3 of the Constitution and/or the Board's obligations pursuant to Section 3 of the European Convention on Human Rights Act 2003 (the 2003 Act), and Articles 2 and 8 of the European Convention on Human Rights (the ECHR).

4 *R (Goesa Ltd) v Eastleigh Borough Council* [2022] PTSR 1473.

The Court dismissed the Applicants' claim under the ECHR finding there was no personal right to a healthy environment under this Convention. The Court highlighted the principle identified in *McD v PI*,[5] *Fox*[6] and *BPSG*[7] and found that it is for the European Court of Human Rights to interpret the ECHR and expressed no desire to find a general right to a healthy environment outpacing the European Court of Human Rights. The Court held that the ECHR is binding in Irish law only to the extent it is made so by the 2003 Act and that direct reliance on the ECHR is impermissible given the dualist nature of the legal system with regard to international law.

Furthermore, the Court found there was no evidence that the Applicants would suffer any actual harm from the Board's decision and given that they never raised these issues before the Board, they lacked standing to raise them now. In addition, if any breach of an obligation existed, any remedy would be confined to damages and an order by the High Court overturning the decision (*order of certiorari*) was not available.

The Court further found that the Applicants lacked standing to argue that there was a breach of their constitutional rights by the Board. This was because the issues were not raised before the Board and there was an "*absence of evidence of imminent, clear and adverse effect upon the Coynes in a real and concrete way by reason specifically of the operation of the Data Centre*".

Ground 3 – Omission of Energy Centre and Condition 4

In response to the appeals of the Council's decision, the Notice Party developer requested that the energy centre, that was originally proposed to power the data centre, would be omitted from the Proposed Development by way of a planning condition.

The Applicants' argument was grounded in Article 6(4) of the EIA Directive, which guarantees rights of public participation in EIA. The Applicants also alleged that Condition 4 of the Board's order was void for uncertainty and exceeded the scope for such conditions allowed by the *Boland* principles.[8]

The Court found that the Applicants had not been deprived of any opportunity of public participation to which they were entitled. They had plenty of opportunity to make submissions on the energy centre at various stages.

Ground 1 in Both Sets of Proceedings – Project-splitting

The Applicants claimed that the grid connection and data centre are considered to be one project for EIA purposes but the EIA was impermissibly split into separate EIAs for each. The Court agreed that the data centre and grid connection were a single project requiring assessment as a whole and cited the three *Ó Grianna*,[9] *Daly*[10] and *Sweetman/Ballycumber*[11] judgments as authorities for this.

The Court held however, that: "*in the present case the two EIAs are closely linked in two ways: first, administratively and in substance they were investigated and reported by a single Inspector and in turn conducted simultaneously by the Board; second, the cumulative effects of the Data Centre and the Grid Connection, taken together, were considered. And each EIA preceded both*

5 *McD v PI* [2010] 2 IR 199; [2009] IESC 81.

6 *Fox v Minister for Justice and Equality, Ireland and the Attorney General* [2021] 2 I.L.R.M. 225 §12.

7 *BPSG Limited trading as Stubbs Gazette v The Courts Service et al* [2017] IEHC 209, [2017] 2 IR 343.

8 In *Boland v An Bord Pleanála* [1996] 3IR 435 a planning permission was granted subject to a number of conditions which required the Minister for Marine to agree matters with the planning authority including plans for the management of ferry traffic (i.e. post consent). The Supreme Court found that flexibility in a planning permission is a matter of degree and that technical points or matters of detail could be left over without an abdication of statutory responsibility. A number of factors can be considered by the decision-maker such as the desirability of leaving a certain amount of flexibility to the developer in carrying out a complex enterprise; the fact that the local authority may have practical experience that comes to bear when implementing those conditions; the fact that the matters of detail may largely concern off-site issues; and the potential need for monitoring/supervision of such conditions.

9 *Ó Grianna v An Bord Pleanála* [2014] IEHC 632; [2015] IEHC 248 & [2017] IEHC 7.

10 *Daly v Kilronan Windfarm Ltd* [2017] IEHC 308.

11 *Sweetman v An Bord Pleanála & Ors* [2023] IEHC 89 (High Court (General), Quinn J, 17 February 2023).

the Board's grant of permission for the Data Centre and its approval of the Grid Connection." The Court was therefore satisfied that the project as a whole was subject to EIA to the extent required by the EIA Directive.

The Court found that this challenge essentially amounted to a challenge to the EIAs on their merits and alleged inadequacy of information that was before the Board. The Court referred to *People Over Wind,*[12] *M28 Steering Group*[13] and *Kemper*[14] judgments in stating that it is for the Board to assess the adequacy of information before it and it is entitled to "*curial deference*". Planning bodies, being expert decision-makers with skill, competence and experience in planning matters that Judges do not necessarily have, are entitled to a certain amount of deference in making planning decisions.[15] In this regard such adequacy is only reviewable for irrationality (i.e. the planning body had before it no relevant material that would support its decision).

Key Takeaways

1. The Board is required to comply with the obligations placed upon it by the Climate Act 2015 but there is no more general requirement to have regard to that Act.

2. An EIA itself should focus on the significance of the environmental effect. The acceptability of the information contained therein is a matter for the decision-maker, subject only to review by the Courts for rationality.

3. In the absence of explicit thresholds, decision-makers can use whatever benchmarks they may deem appropriate in making their decision in relation to acceptability.

4. The Courts cannot outpace the European Court of Human Rights in finding a general right to a healthy environment.

5. The Board is entitled to "*curial deference*" in its assessment of the adequacy of the information before it.

The link to the full Judgment can be found **here**.

12 *People Over Wind v An Bord Pleanála* [2015] IEHC 271.

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

14 *Kemper v An Bord Pleanála* [2020] IEHC 601.

15 See for example *O'Keefe v An Bord Pleanála* [1993] 1IR 39.

Case: Four Districts Woodland Habitat Group, BCM Residents Association, Rathcoole Park Residents Association and Forest Hill Residents Association v An Bord Pleanála, Ireland and the Attorney General and Romeville Developments Limited
Date delivered: 21 June 2023
Citation: [2023] IEHC 335
Judge: Humphreys J.

Background

A Court Order was granted overturning the decision of An Bord Pleanála (the Board) to grant planning permission for a Strategic Housing Development (SHD) comprising the demolition of existing residential units and the construction of 204 residential units, a childcare facility and associated works at Stoney Hill Road, Rathcoole, Co. Dublin on 12 November 2020 (the Board's Reference 307698) (the Decision).

The Applicants for judicial review were local groups that objected to the development. South Dublin County Council, the Planning Authority, made a submission to the Board in which they expressed concerns in relation to the proposed development. However, planning permission was granted by the Board on 12 November 2020 following the Board Inspector's recommendation that permission be granted subject to conditions. The Court noted that, in an SHD context, and in light of Section 9(6) of the Planning and Development (Housing) and Residential Tenancies Act 2016 and Section 37(2)(b) of the Planning and Development Act 2000 (as amended), the Board's role was to proceed with the application on the same basis as if the Planning Authority had decided to refuse permission on the grounds of material contravention.

The two core grounds that arose for the Court's consideration were:
1. the domestic law issue of material contravention of the development plan; and
2. the primarily European law issue of screening for Environmental Impact Assessment (EIA).

The Court did not deal with the EU law points in substance on the basis that the matter could be disposed of on a domestic law basis. On the domestic law points, the Court concluded that the Applicant was successful on two arguments made in relation to the issue of material contravention of the development plan and granted an order overturning the grant of permission for the development.

Analysis of the Court

Initially, the Court conducted an analysis of key concepts relevant to its decision, including (i) a review of the broad grounds of judicial review; (ii) an analysis of the question of weight or discretion to be afforded to the decision-maker's view of the law; (iii) the applicable standards of review in the context of judicial review; and (iv) an examination of the approach to material contravention which resulted in the following nine point summary of the law on material contravention of development/local area plans.

1. Like any public law decision, a finding on material contravention, or indeed a failure to make such a finding, is reviewable for illegality or procedural impropriety as well as merely for irrationality.
2. The Court's review of a decision on the basis of illegality or procedural impropriety is generally *de novo* (i.e. on a consideration of the facts for the first time and without reference to

previous decisions) – for example the Court will quash a decision on material contravention like any other public law decision, if the body, being reviewed, failed to correctly interpret or apply the law, failed to follow the framework of analysis or steps of consideration implied or specified in law, or asked itself the wrong question.
3. Where the plan does not confer significant judgement on the decision-maker, a contravention will arise if the decision-maker does not comply with the requirements of the plan as interpreted by the Court.
4. Under the heading of irrationality, if the plan sets out rough parameters for the exercise of judgement which the decision-maker goes beyond, a contravention may arise even if the relevant provision of the plan confers significant judgement on the decision-maker.
5. Also under the heading of irrationality, where no rough parameters are set by the plan but significant judgement is conferred on the decision-maker, a high degree of weight will be given to the evaluative judgement of the decision-maker.
6. Any factual decision, even if highly discretionary, can be reviewed for irrationality. If a conclusion on contravention is one that would be evident to any decision-maker, the Court can act on the basis of that conclusion even if the decision-maker in fact irrationally decided otherwise. Similarly, an otherwise permissible factual decision can be reviewed if an illegality was committed in the process of reaching it.
7. Development plans seek multiple objectives and tension between these objectives is almost inevitable. Where two general provisions of a development plan are in tension, resolving this normally falls to an exercise of planning judgement.
8. Where a general provision is in tension with a specific provision, the specific provision is more likely to be favoured.
9. A material contravention is likely where tension between two specific provisions exists, regardless of which provision the decision-maker prioritises.

Material Contravention of the Development Plan
Five areas of potential material contraventions were raised on behalf of the Applicants and the Court dealt with each of these in turn.

1. Local Area Plan
The development plan set out the land use objective and the objective for the relevant lands here, zoned as RES-N was to "*provide for new residential community in accordance with approved area plans*". The Court equated "*approved area plan*" with "*local area plan*" by reference to the Planning and Development Act 2000, being the legislation under which the development plan was made, and taking the normal understanding of the term "*area plan*". The only issue under this heading identified by the Court was "*whether the development plan intended that it be mandatory that there be such an area plan before there can be development in an RES-N zoned area*". The Court identified that two of the objectives in the development plan envisaged developments of RES-N lands even in the absence of an area plan. While the Applicants claimed that this represented a conflict within the development plan which constituted a material contravention in itself, the Court agreed with the Board in finding that the more logical way to read the development plan here was to interpret the objective of RES-N as meaning that developments have to be in accordance with the adopted local area plan if there is one.

2. Section 28 Guidelines
The Court noted that, despite the fact the Applicants had included this point under the heading of material contraventions, their actual plea was that the Board was obliged to have regard to the guidelines and/or justify why it departed from the guidelines. The Court stated that these guidelines are subject to a '*have regard to*' obligation and were referred to expressly by the Board, meaning the Applicants were required to show that the guidelines were not considered. The Court set out that having regard to something does not, in and of itself, result in a requirement to give reasons for not accepting that something. Nevertheless, the Court identified that reasons were

provided by the Board's Inspector which, although the Court took the view that these reasons may not be entirely correct in law, were sufficient to discharge the Applicant's plea on the basis that the complaint made by the Applicant was not that the reasons given were incorrect but instead that there were no reasons given.

3. Attenuation Tanks

The development plan set a requirement for all new developments to incorporate Sustainable Urban Drainage Systems (SUDS), subject to the caveat that approval may be given to depart from this in some exceptional cases and at the discretion of the Planning Authority. The development plan stated that these departures would only be considered as a last resort. The developer made a case to depart from the default as set out in the development plan, noting that key SUDS features set out in the development plan had been considered but were not possible to be incorporated on the site. The Court stated that the approval of the developer's application, which gave explanations for the incompatibility of the SUDS features with the site, constituted an "*implicit acceptance of the developer's material*" and triggered the discretion provided for in the development plan as opposed to an implicit contravention of the development plan.

4. Density

By stating that an objective of the development plan was to be carried out "*in accordance*" with the *Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas* (the Guidelines), the Council increased the status of the Guidelines from one of "*have regard to*" to a duty to be "*in compliance*". While the wording of the pre-existing guidelines remained unchanged, the Court found that the legal effect of the Guidelines had been elevated by the development plan, noting that just because the Guidelines were adopted as guidelines did not mean that they could not be granted higher status by a development plan. In defending this point, the Board relied on general statements in relation to higher density developments. However, the Court pointed out that general phrases regarding higher densities could not overrule specific articulations of particular densities in defined contexts. The Guidelines provided for a range of 20 to 35 dwellings per hectare. The Board contended that this density objective was "*framed in broad terms*" which left it to the Board to exercise its planning judgement as the decision-maker. However, the Court found that the requirement for the densities to accord with the Guidelines was a clear provision and, insofar as the Board had a margin of appreciation in this context, it was to be exercised within the range specified in the Guidelines. The requirements of the development plan were sufficiently specific in setting parameters for the Board so as not to confer appreciable planning judgement to go outside of these parameters. The Court stated that there is an autonomous duty on the decision-maker to comply with the law regarding material contravention which implies an obligation to consider whether the application materially contravenes the development plan.This applies regardless of whether the issue is raised in submissions. While the Board's Inspector "e*ffectively conceded that there was a contravention*", there was a failure by both the Inspector and the Board to consider the materiality of that contravention, resulting in a failure to give lawful consideration to the issue. Ultimately, the Court found that there was a contravention and the disparity between the range provided in the Guidelines and the actual density of the development was regarded as a material contravention.

5. Hedgerows and Trees

A total of 674 linear metres of hedges were to be removed from the site. The Planning Authority took the view that the development should be redesigned in order to reduce the extent of hedgerow removal. The Court observed that hedgerows are not "*fungible*" in the sense that they can easily be removed and replaced, meaning mitigating measures did not have the same value in replacing the losses as may apply to trees as hedgerows have a longer lifespan. The Court stated it was impossible to see how the proposed removal of nearly 50% of the hedgerow on the site could be said to protect and enhance the biodiversity value and ecological function of the green infrastructure network, reduce fragmentation or restrict development that would fragment

or prejudice the network (a feature of the development plan) in circumstances where hedgerows are defined as being part of the network. While the Court did consider the Inspector's view that the overall impact would be minimal, the Court noted that this minimal impact would only occur over time and stated that a contravention can still be material even if there may be mitigating measures put in place at a later stage. The removal of hedgerows and trees on site was significant and, as such, the limited discretion conferred by the development plan was surpassed by the Board in favour of the desirability of the efficient use of the site. While the desirability of the efficient use of the site was a feature of the development plan, the Court found it was not one which should have been relied upon to such an extent in the Board exercising its discretion. The Court held that a material contravention was demonstrated under this heading.

Key Takeaways

1. General rules do not prevail over specific rules and the general does not detract from specifics. The rule of *generalia specialibus*, a Latin maxim used for statutory interpretation, was referenced by the Court in this regard. In the context of this case, it dictated that general statements regarding the benefits of higher density developments could not overrule explicit statements regarding density in defined contexts.

2. Judicial review is a process of examining the decision that was made, not writing a new one. While the Guidelines did note, at one point, that higher densities are appropriate in certain locations in relation to small towns and villages, this was not relied upon by the Board in its decision so it could not be a basis to uphold the permission here.

3. The legal effect of Section 28 guidelines can be elevated from that of "*have regard to*" by the relevant development plan. Where an objective of a development plan is to be carried out "*in accordance*" with guidelines this elevates the legal effect of guidelines to a duty to be in compliance with them.

4.A decision-maker is obliged to comply with the law regarding material contravention regardless of whether the issue in question is raised in submissions.

5. Mitigation measures may not be sufficient where they will only take full effect at some point in the future. Here, hedgerows were considered to have a far longer lifespan than trees. Accordingly, measures mitigating the removal of hedgerows would take much longer to take full effect.

A link to the Judgment can be found **here**.

Case: Ironborn Real Estate Limited v Dún Laoghaire-Rathdown County Council
Date delivered: 31 July 2023
Citation: [2023] IEHC 477
Judge: Mulcahy J.

Background
On 5 December 2011, Ironborn Real Estate (the Applicant) was initially granted planning permission (the parent permission) by An Bord Pleanála (the Board) for a mixed-use development consisting of 355 residential units as well as office units, retail units, a créche and a community/ sports facility on lands at Murphystown and Woodside, Stepaside, Dublin 18. The parent permission was granted for a period of ten years and this judgment concerns the decision of Dún Laoghaire-Rathdown County Council (the Respondent) to refuse to extend the duration of the parent permission. In May 2013, construction was commenced on foot of the parent permission and 234 residential units were constructed in what was known as "*Sectors 1 and 2*".

A further permission was granted on 16 December 2016 that permitted amendments to the proposed development, authorising revisions to Sector 3 which provided for the development of 243 apartments and duplexes, a community building, basement parking and site works. In total there were 263 residential units that had not been constructed (243 units granted under the 2016 amendment permission) together with one apartment block in Sector 1 (consisting of 20 residential units permitted under the parent permission).

The Appropriate Period for a Planning Permission and Extension of the Appropriate Period
Section 40 of the Planning and Development Act 2000 (the 2000 Act) provides that a planning permission shall cease to have effect upon the expiry of "*the appropriate period*", the default of which is five years. However, Section 41 of the 2000 Act provides that a longer period of up to ten years can be specified. As noted above, the parent permission was originally granted by the Board for a period of ten years. Section 42 of the 2000 Act provides that an application may be made to the relevant planning authority to extend the appropriate period. The planning authority is required to grant the extension if the criteria specified in Section 42 are satisfied.

On 6 December 2021 an application for an extension of duration of the appropriate period of the parent permission was lodged by the Applicant pursuant to Section 42 of the 2000 Act which related to 263 residential units that remained to be constructed as permitted by the parent permission as amended by the amendment permission. On the same day, an application was also submitted for an extension of duration of the amendment permission. These proceedings solely concerned the application for the extension of the duration of the parent permission.

On 4 February 2022 the Respondent asked the Applicant to address two issues in a request for further information in relation to Section 42(8) and Section 42(1)(a)(i)(IV) of the 2000 Act. While the Applicant responded to this request, the Respondent ultimately refused the application for an extension on the grounds that:
(1) an Environmental Impact Statement was required as the parent permission exceeded the threshold under 10(b)(iv) Part 2 of Schedule 5 of the Planning and Development Regulations 2001-2022 for which a development is likely to have significant effects on the environment and thus an extension was contrary to Section 42(8) of the 2000 Act; and

(2) The Respondent was not satisfied that the development would be completed within a reasonable time and thus the grant of an extension did not meet the criteria set out in Section 42(1)(a)(i)(IV).

Preclusion on Extension if an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA) is Required

Section 42(8) of the 2000 Act states that:

"*A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned*."

The Court, having examined the applicable rules of statutory interpretation,[16] noted that the first port of call was to consider the wording of the Section itself.

The Applicant, emphasising the use of the phrase "*the proposed extension concerned*", contended that Section 42(8) only precludes an extension where an EIA or AA would be required for the works remaining to be completed on foot of the planning permission sought to be extended. The Court had difficulty with this interpretation on the basis that Section 42(8) does not make reference to '*works*' or '*development*'. The Respondent interpreted this Section as applying to the entire development which had been granted permission that was now the subject of the extension application. While the Court agreed that the term '*extension*' referred to extension of '*the appropriate period*', there remained question marks over what '*extension*' actually referred to, with the Court pointing out that "*an EIA is an assessment of the environmental effects of development for which authorisation is sought, not of the planning permission itself*".

The Court noted that the words "*in relation to*" are generally regarded as "*wide words*" in the absence of some indication to the contrary and, therefore, in this context *"in relation to*" could be said to include "*the development the subject of the works*". However, this alone did not cast any further light on the correct interpretation of Section 42(8). The Court went on to consider the phrase "*would be required*", agreeing with the Applicant that this phrase imposed a requirement on a planning authority to '*screen*' the application to determine whether an EIA would be required.

The Court found it necessary to consider what the decision the subject of the extension application would authorise. In doing so, the Court sought to understand the legal effects of the expiry of a planning permission which an extension seeks to avoid. Section 40(1) of the 2000 Act was instructive in this regard, with Section 40(1)(b) dictating that upon expiry, the planning permission does not cease to have effect as regards any works carried out on foot of the permission before it expired. As a result, the Court found that "*an extension of a permission has no legal effect in relation to the 'planning status' of already completed works*". The Court did note that Section 40(1) is subject to the provisions of Section 40(2) which provides that notwithstanding the expiry of the appropriate period, a planning permission does not cease to have effect in respect of certain structures, works, services, roads, or open spaces ancillary or incidental to the development as granted. This is in order to address the risk of developers '*picking and choosing*' which parts of a development to construct (e.g. only constructing the profitable portions of the development, but omitting those intended for the benefit of the development). The Court's view was that any extension granted authorises the completion of works still to be done, not the works which have already been completed.

Ultimately, the Court found that Section 42(8) could readily be interpreted as precluding an extension to a permission where an EIA would be necessary for the works left to be completed under the planning permission. The planning authority in considering an extension application

16 As set out by *Murray J in Heather Hill Management Co. CLG v An Bord Pleanála* [2022] IESC43, [2022] 2 ILRM 313.

must screen the remaining proposed development to determine whether an EIA would be required for that remaining development. The alternative would be for a developer to make a new application for planning permission for the uncompleted portion of the previously permitted development. The Court struggled to see why screening for the purposes of Section 42(8) should have a wider scope than that of a new application for planning permission.

The Court also considered the requirements of EU law in this area, in particular *Friends of the Irish Environment Ltd v An Bord Pleanála Case* C-254/19, concluding that "*a project for which an EIA is mandatory or has been 'screened in' can be changed or extended without requiring a further EIA, if the change or extension will not have significant adverse effects on the environment*" and that this was consistent with the Court's interpretation of domestic law in this area. The Court found that the EIA and Habitats Directives both required '*prior*' assessment and authorisation of the projects to which they apply, and therefore there was no prohibition on an extension of duration where the overall development (i.e. rather than just the uncompleted portion) requires EIA or AA and no requirement for the planning authority to consider the effects of the development already authorised and completed. There are no temporal limitations on development consents under the EIA or Habitats Directives, but there is EU law as to how a change or extension to a project should be assessed.

Therefore, the Court concluded that the Respondent erred in its conclusion that it could not consider the application for an extension on the basis that Section 42(8) applied. The assessment was required not by reference to the whole of the development the subject matter of the parent permission, but rather by reference only to the environmental effects of the uncompleted development (and any additional environmental effects to which the change in completion date may give rise).

Whether the Development Would be Completed Within a Reasonable Time
Section 42(1) sets out that a planning authority shall extend the period of the permission in question provided that each of the requirements listed in Section 42(1)(a) are complied with, which include the requirement in Section 41(1)(a)(i)(IV) that the authority is satisfied that "*the development will be completed in a reasonable time*".

The Applicant contended that Section 42(1)(a)(i)(IV) only requires the Applicant to show that the development is readily capable of being completed within a reasonable period of time, and that the Respondent had erred in imposing a requirement that the works would actually be completed within a reasonable time. The Applicant contended that this threshold would be virtually impossible to satisfy in light of the inherent uncertainties in carrying out any development. The Respondent argued that it is necessary that an applicant for an extension must at a minimum satisfy the planning authority of its intention to complete the development within a reasonable time.

The Court disagreed with the Applicant's suggestion that the Respondent would have to be satisfied that the development would not be completed within a reasonable time in order to determine that this requirement was not satisfied. Referring to *Lackagh Quarries Ltd v Galway County Council* where Irvine J., considering a refusal of an extension to a planning permission for a quarry, stated "*The onus is on the applicant to satisfy the planning authority that the development 'will be completed within a reasonable time'. It is not a theoretical question permitting of an aspirational answer."*

Here, the Court rejected the Applicant's submission that the provision as interpreted set an impossible threshold, finding that it merely required that the Respondent is satisfied that the development will be completed. In circumstances where the Respondent considered that there was an absence of evidence of such an intention on the part of the Applicant, the Respondent

concluded that it was not satisfied that the development would be completed. The Court noted that this clearly inferred that had the Respondent been satisfied that the Applicant intended to complete the development then, where it agreed that the development could be completed within the time sought, the Respondent would have considered that the requirement set out under Section 42(1)(a)(i)(IV) was met.

The Court agreed with the Respondent's conclusion that the Applicant sought this extension in order to keep its options open pending the outcome of other proposals it had on the table, concluding that it was not unreasonable or irrational for the Respondent to reach the conclusion that it did.

Consequences for the Respondent's Decision

As the Court had upheld the Respondent's decision to refuse on one of the two main issues (but of course had found against the Respondent in respect of its conclusion on the application of Section 42(8)), the Court did not overturn the Respondent's decision. The Court relied on earlier caselaw to the effect that the reason for refusal in respect of which the Applicant's claim was rejected would have been dispositive of its application. There was nothing in the invalid reason on Section 42(8) that tainted the valid reason. Each issue was a '*stand-alone*' issue and the Respondent's reasons were based on entirely separate considerations.

Key Takeaways

1. An extension to the appropriate period of a planning permission relating to a development which has commenced will not be granted where the remaining uncompleted works are such that an EIA (or AA) would be required.

2. Difficulties in obtaining an extension cannot be used as an opportunity for developers to '*pick and choose*' what elements of a development can be completed. While Section 40(1)(b) dictates that upon expiry the planning permission does not cease to have effect as regards any works carried out on foot of the permission before it expired, this is subject to the provisions of Section 40(2) which prevent developers from choosing only to construct the profitable elements of a development and omitting those intended for the benefit of the development.

3. An extension to the appropriate period of the planning permission may not be granted in circumstances where the relevant planning authority is not satisfied that the applicant intends to complete the development. A developer may not use an extension as a '*plan B*' while exploring other options.

A link to the Judgment can be found **here**.

These case summaries were prepared by Fieldfisher Ireland LLP Solicitors (Zoe Richardson, Jonathan Moore, Rory Ferguson, Patrick Reilly, Stephen Geoghan, Ann Keating, Craig Farrar and Evan O'Brien) on behalf of the Office of the Planning Regulator.

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