

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 369
[2020 No. 830 JR]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF
THE PLANNING AND DEVELOPMENT ACT 2000**

BETWEEN

SINEAD KERINS AND MARK STEDMAN

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DBTR-SCR1 FUND, A SUB FUND OF CWTC MULTI-FAMILY ICAV

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Monday the 31st day of May, 2021

1. The site to which this application relates is situated in Dublin's south inner city, with the South Circular Road to the south, Rehoboth Place to the southwest, the Coombe Hospital to the west, and St. Teresa's Gardens and Donore Avenue to the east.
2. The Dublin Development Plan 2016 - 2022 was adopted by the city council on 23rd September, 2016 and came into force on 21st October, 2016.
3. The area is designated in the Development Plan as a Strategic Development and Regeneration Area (SDRA), with the title "St. Teresa's Gardens and Environs SDRA 12". The overall SDRA includes two former industrial sites previously operated by Player Wills and Bailey Gibson.
4. A non-statutory development framework plan was prepared by the city council in July 2017 to implement SDRA 12. This included a proposed park measuring 0.2 hectares within the Bailey Gibson site.
5. The developer here is named in the proceedings as a particular sub-fund of a specified Irish Collective Asset-Management Vehicle (ICAV). The parent body, the ICAV, has legal personality under s. 15 of the Irish Collective Asset-management Vehicles Act 2015, and under s. 35 of the Act the sub-fund has separate liability, but is not in itself a body corporate. On the face of things, therefore, the applicant for permission, and thus the notice party here, should have been the ICAV trading as the sub-fund, but that is perhaps more for future reference because no issue was taken on that by anybody in the proceedings thus far.
6. A masterplan for the area was prepared jointly by the notice party's advisers (Hines) and the city council, dated January 2020. That was screened for Appropriate Assessment (AA) by the developer's planning consultants on 15th January, 2020. It was not subjected to Strategic Environmental Assessment (SEA). The masterplan includes the removal of the public open space from the Bailey Gibson site to be provided elsewhere at a later stage of development with a financial contribution from the developer.

7. The developer engaged in pre-planning consultation on 21st January, 2020 and formally applied for permission on 25th May, 2020 under s. 4(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016. That was the first of four planning applications envisaged in relation to the site and environs within the masterplan.
8. The senior planning inspector of An Bord Pleanála recommended refusal of the application on 20th August, 2020. The board, however, disagreed, and granted permission on 14th September, 2020. The permission authorised a “Build to Rent” development allowing for the demolition of all existing structures on site and the construction of 416 dwellings in five blocks ranging from 2 storeys to 16 storeys as well as tenant amenities, communal open space, childcare facilities, commercial floor space, an ESB substation and associated works such as parking places.
9. The primary relief sought in the proceedings is *certiorari* of the board’s decision. The applicants also seek a declaration that s. 28 of the Planning and Development Act 2000 is invalid as contrary to EU law, specifically the habitats directive 92/43/EEC and the Environmental Impact Assessment (EIA) directive 2014/52/EU, on the grounds that mandatory guidelines under that section interfere with the process of appropriate assessment or environmental impact assessment.

Facts regarding heights of the proposed buildings

10. The material contravention statement furnished with the application identifies the heights of the various buildings as follows:
 - (i). BG1 - 11 storeys - 57 metres;
 - (ii). BG2 - 16 storeys - 72 metres;
 - (iii). BG3 - 5 storeys - 38 metres;
 - (iv). BG4 - 4 storeys - 34 metres; and
 - (v). BG5 - 3 stories - 31 metres.
11. The statement expresses the heights in terms of Ordnance Datum (OD) to the parapet, that is the roofline of the top of the building minus plant on top of the building. Reference to OD currently is nowadays normally, and is here, a reference to Malin OD which reflects the mean sea level at Portmoor Pier, Malin Head, County Donegal as measured in the 1960s. That replaced an earlier Poolbeg OD which referred to the low water of spring tide at Poolbeg lighthouse on 8th April, 1837. I am told that some large developments such as factories may on occasion employ their own local datum.
12. Ground level at the site is OD + 20.8 metres, so subtracting that, only two buildings are mid-rise or higher as that term is defined in the development plan (chapter 16, p. 320), meaning between 24 and 50 metres in the inner city area. This is consistent with the Chief Executive’s report at p. 16. Thus, the outcome of the permission was for three low-rise buildings, one mid-rise and one high-rise, although the latter only marginally so.

Domestic law issues

13. I propose to first examine the domestic law issues to ascertain whether any entitlement to relief has been made out under any of the headings pleaded.

Alleged unlawful regard to pre-consultation discussions

14. Core ground 1.1 complains of unlawful regard having been had to pre-consultation discussions. However, reference to those discussions in the papers before the board does not equate to unlawful reliance on those discussions. Generally, such reference is merely a statement of fact and should not be read as purporting to rely on the pre-planning consultation opinion. That is merely referred to in the Chief Executive's report rather than relied on. The fact that the council and developer agreed a masterplan is a separate matter which I deal with further below.

Alleged error in material contravention decision regarding open space

15. At core grounds 3.1 and 3.2, the applicants allege an error in terms of material contravention of the development plan regarding the provision of public open space. The development plan itself however provides that "[p]ublic open space will normally be located on-site, however in some instances it may be more appropriate to seek a financial contribution towards its provision elsewhere in the vicinity" (para. 16.10.3). That does not amount to a sufficiently definite criterion which could be said to have been breached here. Paragraph 15.1.1.15 of the plan envisages that at least 20% of SDRA 12 would be maintained as public open space, but that is an overall requirement which does not render a particular application regarding a portion of the SDRA a material breach of the plan.

Reliance on a masterplan inconsistent with SDRA 12

16. Core ground 3.3 alleges that the board erred in relying on the masterplan because it had not been subject to SEA and because it was not in compliance with SDRA 12. I will deal below with the SEA aspect, but as far as inconsistency with SDRA 12 is concerned, the situation is that while the board relied on the masterplan more than the applicants would have liked, it was not precluded from doing so. That comes within the scope of planning judgement. I do not think that its reliance on the masterplan adds anything to the material contravention argument which I deal with separately.

Alleged inconsistency regarding zoning in respect of open space

17. Core ground 4.1 complains that the decision is inconsistent with the zoning. There are three separate zonings involved in the site. The eastern part is zoned Z14 which is "[t]o seek the social, economic and physical development and/or rejuvenation of an area with mixed use, of which residential and 'Z6' would be the predominant uses". Z6 in turn refers to a zoning objective "[t]o provide for the creation and protection of enterprise and facilitate opportunities for employment creation." The western part is zoned Z4, the objective of which is to "provide for and improve mixed-services facilities." A final part of the site is zoned Z1, which is "[t]o protect, provide and improve residential amenities". There is no requirement for provision for open space in the Z14 objective; and while the Z1 objective does refer to open space, it does not have the effect that any individual development must incorporate open space. Neither does objective Z4 require such an

outcome. Thus it has not been established that there was a breach of the zoning by reason of the lack of open space within the particular development.

Alleged invalidity of condition 22

18. Core ground 5.1 alleges that condition 22 is invalid because it makes provision for leasing of units to the housing authority rather than compliance with Part V of the 2000 Act in the normal way. However, pp. 30 to 31 of the apartment guidelines of March 2018 provide for the leasing of apartment units to local authorities as an alternative to the acquisition or transfer of units, and recommends that agreement be arrived at between the planning authority and the developer as to the best way to discharge the Part V obligations. Section 96(3)(b)(iva) of the 2000 Act provides that a Part V condition can be satisfied by the leasing of units to a housing authority. These provisions furnish sufficient authority for the condition, and no illegality has been demonstrated under this heading.

Alleged invalidity of conditions 2 and 3

19. Core ground 6.1 complains that conditions 2 and 3 are void because they are a restriction on the right of alienation of apartments. However, the Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities (2018) provide expressly for the imposition of such conditions in relation to build to rent development (see SPPR 7) which provides a sufficient basis for conditions of this nature.

Alleged contravention of development plan regarding building heights

20. Core ground 11.1 complains that the board made a fundamental error in the assessment of the issue of the tall buildings and building height. The issue is also referred to in a number of the more particular sub-grounds pleaded. There seem in effect to be two main elements to the complaint: firstly, a contention that there was an erroneous decision regarding the *number* of tall buildings and that the decision that this was not in material contravention of the development plan was incorrect; and secondly, an erroneous decision to permit a material contravention regarding the *heights* of those tall buildings.

21. As regards the first point, which is referred to at sub-ground 3.4, the applicants have unfortunately been labouring under the misapprehension that the heights referred to in the material contravention statement are heights from ground level, whereas in fact they are heights from OD. Thus there is no contravention in terms of the *number* of mid-rise buildings or higher.

22. Given that one of the two mid-rise or higher buildings is above the 50 metre limit envisaged, there *is* a material contravention as regards the building heights, as the board found. In terms of that problem, the board applied SPPR 3 of the Urban Development and Building Heights: Guidelines for Planning Authorities (December 2018). Because those guidelines expressly permit material contravention on such a basis, I do not see any illegality as having been demonstrated here.

Inadequacy of plans and particulars

23. Core ground 11.2 alleged inadequacy of the plans and particulars, but counsel informed me that this was not being pursued.

European law issues

24. As the domestic law grounds all fail, I now turn to the EU law issues.

Alleged breach of the EIA directive regarding expertise

25. Core grounds 2.1 and 2.2 allege breach of the EIA directive, and in particular that the board “did not have the appropriate expertise which is now required under Council Directive 2014/52/EU”. Unfortunately for the applicants here, I do not think that the expertise argument has been sufficiently developed on the papers to form a basis to quash the decision. For good measure, that point is not referred to in the written submissions at all.

Alleged breach of habitats directive

26. Core ground 9.1 alleges a breach of the habitats directive and in particular a failure to consider the hydrology and hydrogeology of the lands and the alleged direct hydrological continuity between the development site and the Hines/Council masterplan area extending across SDRA 12 and the River Poddle. However, as I noted in *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021), points of this nature have to be grounded in evidence that was before the decision-maker. The alleged hydrological connection was not in evidence before the board. so this allegation constitutes new evidence that should not be entertained now. The first the board heard about it was in the statement of grounds. Calling appropriate assessment “jurisdictional” does not get over this problem. The habitats directive could be a *locus classicus* of the sort of detailed technical and scientific examination that needs to be carried out by the decision-maker and not for the first time by the court. Even accepting that AA is technically jurisdictional, not all jurisdictional objections can be saved for the judicial review. Scientific evidence relating to environmental effects should be before the decision-maker if an applicant wants to rely on it later, as *Reid No. 1* makes clear.

Alleged non-transposition of the SEA directive

27. Core ground 10.1 alleges failure to transpose the SEA directive 2001/42/EC. That was never going to succeed because no declaratory relief was sought on foot of that ground. A ground without the appropriate relief is as futile as seeking a relief without grounds – you need both. Ultimately the applicants decided not to pursue the point and sought its deletion from the statement of grounds.

Reliance on a masterplan not subjected to SEA

28. A masterplan is expressly envisaged in the development plan, para. 2.2.8.1 of which states that “Dublin City Council will prepare area-specific guidance for the strategic development and regeneration areas (SDRAs) and key district centres, using the appropriate mechanisms of local area plans (LAPs) and schematic masterplans and local environmental improvement plans (LEIPs).” The development plan was subject to a SEA, but the masterplan was not. The making of a development plan is a statutory obligation (s. 9(1) of the 2000 Act).

29. There are multiple references to the masterplan in the decision. It is referred to 68 times in the inspector’s report, and compliance with the contribution to give effect to the masterplan is made into a binding condition at condition number 24.

30. Giving effect to the masterplan would amount to a deviation from the development plan in the sense that it expressly envisages a different set of developments, particularly in terms of heights.
31. In opposition to the argument that SEA should apply, it is submitted in essence that the masterplan was not adopted by a local authority, and is not in any event binding.
32. In all the circumstances, it seems to me that there are two referable questions of EU law arising as follows.

The first question is: does art. 2(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... as well as any modifications to them ... which are subject to preparation and/or adoption by an authority at national, regional or local level..." includes a plan or programme that is jointly prepared and/or adopted by an authority at local level and a private sector developer as owner of adjacent lands to those owned by a local authority.

The second question is: does art. 3(2)(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in annexes I and II to directive 85/337/EEC..." includes a plan or programme that is not in itself binding but which is expressly envisaged in a statutory development plan which is binding, or which proposes or envisages in effect a modification of a plan that was itself subject to SEA.

33. It seems to me that these questions are not *acte clair* or *acte éclairé* having regard to CJEU caselaw, concern interpretation rather than application of EU law, and are necessary for the decision in that I have rejected the domestic law points, and in the circumstances I would propose to exercise my discretion to refer them to the CJEU.

Alleged breach of EIA directive arising from guidelines under s. 28 of the 2000 Act

34. Core grounds 7.1 and 8.1 allege that s. 28 of the 2000 Act is invalid or fails to transpose EU law or alternatively that the board erred in the manner in which it relied on and applied s. 28 guidelines in circumstances where this "fettered their discretion to act as a competent authority for the purposes of the Directive."
35. Initially the question of validity was modularised for later treatment, but both the applicants and the State did actually address the issue in written submissions so I revisited the earlier direction in order to allow the matter to be argued at the hearing.
36. The applicants take objection to s. 28(1C) of the 2000 Act which provides that where the guidelines contain specific planning policy requirements, the board shall comply with those requirements. The board argues that the guidelines here are permissive, which is

true in one sense that they do not mandate a decision, but allow the grant of permission. But the designation "permissive" is not totally accurate in the sense that the guidelines preclude a conclusion that the effect on the environment does not leave the option of grant open to the decision-maker. That raises a point that is somewhat broader than these particular guidelines.

37. The issue is not really a transposition issue because the State is not required to expressly address every interpretative question that arises out of a directive. Article 288 TFEU provides that a directive is binding in respect of "the result to be achieved" ... but shall leave to the national authorities the choice of form and methods." That does not automatically have the effect that every word of every directive, still less every interpretative consequence of every such provision, has to be set out word-for-word. That is not to encourage divergence, and normally the safest course is to stick to the word-for-word approach. Here, the transposition complaint is that an unstated implied meaning of the directive that has yet to be pronounced by the CJEU has not been set out expressly. That is unlikely as a transposition argument. Whether this is likely to be going anywhere as a point about validity depends on whether the legislation can be interpreted as not cutting across the EIA directive, if that is what that directive requires, which in similar situations is normally possible albeit not always. But that does not take from the point as an interpretation argument.
38. In reply, counsel for the applicants withdrew the point insofar as it related to the habitats directive which is presumably an acceptance that s. 177V(3) of the 2000 Act answers the problem in that context. The core issue really then is one of interpretation and of whether the EIA directive precludes regard being had to national mandatory policies. A particular kind of policy comes into focus here, because para. 3.1 of the 2018 guidelines baldly states that "it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility."
39. It is clear that that approach, which in turn animates the binding SPPRs later in the document, is based on government housing policies and not on purely environmental considerations. That seems to me to be the most acute practical aspect of the grounds pleaded. The applicants of course maintained their objection to mandatory guidelines on any issues, environmental or otherwise, but it seems to me that the facts here more particularly raise the issue of the lawfulness of mandatory guidelines that have their origin in policies motivated primarily, albeit not exclusively, by non-environmental considerations.
40. The applicants contend that the outcome was "pre-determined" by the guidelines. That might be over-cooking the point a little, but maybe not by much. One can perhaps see that by comparing the board decision with the inspector's report which placed more emphasis on environmental considerations.

41. Having regard to the foregoing, it seems to me that a third referable question of EU law arises as follows:

The third question is: whether art. 2(1) of directive 2011/92/EU has the effect of precluding regard being had by the competent authority in the process of environmental impact assessment to mandatory government policies, in particular those which are not based exclusively on environmental criteria, being policies that define in certain circumstances situations where a grant of permission is not to be ruled out.

42. In the circumstances I would propose to refer that question also, for similar reasons to those applying to the earlier questions.

Order

43. In the light of the foregoing, I will in principle make a reference to the CJEU in relation to the referable questions as set out above subject to a formal order for reference, and will direct the parties to facilitate that in accordance with the procedure set out in *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021), and along the lines of the various specific directions and timescales provided for in that case.