

APPROVED

[2021] IEHC 451



THE HIGH COURT
JUDICIAL REVIEW

2019 No. 648 JR

BETWEEN

SUAIMHNEAS LIMITED

APPLICANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

EMER O'SULLIVAN

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 July 2021

INTRODUCTION

1. This judgment addresses the circumstances in which it is lawful to grant *retention* planning permission. The jurisdiction of a local planning authority to grant retention planning permission is restricted as a result of legislative amendments introduced under the Planning and Development (Amendment) Act 2010. These amendments were necessary in order to comply with a judgment of the Court of Justice of the European Union.

NO REDACTION REQUIRED

2. In brief outline, a local planning authority is now precluded from considering an application to retain unauthorised development in circumstances, *inter alia*, where the development concerned had been carried out in breach of certain requirements of the Habitats Directive (Directive 92/43/EEC).
3. There is currently an application for retention planning permission pending before Kerry County Council (“*the Planning Authority*”). The dispute between the parties centres on whether the Planning Authority acted unlawfully in purporting to serve a request for further information in respect of this planning application, rather than rejecting the application outright and returning it to the developer.
4. The resolution of this dispute requires consideration of the correct interpretation of section 34(12) of the Planning and Development Act 2000 (as amended) (“*PDA 2000*”). It also necessitates consideration of the legal significance of an earlier decision of An Bord Pleanála to the effect that the development concerned could not be screened out for the purposes of the Habitats Directive.

DESCRIPTION OF THE PARTIES

5. The following shorthand will be used, where convenient, to describe the parties to the proceedings. The applicant for judicial review, Suaimhneas Ltd, will be referred to as “*the Objecting Party*”. The applicant for retention planning permission, Emer O’Sullivan, will be referred to as “*the Developer*”. (The use of the term “applicant” to describe either of these parties will be avoided as it is apt to lead to confusion between (i) the applicant for judicial review, and (ii) the applicant for planning permission). Kerry County Council will be referred to as “*the Planning Authority*”.

LEGISLATIVE CONTEXT

6. The PDA 2000 imposes a general obligation to obtain planning permission *prior to* the commencement of “development” as defined. Where development has been carried out without planning permission, it is, in principle, open to the developer to apply for planning permission *ex post facto* to “retain” the unauthorised development. Such a planning permission is referred to as a “retention” permission.
7. The circumstances in which retention planning permission may be obtained have been restricted as a result of amendments introduced to the PDA 2000 under the Planning and Development (Amendment) Act 2010. Section 34(12) of the PDA 2000 (as amended) now provides as follows.

“(12) A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—

- (a) an environmental impact assessment,
- (b) a determination as to whether an environmental impact assessment is required, or
- (c) an appropriate assessment.”

8. The steps to be taken by a planning authority where it refuses to consider an application are prescribed as follows under section 34(12B).

“(12B) Where a planning authority refuses to consider an application for permission under subsection (12) it shall return the application to the applicant, together with any fee received from the applicant in respect of the application, and shall give reasons for its decision to the applicant.”

9. The effect of these provisions is to preclude the grant of retention planning permission where the unauthorised development had been carried out in breach of certain requirements of the Environmental Impact Assessment Directive (“*EIA Directive*”)

(Directive 2011/92/EU) and the Habitats Directive (Directive 92/43/EEC). The present proceedings are concerned only with an alleged breach of the Habitats Directive, so the discussion which follows will be confined to that Directive.

10. (There is special provision made under section 34(12A) in respect of unauthorised development within the curtilage of a dwelling house, but this is confined to the EIA Directive and thus not relevant to the present proceedings).
11. The Habitats Directive requires that development projects which are likely to have a significant effect on designated conservation sites (“*European Sites*”) must be subject to what is referred to as an “appropriate assessment”. The Directive envisages that applications for development consent will be subject to a “screening” exercise to determine whether it is necessary to carry out an “appropriate assessment”. The screening exercise requires the competent authority to determine whether the development project, either individually or in combination with other plans or projects, is “likely to have a significant effect” on a protected European Site. This is to be determined by reference to best scientific knowledge.
12. Although the terms do not appear in the Habitats Directive itself, the terms “stage one” and “stage two” are often employed when describing this overall process, i.e. a stage one screening determination and a stage two appropriate assessment.
13. The case law of the Court of Justice makes it clear that the trigger for an appropriate assessment is a very light one, and that the mere probability or a risk that a project might have a significant effect is sufficient to make an appropriate assessment mandatory. See Case C-127/02, *Waddenzee* (at paragraphs 41 to 43).
14. The Court of Justice has recently reaffirmed the nature of the test to be applied in making a screening determination. See Case C-323/17, *People Over Wind* at paragraph 34 as follows.

“[...] it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, *Commission v Belgium*, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light *inter alia* of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).”

15. The domestic planning legislation envisages that the screening exercise will be carried out, prior to the commencement of any development works, in the context of a conventional planning application. A planning authority is required, under Part XAB of the PDA 2000, to carry out a screening for appropriate assessment before permission is given.
16. Of course, in most instances of *unauthorised development*, no such screening exercise will have been carried out prior to the commencement of the development. This is because, in almost all instances, the unauthorised development will have been carried out without any planning application whatsoever having been made. The issue of screening will, however, arise subsequently in the event that the developer seeks to regularise the planning status of the lands by making an application for retention planning permission.
17. Section 34(12) of the PDA 2000 precludes the grant of retention planning permission where, *inter alia*, an appropriate assessment would have been required if an application for permission had been made in respect of the “development concerned” before it was commenced.
18. It follows that, in order to decide whether the prohibition under section 34(12) bites, a planning authority, on receipt of an application for retention planning permission, must perform a notional screening exercise. This screening exercise is premised on the

counterfactual hypothesis that an application for planning permission had been made in advance of the commencement of the unauthorised development. The planning authority must ask itself whether a hypothetical planning application for the “development concerned” would have triggered the requirement to carry out an appropriate assessment. If the requirement would have been triggered, then the application for retention planning permission cannot be considered and must be returned. The developer would then be confined to making an application for leave to apply for “substitute consent” under Part XA of the PDA 2000. This would require the developer to satisfy An Bord Pleanála that “exceptional circumstances” exist such that it is appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

19. The dispute between the parties in the present case centres on whether a planning authority is entitled to have regard to *revised* development proposals in carrying out the notional screening exercise under section 34(12) of the PDA 2000.
20. The provisions of section 34(12) have been examined in two recent judgments of the High Court, *Hayes v. An Bord Pleanála* [2018] IEHC 338 and *Mount Juliet Estates Residents Group v. Kilkenny County Council* [2020] IEHC 128. Neither of these judgments had to address the specific question which arises in these proceedings.

FACTUAL BACKGROUND

21. These judicial review proceedings are directed to a planning application submitted on 21 June 2019 (“*the 2019 planning application*”). However, for a proper understanding of the dispute between the parties, it is necessary to begin the narrative at an earlier point in the planning history of the lands.
22. In or about April 2016, the notice party to these proceedings (“*the Developer*”) carried out certain development works on lands in the ownership of her family. The lands

immediately adjoin a protected European Site, namely, the Kenmare River Special Area of Conservation (“*SAC*”). Thus, the development works should have been subject to screening for the purpose of the Habitats Directive.

23. The development works included the demolition of an existing holiday cottage or chalet on the lands (“*the chalet/cottage*”), and the construction of a much larger dwelling house. Regrettably, no planning permission was sought for these development works at the time.
24. The applicant in these judicial review proceedings, Suaimhneas Ltd (“*the Objecting Party*”), instituted enforcement proceedings against the Developer pursuant to section 160 of the PDA 2000 (“*the enforcement proceedings*”). The enforcement proceedings were ultimately determined by the Circuit Court; and by order dated 12 October 2018, the Developer was directed, *inter alia*, to demolish the unauthorised structure and to reinstate the chalet/cottage.
25. Following the institution of, but prior to the determination of, the enforcement proceedings, the Developer made a number of applications for retention planning permission. The first valid planning application was submitted in September 2016 and bears the register reference 16/867 (“*the 2016 planning application*”). Crucially, it had been initially envisaged under this planning application that waste water arising from the newly constructed dwelling house would be treated by utilising an existing septic tank on the overall site. The septic tank had previously served the chalet/cottage which had been demolished without planning permission. However, during the course of the processing of this planning application, the Developer put forward a *different* proposal. More specifically, in response to a request for further information on the part of the Planning Authority, the Developer submitted revised plans and particulars which proposed that a waste water treatment unit be provided.

26. The 2016 planning application resulted in a decision on the part of the Planning Authority to grant planning permission. This first-instance decision was, however, successfully appealed to An Bord Pleanála. The Board's decision is dated 1 February 2018 and bears the case reference PL08.248783.
27. An Bord Pleanála gave three reasons for refusing planning permission. In circumstances where the Objecting Party relies on the precedential value of the Board's decision, it is necessary to set out the second and third of the stated reasons in full.
 - “2. Having regard to the difficult ground conditions on this site, including failed percolation tests, shallow water table and shallow bedrock, the Board is not satisfied, on the basis of the submissions made in connection with the planning application and the appeal, that the site can be drained satisfactorily, notwithstanding the proposed use of a proprietary wastewater treatment system. The proposed development would, therefore, be prejudicial to public health.
 3. On the basis of the submissions made in connection with the application and appeal and the proximity of the proposed development to the Kenmare River Special Area Conservation (Site Code 00 2158), the Board was unable to screen out the possibility that the proposed development, either individually or in combination with other plans or projects, would be likely to have a significant effect on a European site, in view of the site's conservation objectives. In such circumstances, the Board is precluded from granting permission.”
28. (A clerical error in the wording was corrected in a subsequent board direction and the passage cited above reflects the corrected version).
29. I will return to consider the implications of An Bord Pleanála's decision at paragraph 64 *et seq.* below. For present purposes, it is sufficient to note that An Bord Pleanála regarded itself as precluded from granting retention planning permission because of the potential effect of the development concerned on a European Site. This preclusion arises under section 34(12) of the PDA 2000.
30. Notwithstanding that An Bord Pleanála had found that the grant of retention planning permission was precluded, the Developer submitted a number of further applications for

retention planning permission to Kerry County Council. These applications were either invalidated or deemed withdrawn. The detail of these intervening applications is not immediately relevant to the issues which arise in these judicial review proceedings. Rather, the next event of significance is the making of the 2019 planning application for retention planning permission. This application was submitted on 21 June 2019 and bears the register reference 19/651.

31. The Developer, in the 2019 planning application, sought to overcome the second and third of the reasons for refusal cited by An Bord Pleanála as follows. The proposal now is that the sandcel polishing filter is to be located at an area which is 300 metres to the north of that originally proposed in the 2016 planning application. It is submitted in the planning documentation that this location has better percolation and is further from the Special Area of Conservation. The 2019 planning application has been accompanied by what is described as a screening report which purports to rule out the need for an appropriate assessment.
32. The Objecting Party made a detailed submission in opposition to the 2019 planning application through its planning consultants, McCutcheon Halley, on 19 July 2019. Relevantly, the submission raised the following jurisdictional objection.

“Having regard to Section 34 (12) of the Planning Act, the third refusal reason cited by the Board under ABP ref. PL08.248783 precludes any further decision being made by Kerry County Council to grant retention permission. The current application should therefore have been invalidated and the Applicant should have been advised to apply directly to the An Bord Pleanála for leave to apply for substitute consent.”

33. A second submission was made on behalf of the Objecting Party on 25 July 2019, this time through its solicitors. This submission sought to elaborate upon the jurisdictional objection.

34. The Planning Authority rejected the second submission on the basis that it had been received one day outside the five week time-limit prescribed for the making of submissions and observations on a planning application under the Planning and Development Regulations 2001. This rejection of the second submission is challenged as part of these judicial review proceedings. This is, however, very much a subsidiary argument and the principal issue in the proceedings is directed to the jurisdictional objection under section 34(12) of the PDA 2000.

KERRY COUNTY COUNCIL'S APPROACH TO 2019 APPLICATION

35. The approach which Kerry County Council took to the 2019 planning application has been explained in detail in two affidavits sworn by the senior planner.
36. The Planning Authority validated the planning application and date stamped it as having been received on 21 June 2019. The planning application had then been referred to the biodiversity officer within Kerry County Council. The biodiversity officer prepared a memo and detailed report on 9 August 2019. The approach adopted by the biodiversity officer is summarised as follows in her memo.

“In reference to planning application number 19651.

The applicant has submitted an AA screening report with the application. Please find attached an appropriate assessment screening of the proposed application which has been informed by aforementioned report and a site inspection. Briefly the attached AA screening report concludes the (*sic*) in accordance with Section 177U of the Planning and Development Act 2000 (as amended) and on the basis of information provided with the application and a request for FI from the Environmental Section of KCC, it is concluded that significant effects on the Kenmare River cSAC cannot be excluded. Further to Section 177U(3) of the Planning and Development Act 2000 (as amended) further information is required in order to complete this screening exercise. Specifically, information requested on the waste water treatment unit proposed on site.”

37. The Planning Authority duly served a request for further information dated 12 August 2019. The information requested is as follows.
- “1. Can the Assessor please provide section drawings of the proposed effluent treatment system to allow the SAU confirm if the design of the proposed polishing filter allows for the required amount of suitable permeable soil.
 2. When the SAU visited the site, they were unable to find the proposed position/area for the proprietary sand-polishing filter. Can the assessor please organise to have the position of proprietary sand-polishing filter clearly marked out for the SAU to assess.
 3. Once the position of the proprietary sand-polishing filter has been clearly marked out, could the Assessor please arrange a date and time to meet with the SAU on site to discuss the proposed application.”
38. It is apparent from the biodiversity officer’s memo and report that the Planning Authority failed to differentiate between (i) the criteria governing the specific screening requirement under section 34(12), and (ii) those criteria governing the general screening requirement obtaining to a conventional planning application under section 177U of the PDA 2000.
39. A similar lack of discrimination is to be found in the senior planner’s two affidavits. The senior planner suggests that it is the form of development *as proposed* in any particular planning application that must be screened, rather than the development as intended at the time the unauthorised development took place. Indeed, the senior planner goes so far as to imply that the *intentions* of the developer are not relevant. It is suggested that where unauthorised development is carried out, the developer did not intend to install a particular design feature at the time otherwise an application would have been made. (See senior planner’s second affidavit, at paragraph 23).
40. Insofar as the precedential value of An Bord Pleanála’s decision refusing the 2016 planning application is concerned, the senior planner makes two broad points. First, it is said that the proposed development under the 2019 planning application is

distinguishable from that under consideration under the 2016 planning application. It is now proposed to locate the filter approximately 230 metres to the northwest of the rear elevation of the unauthorised dwelling house. Reference is also made to the fact that the Developer has submitted a formal screening report with the application.

41. Secondly, it is suggested that An Bord Pleanála's decision had been made on a precautionary basis, and that the Board had not actually determined that an appropriate assessment would have been required. (See senior planner's first affidavit at paragraphs 16 and 20, and second affidavit at paragraph 20).
42. In summary, it is evident that the Planning Authority has taken the approach that what is to be screened for the purpose of section 34(12) of the PDA 2000 is the development as proposed in any particular planning application, rather than the development envisaged at the time of the commencement of the unauthorised development. Indeed, the Planning Authority seeks to make a virtue of the fact that the form of development proposed in 2019 is materially distinguishable from that considered by An Bord Pleanála under the 2016 planning application.

SECTION 34(12): "THE DEVELOPMENT CONCERNED"

43. As explained earlier, in order to decide whether the prohibition under section 34(12) of the PDA 2000 bites, a planning authority, on receipt of an application for *retention* planning permission, must perform a notional screening exercise. The planning authority must ask itself whether a hypothetical planning application for the "development concerned" would have triggered the requirement to carry out an appropriate assessment.
44. The peculiar circumstances of the present case bring into sharp focus the question of what precisely constitutes the "development concerned" for the purpose of section 34(12). As appears from the summary of the factual background above, the nature and extent of the

development in respect of which retention planning permission has been sought has gone through a number of iterations between 2016 and 2019. In particular, the proposals in respect of the management of waste water have become more elaborate.

45. The question which arises for determination in this judgment is whether the notional screening exercise must be carried out by reference to the development as envisaged at the time the unauthorised works commenced, or, alternatively, by reference to the more elaborate proposals since set out in the 2019 planning application.
46. In interpreting section 34(12) of the PDA 2000, it is necessary to have regard to the EU law context. The current version of section 34(12) had been introduced, under the Planning and Development (Amendment) Act 2010, as part of a series of amendments intended to give effect to the judgment of the Court of Justice in Case C-215/06, *Commission v. Ireland*. This judgment had been delivered on 3 July 2008. The Court of Justice had condemned the pre-2010 version of the planning legislation because of the blanket provision made thereunder for retention planning permission.
47. The Court of Justice commenced its judgment by reiterating that the EIA Directive must necessarily be understood as meaning that, unless a developer has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, they cannot commence development works.
48. The judgment is critical of the fact that a retention planning permission could be granted even in respect of development projects for which an environmental impact assessment would have been required under the EIA Directive. The judgment observes, with disapproval, that domestic law equated the effects of a retention permission to those of an ordinary planning permission, and that the grant of retention permission had the result, under domestic law, that the obligations imposed by the EIA Directive were considered to have been satisfied.

49. The Court of Justice then identifies the limits of a Member State’s discretion to regularise the status of development projects carried out in breach of the requirements of the EIA Directive. See paragraphs 57 and 58 of the judgment as follows.

“While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.”

50. These passages have been cited with approval in a number of subsequent judgments of the Court of Justice. The principles governing the regularisation of development carried out in breach of the EIA Directive have been formulated as follows. See Joined Cases C-196/16 and C-197/16, *Comune di Corridonia* (at paragraph 44).

“[...] EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:

- national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and
- an assessment carried out for regularisation purposes is not conducted solely in respect of the plant’s future environmental impact, but must also take into account its environmental impact from the time of its completion.”

51. The Court of Justice has since confirmed that the same principles apply, by analogy, in the event of a failure to conduct a prior impact assessment of the effects of the development project concerned on a protected site as required by Article 6(3) of the Habitats Directive. See Case C-411/17, *Inter-Environnement Wallonie ASBL* (at paragraph 176).
52. These, then, are the principles which must inform the interpretation of section 34(12) of the PDA 2000. This court, as a national court of a Member State, must seek to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Habitats Directive in order to achieve the result sought by the Directive.
53. The term the “development concerned” under section 34(12) of the PDA 2000 should be understood as referring to the development as envisaged at the time the unauthorised development commenced. On this interpretation, a planning authority must ask itself whether development of the nature and extent envisaged at that time would have been likely to have a significant effect on any European Site. This notional screening exercise is to be carried out on the counterfactual hypothesis that an application for planning permission had been made prior to the commencement of the development concerned.
54. The contrary interpretation contended for on behalf of Kerry County Council would not achieve the result sought by the Habitats Directive. The Planning Authority seeks to distinguish between (i) the partially built structures to be retained on-site, and (ii) the further works proposed to complete the dwelling house and to make it habitable (including the provision of the waste water treatment unit). On this interpretation, the notional screening exercise is to be carried out by reference to the revised development proposals submitted in June 2019, and not by reference to the development as envisaged at the time the unauthorised development commenced in April 2016.

55. With respect, such an interpretation would undermine the effectiveness of the Habitats Directive. It would allow a developer who had carried out unauthorised development, which was likely to have a significant effect on a European Site, to mend their hand subsequently in the event of enforcement proceedings. More specifically, a developer who had potentially endangered a protected site by carrying out unauthorised development would be able to avoid the rigours of the “substitute consent” procedure under Part XA of the PDA 2000 by the ready expedient of revising their proposals when caught out. Such a developer would be able to apply for planning permission *ex post facto*, without having to demonstrate exceptional circumstances which justify their being allowed to regularise the planning status of the unauthorised development.
56. Such an interpretation of section 34(12) of the PDA 2000 would afford developers an opportunity of circumventing the requirement to conduct a prior impact assessment of the effects of the development project concerned on a protected site. This would not be consistent with the principles identified in the case law of the Court of Justice cited above.

APPLICATION TO CIRCUMSTANCES OF THE PRESENT CASE

57. The correct interpretation of section 34(12) of the PDA 2000 has been set out at paragraph 53 above. Applying that interpretation to the circumstances of the present case, the notional screening exercise should have been carried out by reference to the nature and extent of the residential development as envisaged at the time the unauthorised works commenced in April 2016.
58. Whereas the exercise of identifying the nature and extent of the development envisaged might be difficult where the development project is complex, the position in the present case is straightforward. The development envisaged consisted of the demolition of the existing chalet/cottage, and its replacement by a much larger dwelling house, with the

waste water to be managed by way of the existing septic tank. It is the likely significant effects of this form of development which are to be considered for the purpose of the notional screening exercise under section 34(12) of the PDA 2000.

59. That this was the form of development envisaged at the time is confirmed by the content of the application for retention planning permission as submitted on 8 September 2016. It had been initially envisaged under this planning application that waste water arising from the newly constructed dwelling house would be treated by utilising an existing septic tank on the overall site. It appears to be common case that the use of the existing septic tank for a dwelling house of the scale involved would have triggered a requirement for an appropriate assessment.
60. The proposal to provide a waste water treatment unit only arose for the first time during the course of the 2016 planning application, in response to a request for further information served by the Planning Authority.
61. Crucially, even that revised proposal was found to be inadequate. An Bord Pleanála determined that the subsequently introduced proposal to use a proprietary waste water treatment system would not have obviated the need for an appropriate assessment. Put otherwise, irrespective of whether one characterises the “development concerned” as entailing the use of the existing septic tank or the use of the 2016 version of the proposed waste water treatment unit, an appropriate assessment would still have been required.
62. Kerry County Council has erred in law in its approach to the 2019 planning application. It is evident from the biodiversity officer’s report—and since confirmed by the affidavits filed on its behalf—that the Planning Authority misunderstands the requirements of section 34(12) of the PDA 2000. It has failed to appreciate that the criteria governing the specific screening requirement under section 34(12) are very different from those governing the general screening requirement under section 177U of the PDA 2000.

Indeed, it is telling that the biodiversity officer incorrectly invokes section 177U of the PDA 2000 for the purpose of her initial screening exercise, rather than section 34(12).

63. The Planning Authority has, in effect, sought to screen the latest iteration of the development as proposed under the 2019 planning application, rather than to screen the “development concerned”. The response of the senior planner when this error was pointed out (in the affidavit of the Objecting Party’s planning consultant) had been to say that where unauthorised development is carried out, the developer did not intend to install a particular design feature at the time otherwise an application would have been made. This response not only demonstrates a misunderstanding of section 34(12), it also appears to confuse matters further by introducing language reflective of the distinction between mitigation measures and measures which are integral to the project.
64. The Planning Authority has also erred in its understanding of the precedential value of An Bord Pleanála’s decision on the 2016 planning application. The relevance of the Board’s decision is that it had found that the nature and extent of the development then proposed was such that an appropriate assessment could not be excluded.
65. Kerry County Council has sought to distinguish An Bord Pleanála’s decision. The Planning Authority observes—correctly insofar as it goes—that the waste water management proposals have been revised and are different from those considered by An Bord Pleanála in 2018. Had this been an application for a conventional planning permission, then the existence of revised proposals might well have been relevant. This is because the screening exercise in respect of a conventional application would fall to be carried out under section 177U of the PDA 2000, and would be directed to the “proposed development”. However, for the purpose of section 34(12), the emergence of revised proposals subsequently, some three years after the event, cannot change the nature and extent of the “development concerned”.

66. The Planning Authority has also erred in its understanding of the meaning of An Bord Pleanála's decision. The Planning Authority insists that the Board, in its third reason for refusal, did not determine that an appropriate assessment would have been necessary, but instead merely found that it could not rule out significant effects on a European Site. With respect, this is a distinction without a difference. The Court of Justice has consistently held that an appropriate assessment is required where it cannot be excluded, on the basis of objective information, that a development project will have a significant effect on a European Site. Therefore, it follows that in stating that it was unable to screen out the possibility that the development, either individually or in combination with other plans or projects, would be likely to have a significant effect on a European site, in view of the site's conservation objectives, the Board was implicitly finding that an appropriate assessment would have been required. This is confirmed by the very next sentence of the decision where the Board stated that, in such circumstances, it was *precluded* from granting permission. In this sentence, the Board is acknowledging the statutory preclusion under section 34(12) of the PDA 2000.
67. The legal significance of An Bord Pleanála's decision is that the Board has found that even with the proposal to introduce a waste water treatment unit, the nature and extent of the development envisaged was such as to require an appropriate assessment. This then triggered the preclusion under section 34(12) of the PDA 2000.
68. Finally in this regard, it is necessary to address the argument advanced on behalf of the Planning Authority to the effect that the decision of An Bord Pleanála and that of its planning inspector was informed by a precautionary approach. With respect, the precautionary principle forms part of the approach to be adopted under the Habitats Directive, and the use of the term "cautionary" in the inspector's report cannot be

understood as suggesting that in some way An Bord Pleanála were adopting an overly cautious approach.

ARE JUDICIAL REVIEW PROCEEDINGS PREMATURE?

69. Counsel on behalf of Kerry County Council submits that the application for judicial review is premature. It is said that the Planning Authority has not yet completed its screening exercise. Whereas the biodiversity officer had indicated a provisional view that significant effects on the Kenmare River SAC cannot be excluded, she had recommended that further information be sought from the Developer. The Planning Authority duly served a request for further information pursuant to article 33 of the Planning and Development Regulations 2001.
70. Counsel submits that the Objecting Party should have awaited the outcome of this process; and, if dissatisfied with the outcome, could have brought judicial review proceedings at that time.
71. (Perhaps paradoxically, it should be noted that the Planning Authority also alleges that the Objecting Party is guilty of *delay* insofar as it challenges the rejection of the second submission made in July 2019).
72. The leading judgment on the timing of challenges to planning decisions is that of the Court of Appeal in *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 268. There, Costello J. held that a party is generally required to await the final decision on an application for planning permission before moving for judicial review. Save in exceptional instances, it will not normally be permissible to challenge an intermediate decision, i.e. a decision made during the course of the processing of a planning application. An application to set aside an intermediate decision by way of judicial review will usually be regarded as premature.

73. Applying these principles to the present case, I am satisfied that this is one of the exceptional instances in which judicial review is justified in advance of a final decision on a planning application. I say this for the following reasons.
74. First, Kerry County Council has gone irremediably wrong in its processing of the planning application. The evidence before the court establishes that the Planning Authority has misdirected itself in law and has misunderstood the requirements of section 34(12) of the PDA 2000. The Planning Authority has failed to make a decision as required under section 34(12), and has instead purported to embark upon a screening exercise under section 177U of the PDA 2000. Even more worryingly, the Planning Authority has also misunderstood the legal implications of An Bord Pleanála's earlier finding that it was precluded from considering a retention application in respect of the development concerned.
75. Secondly, the objection raised in the judicial review proceedings goes to the very jurisdiction of the Planning Authority to accept the planning application. Section 34(12) of the PDA 2000 precludes a planning authority from even considering an application for retention in circumstances such as those of the present case. The Planning Authority is obliged to return the application. These statutory provisions are intended to give effect to the Habitats Directive, and to ensure compliance with the Irish State's obligation to give effect to the judgment of the Court of Justice in Case C-215/06, *Commission v. Ireland*.
76. Thirdly, it would be unfair to the Objecting Party were it to have to incur the time and expense of engaging with the detail of a planning application in circumstances where the very making of that application is irregular. The Objecting Party has already had to participate in a number of other planning applications. It should not be required to do so again in circumstances where An Bord Pleanála has already found that it is precluded

from considering a retention application in respect of the development concerned. It is contrary to good administration and *ultra vires* for the Planning Authority not to follow the Board's decision in circumstances where no valid reason has been advanced for saying that the decision is incorrect.

77. In summary, therefore, I am satisfied that the application for judicial review is not premature. Having regard to the protracted planning history of this unauthorised development, and the EU law context, it is proper that this court should rule upon the validity of the 2019 planning application.

REJECTION OF CORRESPONDENCE FROM SOLICITOR

78. Given my findings on the principal issue in the proceedings, it is neither necessary nor appropriate to make a finding on the subsidiary issue of whether the Planning Authority erred in refusing to have regard to the submission made by the Objecting Party's solicitor on 25 July 2019. I would simply observe that there is a respectable argument to be made that correspondence from a solicitor on record in enforcement proceedings to which a planning authority is a notice party should not be regarded merely as a submission or observation to which the five week time-limit under the Planning and Development Regulations 2001 applies.

CONCLUSION AND FORM OF ORDER

79. The term the "development concerned" under section 34(12) of the PDA 2000 should be understood as referring to the development as envisaged at the time the unauthorised development commenced. On this interpretation, a planning authority must ask itself whether development of the nature and extent envisaged at that time would have been likely to have a significant effect on any European Site. This notional screening exercise

is to be carried out on the counterfactual hypothesis that an application for planning permission had been made prior to the commencement of the development concerned.

80. The evidence before the court establishes that Kerry County Council has misdirected itself in law and has misunderstood the requirements of section 34(12) of the PDA 2000. The Planning Authority has failed to make a decision as required under section 34(12), and has instead purported to embark upon a screening exercise under section 177U of the PDA 2000. The Planning Authority has, in effect, sought to screen the latest iteration of the development as proposed under the 2019 planning application, rather than to screen the “development concerned”. With respect, the emergence of revised proposals subsequently, some three years after the event, cannot change the nature and extent of the “development concerned”.
81. Even more worryingly, the Planning Authority has also misunderstood the legal implications of An Bord Pleanála’s earlier finding that it was precluded from considering a retention application in respect of the development concerned.
82. I am satisfied that the application for judicial review is not premature, for the reasons explained at paragraphs 69 to 77 above.
83. The application for judicial review will, therefore, be allowed.
84. My provisional view is that the proper form of order is to make a declaration that, in consequence of section 34(12) of the PDA 2000, the Planning Authority has no jurisdiction to adjudicate upon or make a determination on the 2019 planning application. The purported request for further information of 12 August 2019 should also be set aside. However, I will hear counsel further on the precise form of order and on costs.

85. Subject to the availability of the parties, the proceedings will be listed before me on
16 July 2021 at 10.15 am.

Appearances

Elizabeth Murphy for the applicant instructed by O'Donovan Murphy & Partners (Cork)
David Browne for the respondent instructed by the County Solicitor
No appearance for the notice party

Approved
Gemma S. Mans