Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

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Legal Cases:

Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322

Clifford/O'Connor v An Bord Pleanála and Kerry Co. Co [2021] IEHC 459

Waltham Abbey Residents Association v An Bord Pleanála and Pembroke Road Association v An Bord Pleanála and Others [2022] IESC 30

Prepared by Fieldfisher for the Office of the Planning Regulator

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Introduction

The OPR is pleased to present the inaugural edition of the quarterly '*Learning from Litigation*' bulletin. Along with wider engagement with the sector, the initiation and development of this publication draws on the views expressed during the consultation process for the **Local Authority Planning Sector Learning and Development Strategy**, published in January 2023.

As part of this consultation process for the strategy, a survey of 1,550 local authority planning personnel was undertaken, with a response rate of over 50%. An important conclusion from the survey noted that:

> *"…most respondents pointed to the need for an ongoing general or foundation-level training and **awareness programmes to keep staff and members updated in real-time on the fast-paced nature of legislative and policy development, landmark legal cases,** and technological and operational advances relevant to the planning function."*

This new initiative aspires to serve as a valuable resource to disseminate key learnings from the continually evolving planning and environmental case law. It provides valuable information on important precedents, court decisions and emerging trends and a concise overview of noteworthy planning cases.

The development of the bulletin has been overseen by the Planning Law Bulletin Steering group consisting of nominees from the Environmental and Planning Law Committee of the Law Society, the OPR legal services provider Fieldfisher and the OPR. A nominee for the steering group will be sought from the local authority/Board (planning authority) sector/ CCMA.

This review group provides input on relevant cases and assists in the curation of a selection of pertinent planning cases. Through detailed summaries, analysis and key takeaways for practitioners and all stakeholders, we trust that the bulletin will serve as a valuable tool for ongoing information on the dynamic legal landscape governing planning matters.

It is envisaged that the bulletin will be published on a quarterly basis and the OPR welcome any feedback and input as we continue to develop this publication.



***Disclaimer: This document is for general guidance only and not intended as legal advice. Legal advice should always be taken before acting on any of the issues identified**.*

Atlantic Diamond Ltd v. An Bord Pleanála [2021] IEHC 322

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On 14 May 2021, the High Court (Humphreys J.) delivered judgment in Atlantic Diamond Ltd v. An Bord Pleanála and EWR Innovation Park Ltd [2021] IEHC 322 ("*Atlantic Diamond*").

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 replacement of most of the existing commercial units at Docklands Innovation Park, East Wall Road in Dublin with six residential blocks, leaving three of the existing operating industrial units in place. The development would involve 366 dwellings, childcare facilities and associated site works.

The Applicant for judicial review was a commercial tenant of one of the units to be retained at the Innovation Park. The Applicant made a submission claiming there would be a necessity for heavy goods vehicles to come into the development for the indefinite future, at somewhat unsocial hours and for the operation of noisy industrial equipment outdoors, again during unsocial hours, which would impact on the prospective tenants of the proposed development.

Finding on certain wording in the Board's decision
The Court took issue with the use of the phrase in the Board's decision to the effect that it had "***considered all matters that it was obliged to consider under the legislation***". The Court said this was "***defensive and circular***", didn't assist the Board, added nothing to the decision and was a "***self-consciously defensive formulation***".

Lack of reasons
The Applicant had made a submission in relation to a residential development within a commercial premises being unprecedented, and the Inspector did not address that point. At trial, the developer gave examples of other similar developments. However, the Court found that it was a main issue and the Board's Inspector did not provide any reason as to why they did not think it was an important factor to consider when considering whether to grant or refuse permission.

The Applicant had also made a submission in relation to the impact of noise and fumes from industrial estate traffic and machinery on prospective residents, in particular children playing around industrial traffic and inhaling diesel fumes. The Board's Inspector agreed with the Developer's Reports that the impacts were acceptable, but did not expressly address the submission from Atlantic Diamond.

> *"Insofar as concerns questions of planning judgement, the decision-maker is entitled to prefer one set of expert opinion over another, all things being equal. However, that approach has its limits, particularly where the facts are contested. It is hard to see in the decision a basis for saying that clear reasons are provided in respect of all of the applicant's main points, particularly the movements of heavy vehicles and the use of outdoor equipment."*

Daylight-sunlight analysis
One of the main issues in the case concerned the application by the Board of the daylight-sunlight requirements of the following Guidelines:
· **The Urban Development and Building Heights: Guidelines for Planning Authorities (2018);**

·**The Sustainable Urban Housing: Design Guidelines for New Apartments (2020)**;
· **The Building Research Establishment (BRE) Guidelines Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice**;* and/or
· **The British Standard (BS) 8206-2 Code of Practice for Daylighting 2008**.*
***Note that the BRE and BS have been updated, but the ADF requirements remain the same.*

Under those Guidelines, the applicant for planning permission is required to demonstrate that the proposed development satisfies the development management criteria in para. 3.2 of the Building Height Guidelines (similar requirements are set out in para. 6.7 of the Apartment Guidelines), which includes having "*appropriate and reasonable regard*" to the BRE or BS Guidelines. If a proposal cannot completely meet the daylight requirements, it should be clearly acknowledged. Alternative design solutions that compensate for this should be explained. The planning authority or An Bord Pleanála should then exercise their judgment, taking into account local factors such as site constraints and balance that assessment against the importance of achieving wider planning objectives.

The Court interpreted these guidelines as follows:

"
If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.

i) this must be clearly identified;
ii) a rationale for any alternative compensatory design solutions must be set out; and
iii) a discretion and balancing exercise is to be applied."

The Board's decision found that grant of permission would contravene the Development Plan materially in respect of building heights, relying on S. 37(2)(b)(iii) of the 2000 Act, the Board held that this was permissible by reference to, amongst other things, para. 3.2 of the Building Height Guidelines and Specific Planning Policy Requirement 3 (SPPR 3).

However, the Court found that the Board failed to properly apply the Guidelines in assessing the daylight-sunlight analysis undertaken for the proposed development. The BRE Guidelines recommend that an Average Daylight Factor (ADF) of 2% should be applied for kitchens, as set out in the BS. While there is a recommendation of 1.5% ADF for living rooms, where the kitchen/living areas are combined rooms the recommendation is for the higher standard (i.e. 2% ADF) to apply.

In its assessment, the developer applied the standard of 1.5% ADF to the combined kitchen/living rooms in the proposed development without noting that the rooms were combined rooms. There was also no acknowledgement that the BRE/BS Guidelines required the higher standard to be applied in a combined room. That analysis was adopted by the Board's Inspector (and by the Board decision), who did not stress-test it against the Guidelines.

The Court rejected the Board's defence that the Building Height Guidelines are permissive, and that there is discretion afforded. It found that the Building Height Guidelines ***"are binding mandatory statutory guidelines which require as a matter of legal obligation that the decision-maker have appropriate and reasonable regard to identified standards"***.

The Court acknowledged that it could be appropriate to depart from a particular standard in some circumstances, but it would be necessary for that to be specifically addressed in the decision and justification provided for such a departure. This had not been done in this case and the Court overturned the decision on this ground too.

Lack of disclosure of enforcement in the application
A final ground on which the decision was overturned, was that the developer had ticked *'yes'* to the question of statutory enforcement notices in its planning application form, but had failed to give details as required. The Court noted that the Minister's prescribed form clearly and expressly indicated that the details required are mandatory. Therefore, the Court found that that the developer's application form should have been invalidated by the Board. It was not possible to send the application back for further review by the Board.

Key takeaways
1. Local authorities should avoid using template phrases such as that they have *"considered all matters that they are obliged to consider under the legislation"* unless they are meaningful.

2. A failure to meet the recommended ADF in the BRE Guidelines for rooms (e.g. 1.5% ADF for living rooms and 2% ADF for kitchens) must be clearly identified, a rationale for any alternative compensatory design solutions must be set out; and a discretion and balancing exercise must be applied by the planning authority making the decision in the context of the application of the SPPR and the Building Height Guidelines.

3. Where there are combined rooms the recommendation is for the **higher** standard to apply (e.g. 2% for combined kitchen/living rooms).

4. Where a planning application form discloses that statutory enforcement notices have been served on the applicant, then details of same should accompany the application otherwise it will be invalid.

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"The Kerry Greenway No. 3 Judgment"

Purpose of this Judgment
In Clifford/O'Connor v. An Bord Pleanála (No. 1) [2021] IEHC 459 Mr. Justice Humphreys refused to overturn the decision of An Bord Pleanála to approve the construction of the South Kerry Greenway as required by S. 51 of the Roads Act 1993 (as amended). Some declaratory reliefs were reserved for module II, meaning they were not addressed during the first hearing. Leave to appeal was refused (see the No. 2 Judgment [2021] IEHC 642) and the Supreme Court refused a leapfrog application (see SC Determination [2022] IESCDET 13). This No. 3 Judgment deals with module II on whether the Board had complied with its publication obligations. Specifically, (i) the failure to publish materials on the Board's website in the course of the application procedure, and (ii) the failure to publish notice of the decision at the end of the procedure.

The reason why any lack of publication did not result in overturning the decision is that these Applicants were not handicapped in their submissions because of any lack of publication. However, the Court found that that left open the possibility of declaratory relief if a breach has been shown.

Relevant facts
In August 2018, Kerry County Council ("***The Council***") published a notice in Kerry's Eye Newspaper of an application to the Board to approve the construction of the South Kerry Greenway ("***the Greenway***") as required by S. 51 of the Roads Act 1993 (as amended). The Council also applied to the Board for confirmation of a Compulsory Purchase Order (CPO) of the lands required along the Greenway route.

In October 2018, the Board received a number of submissions from the public, including the Applicants in these proceedings, resulting from the newspaper publication of the notice.

In November 2018, the Board requested further information from the Council, which was notified to the Applicants, and which the Council supplied in April 2019. The Board decided the Council needed to advertise this further information as it was *"significant".* The Council advertised the information in the Irish Examiner and Kerry's Eye on 9 May 2019. The Board received submissions from various third parties, including from the Greenway Information Group on 24 June 2019. This submission was not published on the Board's website.

Coincidentally, on 24 June 2019, the same day as the submission from the Greenway Information Group was received by the Board, the European Union (Roads Act 1993) (Environmental Impact Assessment) (Amendment) Regulations 2019 (S.I. No. 279 of 2019) ("***The 2019 Regulations***") came into force. This made amendments to the Roads Act 1993 to give effect to Directive 2014/52/EU (in particular concerning public participation in respect of development consents requiring Environmental Impact Assessment (EIA)). The 2019 Regulations expanded the requirements for newspaper publication and to ensure certain documentation was published on the Board's website. The making of the 2019 Regulations was published in Iris Oifigúil on 28 June 2019.

The Board held an extended oral hearing on the Kerry Greenway between 8 October 2019 and 22 November 2019, and various additional information was provided by the Council at the hearing, in the form of four correcting documents to the EIA and CPO process. This documentation was not published on the Board's website.

Ultimately, on 10 November 2020, the Board approved the construction of a modified version (omitting two sections of the Greenway, because of certain environmental concerns raised by the Board's Inspector) with conditions, and approved the CPO of the necessary lands.

In the No. 1 Judgment, Mr. Justice Humphreys in the High Court refused to overturn the Board's decisions on various substantive grounds (so the Greenway construction has proceeded), but had left over the claims for declaratory relief in order to clarify the law in respect of the publication requirements under the Road Act 1993 (as amended).

Findings
In this No. 3 Judgment, Mr. Justice Humphreys drew conclusions under the following headings:

1. Failure to publish material on the Board's website
There were two categories of information that it was alleged that the Board had failed to publish:

(i) information that arose before transposition of the amending EIA Directive; and
(ii) information that arose on or after that transposition on 24 June 2019.

In respect of publication prior to the transposition date, the Court noted that the EIA Report (EIAR) was published on the Council's website, but not on the Board's website. The additional information and the notice seeking the additional information were not published on the Board's website and nor were location maps. In addition, after the Amendment came into operation, the Court found that the Board had failed to publish the submission of Greenway Information Group and the four correcting documents adding to the EIAR on its website.

2. Non-publication on the central portal
The Court refused to examine questions relating to the operation of the Minister for the Environment and Local Government's website as they were not joined as a Respondent to the proceedings.

3. Lack of publication of material by the Board
The Court went through the amending provisions of the 2019 Regulations, and concluded that the Board was not required to retrospectively revisit its past actions and apply the new law to such past actions by, for example publishing documents which it had received historically. The context, language, and purpose of the 2019 Regulations strongly support the interpretation that the new requirement to publish material introduced on 24 June 2019, was intended for future publication of material from that date onwards. It does not impose an obligation to review past files or publish material before that date.

However, the Court found that the material received on or after the transposition date was subject to the obligations under the 2019 Regulations. The Court found that the Board's reasons for failing to publish the Greenway Information Group submission dated 24 June 2019 and the EIA errata documentation on its website on or after 24 June 2019, were not sufficient, as follows:

(i) The submission may have been made before the regulations
Even if the Greenway Information Group submission was received on 24 June 2019 before the time that the Minister signed the commencement order for the 2019 Regulations, Section 16(3) of

the Interpretation Act states that every provision of a statutory instrument comes into operation at the end of the day before the day on which the statutory instrument is made.

(ii) The notice of legislation in Iris Oifigúil came later
Publication in Iris Oifigiúil is only for information. It is not a legal prerequisite to the coming into operation of instruments. Some jurisdictions have a general rule that Regulations don't come into force until their official promulgation, but Ireland is not one of those jurisdictions.

(iii) Legal uncertainty
The Court found that ignorance of the law is no excuse, particularly for a state body, so the Board could not simply say that it was unaware of the 2019 Regulations coming into force at that time.

The Court also dismissed the Board's argument that because the Greenway public participation process had already got underway at some point prior to the 2019 Regulations, the Regulations should not apply to new incoming material in order to maintain legal certainty. This was for the following reasons: the 2019 Regulations did not say such; doing so would undermine the purpose of the Regulations; applying the Regulations to a live process is not retrospective; and whether to publish a document is a procedural question not a substantive question.

The requirement to continue the process as it was initially intended only applies if it negatively impacts some established significant right. The Court reviewed the case law in this area and concluded that nobody (in particular a State body such as the Board) has a "*right*" to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted, in particular when that new law related to an EU law requirement such as public participation.

(iv) Lack of prejudice
The Court found that the lack of prejudice against the Applicants in this case had already been dealt with by refusing to allow for review on these grounds, but that prejudice was not a fatal obstacle to the Applicants when seeking declaratory relief.

4. Historic nature of the point and discretionary nature of declarations
Even though the facts of the case are novel and likely unique because the transposition date had long since passed and there were unlikely to be any more such cases in the pipeline, there were three reasons why the court said that it was appropriate to make declarations in this case:

i) clarification of these specific issues may shed light on analogous matters in future;
ii) the rule of law seeks to mark breaches of statute; and
iii) the Board had still not notified the public of the additional information via a central portal.

5. Pleading objection
The Court found that even though the Applicants had not specifically pleaded the failure of the Board to publish the submission received on 24 June 2019. They did refer to S. 51(4C) of the Roads Act 1993 (as amended) which includes the requirement to make an electronic copy of submissions available on its website. Therefore, the Court found that the Applicants had adequately pleaded the failure to publish submissions.

6. Alleged failure to publish newspaper notices
The Applicants' claimed that the newspaper notice publishing the Board's decision to approve the Greenway, did not specify that a section of the route had been omitted. However, the Court found that the Board's decision included a condition for the omission of the relevant sections of the Greenway, and therefore the modifications are apparent from the decision itself.

More generally, the Applicants argued that the notice did not contain the necessary details of the decision, but simply referred the reader to the Board's website and to the reference number of the Board's decision.

The Court determined that it was not wrong for there to be a detailed explanation, especially when dealing with a complicated matter that cannot be adequately summarised in a newspaper notice. As long as there was a suitable website link provided, this approach was acceptable.However, the Court found that using the full reference number provided for in the newspaper notice did not return a result in the search function of the Board's website. This made it insufficiently accessible for the ordinary members of the public. A specific link to the page would have been more appropriate.

The Court dismissed the Applicants' argument that Section 51(6C) of the Roads Act 1993 (as amended) required the EIAR to be contained in the newspaper advertisement.

The Applicants' final complaint was that the newspaper notice was not published promptly. The Court found that the concept of the publication occurring "*promptly*" is set out in Art. 9 of the Directive, therefore the Applicants had failed to enter a plea against the State for non-transposition, and the court could not consider that argument. The Court found that the case law of the CJEU was clear in respect of the test that proceedings must be brought *"promptly"* for the purposes of a limitation period.

Finally, in rejecting the claim that the eight week limitation period on a challenge to a decision of the Board ran from notification of the decision, the Courts looked to Section 50(7) of the 2000 Act, which prescribes it runs from notification of the decision because this was a function covered by Part XIV (Ss. 214 and 215) of the 2000 Act.

Key takeways

1. Local authorities should always be cognisant of the commencement of new legislation transposing additional requirements, such as the publication of documentation on a website as in this case, although retrospective application will likely not be required.

2. Local authorities should remember to notify the Department in respect of any planning applications in which an EIAR is received. Local authorities should be careful in publishing newspaper notices to ensure that they are as detailed as possible, and if links are being provided for more detailed information to be found elsewhere they should be sufficiently accessible for ordinary members of the public.

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On 10 May 2021, the High Court (Humphreys J.) delivered judgment in Waltham Abbey Residents Association v. An Bord Pleanála[1] (“*Waltham Abbey*”)

A Court Order was granted overturning the decision of An Bord Pleanála to grant planning permission for a Strategic Housing Development (“***SHD***”) comprising the construction of 123 apartments and associated development at Old Fort Road, Ballincollig, Co. Cork. This decision was quashed because the High Court determined that there was a failure to comply with the requirements of Article 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001 (as amended) (“***the 2001 Regulations***”).

Article 299B(i)(b)(ii)(II)(c) (“***Article 299B***”) applies to SHD applications and places an obligation on the Board to satisfy itself that the applicant for permission has provided a statement “*indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to legislation other than the EIA directive have been taken into account*” (“***the Statement”***).

The High Court held in *Waltham Abbey* that in order to comply with Article 299B a specific, standalone statement addressing the available results of other statements must accompany the application for planning permission. In doing so, the High Court drew a distinction between just the information required found in the application documents and a statement which he found to be “*an identifiable document*”. The High Court found that Article 299B required four clear elements:

i) a distinct identifiable document constituting a statement of all the relevant matters for the purposes of Reg. 299B(1)(b)(ii)(II)(C);
ii) identification of the relevant assessments that are available;
iii) identification of the results of those assessments; and
iv) identification of how those results have been taken into account.

On 29 July 2021 the High Court (Owens J.) delivered judgment in Pembroke Road Association v An Bord Pleanála & Others[2](“***Pembroke****”*). This judgment gave rise to a conflicting interpretation Article 299B whereby Owens J. found that the requirement under Article 299B is largely one imposed for the requirements of good administration and there is no absolute requirement that the analytical material referred to in a statement must always be presented in one distinct identifiable document.

The High Court judgments were delivered just one month apart, and as they were in direct contradiction of one another on this key issue, both cases were appealed to the Supreme Court by way of leapfrog application.

Supreme Court
The Supreme Court (MacMenamin J., Charleton J., O’Malley J., Baker J. and Hogan J.) heard both appeals together on 31 May 2022, and Hogan J. delivered a joint judgment on 4 July 2022, wherein it held that the failure to include a separate document in these cases was not a significant enough impediment to render the Board unable to discharge their function as a planning authority. In reaching this decision, the Supreme Court conducted a comprehensive analysis of the proper construction of Article 299B and the use of the word “*statement*”. While the Supreme Court did

1 *Waltham Abbey Residents Association v. An Bord Pleanála [2021] IEHC 312.*

2 *Pembroke Road Association v An Bord Pleanála & Others [2021] IEHC 545.*

prefer the construction of the word as favoured by Humphreys J. in Waltham Abbey, it went on to find that the term should not be read as it appears in Article 299B in isolation from the rest of the Regulations, citing the principle of "*noscitur a sociis*" ("*known by its companions*"). This principle was outlined by Black J. in *The People (Attorney General) v Kennedy*[3] where he stated he stated *"A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and looks at the whole canvas, the close-up of the small section is often found to have given a wholly wrong view of what it really represented."*

The Supreme Court agreed with the view taken by Owens J. in Pembroke Road in finding that the failure to supply a specific statement was not a real impediment to the Board in performing its functions and that the Board was *"perfectly capable of interpreting the data and analysis furnished to it".*

The Court also noted that, if the Court was to hold that Article 299B imposed a mandatory obligation on developers to supply a specific statement, it would lead to the *"strange and contradictory state of affairs"* whereby a permission could be invalidated for the failure to supply a specific statement when no such obligation existed in the first place when the developer was lodging the SHD Application Form 14. Hogan J. cited clear judicial authority[4&5] which set out that statute should be read,where possible, to produce a workable and coherent interpretation and avoiding interpretations which imposed unfair or anomalous obligations on private citizens.

The Court found that although there was no requirement for a standalone statement, the Board is still required to ensure that the developer supplies all of the results of the relevant environmental assessments to its satisfaction such that they may properly be considered and assessed. However, the failure to supply a standalone statement in this regard cannot in itself invalidate a subsequent grant of planning permission.

The Supreme Court ultimately allowed the appeal of the Board against *Waltham Abbey* and dismissed the appeal in *Pembroke Road* regarding the issue of Article 299B.

Two further issues were then considered in relation to the *Pembroke Road* case, as follows.

Section 146A

Under the Dublin City Council Development Plan ("***the Development Plan***"), 10% of site space for new residential developments should be reserved for public open space. However, the Development Plan provides that, this requirement may be relaxed where a developer commits to the payment of a financial contribution in lieu of open space, used to support the provision of public spaces in the local area.

As the planned Pembroke Road development was situated beside a large park, Herbert Park, the Board accepted this financial contribution based on a recommendation report from the Chief Executive Officer. However, the High Court considered that the Board had incorrectly relied on Section 48(2)(c) of the Planning and Development Act 2000 ("***the 2000 Act***") in imposing the financial contribution condition but that it was within a general power of the Board under S.9(4) of the 2016 Act to impose a condition that the developer pay the financial contribution.

At trial, Owens J. adjourned the proceedings in order to allow the Board to correct this error under Section 146A(1)(iii) of the 2000 Act. This permits the amendment of a planning permission granted where the amendment to be made may "*reasonably be regarded as having been contemplated*" by the permission taken as a whole but which was not expressly provided for in the permission, on the basis it was wide enough to permit such a correction. Owens J. held that he was

3 *The People (Attorney General) v Kennedy [1946] 517 at 536.*

4 *Frescati Estates Ltd v Walker [1975] IR 177 at 187.*

5 *Re Murphy [1977] IR 243 at 251.*

exercising his discretion as to remedies in circumstances where the error was not one which required judicial review order overturning the decision. This was challenged by the Applicant in the Supreme Court who contended that such a mistake should be sufficient to set aside the decision of the Board, and that the provisions of Section 146A should not have been available to remedy its error.

The Supreme Court also upheld the decision of Owens J. on this issue. In explaining the gravity of a judicial review order overturning a decision, Hogan J. noted that the "*remedy is- for good reasons- a powerful and effective one*. *Experience has, however, shown that the remedy of annulment may sometimes amount to a form of excessive enthusiasm on the part of the legal system and that a more finely tuned remedy may be required*". The Supreme Court held that in this case the error was a simple one that did not weaken the integrity of the decision, and found that it could readily be corrected by simply substituting the correct statutory reference in the planning decision using the S.146A procedure.

Building Height Guidelines

The final issue raised in Pembroke Road was in relation to material contravention of the Development Plan in respect of the height of the proposed development. Under Section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016 ("*the 2016 Act*"), the Board may grant planning permission in material contravention of a development plan provided this decision can be justified with reference to Section 37(2)(b) of the 2000 Act. Section 37(2)(b) allows such permission to be granted where the Board considers that it should be granted having regard to certain matters including Guidelines issued under Section 28 of the 2000 Act.

The Board argued that it had given due consideration to the required matters here before determining that the permission should be granted despite the material contravention of the Development Plan due to the proposed development's strategic or national importance and with regard to Specific Planning Policy Requirement 3 ("*SPPR 3*") as per the ministerial guidelines. The Applicant contended that if the Board wanted to rely on SPPR 3 for the purposes of Section 37(2)(b)(iii) then it must "*demonstrate*" that the Development Plan is not in alignment with the National Planning Framework. In the High Court, Owens J. considered that this requirement had been satisfied, despite the fact that there was no express statement made by the Board to this effect, on the basis that it was "*self-evident*" that the Development Plan and the National Planning Framework did not align.

The Applicant argued that the High Court erred in reaching this conclusion, contending that the Board could only invoke its powers under Section 9(6)(c) of the 2016 Act and Section 37(2)(b) of the 2000 Act in circumstances where it was clear that there was an identified want of alignment between the height requirements and objectives of the Development Plan and the Ministerial Guidelines and National Planning Framework. The Supreme Court agreed with Owens J. in holding that this want of alignment regarding height guidelines was obvious and it was at the very least implicit in the Board's decision that it was aware of this and that appropriate attention was paid to the general objectives of the Guidelines and the need to comply with the combined requirements of Section 9(6) of the 2016 Act and Section 37(2)(b) of the 2000 Act.

High Court outcome

Both matters were sent back to the High Court for further consideration of the implications of the Supreme Court Judgment. As the Supreme Court upheld the findings of Owens J. in Pembroke Road, an order overturning the decision was refused and the challenge fell away.

In *Waltham Abbey* Humphreys J. had to consider the implications of the Supreme Court Judgment vis a vis Article 299B and he also had to hear the matters that had been left over in the substantive matter (screening for EIA, and in particular the adequacy of the information as regards bats).

In relation to Article 299B Humphreys J. noted that the Supreme Court had decided the issue, so there wasn't anything to remit. However, he did note that in another case presumably an applicant could make the domestic law point that the contents of the developer's material did not comply with Article 299B, even bearing in mind the lack of a need in domestic law for a unified statement as a stand-alone document.

In relation to the matters left over, Humphreys J. intends to make a preliminary reference to the Court of Justice of the European Union ('*CJEU*') in relation to, inter alia, the scope and quality of the information to be provided by a developer under Article 4(4)6 of the EIA Directive when viewed in light of the precautionary principle. The reference has not yet been finalised as Humphreys J. is awaiting further submissions from the parties and may refine the questions following the CJEU judgment in Case C-721/21 *Eco Advocacy v An Bord Pleanala.*

Key takeaways

1.There is no requirement for a standalone "*statement*" to be provided to the Board under Article 299B(i)(b)(ii)(II)(c) of the 2001 Regulations - by an applicant for permission for an SHD development - indicating how the available results of other relevant assessments have been taken into account, as long as this information can be found within the existing environmental assessments submitted.

2. Section 146A(1)(iii) of the 2000 Act permits the amendment of a planning permission granted where the amendment to be made may "*reasonably be regarded as having been contemplated*" by the permission taken as a whole but which was not expressly provided for in the permission.

3. Where there is obvious misalignment between guidelines/planning policy and the provisions of a development plan, it might be implied that the Board is aware of same and the need to expressly refer to a material contravention is not necessary, although of course clarity in such decisions is always preferable.

These case summaries are prepared by Fieldfisher Ireland LLP Solicitors (JP McDowell, Zoe Richardson, Jonathan Moore, Rory Ferguson and Patrick Reilly) on behalf of the Office of the Planning Regulator.

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