Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

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Legal Cases:

Killegland Estates Limited v Meath County Council & Ors [2023] IESC 39/McGarrell Reilly Homes Limited & Anor v Meath County Council [2023] IESC 40

Gardiner v Mayo County Council [2024] IEHC 5

Corrib Community Association Company Limited by Guarantee v Killola Quarries Limited & Ors [2023] IEHC 610

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Prepared by Fieldfisher for the Office of the Planning Regulator

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Introduction

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

The case selection for this edition of the bulletin was made following recommendations received from the Planning Law Bulletin Steering Group. This Group consists of nominees from the Law Society of Ireland's Environmental and Planning Law Committee, An Bord Pleanála, the OPR legal services provider Fieldfisher LLP, the County and City Management Association and the OPR.

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

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

Cases: Killegland Estates Limited v Meath County Council, Cornelius Giltinane and Patricia Giltinane (Notice Parties) and **McGarrell Reilly Homes Limited and Alcove Ireland Eight Limited v Meath County Council**

Date delivered: 21 December 2023
Citations: [2023] IESC 39 and [2023] IESC 40
Judge: Hogan J.

Note: On 21 December 2023 the Supreme Court (Mr. Justice Hogan) delivered judgments in the above appeals against judgments of Mr. Justice Humphreys in the High Court. The appeals were heard sequentially by the Court as they involved similar challenges to the Meath County Development Plan-making process.

The judgments are considered in turn below.

Killegland Estates Limited v Meath County Council & Ors [2023] IESC 39

Background

In September 2021, the elected members of Meath County Council (the Council) decided to adopt a new Development Plan, the Meath County Development Plan 2021-2027 (the 2021 Development Plan).

The effect of this decision was to change the land-use zoning of certain lands owned by Killegland Estates Limited (the Appellant) in Killegland, Ashbourne from residential to community infrastructure. At the same time the Council rezoned certain lands (the Giltinane lands) owned by the notice parties to the proceedings from rural to residential.

The elected members of the Council wished to preserve the Appellant's lands as being suitable as part of the development of a park along the river to facilitate access to the proposed park and for the construction of a cark park to service the proposed park.

The Appellant brought judicial review proceedings challenging the Council's decision on the basis that inadequate reasons had been given by the Council given the adverse consequences for the Appellant of the de-zoning of the lands. In this regard, the lands had been purchased by the Appellant in 2021 at a price which appeared to reflect the then residential zoning. The Appellant argued that it had been singled out unfairly for de-zoning and that the Council's decision was against the advice of the Council officials and the Office of the Planning Regulator.

The Appellant further alleged that the de-zoning was contrary to the sequential approach to zoning, that the Council failed to have regard to the Development Plan Guidelines 2007, that the Council acted contrary to Objectives 72a-c and Appendix 3 of the National Planning Framework (NPF), and that the lands were sequentially preferable for residential development to the alternative Giltinane lands. The Appellant also alleged that the Council had taken into account irrelevant considerations in making its decision.

High Court (Humphreys J.)
In a judgment delivered on 1 July 2022, Mr. Justice Humphreys held that the Council did have regard to the Section 28 Development Plan Guidelines and that this was not a '*heavy bar*' and that departure from the guidelines does not constitute a misunderstanding of them or a failure to have regard to them.

Humphreys J. accepted that the obligation to ensure the Development Plan was consistent with objectives specified in the NPF was a more onerous obligation but held that Section 10(1A) of the Planning and Development Act 2000 (the PDA 2000) only required the Development Plan to comply with the objectives of the NPF and the Regional Spatial and Economic Strategy (RSES) as far as this was practicable i.e. the Council only had to comply with objectives rather than the whole document and objectives could be departed from on a reasoned basis.

In relation to the contention that the Appellant's representations were not considered, Humphreys J. held that a failure to discuss something by way of narrative is not to be equated with a failure to account for it at all and that the requirement was to give the main reasons for the main issues. Reasons could be gathered from documentation expressly referred to or from the context of the decision. Further Humphreys J. found that there was no requirement to engage with submissions in a discursive sense. Humphreys J. considered that the nature of the Council's decision, being a result of a collective/deliberative assembly, was a basis for a more flexible approach to the formal requirement to set out reasons on the face of a resolution or document referred to in that resolution. Humphreys J. noted that it is inherent in the nature of a collective or deliberative assembly that the body is bound by the collective majority decision and that it was not just what was stated at the meeting that was relevant but also the materials that were before the decision-makers.

Humphreys J. also concluded that the Appellant could not challenge the housing provisions on any one piece of land without also challenging the core strategy of the Development Plan.

Supreme Court (Hogan J.)
The judgment of Mr. Justice Hogan in the Supreme Court largely upheld the High Court decision but disagreed with the High Court on one particular aspect: it was not necessary for the Appellant to have challenged the entirety of the development plan. The Court noted that judicial review is premised on the basis that applicants will challenge only those decisions which directly affect them, and that the alternative would be unnecessary, burdensome and likely to lead to unnecessary costs and a waste of court time.

Mr. Justice Hogan noted the position under the PDA 2000 in the context of the making of development plans that there can be no expectation that a particular zoning of land in a given development plan will remain in a future development plan.

Reasons
In relation to the alleged inadequacy reasons, Mr. Justice Hogan noted that where the Council makes the development plan it acts as a deliberative assembly and that reasons are not as neat as in a decision on a planning application (of course the elected members have no role in making decisions on a planning application, this is an executive function of the Council acting as the planning authority). The reasons for going against the advice of the Chief Executive and Council officials should be properly evidenced and justified, and should be clear from the resolution itself or from the documents before the councillors when making the resolution. The Court held that the councillors proposing the change to the zoning of the Killegland lands had on many occasions explained the reasons for their decision and no-one could have been in any doubt as to the reasons given for the de-zoning. Ultimately, the Court held that the reasons contained in the minutes of the meeting and the motion papers filed in support of the resolution were adequate.

Irrelevant Considerations
The Court found that the reasons given for disregarding the advice of the Council officials were for the most part planning-based reasons.

The Court noted that some councillors erroneously believed that the lands were in church ownership and that was why they had not been developed to date. Further, some Councillors also mistakenly believed that a swap of the Giltinane lands was necessary to facilitate the de-zoning of the Appellant's lands.

The Court held that both of these issues were irrelevant to the planning decision, they were not absolutely central and were at best marginal considerations and could not be said to vitiate the overall decision to de-zone the Appellant's lands.

Was the decision in accordance with the requirements of the NPF?
The Appellant's case under this heading was that the de-zoning was not consistent with the NPF.

The Court noted that one key object of the core strategy provisions is to ensure that development plans take proper account of projected population growth in any given areas and that this implies that the promiscuous and unlimited rezoning of land for residential use should no longer be permitted. The Court noted that, overall, the effect of these provisions constrain to some degree the Council in the making of development plans. However, the Court acknowledged that some allowance must be made for the large-scale nature of this exercise and it would be unrealistic to expect perfect consistency or alignment with national planning guidelines or frameworks such as the NPF. Elected members are not unconstrained in their plan-making and any development plan must align itself in general with certain national and local policy objectives.

The Court held that Section 12(18) of the PDA 2000, which requires that the development plan is consistent with the objectives of the NPF, means to be generally consistent as distinct from complying in every detailed and minor particular.

The Court found National Policy Objective (NPO) 3c of the NPF (which sets out compact growth targets) to be aspirational and a preferred approach rather than imposing a legally prescriptive standard which requires every in-fill site to be zoned for housing.

Requirements of the RSES
The Appellant also alleged that the Council's decision was contrary to the requirements of the RSES, made by the Eastern and Midland Regional Assembly, in particular Regional Policy Objectives (RPOs) 4.1 and 4.2 which set out formal objectives in relation to the hierarchy of settlements and the phasing of infrastructure investment. The Court noted that the RSES mirrors the requirements of the NPF regarding spatial development but this did not amount to some imperative requirement that all in-fill sites in existing urban areas must be zoned for housing development.

The Court commented that it might be different if a development plan studiously avoided such zoning for in-fill sites throughout the county but found that the rezoning of the Killegland lands for community infrastructure did not breach the RPO 4.1 objective and there was a clear rationale explaining the reasons for the de-zoning of these particular lands.

Ultimately, the Court found no basis in law by which the validity of the Council's decision could be impugned and therefore dismissed the Appellant's appeal.

McGarrell Reilly Homes Limited and Alcove Ireland Eight Limited v Meath County Council [2023] IESC 40

Background

These proceedings also sought to challenge the decision of Meath County Council (the Council) to adopt the Meath County Development Plan 2021-2027 (the 2021 Development Plan).

The apparent effect of the Council's decision was to change the land-use zoning of certain lands owned by McGarrell Reilly Homes Limited and Alcove Ireland Eight Limited (the Appellants) at a site at Kilcock and two sites at Stamullen and actually change the zoning of a further site at Stamullen. The distinction between the apparent and actual effect relates to the nature of the land-use zoning of the sites prior to the Council's decision.

This challenge raised similar issues to the Killegland proceedings but there was one significant additional issue to be determined, namely, whether a Council can commit itself to reserving certain lands for residential purposes beyond the lifetime of an existing development plan.

In relation to all four of the Appellants' sites, the earlier zoning had been for *future* residential purposes under the previous development plan following a variation to the development plan to address the oversupply of existing zoned land in Meath. The purpose of the variation was to present a strategy to deal with the excess of residentially zoned land as identified in the 2013-2019 Meath County Development Plan (the 2013 Development Plan). A statement from the Council accompanying the variation indicated that the inclusion of lands in Phase II which were indicated as being required beyond the life of the present County Development Plan (i.e. post 2019) inferred a prior commitment on the part of the Council regarding their future zoning for residential or employment purposes.

The Appellants had expended considerable monies on the lands for general infrastructure purposes and it appeared to the Court that at least some of the expenditure was in anticipation of future later development.

The Kilcock site was previously zoned A2 New Residential Post-2019[1] under the 2013 Development Plan[2] and was zoned A2 Residential (Phase II) Post-2027[3] under the 2021 Development Plan. Two of the Stamullen sites were zoned A2 Residential Post-2019 under the 2013 Development Plan with one of the sites (Crowe's Lands) changing to G1 Community Infrastructure and the other (Silverstream lands) to RA Rural Lands under the 2021 Development Plan. A third site at Stamullen (Haran's lands) was previously zoned A2 Residential Post-2019 but is now zoned E3 Warehouse and Distribution in the 2021 Development Plan.

The Appellants challenged the Council's decision on a number of grounds including an alleged inadequacy of reasons for changing the zoning of the Appellants' lands, a failure to engage with submissions made, a breach of the Appellants' legitimate expectations and alleged inconsistency of the Council's decision with the NPF (NPO 72a, 72b, 72c and Appendix 3) and RSES (RPO 3.2 and paragraph 4.3).

High Court (Humphreys J.)

In a judgment delivered on 1 September 2022, Mr. Justice Humphreys rejected the challenge to the validity of the de-zoning and adopted reasoning found in his Killegland judgment.

1 This meant that the lands were not actually zoned residential at that time but the Council had, in effect, committed to zone them residential in the next development plan.

2 The plan was extended to seven years due to the COVID-19 pandemic.

3 As with the post-2019 zoning, the post-2027 zoning was understood to mean that the lands would be zoned residential in the next development plan.

The Court noted that consistency with the objectives of the NPF is a statutory obligation for the Council and that this was a more onerous obligation than the "*have regard to*" standard. When the NPF refers to objectives in relation to zoned land this clearly means zoning for the purposes of housing or economic activity. The infrastructure assessment report envisaged by the NPF is required if development is to be permitted. A key issue was whether the Council was under a statutory duty to prepare an infrastructure assessment report, as required by the NPF, and whether the de-zoning of the Appellants' lands was inconsistent with the NPF by not applying a '*tiered approach*' to zoning.

Mr. Justice Humphreys held that none of the Appellants' lands were zoned lands within the meaning of Appendix 3 of the NPF and the Council was not under an obligation to prepare an infrastructure assessment report.

The Court also held that the statutory obligation to ensure a development plan was consistent with the objectives of the NPF and RSES only applied to the specific objectives contained therein and not to the entirety of those documents. Further, the Court found the 2021 Development Plan to be consistent with the objectives of paragraph 4.3 of the RSES which permitted core strategies to apply prioritisation measures and/or de-zoning of land where a surplus is identified.

Supreme Court (Justice Hogan)
In accordance with his judgment in the Killegland proceedings, Mr. Justice Hogan held that there was no requirement to challenge the whole plan or the core strategy and that appellants could challenge an aspect of it relating to a particular portion of land.

Commitments in respect of Future Zoning
The Court found that the language of the variation to the previous 2013 Development Plan did imply a commitment to residential zoning post-2019 but that this was not a commitment which the Council was empowered to give and it could not constrain future development choice. It was an ineffectual future promise which could not bind the planning authority. The Court further held that there was no estoppel or legitimate expectation in view of the express statutory provisions governing the making of a future development plan contained in Sections 9 to 12 of the PDA 2000.

The Court further noted that it was not possible for any local authority to bind itself beyond the six-year lifetime of its development plan insofar as the making of a future development plan is concerned.

The Appellants' lands were therefore not zoned lands for the purposes of the existing development plan or the NPF or RSES. The Court considered the provisions of Objective 72b of the NPF, which requires planning authorities to prepare infrastructure assessment reports when considering zoning lands for development purposes that require investment in service infrastructure. Mr. Justice Hogan agreed with the High Court that the reference to zoned land in the context of Objective 72b is clearly land which is or may be zoned for housing and development purposes.

The Court held that an infrastructure assessment report under Objective 72b of the NPF was not required given that the lands were not zoned for residential use and thus there was no breach of the objective in this regard.

In relation to the site that was zoned Warehouse and Distribution, the Court found that there was no evidence that this site would have required investment in service infrastructure such as would require an infrastructure assessment report. In any event this would not benefit the developer as even a favourable decision of the Court could not change the zoning to residential.

Inconsistency with NPF/RSES
The obligation to ensure that the development plan is consistent with the objectives of the NPF and RSES arises from the provisions of Sections 11(1A), 12(11) and 12(18) of the PDA 2000.

The Court found that the RSES expressly contemplates that in the case of surplus land not immediately available for development, the Council should consider land prioritisation measures rather than de-zoning of lands currently zoned for residential development. However, the RSES could not be interpreted as imposing an obligation on the Council to provide for something outside of the lifetime of the development plan. Further, the Court found that guidelines and strategic plans made pursuant to statute - such as the NPF and the RSES - cannot be allowed to take precedence over the express nature of the statutory structure regarding the making of development plans.

Ultimately, the Court held that the Council was not in breach of its obligations under Section 12(18) of the PDA 2000 to ensure the general consistency of the 2021 Development Plan with the NPF and the RSES.

Adequacy of Reasons
The Appellants made detailed submissions to the Council concerning the zoning of the four sites and the Council received hundreds of other submissions on the draft development plan, including from the Office of the Planning Regulator.

The Council's Chief Executive, in her report dated 13 August 2020, addressed the status of the four sites and gave detailed reasons for her conclusions in respect of each of them.

Mr. Justice Hogan found that the reasons for de-zoning were rational, intelligible and comprehensive. He noted that the only area where the reasons given were not as fulsome as they might ideally have been related to the decision of the Council to depart from the prior commitments given in respect of the Appellants' sites. Nonetheless, the Court considered the reasons given were sufficient to satisfy the reasons requirements as set out in cases such as *Christian*,[4] *Connelly*[5] and *Balz*[6] noting that the reasons were sufficient for the Appellants to know in at least general terms the reasons why the decision to de-zone the lands was taken.

Key Takeaways from Both Judgments

1. In a deliberative and collective decision-making process -- as in the decision by the Council to adopt a development plan -- there is a more flexible approach to the recording of reasons. It is not just what is stated at the meeting that is relevant but also the materials that are before the decision-makers.

2. The obligation on planning authorities in the plan-making process is to ensure consistency with the objectives of the NPF and RSES not the entire documents.

3. Further, the obligation means consistency generally as distinct from complying in every detailed and minor particular.

4. Where a decision-maker has taken into account irrelevant considerations, where those considerations are not absolutely central or material to the decision, they are not a basis for annulling the overall decision.

4 *Christian & Others v Dublin City Council* [2012] IEHC 163.

5 *Connelly v An Bord Pleanála* [2018] IESC 31.

6 *Balz & Heubach v An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 167.

5. A judicial review challenge is generally not required to challenge the core strategy of an entire development plan when it is only a particular zoning decision in that development plan that is of concern to the appellant.

6. It is not possible for a local authority to bind itself into the future beyond the lifetime of the development plan in respect of the zoning of land.

7. "*Zoned lands*" in the NPF means lands zoned for residential or economic activity.

8. The obligation under NPO 72b to prepare an infrastructure assessment report only arises in respect of zoned lands.

A link to the Judgments can be found here **[2023] IESC 39** and here **[2023] IESC 40** respectively.

Case: John Gardiner v Mayo County Council; BP Mitchell Haulage and Plant Hire Ltd Trading As Killala Rock (Notice Party)
Date delivered: 15 January 2024
Citation: [2024] IEHC 5
Judge: Simons J.

Background

These proceedings concerned a grant of planning permission which authorised the carrying out of certain quarrying activities. On 1 July 2021, BP Mitchell Haulage and Plant Hire Limited (the Developer) applied to Mayo County Council (the Council) for planning permission for the continued use and operation of a limestone quarry. The Council decided to grant permission on 11 January 2022. John Gardiner (the Applicant) who resided next to the quarry, and had made an objection in relation to the planning application, attempted to appeal against the Council's decision but this appeal was invalidated by An Bord Pleanála (the Board) on the basis that the appeal had not been accompanied by the required proof that the Applicant had made an objection to the Council in the first instance. With no valid appeal in existence, the Council granted planning permission on 14 February 2022.

Following this, the Applicant sought to judicially review the matter, instituting proceedings on 8 April 2022 which was within eight weeks of the "*grant*" of planning permission but more than eight weeks after the date the "*decision*" to grant planning permission was made. The Applicant contended that the proceedings concerned the "*grant*" of planning permission rather than the "*decision*" to grant and were therefore not out of time. The Developer contended that the statutory time-limit had expired and that it was not open to the Applicant to use the "*grant*" of planning permission in order to attack the underlying "*decision*" to grant planning permission.

The Legislation

The Planning and Development Act 2000 (the PDA 2000) distinguishes between a "*decision*" to grant planning permission and the subsequent "*grant*" of planning permission on the basis that the decision of the planning authority is subject to appeal. The decision is only given legal effect by the issue of a "*grant*" of planning permission, which can only be made in circumstances where the prescribed four-week period for an appeal has expired with no appeal having been made (or withdrawn) prior to the Board making a determination on that appeal.

In either event, the planning authority is obliged to make a "*grant*" of planning permission without making any amendments to the earlier "*decision*". In the event an appeal is made to the Board and not withdrawn, the "*grant*" of planning permission is never made as the decision of the Board annuls the earlier decision of the planning authority under Section 37 of the PDA 2000. If the Board decides to grant planning permission then the "*grant*" is issued by the Board. If the Board decides to refuse permission then no grant is made by either the planning authority or the Board.

Section 50(2) of the PDA 2000 sets out the judicial review procedure for challenging decisions and acts of a planning authority, a local authority or the Board and Section 50(6) of the PDA 2000 sets an eight-week time limit for taking such judicial review proceedings. There is scope for an extension of time in certain circumstances (Section 50(8) of the PDA 2000).

The Arguments of the Parties
Both parties to this case were in agreement that the "*grant*" of planning permission constitutes an "*act*" of a planning authority in the performance of its functions under the PDA 2000 and that this "*act*" of making a "*grant*" of planning permission is justiciable. The Applicant disagreed on whether the grounds of challenge implicated the validity of the "*decision*" to grant planning permission. The Applicant's grounds of challenge comprised an impermissible collateral challenge to the "*decision*" to grant. The time limit for the Applicant to challenge the "*decision*" to grant had expired prior to the institution of these proceedings.

Collateral Challenge
The Court outlined the concept of a collateral challenge, stating that "*a party who has the benefit of an administrative decision, which has not been challenged within the prescribed time-limit, should not be exposed to the risk of having the validity of that decision challenged in later proceedings which seek to quash a subsequent decision on the basis that the earlier decision was invalid*". In essence, an Applicant cannot use a subsequent decision as an indirect means of challenging an earlier decision. The earlier decision has the benefit of immunity arising from the expiry of the eight-week time limit.

It is for the Court, in any given case, to determine whether a challenge to a subsequent decision involves an impermissible collateral challenge to an earlier decision in the same process. The Court identified the proper approach to be taken from the case of *Sweetman v An Bord Pleanála* [2018] IESC 1 at Para 42, which sets out that the Court should consider the legislative scheme as a whole, having regard to its express terms and any additional matters which can be properly implied. The Court should determine whether it is clear that there is a particular question or issue that is to be definitively determined at an earlier stage to the extent that this question or issue cannot be re-opened at a later stage. If so, any person seeking to challenge that determination should be required to do so within a relevant statutory time limit or time set out in the rules of court. Any failure to challenge within that timeline, or an extended timeline as permitted by the Court, will result in that determination being incapable of challenge. Any subsequent decision made in the same process is then incapable of challenge, where such a challenge is grounded on the premise that the initial determination was not lawfully made.

The Court found that these proceedings fell foul of the preclusion on collateral challenges. It noted that the PDA 2000 makes it clear that all matters of substance are to be determined at the stage of the "*decision*" to grant planning permission. The "*grant*" stage is purely mechanical and the purpose of the distinction between the "*decision*" to grant and the "*grant*" stages is to identify that the planning authority's decision is subject to appeal. Once the appeal period has expired the planning authority does not have any discretion to refuse or amend the decision. It is required in good faith to make a formal "*grant*" of its prior decision. The result of this is that the grounds upon which a "*grant*" can be challenged are very narrow. The Court gave the example of where an additional condition is added to the planning permission at the time the "*grant*" is made.

The Court identified that all of the grounds pleaded were grounds that went to the "*decision*" as opposed to the "*grant*". Accordingly, it was not possible for the Court to find in favour of the Applicant without implicitly finding that the "*decision*" to grant was invalid. The Court noted the PDA 2000 was clear and unambiguous in setting out that the eight-week time limit to challenge a "*decision*" to grant runs from the date of the "*decision*" to grant and not the date of "*grant*". The question of whether the decision is legally effective or not is irrelevant for the purposes of this time limit.

The judicial review proceedings concerned a challenge to the validity of the underlying "*decision*" to grant. Accordingly, the proceedings were deemed inadmissible due to delay and the Court dismissed the proceedings on this basis, stating that the Applicant could not "*sidestep the time-*

limit by purporting to challenge the subsequent grant of planning permission by reference to grounds which impugn the validity of the underlying decision to grant".

The Court distinguished the facts of this case from that of *Henry v Cavan County Council* [2001] IEHC 16, a judgment, which concerned an earlier version of the planning legislation whereby the special judicial review procedure was confined to a "*decision of a planning authority on an application for a permission or approval*". This procedure now extends to "*any decision made or other act done by*" a planning authority. In *Henry,* it was argued that there was a "*continuum*" between the initial decision to grant planning permission and the formal grant of permission with the critical date for the purposes of the time limit being the date of the grant. The judge held that a distinction must be drawn between a decision of a planning authority to grant planning permission and the grant itself and the proceedings were out of time.

The Court found that the *Henry* judgment was not relevant to the present proceedings in light of the modern planning regime and the fact that the present proceedings centred around the issue of an impermissible collateral challenge.

Key Takeaways

1. A "*decision*" to grant planning permission and the subsequent "*grant*" of planning permission are distinct acts of the planning authority. While both acts may be challenged, a "*grant*" of planning permission cannot be used as a "*back-door*" means of challenging the "*decision*" to grant which entails the substantive decision to grant planning permission to the applicant in the planning process.

2. The "*grant*" of planning permission is obligatory for the planning authority in circumstances where no appeal against the "*decision*" to grant has been made within the prescribed four-week period or any appeal has been withdrawn prior to the Board making a determination on that appeal.

3. A "*grant*" of planning permission is not immune from challenge. However, the parameters within which a "*grant*" may be challenged are narrow and do not include a challenge against the substance of the "*decision*" to grant. Rather, a challenge to a "*grant*" will require the identification of some legal defect in the finalisation of the underlying "*decision*" to grant. For example, the inclusion of a new condition which did not form part of the "*decision*" to grant.

4. A litigant cannot mount a challenge to an act by relying on a subsequent act or decision as a mechanism to indirectly challenge a decision which is immune from challenge by virtue of the expiry of a statutory time limit. This would be considered an impermissible collateral challenge. What falls within the scope of an impermissible collateral challenge will be a matter for the Court to determine, taking the legislative scheme as a whole into account and identifying whether the subject matter of the challenge has been definitively determined at an earlier stage to the extent that there is no possibility of that issue being re-opened.

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

Case: Corrib Community Association Company Limited by Guarantee v Killola Quarries Limited, Michael Power and Noel Welby and Galway County Council (Notice Party)
Date delivered: 9 November 2023
Citation: [2023] IEHC 610
Judge: Humphreys J.

Background

This matter concerned an injunction application under Section 160 of the Planning and Development Act 2000 (the PDA 2000) by the Corrib Community Association Company Limited by Guarantee (the Applicant) in relation to ongoing blasting and other works at a quarry in County Galway that never had the benefit of a conventional grant of planning permission under Section 34 of the PDA 2000. Killola Quarries Limited, Michael Power and Noel Welby (the Respondents)[7] argued that the quarrying activity had been established prior to 1 October 1964 i.e. before the coming into effect of the Planning Acts. Enforcement proceedings brought by Galway County Council (the Council) in 2004 apparently failed on the basis of a lack of evidence to establish unauthorised development.

In 2007 the quarry was registered under Section 261 of the PDA 2000 with conditions of operation imposed. In 2012 the Council directed the Respondents to apply to An Bord Pleanála (the Board) for substitute consent with a remedial Environmental Impact Statement (rEIS) and a remedial Natura Impact Statement (rNIS) under Section 261A(3)(c) of the PDA 2000.

On 28 January 2015 the Board granted substitute consent. The conditions were phrased in terms of restoration and clearly related to development already undertaken. They did not authorise any future development at the quarry.

However, the quarry continued to operate and in early 2020 local residents began to notice an increased intensity in the blasting operations at the quarry and activity outside of normal working hours. This coincided with an intensification of the operation of the quarry in order to meet the demand from Galway County Council's contractor on the Moycullen Bypass. Local residents - who were working from home due to the COVID-19 pandemic - witnessed increased levels of dust, noise and vibrations. The local residents held meetings, formed the community association and made representations to the Council.

In September 2022 the Council issued an enforcement notice, which was judicially reviewed by Michael Power (the Second Respondent) and struck down by order of the court in July 2023.

In October 2023 the Applicant issued proceedings and a motion for an '*interlocutory*' injunction (i.e. one that is in place on a temporary basis until the substantive proceedings are determined) was heard on 6 November 2023. The Respondents claimed it was "*grossly unfair*" that an injunction was being sought in such circumstances by the Applicant, but this was firmly rebutted by the Court, finding that the Respondents had a lot of notice of concerns about the alleged unauthorised development, had about a month's notice of the proceedings, and had three weeks' notice of the injunction and of the hearing date, as well as noting that any order made would be revisited in the context of the substantive hearing.

7 On 1 March 2019, the First Respondent surrendered its operating rights at the quarry. Such rights were then conferred on Noel Welby Plant Hire Limited (the proposed Fourth Respondent). The First Respondent was ultimately let out of the proceedings.

Admission to the Planning and Environmental Court
The first aspect of the case dealt with by the Court was admission to the Planning and Environmental List,[8] and the Court found that it was appropriate and in the interests of justice to admit the case.

Whether the Case should be remitted to the Circuit Court
Secondly, the Court addressed the Respondents' motion to remit the matter to the Circuit Court. The Court found that because part of the Applicant's claim involved reliance on Section 11 of the Local Government (Water Pollution) Act 1977 (the 1977 Act), which jurisdiction is exclusively confined to the High Court, it made no sense to remit the other part of the Applicant's claim under the PDA 2000 only. The Court also found that there was no requirement that the injunction under Section 160 of the PDA 2000 be heard in the lowest court, such an injunction can be brought in both the High Court and the Circuit Court. The Court found that there were multiple other reasons why it should not exercise its discretion in favour of remittal to the Circuit Court, including the serious nature of the allegations, the significant legal issues, the EU law defences raised, the case management procedures available in the High Court and the likely delay in the Circuit Court.

The Interlocutory Injunction Application
Thirdly, the Court dealt with the '*interlocutory*' injunction application. It is important to note that this was only deciding what would happen to the activity at the quarry pending the hearing of the substantive matter that may take months or even years to be resolved. First, the Court looked at the reliefs sought by the Applicant, which were in summary to cease unauthorised development at the quarry pursuant to Section 160 of the PDA 2000 and to prohibit the Respondents from causing or permitting or continuing to cause or permit the entry of polluting matter to the waters pursuant to Section 11 of the 1977 Act. The Court dealt with various procedural objections that the Respondents had made to the form of the proceedings, and dismissed them summarily. Then the Court addressed the three main elements of the test for granting an injunction that: (i) the applicant has clearly established a fair question to be tried; (ii) damages are not an adequate remedy for environmental damage; and (iii) the balance of convenience favours an order, particularly having regard to the risk of environmental damage, reinforced by the precautionary principle in the EU law context.

The Court noted that a conflict of evidence is not fatal to granting an '*interlocutory*' injunction, although the opposing evidence has to be borne in mind, but went on to find that the Applicant had clearly demonstrated a fair question to be tried. In particular, the Court had regard to evidence of:

1) unauthorised development– the Applicant had put in affidavit evidence from Mr. Peter Thomson, a planning consultant, of unauthorised development that had been observed at the quarry and how that related to the permissions that the quarry had obtained (including substitute consent).

2) impacts on the Applicant's members, and their family members including children– the Applicant had put in affidavit evidence of residents including vibration and dust effects in their homes.

3) impacts on European sites – this was a concern of the Department of Arts, Heritage and the Gaeltacht at the substitute consent stage. The Applicant submitted affidavit evidence of Mr. Owen Twomey, a Senior Ecologist with APEM Ireland, who noted that the quarry boundary, as permitted in the substitute consent application, had been c.3 hectares in total area, and the extent of the current quarrying area, estimated from aerial imagery, was c.15.5 hectares, extending from the permitted area in all directions. The quarry was situate on Karst Limestone that was classified as a regionally important aquifer with extreme vulnerability. The closest watercourse was the Killola

8 Now the Planning and Environmental List.

stream, c.20m south of the quarry, which had a moderate "*at risk*" status under Water Framework Directive monitoring, and which flows into Ross Lake which is a Special Area of Conservation (SAC) and proposed Natural Heritage Area (pNHA) c.3 kilometres downstream. Suspended solids, fuel oils and explosive residues in surface water run-off from the quarry had a potential impact on the water dependant qualifying interests of Ross Lake SAC through the surface water hydrological connection. There was also evidence of oak, ash and hazel woodland removal adjacent to the quarry which had the potential to affect the lesser Horseshoe Bat population of the Ross Lake and Woods SAC. There are also a number of Annex I habitats protected under the Habitats Directive in the immediate vicinity of the quarry, including limestone pavement and wet/dry heath. Lough Corrib SAC was also c.500m west of the quarry and evidence was given that it was possible there was a groundwater connection between the quarry and the lake, which may affect the groundwater dependant terrestrial ecosystem listed as being a qualifying interest of the SAC. The Respondents' rEIS was referred to wherein it was accepted that explosive residues, silt and hydrocarbons may recharge to groundwater from the surface water run-off from the quarry.

4) impact on habitats including Annex I habitats and strictly protected species– in addition to the potential effects outlined above, Mr. Twomey outlined how the clearing of oak, ash and hazel woodland was potentially associated with the loss of priority Annex I habitat, which had been offered to be retained as part of the mitigation measures proposed in the rEIS that had been submitted by the Respondents in their substitute consent application in 2013.

5) impact on an ecclesiastical enclosure and children's burial ground– evidence from Mr. Twomey and Mr. Liam O'Connor (an expert in the heritage field) was that clearing, sorting/storage of waste and vehicle parking/moving had taken place on an area that was within the 50m exclusion zone from a national monument. This National Monument is an early Christian ecclesiastical enclosure and children's burial ground, in the ownership of the Respondents but outside the registered quarry area, and Mr. O'Connor submitted that it was under extreme threat from the quarry activities.

The Court went on to consider the Respondents' replies, which it found general and not to constitute detailed refutation of the Applicant's evidence, and were not enough to outweigh the factors in favour of an injunction pending the substantive hearing.

The Court considered the Respondents' potential defences to the injunction application, but dismissed them finding that: pre-1964 use did not authorise any wider developments since then; that even if pre-1964 use applied there would still be a requirement for environmental assessment under EU law (EIA and AA); the inspector's report and the Board's order for substitute consent did not apparently allow for future quarrying activities rather than merely regularising past activities; the fact that the Council didn't effectively close the quarry was not a decisive factor; any application for the Applicant to provide an undertaking as to damages would be inconsistent with Article 9(3) of the Aarhus Convention and Section 50B of the PDA 2000 costs protection rules; and the effect of closure of the quarry on employment was a factor but did not outweigh the requirement for environmental protection.

The Court considered whether the fact that the activity had been going on since 2015 and the apparent delay in the Applicant bringing proceedings was a factor but found that whilst it could be revisited it wasn't a basis for refusal at this point in time and whether delay was a proper basis to refuse an order where environmental protection was necessary was debatable. The Court stated the "*fact that one has been doing something (the applicant would say "getting away with something") for a period of time does not create a right to keep doing it (or keep getting away with it, if that is one's perspective). Obviously that is only a generalisation and there are such things as limitation periods and reliance interests, but there are also European legal requirements that may come into play to counterbalance that*".

The Court found that environmental risk normally outweighs other considerations and the environment isn't just some kind of mere neutral factor among other factors, rather environmental protection is an imperative of national and EU law.

The Appropriate Respondents to the Injunction
The Court considered the appropriateness of each of the Respondents in terms of answerability to the alleged unauthorised development, as follows:

(i) The First Respondent, Killola Quarries Limited, was let out of the proceedings by agreement of the parties.

(ii) The Second Respondent, Mr. Michael Power, was the landowner and listed as the owner of the quarry in the Section 261 application and had met with the Applicant on occasion to discuss their concerns. The Court found that there was ample evidence of a degree of control and involvement that made Mr. Power an appropriate Respondent.

(iii) The Third Respondent, Mr. Noel Welby, was a director and sole owner of the company Noel Welby Plant Hire Limited and evidence was presented by the Applicant that he had been communicating with the residents concerning the operation of the quarry and there was ample evidence as to Mr. Welby's familiarity with the operations of the quarry. The Court considered the caselaw and found that it was appropriate that the company, Noel Welby Plant Hire Limited, should be joined to the proceedings as a fourth named respondent, but for the purpose of the '*interlocutory*' injunction it was just and convenient that an order was made against that company's director Mr. Welby.

Injunction Order Made
Therefore, in respect of the '*interlocutory*' injunction application, the Court made an order pursuant to Section 160(1)(a) of the PDA 2000, the inherent jurisdiction of the court or otherwise, requiring the second to fourth respondents, their respective servants, agents, licensees, or any person acting in connection with them or on their instruction, or anyone acting in concert with them and all persons having the knowledge of the making of any Order herein, forthwith to cease and/or refrain from carrying out unauthorised development at Killola Quarry, Rosscahill, Oughterard, Co. Galway comprising unauthorised quarrying and associated activities including the blasting, extraction, processing, production, storage, distribution of any quarried and/or associated materials, and for this purpose all quarrying and associated activities at the site to be treated as unauthorised until further order, and in addition the prohibition on storage of any materials on site will not apply to materials already on site as of the date of making of the order.

Key Takeaways

1. This case makes it clear that the new Planning and Environmental Court will readily accept applications for an '*interlocutory*' injunction pursuant to Section 160 of the PDA 2000 and Section 11 of the 1977 Act seeking to refrain a person(s) from unauthorised development/unauthorised discharges to waters, and deal with such applications promptly.

2. The evidence provided by the Applicant of unauthorised development and risk to protected EU sites and species/habitats was comprehensive. The Respondents did not engage in a detailed refutation of that evidence but rather provided general replies and legal defences that did not outweigh the environmental factors presented by the Applicant. As a result, the Court found overwhelmingly in favour of the Applicant on an '*interlocutory*' basis (it remains to be seen if this will be reversed at the substantive hearing).

3. Delay in bringing such proceedings and previously unsuccessful enforcement efforts may be a factor in an injunction application, but were not necessarily determinative where future environmental damage injected urgency into the situation. The Court made a clear statement that environmental risk normally outweighs other factors and found that was the case here.

4. It is clear that injunctive proceedings, such as these, can be brought on the application of a planning authority or any other person and against any person that can be shown to have control over the unauthorised development or discharge concerned.

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

Case: Ballyboden Tidy Towns Group v An Bord Pleanála, Ireland and the Attorney General, South Dublin County Council and Ardstone Homes Limited (Notice Party)
Citation: [2023] IEHC 722
Judge: Holland J.

Background
An Bord Pleanála (the Board) granted planning permission to Ardstone Homes Limited (the Developer) to build a Strategic Housing Development (SHD) of 114 Build-to-Rent apartments in six blocks of up to six stories in height (the Proposed Development) on a 2.2 hectare site south of Stocking Avenue, Rathfarnham, Dublin 16 (the Site) by order dated 16 September 2021 (the Decision).

The South Dublin County Council Development Plan 2016 – 2022 (the Development Plan) and the Ballycullen-Oldcourt Local Area Plan 2014 (the BOLAP) applied to the Decision.
Ballyboden Tidy Towns Group (the Applicant) sought to overturn the Decision on grounds including:

- failure to identify a material contravention of the RES-N objective of the Development Plan that new residential communities should be provided in accordance with approved area plans,

- inaccuracy of the SHD planning application form (regarding the number of bicycle parking spaces and the number of proposed vehicle entrances),

- failure to recognise a material contravention of the BOLAP on the basis of encroachment on an electricity line wayleave,

- failure to recognise a material contravention of Objective GI13 of the BOLAP relating to removal of the only hedgerow on site,

- failure to engage with residents' objections regarding childcare facilities, and

- that the Decision was invalid as it contravened Articles 1 and 3 of the Strategic Environmental Assessment (SEA) Directive[9] by granting permission in material contravention of the Development Plan and the BOLAP.

South Dublin County Council recommended refusal of permission due to material contravention of specific objectives of both the BOLAP and the Development Plan as to building height, density and unit mix and the non-provision of childcare facilities contrary to Section 3.3.1 of the Childcare Facilities - Guidelines for Planning Authorities 2001.

Holland J. dealt with the main grounds of challenge to the decision as set out below, but as many of the grounds related to failures by the Board to recognise alleged material contraventions, he set out the relevant statutory provisions, as follows:

> Section 9(6) of the Planning and Development (Housing) and Residential Tenancies Act 2016 allowed the Board to grant permission for proposed strategic housing developments even if

9 Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

they materially contravened the relevant development plan or local area plan in relation to the area concerned, aside from the zoning of land. It is important to note that the Board could only grant permission in such cases if it considered that Section 37(2)(b) of the Planning and Development Act 2000, as amended would apply.

Section 37(2) of the Planning and Development Act 2000, as amended, provides that:

> *(a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.*
>
> *(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—*
>
> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or*
>
> *(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.*
>
> *(c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34 (10), indicate in its decision the main reasons and considerations for contravening materially the development plan.*

At the time of legal submissions and again at the beginning of the hearing, the Applicant dropped a number of grounds of challenge. The grounds that were dealt with at the hearing are set out below.

Ground 1: Material Contravention of Development Plan Objective RES-N
The Applicant challenged the Board's failure to address material contraventions of Development Plan objective RES-N. The Applicant argued that the Proposed Development contravened the BOLAP in terms of unit mix, density, and phasing, leading to a material contravention of Development Plan Objective RES-N which is "*to provide for new Residential Communities in accordance with approved Area Plans*".

However, the Court found that the Board "*discretely identified*" the respects in which the Proposed Development would not be "*in accordance with*" the BOLAP, as required by Development Plan Objective RES-N. Therefore, the Applicant was effectively arguing that the Board should have twice addressed the material contraventions: – once with respect to the BOLAP and a second time with respect to Objective RES-N in the Development Plan.

The Court said that the Applicant "*shifted ground*" at trial and asserted that the Board should have taken a global or cumulative analysis and justification of the contraventions of the BOLAP, in addition to the discrete justifications of the BOLAP which the Board did make.

The conclusion was that the Applicant's argument lacked substance and clarity, leading to the dismissal of this ground. Holland J. found that the Board did in fact and in substance do what the Applicant said it should have done.

The Court declined to decide a point that the Board had raised in respect of raising issues in judicial review that had not been raised before the Board at decision-making stage, or "*gaslighting*", but does make some judicial comments. These are to the effect that the term is used too much and may not have that much applicability anyway where the Board's proper interest in judicial review is in the correct result as to the legality or illegality of its decision rather than any private interest in having its decision upheld.

Ground 3.1: Inaccuracy in the number of bicycle spaces provided in the SHD Application Form

The Applicant raised concerns about inaccuracies in the number of bicycle parking spaces stated in the application form for the Proposed Development, highlighting discrepancies between different figures provided. The Board justified its decision regarding this issue deeming the discrepancies as not material.

The Board's Inspector noted various figures mentioned in different documents relating to bicycle parking spaces. The Application Form stated 198 bicycle parking spaces and the drawings indicated 213, whereas the EIAR and other documents referenced 238 spaces. The Inspector recommended that any permission should include a condition requiring additional cycle parking spaces due to the shortfall compared to the recommendation in the Section 28 Sustainable Urban Housing Design Standards for New Apartments Guidelines for Planning Authorities (December 2010).

Holland J. concluded that while discrepancies existed, they did not significantly impact public participation or compliance with guidelines, leading to the dismissal of Ground 3.1. There was a large volume of information in the application as a whole with regard to bicycle spaces to inform the Board's decision and Holland J. points to the quote in *Pembroke Road*:[10] "*the error… was a purely venial one, not otherwise affecting the integrity of the decision*".

The Court did comment, however, that many hours were wasted by the Inspector, the Applicant and lawyers involved in interpreting the discrepancies in the Developer's application documentation.

Ground 3.2: Inaccuracy in the number of proposed vehicular entrances as per the Application Form

The Applicant argued that the planning application was misleading as it described only one vehicular access point to the Proposed Development when there were in fact three. The Board and the Developer did not dispute this fact but rather disputed that it constituted an error in the application and that it did not have any legal significance. The assertion that public participation by this was affected was disputed.

Holland J. stated that this ground is "*easily dismissed for want of any factual basis*" and the Board's decision regarding this issue was supported by evidence from the Developer's site plan and other documents which clearly indicated three vehicular entrances. The Court found that at no point did the Developer misdescribe or insufficiently describe the vehicular access to the Proposed Development.

10 *Pembroke Road Association v An Bord Pleanála* [2022] IESC 30, [2022] 2 ILRM 417, §64.

In dismissing the ground, the Court stated:

"*In my view it would be impossible for the intelligent, informed layperson, who must be presumed to have at least a basic ability to read a map, (even without my markings thereon) to fail to correctly understand Ardstone's intentions as to vehicular access to the Proposed Development*."

Ground 4: Material Contravention of the BOLAP regarding electricity line wayleave width
The Applicant claimed that the Board failed to identify a material contravention of the BOLAP concerning the width of an electricity line wayleave which traverses the site. The Proposed Development left a lateral clearance area of 17 metres either side of a power distribution line on the site and it was argued by the Applicant that this materially contravened the BOLAP, which required 23 metres of clearance.

The Court found that the BOLAP did require a 23 metre lateral clearance area either side of the power line. However, while the Court agreed that the BOLAP was contravened, it found that there was no material contravention here having regard to the case law in *Roughan*,[11] another *Ballyboden*[12] case and *Jennings*.[13]

Holland J. was of the view that the Applicant, was merely voicing an objection to the Proposed Development rather than having the underlying interest of the ESB or safety as its primary concern.

The Court stated that no planning or other detriment could be identified from the contravention and as such it was not material. It further stated that the BOLAP reflects the requirements for utility providers and no objection was raised to the development by the ESB or the CRU.

This ground was therefore dismissed.

Ground 5: Material Contravention of the BOLAP Objective GI13 by the removal of a hedgerow
The Applicant's ground here focused on the removal of a hedgerow and whether it constituted a material contravention of the BOLAP. The Applicant argued that the removal materially contravened Objective GI13 of the BOLAP and G2 Objectives 2, 6 and 9 of the Development Plan while the Board argued that the contravention was not material.

The Court's conclusion was that the Development Plan objectives invoked by the Applicant were framed at a high and general level and did not protect individual hedges or deem the removal of any and every hedge to be a contravention of the Development Plan, much less a material contravention. In addition, while the removal of the hedgerow was significant to the green infrastructure network, it was ultimately deemed not to be a material contravention of BOLAP Objective GI13. The absence of complaints during the planning process regarding this specific contravention was noted, and the substantive objective of the hedgerow as part of the green infrastructure network was considered. As a result, Ground 5 was dismissed.

Ground 8: Failure to engage with residents' objections regarding childcare facilities
The challenge involved the Board's alleged failure to address residents' objections concerning childcare facilities. The Developer proposed to provide no childcare facilities as a nearby childcare facility under construction would supply 65 or more childcare places. The Developer's own childcare demand assessment concluded that demand for between 45 and 90 childcare spaces would be generated by the Proposed Development.

11 *Roughan and Others v Clare County Council* (unreported, High Court, Barron, J. 18 December 1996).

12 *Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes* [2022] IEHC 7 §140 et seq.

13 *Jennings & O'Connor v An Bord Pleanála & Colbeam* [2023] IEHC 14.

The Developer's demand assessment yielded an estimate of 170 places available in other childcare facilities. The White Pines North Residents objected to the Proposed Development and disputed the factual basis for assessment of the numbers of childcare places available and those that would be needed.

The Court cited *O'Donnell*[14] and *Sliabh Luachra*[15] in that it is "*crucial … that the points made in submissions should be addressed*", as well as *O'Brien*[16] and *Balz*.[17] The Court also reaffirms that the Board must give adequate reasoning to allow those who made submissions understand that their submissions were addressed and considered, however, as per *O'Donnell* what is required is the "*main reasons on the main issues*".

The Board's Inspector concluded that the "*likely childcare demands arising from the development would be satisfied within the wider White Pines development*" referring to the 65 places becoming available. The Court was satisfied that the main issue here was identified as the likely childcare demands that would arise from the development. The Court found that a resolution of the dispute as to the quantum of childcare availability was not necessary to the determination of the issue as the actual availability of childcare sufficed, and dismissed the ground.

Ground 8A: Strategic Environmental Assessment (SEA) issues
The Applicant argued that the Decision was invalid as it contravened Articles 1 and 3 of the SEA Directive by granting permission in material contravention of the Development Plan and the BOLAP as identified at Grounds 1, 4 and 5. The Court stated that it had already found that the impugned permission does not effect the material contraventions alleged and Ground 8A was dismissed.

The Court discussed the implications of the SEA Directive and relevant regulations and the decision in *O'Donnell*.[18] The Court considered itself bound by *O'Donnell* in its finding that a challenge to an SHD planning permission on the basis that the statutory provisions allowing the grant of planning permission in material contravention of Development Plans were incompatible with the SEA Directive because material contraventions themselves required SEA. This argument had already been rejected by Humphreys J. The Court extensively discussed the caselaw for the suggestion that the SEA Directive may apply to a development consent and dismissed the challenge made on SEA grounds.

Key Takeaways

1. The Board "*discretely identified*" the material contraventions where the Proposed Development may not be in accordance with the BOLAP as required by Development Plan Objective RES-N.

2. Discrepancies in an application form may not be material to the validity of a decision and it could be seen from this judgment that a broad view of the application as a whole must be taken.

3. One must be able to examine an application as a whole in order to understand the impact of a proposed development and the Court applied the objective of "*the intelligent, informed layperson*".

4. The materiality of a contravention of the BOLAP was examined in terms of potential planning or other detriment that could be identified as well as the lack of objections or submissions on the issue at hand.

14 *O'Donnell v An Bord Pleanála [2023]* IEHC 381.

15 *Sliabh Luachra against Ballydesmond Wind Farm Committee v An Bord Pleanála* [2019] IEHC 888.

16 *O'Brien v An Bord Pleanála & Draper* [2017] IEHC 733.

17 *Balz v An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367.

18 *O'Donnell v An Bord Pleanála* [2023] IEHC 381.

5. Decision makers have an obligation to engage with and address concerns raised in objections and submissions but the Court reaffirmed that the "*main reasons on the main issues*" are required to be addressed as per *O'Donnell*.

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

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

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