Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

Issue 04: June 2024

Legal Cases:

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Prepared by Fieldfisher for the Office of the Planning Regulator

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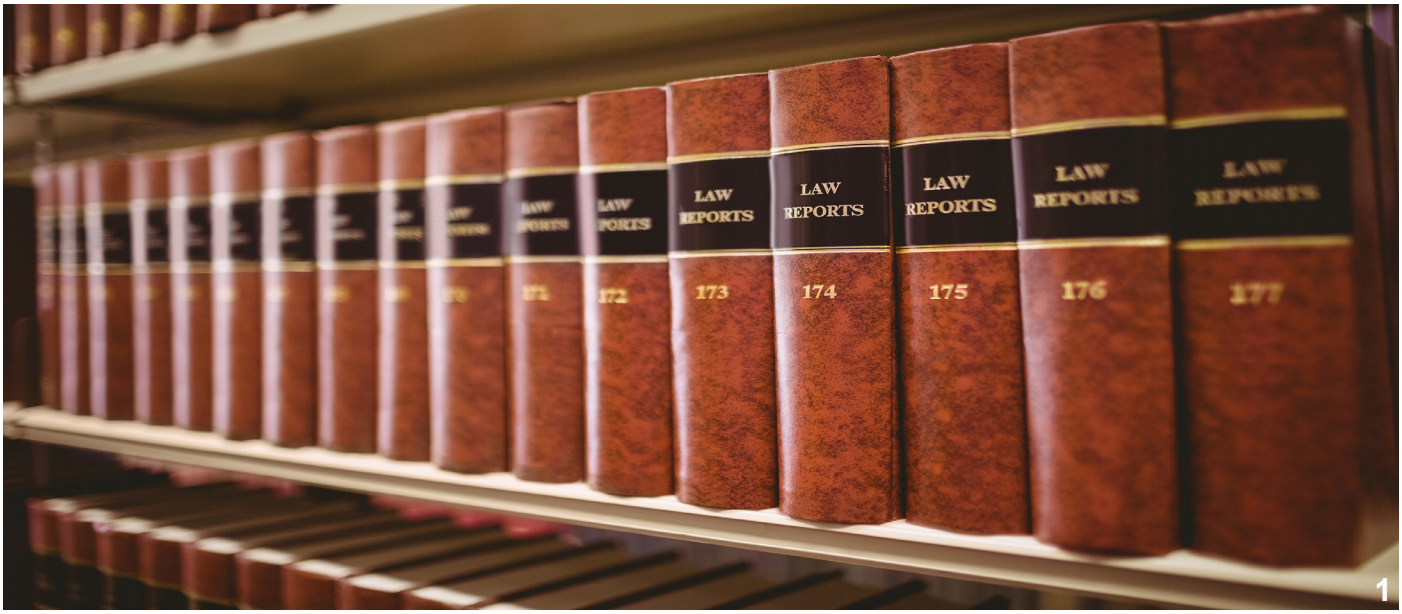
Introduction

The Office of the Planning Regulator (OPR) is pleased to present the fourth 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.



Case: Crofton Buildings Management CLG and Stephanie Bourke v An Bord Pleanála and Fitzwilliam DL Limited (Notice Party)
Date delivered: 10 April 2024
Citation: [2024] IESC 12
Judge: Donnelly J.

Abstract

This appeal concerned the High Court's authority to remit a matter for reconsideration by An Bord Pleanála (the Board), following a High Court order quashing a decision of the Board.[1] The case concerned the interpretation of Section 50A(9A) of the Planning and Development Act 2000, as amended (the 2000 Act), which reads as:

> *"If, on an application for judicial review under the Order, the Court decides to quash a decision or other act to which section 50(2) applies, made or done on an application for permission or approval, the Court shall, if requested by the applicant for permission or approval, remit the matter to the planning authority, the local authority or the Board, as may be appropriate, for reconsideration, subject to such directions as the Court considers appropriate, unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so".*

Background

The developer, Fitzwilliam DL LTD (the Notice Party) applied under Section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act) for a Strategic Housing Development (SHD) and was granted planning permission by the Board in April 2021.

Crofton Buildings Management CLG and Stephanie Bourke (the Appellants) then sought an order of *certiorari* quashing the planning permission. They argued, inter alia, that the Board was in breach of Section 9(6)(c) of the 2016 Act in granting the permission in material contravention of the Dún Laoghaire-Rathdown Development Plan 2016-2022 (the 2016 Development Plan) objectives, specifically those regarding building height. The Board conceded that the decision should be quashed and the Notice Party agreed. The parties agreed on the form of the order to be made in this regard apart from the question of remittal. Remittal involves returning the matter to the decision-maker for a fresh consideration and decision. The Notice Party sought remittal to the Board whereas the Appellants argued against remittal and sought that the decision be simply quashed.

By the time the application for remittal was made to the High Court, there had been a number of changes to the statutory and policy framework. The 2016 Development Plan was replaced by the Dún Laoghaire-Rathdown Development Plan 2022-2028 (the 2022 Development Plan) and the SHD process was replaced by the Large-scale Residential Development (LRD) process as provided for under the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (the 2021 Act).The Appellants contended that there were material differences between the two development plans that could affect the application for planning permission.

1 This decision was quashed by an order of certiorari made by the High Court. An order of certiorari may be made when it is determined that a body had no jurisdiction to make a decision on a particular matter and the decision is then nullified.

High Court (Mr. Justice Holland judgment delivered on 16 May 2023)
The Notice Party argued for a number of reasons, including the right to an effective remedy and fair procedures, that the remitted decision should be made having regard to the 2016 Development Plan, but the High Court held that the relevant development plan means the plan in force at the time of the decision, therefore any remitted decision should be made having regard to the 2022 Development Plan.

By way of explanation, an SHD application for development that was considered to materially contravene the relevant Development Plan or Local Area Plan had to be accompanied by a material contravention statement indicating why permission should be granted having regard to a consideration specified in Section 37(2)(b) of the 2000 Act.[2] No such statement had been provided by the Notice Party in the context of the 2022 Development Plan. The High Court acknowledged that the Board could not seek such a statement and did not have the power to circulate this information to the Appellant, prescribed bodies, the public and the planning authority, for their considered response in a timely manner. The High Court noted the decision of Barniville J. in *Crekav*[3] where he held that under the SHD process, pursuant to the relevant SHD legislation, the Board did not have the power to circulate any further information obtained from the applicant. The Appellants argued that remittal was not lawful in this case under Section 50A(9A) of the 2000 Act because fair procedures and public participation could not be provided for. The High Court concluded that there was no prospect, within the statutory process, of lawful remittal. The High Court made a number of directions in order to ensure that the process attaching to any remitted decision would comply with fair procedures. One such direction was a requirement that the Board would hold an oral hearing. Some of the High Court's directions supplemented and went further than the statutory procedures provided for in the 2016 Act. The High Court's approach was significantly influenced by Section 50A(9A) of the 2000 Act and the statutory recognition of the exceptional circumstances requiring the urgent delivery of housing.

The High Court granted the Appellants leave to appeal, determining that the case raised issues of general public importance and that it was in the interests of justice for leave to be granted regarding the scope of the remittal power.

The Supreme Court, in the absence of any real dispute between the parties on the issue during the oral hearing,[4] proceeded on the basis that the development plan applicable to the planning decision is the one that is in effect on the day that the decision is made, which was consistent with the finding of the High Court.

The Supreme Court considered that the main issues arising on the appeal were:

a) Can and should the matter be remitted to the Board in light of Section 50A(9A) of the 2000 Act? and

b) If so remitted, whether any directions should be given to the Board as to the manner in which the remitted application is to be determined?

The Main Issues Considered by the Supreme Court
(a) Can and should the matter be remitted?
The Supreme Court noted the existing caselaw on remittal in planning matters but found that Section 50A(9A) of the 2000 Act eliminates the discretionary power to remit and substitutes it with an obligation to remit upon the request of the developer unless it is unlawful to do so. In this regard, the Supreme Court disagreed with the High Court's finding that Section 50A(9A) of the

2 Section 8(1)(a)(iv)(II) of the Planning and Development (Housing) and Residential Tenancies Act 2016.

3. *Crekav Trading GP Limited v An Bord Pleanála* [2020] IEHC 400.

4 The Notice Party had in written submissions sought to advance an argument that the 2016 Development Plan should apply to the remitted decision but this was not pursued at the oral hearing.

2000 Act was an expression and reinforcement of existing principles discernible from caselaw and found instead that it introduced a statutory imperative to remit unless it would not be lawful to do so.

The Supreme Court found that the threshold introduced by Section 50A(9A) meant that remittal must be the default position where the conditions for remittal are met unless it would be unlawful to remit. The Supreme Court considered that part of the reason for the introduction of Section 50A(9A) of the 2000 Act was that the issue of remittal had become an area of high complexity and had added cost and delay to judicial review challenges to planning permissions.

The word "*lawful*" is not defined in the 2000 Act. Within the wording of the subsection, the restriction "*not lawful*" was chosen in contrast to "*unless it would not be just to do so*". The Supreme Court considered that was significant. In declaring that the remittal must take place if requested by a developer, the Oireachtas was in effect saying that the expense and inconvenience of the developer, having made the application, requires it to be remitted unless otherwise unlawful.

The Supreme Court found that the word *"lawful*" must relate to the High Court's decision to remit and that there was nothing unlawful about a remittal that would result in the Board being in a position to take a valid decision, whether that is to grant or refuse permission. Therefore, the only restriction on remittal is where it would not be possible for the Board to come to a lawful decision; a very high threshold to reach. The Supreme Court further noted that the situations in which the court will refuse remittal under Section 50A(9A) of the 2000 Act will be "*rare and exceptional*".

The Supreme Court therefore found that it was lawful for the High Court to remit the decision in this case to the Board, despite the subsequent change to the 2022 Development Plan and the limitations on the Board's powers under the SHD process.

(b) Should directions be given?
The Supreme Court agreed with the Board's submission that the question of directions by the High Court on remittal to the Board, is secondary to the question of whether remittal is unlawful. The Supreme Court further noted that there was nothing in Section 50A(9A) of the 2000 Act that suggested that the High Court could give directions that would change the statutory duties or limitations imposed by law on the Board.

The Supreme Court found that the reference to "*directions*" in Section 50A(9A) of the 2000 Act simply reflected the position established in existing caselaw on remittal and that no consideration of directions, with a view to making remittal lawful, should be entered into by the High Court.

In circumstances where remittal was found to be lawful, the Supreme Court did not consider it necessary or appropriate to engage with directions for the purpose of rendering proceedings before the Board "*fair*". In this regard, the Supreme Court noted that there was a presumption that the Board will comply with fair procedures and will act within the confines of its statutory powers in making decisions.

Ultimately, the Supreme Court found that the purpose of Section 50A(9A) of the 2000 Act is to require remittal as a default unless a high threshold is reached and the High Court is not required to engage in a lengthy adjudication designed to make the remittal process fairer or to ensure public participation.

The Supreme Court noted that there may be occasions where it is appropriate for the High Court to give directions on remittal but, in the circumstances of this case, directions were not appropriate. The Court therefore varied the Order of the High Court by deleting the directions which prescribed how the Board must deal with the remitted matter.

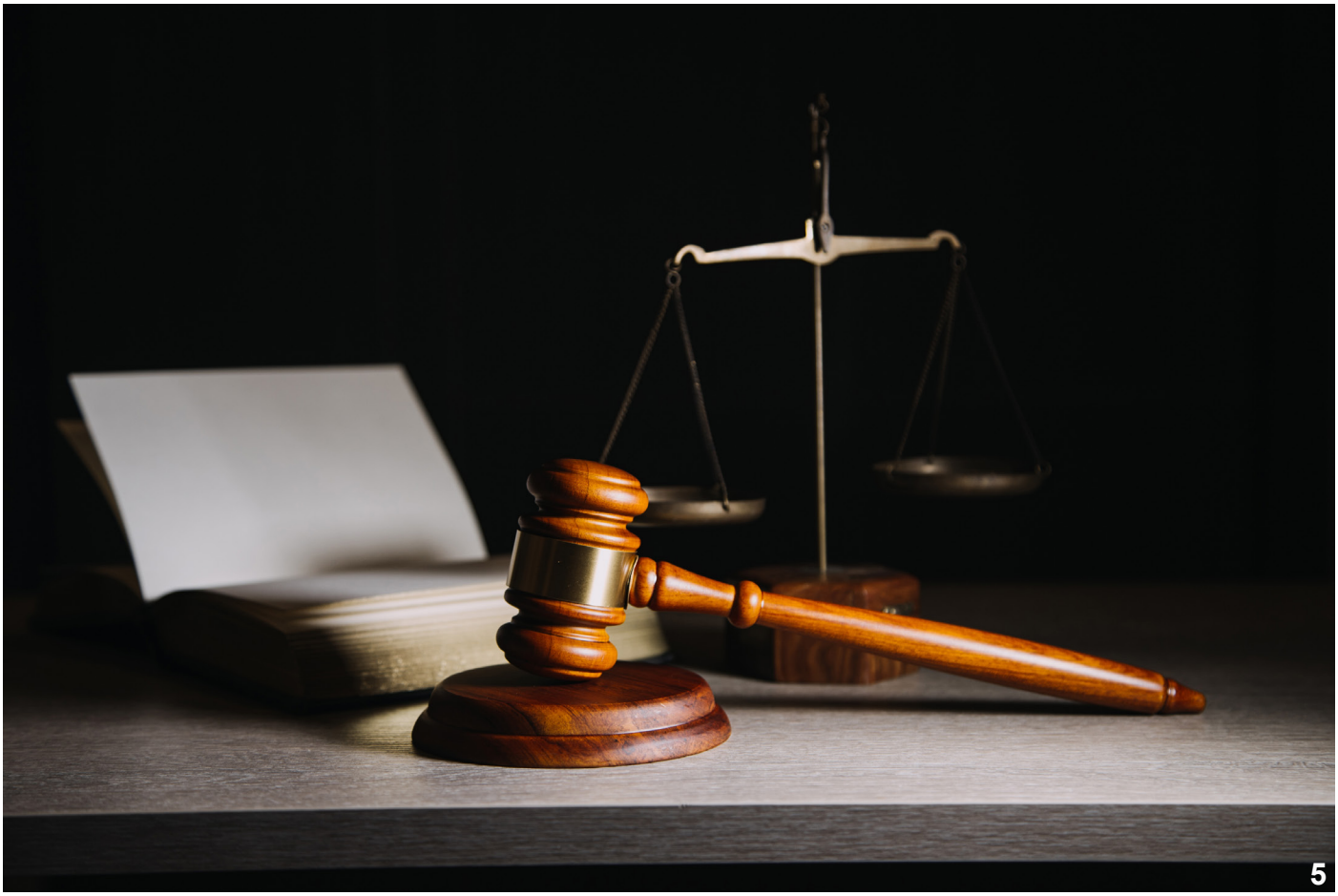
Key Takeaways

1. If requested by a developer, a court must remit a decision unless it is not lawful to do so.

2. The threshold for not remitting a decision is very high and only arises in rare and exceptional cases.

3. The Board is presumed to act fairly and within its powers and it is not appropriate for the Court to give directions to ensure fairness or public participation on remittal.

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



Case: Fionuala Sherwin v An Bord Pleanála and CWTC Multi Family ICAV (Notice Party)
Date delivered: 11 April 2024
Citation: [2024] IESC 13
Judge: Woulfe J.

Background

CWTC Multi Family ICAV (the Notice Party) appealed an Order of the High Court which quashed a decision of An Bord Pleanála (the Board) to grant permission for certain developments proposed by the Notice Party. The Notice Party was granted permission by the Board on 4 November 2021 for development on the site of the former Dublin Diocesan Seminary at Holy Cross College, Clonliffe Road, Drumcondra, Dublin 3 (the Site). The proposed development consisted of the demolition of a number of existing office and former college buildings on site, and the construction of a large-scale build to rent development extending to 1,592 (reduced from 1,614) apartments set out in 12 residential blocks, ranging from 2 to 18 storeys (the Proposed Development). The application was made to the Board directly under the Strategic Housing Development (SHD) process.[5] It is important to note that under the SHD process, the Board is only permitted to materially contravene the development plan where one or more of the criteria in Section 37(2)(b) of the Planning and Development Act 2000, as amended (the 2000 Act) apply.[6]

The High Court noted several important features of the Site. The five main buildings on the Site are listed in the Record of Protected Structures in the Dublin City Development Plan 2016-2022 (the Development Plan). There is a building located on the Site but just outside of the part of the site being developed known as the "*Red House*". The Red House is both a protected structure and a recorded monument pursuant to Section 12 of the National Monuments (Amendment) Act 1994. A significant feature of the Proposed Development was the height of the majority of the proposed apartment blocks. Ms. Fionuala Sherwin (the Applicant) contended that the Proposed Development exceeded the maximum height restrictions imposed under the Development Plan. During the course of the SHD planning application, Dublin City Council's Conservation Officer (the CO) made a submission to the Board recommending that the proposed basement, located beneath the eastern end of the central garden area in front of the former Seminary building, should be omitted from the Proposed Development. This recommendation was based on the CO's concerns that the proposed basement would have a potential serious and injurious impact on the wider setting and curtilages of the protected structures. Ultimately, the CO recommended refusal of the permission as they felt the height, scale and massing of the proposed development was unjustifiable.

The High Court

In the High Court the Applicant challenged the grant of permission. In a judgment delivered on 27 January 2023, Mr. Justice Humphreys noted that there were eight core grounds and 48 sub-grounds of challenge.

5 The SHD process is governed by the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act). This application was made under Section 4 of the 2016 Act. The SHD process is now effectively revoked although there are some applications still pending decision. The SHD process has been replaced by the Large-scale Residential Development (LRD) process as provided for under the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021.

6 However, the Board is not permitted under the SHD process to grant permission where the proposed development materially contravenes the development plan in relation to the zoning of land – see Section 9(6) of the 2016 Act.

The High Court noted the historical and cultural significance of the Dublin Diocesan Seminary at Clonliffe and considered the case boiled down to two net issues (at paragraph 182), namely:

> *(i) "The city council's first objection to the application, principally regarding impact on protected structures, and related issues regarding material contravention of the development plan and contravention of the legislation regarding such protected structures; and*
>
> *(ii) The city council's second objection to the application, principally regarding the impact of the subterranean basement structure, and the related question of material contravention of the development plan in respect of that structure."*

In relation to the first point, the High Court referred to Section 57(10)(b) of the Planning and Development Act 2000 (the 2000 Act) which provides that "*a planning authority, or the Board on appeal, shall not grant permission for the demolition of a protected structure or proposed protected structure, save in exceptional circumstances*". The High Court noted careful scrutiny is required when considering any proposals for full or partial demolition of protected structures in order to comply with Section 57(10) of the 2000 Act. At paragraph 197 of the judgment, the High Court set out what it considered was the correct approach for the Board to adopt to comply with Section 57(10) of the 2000 Act when assessing development affecting a protected structure. The High Court concluded that the requirement to demonstrate exceptional circumstances in Section 57(10)(b) applied to the demolition of any part of a protected structure. Mr. Justice Humphreys' analysis relied on the definition of a structure as set out in Section 2(1) of the 2000 Act (as including any part of a structure) applying to the term "*protected structure*" in Section 57(10)(b) of the 2000 Act. Therefore "*demolition*" in Section 57(10)(b) of the 2000 Act means demolition of any part of the protected structure and not merely demolition of the whole protected structure.

The High Court went on to consider the relevant development plan objectives relating to protected structures and noted the various concerns raised by the CO together with concerns raised in a submission from the Department of Housing, Local Government and Heritage (DHLGH). The High Court found that the Inspector and the Board did not meaningfully engage with the need to minimise impacts on protected structures in light of the requirements of the development plan. Ultimately the High Court found the Board's decision to be flawed as it did not engage with the "*heritage material contraventions*" or with Section 57(10) of the 2000 Act.

In relation to the second point, i.e. the basement structure, the High Court noted the detailed submissions made by the CO who considered the proposed construction of a new basement would "*fundamentally and permanently*" destroy and disrupt the landscape. The High Court further noted the Development Plan policy to discourage any significant underground or basement development in Conservation Areas or properties listed on the Record of Protected Structures. The High Court ultimately agreed with the Applicant in relation to the second point regarding the basement structure. The High Court arrived at this conclusion based on the lack of reasons provided for disagreeing with the views of the city council (which was a major issue which required main reasons to be provided) and an unacknowledged material contravention of the Development Plan.

The Notice Party applied for, and was granted, leave to appeal to the Supreme Court as the case raised issues of general public importance regarding the proper interpretation of Section 57(10) of the 2000 Act and interpretation of development plans.

Supreme Court
In the Supreme Court Mr. Justice Woulfe broke the issues into three categories:

The First Issue: Interpretation of Section 57(10)(b) of the 2000 Act
The Supreme Court noted that the term "*protected structure*" is defined in Section 2 of the 2000 Act as "*(a) a structure, or (b) a specified part of a structure, which is included in a record of protected structures…."* and the term *"structure"* is defined as *"any building, structure, excavation thing constructed or made on, in or under any land, or any part of a structure so defined…*". The Supreme Court concluded that the term "*structure*" when used in the 2000 Act *prima facie* means any structure or any part of any structure. The question the Supreme Court then considered was whether, when construing the word "*structure*" as it appears in Section 57(10)(b) of the 2000 Act the context requires a different meaning. The Supreme Court concluded that the High Court judge erred in its interpretation of Section 57(10)(b) of the 2000 Act, finding that the context required a different meaning[7] to be given to the word "*structure*" than the normal definition as set out in Section 2 of the 2000 Act. The Supreme Court held that the requirement for exceptional circumstances in the case of the proposed demolition of a protected structure is not triggered by the proposed demolition of any part of such a structure. The Supreme Court's analysis considered the regular use throughout the 2000 Act of the term "*structures or part of structures*" and noted how this terminology does not appear in Section 57(10)(b).

The Supreme Court considered that a harmonious interpretation of Section 57(10)(a) and (b) of the 2000 Act requires the interpretation that "*protected structure*" in Section 57(10)(b) means the entire structure, and not just any part of the structure. The Supreme Court took the view that the Oireachtas intended a graduated level of protection, whereby the lower level is that any application for demolition of part of a protected structure falls within Section 57(10)(a), and in such a case the Board is reminded to have regard to the protected status of the structure.

The Supreme Court held that anything short of complete bulldozing would require permission from the planning authority or the Board (unless exempt), and the decision-maker must have regard to the protected status of the structure in considering any application for permission. The extent of the demolition short of total demolition, could well be a significant factor for the planning authority or the Board in exercising its discretion whether to grant permission. The Supreme Court also took the view that the second aspect of the context also requires interpreting "*protected structure*" in Section 57(10)(b) of the 2000 Act as not including demolition of part of a structure.

The Supreme Court therefore overturned the High Court's decision as to the meaning of Section 57(10)(b) of the 2000 Act and the Board's obligations in that regard.

The Second Issue: Material Contravention of the Development Plan and Standard of Review
The development plan sets out the parameters for which permission may be granted or refused. Particular procedures must be followed before a planning authority, or the Board can grant planning permission for a development which would materially contravene the development plan. The present case concerned Section 9(6) of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the 2016 Act) whereby the Board may only grant permission in the case of a "*non-zoning*" material contravention where it considers that certain stipulated special circumstances apply. The Board did not address any material contraventions arising from the provisions regarding protected structures or regarding basements. The Supreme Court held that if any material contraventions did arise in that regard, then the Board's decision would constitute a breach of the Section 9(6) of the 2016 Act and would thus be invalid.

7 The Court relied on the analysis of Murray J. in the Supreme Court judgment in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43 regarding the need to view statutory wording in their context.

The Supreme Court expressed broad agreement with Holland J.'s analysis in *Jennings*[8] as to the standard of review by a court when considering whether a development plan has been materially contravened. This means that where a development plan on a proper interpretation allows the decision-maker a level of flexibility, discretion and/or to exercise their own planning judgement then the Court will review the decision for irrationality as opposed to conducting an in-depth review of the substantive decision. However, where the decision-maker is not afforded this flexibility, discretion or to exercise their own planning judgement then the Court will conduct an in-depth review as the issue concerned is a legal issue as opposed to a planning issue. The Supreme Court noted, however, that the first question must be the nature of the determination actually made by the decision-maker as to whether the proposed application, as a matter of law and fact, would materially contravene the development plan.

The Supreme Court considered that the details of the planning application and the materials before the Inspector and the Board clearly required a focus on policy CHC2 of the Development Plan. This policy required, inter alia, that the scale and height of new development "*should relate to and complement the special character of the protected structur*e". The Supreme Court considered that the same obligation arose in respect of the Development Plan policy relating to basements (as referred to above). This required the Board to consider and engage with the text of the policies and to interpret that text to some degree as to its meaning.

In dismissing the appeal, the Supreme Court was satisfied that the Board did not make any determination as to material contravention in relation to whether the proposal materially contravened policy CHC2 or the development plan provisions relating to basements, in circumstances where it was required to do so. The Supreme Court therefore quashed the decision on a slightly different basis to the High Court, i.e. on the basis of a failure to take relevant considerations into account namely the relevant provisions of the Development Plan and Section 9(6) of the 2016 Act.

The Third Issue: Duty to Give Reasons

Whilst the Supreme Court noted that this issue overlapped to some extent with the material contravention issue, the Supreme Court considered that it still required separate consideration. The Supreme Court confirmed the approach, adopted in *Connelly*,[9] remains the correct approach of a court to a review of a decision by the Board. As Clarke C.J. observed in the *Connelly* case, the standard imposed on the Board should not be "*too exacting*" and a court reviewing such decision-making must ensure that the reasons given are adequate to enable an interested party to know why a decision went the way it did, and whether there existed any legitimate basis for seeking to mount a challenge.

In this case, the Supreme Court determined that the Board relied on the detailed and extensive report of the Inspector. However, the Supreme Court noted that neither the Board nor its Inspector adequately addressed a number of concerns raised by the CO and the DHLGH including the concern that the dominant typology of small dwelling units would seriously impact on the historic buildings and would be likely to result in long-term difficulties with maintenance and conservation of the protected structures, the impact of height, scale and massing of Block D1 on the protected structures and the impact of the basement development and the loss of the verdant and historic landscape as a result. The Supreme Court was therefore not satisfied that the reasoning of the Board was sufficient in relation to these matters and upheld the finding of the High Court as to the lack of adequate reasons put forward by the Board for its decision.

Ultimately, the Supreme Court upheld the order of the High Court to quash the decision of the Board to grant permission, albeit in part for slightly different reasons. The Supreme Court therefore dismissed the appeal.

8 *Jennings & Anor v An Bord Pleanála and Ors* [2023] IEHC 14 at paragraph 112.

9 *Connelly v An Bord Pleanála and Ors* [2018] IESC 31.

Key Takeaways

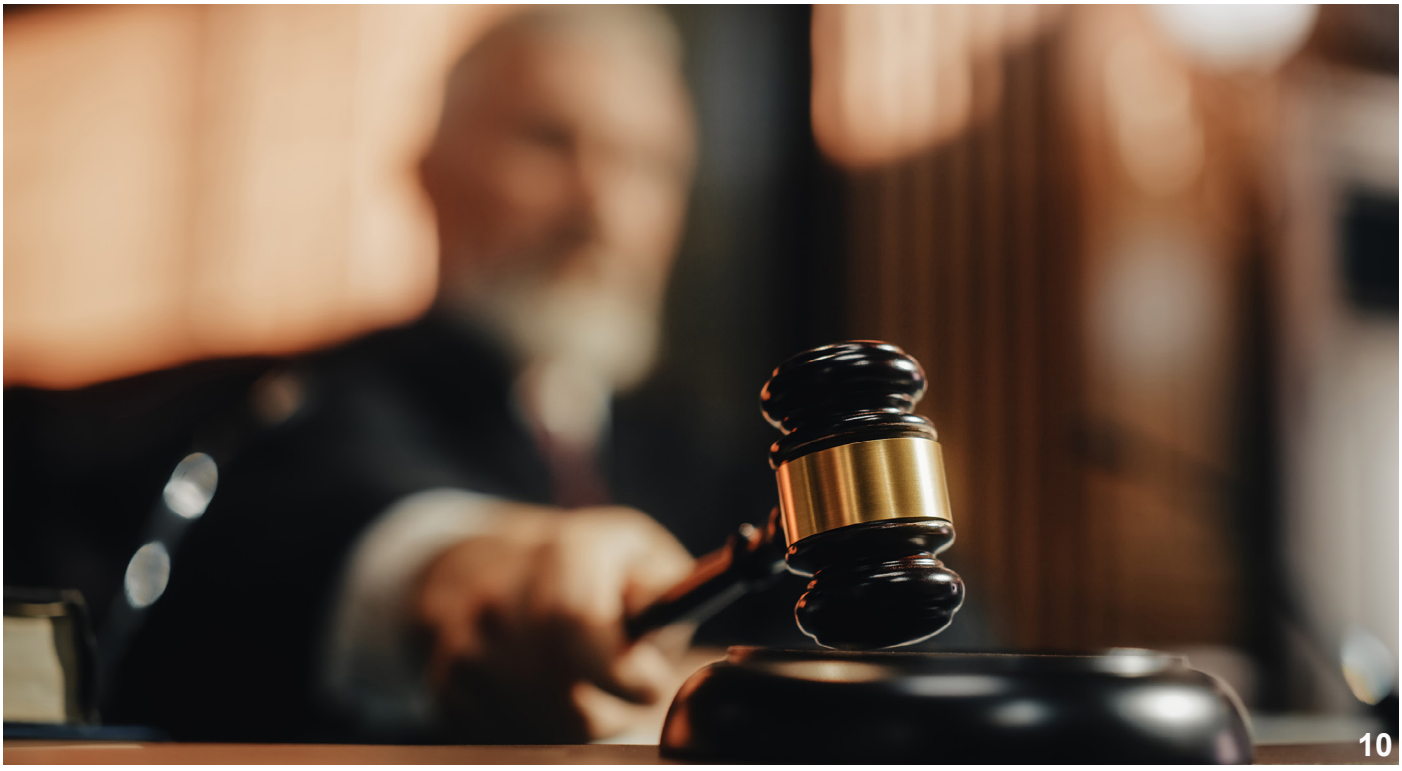
1. The term '*protected structure*' in Section 57(10)(b) of the 2000 Act means the whole structure and not part of it.

2. Policies of the development plan which are clearly relevant to the proposed development must be properly engaged with to determine whether a material contravention arises.

3. The approach in *Connelly v An Bord Pleanála* has been reaffirmed, the Board must give sufficient reasons to ensure the parties understand how a decision was made and if there are legitimate grounds to mount a challenge.

4. Factors of central importance to the planning application must be specifically dealt with by the Board. In this regard, it should be possible to read the decision of the Board, in conjunction with the Inspector's Report, where necessary, and to understand the reasons why the Board has made the decision it has, in particular in relation to the factors of central importance.

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



Case: Keshmore Homes Limited v An Bord Pleanála
Date delivered: 27 June 2023
Citation: [2023] IEHC 369
Judge: Phelan J.

Background
These proceedings concerned a refusal of planning permission by An Bord Pleanála (the Board) for a residential development comprising 62 dwellings (reduced from 64) and associated development on lands in the townlands of Loughminane, Knocksborough Glebe and Whitesland West, Kildare, County Kildare (the Proposed Development). Keshmore Homes Limited (the Developer) was the applicant for planning permission.

At the time the application for planning permission was made by the Developer i.e. 6 December 2019, the site was subject to the Kildare County Development Plan 2017-2023 (the Development Plan) and the Kildare Town Local Area Plan 2012-2018 (as extended) (the LAP). Planning permission was refused by Kildare County Council (the Council) on 7 February 2020 for three reasons, the first of which being that the Proposed Development, if permitted, would represent a material contravention of section 7.2.1 and specifically policy HP2 of the LAP which sought to prioritise development of land zoned Phase 1 over land zoned Phase 2. The Developer's lands were zoned as Phase 2 and as there existed a significant quantum of extant permissions for residential development in the Phase 1 lands, the Council determined that the Proposed Development, if permitted, would materially contravene the LAP. No contravention of the Development Plan was noted by the Council.

On 5 March 2020 the Developer appealed the Council's decision to the Board. The Developer submitted that there was no material contravention of the LAP and that it was in the interests of proper planning and sustainable development to grant permission for the development of these lands zoned Phase 2 despite the fact that not all lands zoned Phase 1 had yet been developed. An alternative submission was also made by the Developer that, if the Board concluded there was a material contravention of the LAP, the Board could still grant permission for the proposed development. Express reference was made to Section 37(2) of the Planning and Development Act 2000, as amended (the 2000 Act) which gives the Board power to grant permission in material contravention of a development plan, in certain circumstances, as outlined in Section 37(2)(b) of the 2000 Act. This reference was made in relation to the LAP and not the Development Plan. The main focus of the submission was on the importance of development in the context of the national housing crisis. Express reference was also made to a proposed variation of the Development Plan even though that variation had not been adopted and was not the basis for the Council's refusal of planning permission.

In June 2020 the Council made the aforementioned variation to the Development Plan (the Variation). The Variation made changes to the Core Strategy and Settlement Strategy contained in the Development Plan, including a reduction in the dwellings target for towns in the county. The dwellings target for Kildare Town, where the Proposed Development is located, was reduced by 81%. The Variation was subsequently challenged in July 2020 in proceedings entitled *Ardstone Residential Partners Fund ICAV and Ardstone Homes Limited v Kildare County Council* (2020/538JR) (the Ardstone Proceedings). Initially, a stay on the Variation was granted on an interim basis for the towns of Celbridge, Clane and Johnstown. In November 2020 the

application of the stay was limited to the lands the subject of the Ardstone Proceedings.

Separate to the Proposed Development and to the Ardstone Proceedings, in August 2020 the Board made a decision in relation to a separate development (the Rycroft Decision). In the Rycroft Decision, the Inspector recommended refusal of permission for the development with reference to the Variation. The Inspector's recommendation was on the basis that, if the stay in the Ardstone Proceedings was lifted then the grant of permission would be a material contravention of the housing allocation for Kilcock. The Inspector considered whether permission should be granted in spite of the material contravention and having regard to Section 37(2)(b) of the 2000 Act but concluded that the Variation was in keeping with the policies and objectives of the National Planning Framework (NPF) and the Eastern and Midland Regional Assembly's Regional Spatial and Economic Strategy (RSES) and therefore found that a recommendation to grant would be contrary to the proper planning and sustainable development of the area. However, the Inspector also addressed the possibility that the Board might disagree with her and argue that the grant of permission was warranted under Section 37(2)(b)(ii) of the 2000 Act which allows the Board to grant permission in material contravention where it considers that there are conflicting objectives in the development plan or the objectives are not clearly stated. Ultimately, the Board granted permission in the Rycroft Decision on the basis that the proposed development would be in accordance with the proper planning and sustainable development of the area notwithstanding a material contravention of the varied Development Plan.

In September 2020, the Inspector's Report for the Proposed Development was finalised. The Inspector summarised the Developer's appeal but only in part, recording that the Developer had submitted that the Proposed Development was not a material contravention of the LAP but not recording the alternative submission made by the Developer that permission could be granted if there was a material contravention. The Inspector concluded that the Proposed Development would represent a material contravention of the LAP, noting that recent permissions would provide residential units "*significantly above the number of units permissible in the core strategy*" and recommended refusal of permission due to the Proposed Development being contrary to the proper planning and sustainable development of the area. The Inspector's Report did not address whether permission should be granted in spite of a material contravention.

In November 2020 the Board refused permission for the Proposed Development. The Board's decision had regard to the Variation and its revision of the core strategy in the Development Plan. The Board also had regard to the number of extant permissions for residential development within the boundary of Kildare Town. The Board concluded that the Proposed Development would contravene the core strategy of the Development Plan and, therefore, the LAP and would be contrary to the proper planning and sustainable development of the area.

In her judgment, Ms. Justice Phelan noted that the Board did not provide the Developer with an opportunity to comment or make submissions in relation to the Variation, which was at that point the subject of a stay in respect of Celbridge, Clane and Johnstown but not Kildare Town, where the Proposed Development was located. The Court noted that the Board's decision did not address whether permission should be granted despite the material contravention and gave no reasons for rejecting the Developer's submission on this point. This distinguished the Board's decision in this matter from the Rycroft Decision.

The Main Issues
The Developer challenged the Board's decision on five grounds which the Court then distilled into three issues:

1. An alleged failure to consider a submission made by the Applicant that planning permission should be granted in material contravention of the Development Plan and/or a failure to give reasons for rejecting that submission;

2. An allegation that the Board failed to afford fair procedures to the Applicant in relation to the Variation to the Development Plan; and

3. An allegation that the Board adopted an inconsistent approach to different applications for planning permission in the context of the Variation which gave rise to an unfairness.

Grounds 1 and 2: Failure to consider the Developer's submission and/or provide reasons for rejection
The Developer contended that the Board failed to consider their submission that if there was a material contravention of the Development Plan or LAP then permission should still be granted. The Developer further contended that the Board failed to give reasons for rejecting their submission that permission should be granted notwithstanding a material contravention therefore the Board's decision was invalid.

The Board refused permission due to a material contravention of the LAP having regard to the Variation and its revision of the core strategy in the Development Plan and the quantum of extant permissions for residential development within the boundary of Kildare Town. Neither the Board nor its Inspector made reference to whether permission should be granted notwithstanding a material contravention. The Developer, relying on *Balz v An Bord Pleanála* [2019] IESC 90, contended that there was a failure to address this relevant submission and provide an explanation as to why it was not accepted. The Developer contended that this submission was either not considered at all or it was considered and rejected with a failure to give any reasons for the rejection. The Board rejected this accusation and contended that the application for planning permission and the appeal were presented on the basis that the proposal was consistent with the Development Plan and the LAP.

The Court found that the Board, in its decision, established that a grant of planning permission would contravene the core strategy of the Development Plan and, therefore, the LAP, and would not be in accordance with the proper planning and sustainable development of the area. The question for the Court was whether, having determined that the proposal contravened the Development Plan and the LAP, the Board was required to consider whether permission should be granted by reference to Section 37(2)(b) of the 2000 Act and, if so, to provide a reasoned decision in respect of its decision to refuse to do so. The Board contended that it was not obligated to consider the exercise of a power to grant permission in respect of a development which has been found to be in material contravention or to give reasons for not exercising that power. The Board contended that where it had found the development is not in accordance with the proper planning and sustainable development of the area then there was subsequently no obligation to consider a grant of permission in material contravention and, accordingly, the decision was properly reasoned.

The Court considered *Kenny v An Bord Pleanála* [2020] IEHC 290 and noted that this judgment of McGrath J. found that once it has been concluded that a development is not in accordance with the proper planning and sustainable development of the area, a request for the jurisdiction to grant permission notwithstanding a material contravention "c*annot translate into a legal obligation to consider that which does not arise in the first place*".

In essence, the potential exercise of the power to grant permission in material contravention does not arise unless the Board is of the view that the development is in accordance with the proper planning and sustainable development of the area having taken everything into consideration and in spite of the development constituting a material contravention. Accordingly, the Court held that it is established that the Board is restricted to considering the proper planning and sustainable development of the area and may not consider a material contravention which would not be in the interests of proper planning and sustainable development.

Ground 4: Unfair Procedures in relation to the Variation
The Developer argued that the Board failed to follow fair procedures as it did not allow the Developer an opportunity to make submissions on the Variation before refusing the appeal on this basis despite the fact that the Variation had not been adopted when the appeal was lodged and was therefore not relied upon by the Council in refusing permission or addressed in any meaningful way in the appeal submissions.

The Court noted that no provision is made for a party to an appeal to the Board to make submissions in respect of a change such as that of the adoption of the Variation in this case. The Court accepted that under Section 131 of the 2000 Act, the Board may request submissions or observations regarding any subject that has arisen from an appeal or referral if it determines that it is appropriate in the interests of justice to do so in the specific circumstances of an appeal or referral. The Board contended that it is for the Board to determine whether an additional submission or observation is to be sought. The Board argued in this case that there was no absence of fair procedures towards the Developer as the proposed Variation was on public display between 9 January 2020 and 6 February 2020, during which time the public was entitled to make submissions on the proposed Variation, and the Developer had an opportunity to address the substance of the Variation by reference to the draft Variation. The Court, considered the judgment of Charleton J. in *Wexele v Dún Laoghaire County Council* [2010] IEHC 21 where the Court found that if a party is to succeed in allegations of unfairness by the Board in shutting them out of making a submission, that party must show what it is they intended to say and why it was unjust for the Board to deny them from saying it. Charleton J. found that this was an objective standard under Section 131, where the interests of justice are met by seeking submissions where the Board receives a novel submission that might reasonably affect its decision and where that submission does not already form part of the papers on the appeal which have been made available to the complaining party. Here, the Court found that the Board must use its discretion under Section 131 in conformity with that objective standard.

The Court also noted the relevance of Section 137 of the 2000 Act which allows the Board, in determining an appeal, to take into account matters which the Board is entitled to have regard to other than those raised by the parties or by any person who has made submissions or observations to the Board in relation to the appeal. If the Board relies on Section 137 then the Board must give notice of this in writing to the parties and any person who has made submissions or observations and afford them an opportunity to make submissions or observations on these matters.

While Section 137 may not have been triggered in this case because reference was made to the proposed Variation by the parties in the papers, the Court observed that the adoption of the Variation was a matter not raised by the parties.

The Developer took the position that the Variation did not apply until it was adopted, something the Court ultimately found to be the correct position. While there was no doubt that the Variation was in contemplation when the appeal was lodged by the Developer, and to that extent the Developer was on notice, the Court found that nothing indicated that the Variation's adoption was necessary,

required, or inevitable to the point where there should have been a high degree of confidence that it would be approved and should be given comprehensive consideration, considering the arguments presented at the time the appeal was filed.

The Court also placed some weight on the fact that the Board had considered the Variation in the Rycroft Decision during the time the Inspector's Report in this matter was written and the matter came before the Board. The Court found that, while the facts between the Proposed Development and the development the subject of the Rycroft Decision differed substantially, the reasons for the Board granting permission notwithstanding a material contravention of the Variation in the Rycroft Decision could have provided the Developer with an example of framing an argument as to why permission should be granted here in relation to proper planning and sustainable development notwithstanding a material contravention arising due to the recently adopted Variation. The Court was clear that the Board would not be bound to arrive at the same decision here but consistency in decision-making on the same objective facts is critical in ensuring an objectively fair decision and a submission made by the Developer with reference to a previous decision of the Board should carry weight with the Board, even if the Board ultimately finds that a different outcome is appropriate on the particular facts of the case.

Ultimately, the Court held that, while the Board is not obliged to provide an opportunity to address every potentially relevant decision of the Board that is made after an application has been submitted, the failure to afford the Developer the opportunity to make submissions in respect of the Variation, which was a key variation of the Development Plan, was in breach of the requirements of fair procedures.

Ground 5: Unfairness arising from inconsistency in the Board's approach to the Variation
The Developer argued that the Board's decision to refuse permission was unreasonable or irrational due to inconsistency in the Board's approach to the Variation between this decision and the Rycroft Decision. The Board contended that this decision and the Rycroft Decision were two separate matters and had different aspects affecting their outcomes. The Court found that while access to previous decisions is an important element of ensuring fairness and consistency in a quasi-judicial decision-making process, such previous decisions are not binding. The Court found that a case cannot be challenged as inconsistent in its outcome when compared to a different case involving different considerations. The only real significance that the Rycroft Decision held in relation to these proceedings is to display the type of submission that the Developer may have made if it had been given the opportunity to address the Variation after its adoption. The Court found it remained open to the Board to arrive at a different decision on the particular facts of the application under consideration.

The Court held this argument fell well short of what would be required to consider a decision as unreasonable or irrational by reason of inconsistency or otherwise in judicial review proceedings.

Key Takeaways

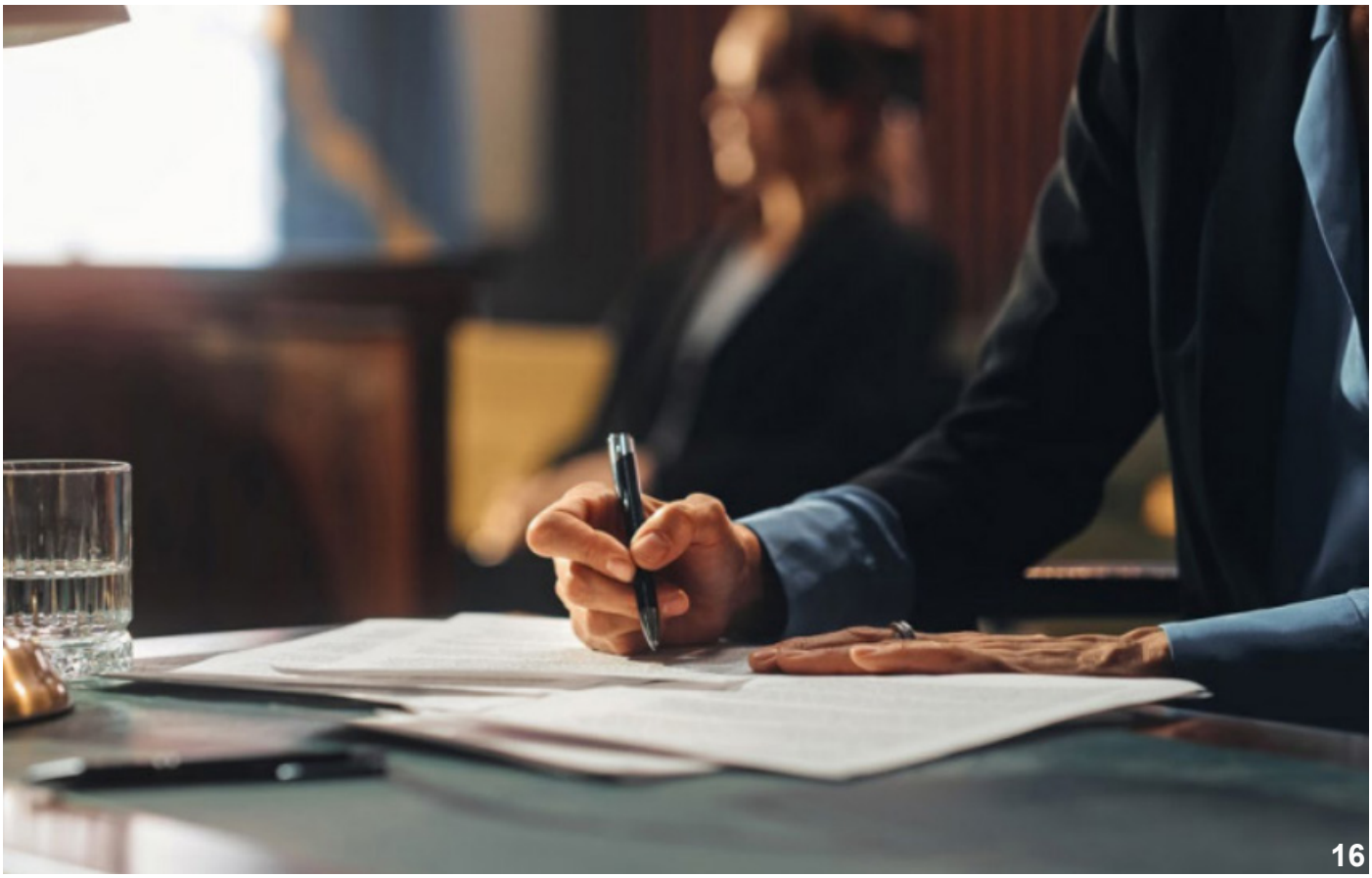
1. The potential exercise of the power to grant permission in material contravention does not arise unless the Board is of the view that the development is in accordance with the proper planning and sustainable development of the area.

2. The Board has discretion under Section 131 of the 2000 Act to provide an opportunity to make further submissions. However, this discretion is one which should be exercised fairly, in a just and proper manner and in accordance with the principles of constitutional justice.

3. A failure to provide an opportunity to a party to make submissions in relation to a significant development, occurring after an appeal is lodged, which the Board is required to consider amounts to a breach of fair procedures where the complaining party can show what they intended to say and why it was unjust for the Board to deny them from saying it.

4. Access to previous decisions is an important element in ensuring fairness and consistency in a quasi-judicial decision-making process. However, these decisions are not binding on the decision-maker and it remains open to the decision-maker to reach a different decision in a different case involving different considerations.

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



Case: Grafton Group PLC v An Bord Pleanála and Strategic Power Limited (First Notice Party) **and Offaly County Council** (Second Notice Party)
Date delivered: 22 December 2023
Citation: [2023] IEHC 725
Judge: Farrell J.

Background
Permission was granted by An Bord Pleanála (the Board) to Strategic Power Limited (the Developer) on 17 February 2022 in respect of a renewable biogas facility on a 2.14 hectare site at Ballyduff, Tullamore, County Offaly. The proposed facility would produce renewable energy and organic fertiliser through anaerobic digestion of farm by-product including silage, manure and chicken litter.

Offaly County Council (the planning authority) refused permission on the basis that the Environmental Impact Assessment Report (EIAR) accompanying the planning application contained insufficient information in relation to the type and quantity of expected residues and emissions and an assessment of the impact of these on the environment. The planning authority stated that it was not satisfied, on the basis of the information presented, that the proposed development would not cause serious air pollution and have a significant effect on the environment and on public health. Accordingly, the planning authority considered that the proposed development would be contrary to the proper planning and sustainable development of the area. The Developer appealed the planning authority's decision to the Board on 19 February 2021. Grafton Group PLC (the Applicant) submitted a third party observation to the Board in respect of the appeal on 16 March 2021.

Grounds of Challenge
The Applicant argued that the decision of the Board was invalid on the following grounds:

(i) Material Error on the part of the Board in relation to zoning and the Development Plan:

(a) material error of law in finding that there was no material contravention of the Development Plan;
(b) failure to take account of all relevant considerations in particular, the designation as a Strategic Employment Zone and LUZO-15 and LUZO-16;
(c) taking account of irrelevant considerations, in particular, that the site was at the bottom of the zoning area and consideration of the absence of significant environmental effects, having regard to the Environmental Impact Assessment (the EIA); and
(d) failure to provide adequate reasons.

(ii) Failure to adequately consider all environmental effects of the proposed development for the purposes of Sections 171A and 172 of the Planning and Development Act 2000 (the 2000 Act), in particular consideration of the cumulative effects on the environment, habitats and bats.

(iii) The Applicant also sought a declaration that the Board failed to publish the EIAR in compliance with Article 114 of the Planning and Development Regulations 2001 (the 2001 Regulations).

Material Error on the part of the Board in relation to Zoning and the Development Plan
While the planning application was made, determined by the planning authority and considered by the Board's Inspector under the Tullamore and Environs Development Plan 2010-2016 (the Tullamore Plan), the Board was required to consider the application in the context of the Offaly County Development Plan 2021-2027 (the Development Plan) which came into effect prior to the determination of the appeal. The Inspector considered both the Tullamore Plan and the draft Development Plan in their Report. The Development Plan was subsequently adopted without any material change to the draft version considered by the Inspector. The Board considered the Development Plan in making its decision.

The site of the proposed development was zoned "*Business and Technology Park*" in the Development Plan, and the Zoning Matrix for this land use included "*Waste to Energy Facilities*". The Development Plan also asserted that land uses which were not listed in the Zoning Matrix would "*be considered on a case-by case basis having regard to the proper planning and sustainable development of the area and compliance with the relevant policies and objectives (including land use zoning objectives), standards and requirements*" under the Development Plan as well as Section 28 guidelines and other government guidance. The site was also included in the Ballyduff Strategic Employment Zone (SEZ). The Development Plan contained an objective to provide two SEZs within the settlement of Tullamore town. The purpose of this objective was "*to facilitate strategic large scale employment in development zones in a sequential manner to promote sustainable compact growth in tandem with the delivery of infrastructure and enabling services*".

Land Use Zoning Objective LUZO-15 designated inter alia Ballyduff for a Business and Technology Park within the SEZ. LUZO-16 identified that planning applications for SEZs "*shall be brought forward in the context of a masterplan for the subject lands*" and any individual units within SEZs "*shall comply with the principles of any Design Statement prepared as part of the masterplan for the overall site*".

The Inspector, by reference to the draft Development Plan, identified that "*Waste to Energy Facilities*" were classified as "*Open for consideration*" and that uses identified as not permitted included "*Composting Facility*", "*Materials Recovery Facility/Composting/Waste Transfer Station/ Waste Recycling Centre*". The Inspector observed that the site was zoned Industrial in the Tullamore Plan and that this zoning was proposed to change under the draft Development Plan. The Developer submitted that this had "*no effect on the current assessment*". Nevertheless, the Developer set out that a new use class of "*Waste to Energy Facility*" was introduced in the draft Development Plan and this use best reflected the nature of the proposed use.

The Court noted that "*the manner in which the Inspector considered the question of compliance of the proposed development with the zoning of the site*" in the draft Development Plan was "*fundamental to the first issue before the Court*" as the Board relied upon the Report, "*thereby adopting the reasons stated therein*".

The Inspector recommended that permission be granted and the Board subsequently granted permission after the Development Plan came into force.

The Applicant contended that the Board erred in law in finding that the proposed development was consistent with, and did not materially contravene, the Development Plan, having particular regard to the zoning of the site as a Business and Technology Park and its designation as a SEZ.

The Court did not deem it necessary to decide whether or not the Inspector found that the proposed development was or was not a "*Waste to Energy Facility*", noting that the Inspector's Report was "*somewhat ambiguous*" in this regard. What the Court did find it necessary to consider was whether the proposed development complies with the zoning objectives and other relevant policies and objectives, standards and requirements as set out in the Development Plan.

The Applicant argued that the proposed use as a renewable biogas facility was incompatible with this designation of the lands as a Business and Technology Park and SEZ due to the low employment intensity proposed for the site. The Developer submitted that the proposed development would create 50-70 jobs during the construction phase, which would run for approximately 12 months, and 4-5 jobs once the proposed development became operational. The Inspector's Report noted that the level of long-term employment benefits arising from the development would be "*slight*". Ultimately, the Court found that this level of employment was insufficient to comply with the policies and objectives of the Development Plan. The Court identified that the designation of lands as a SEZ was to "*facilitate strategic large scale employment in development zones*" and found that the creation of "*slight*" long-term employment on a site of almost 2.14 hectares was not consistent with the Development Plan or LUZO-15. The Court held that this amounted to a material contravention of the Development Plan.

The Court also found that if it was incorrect in its interpretation of the Development Plan, and the Development Plan was sufficiently flexible to allow the Board to exercise planning judgment in its interpretation of how lands zoned as a Business and Technology Park and designated as a SEZ should be interpreted, then the Board had not disclosed the basis on which it exercised planning judgement in this regard.

Reasons and Consideration by the Board of Relevant Matters

The Court identified that the only material difference between the reasons and considerations set out by the Board in its Direction and Order and by the Inspector in their Report was that the Board relied solely on the relevant policies set out in the Development Plan whereas the Inspector primarily considered the Tullamore Plan but did consider the Development Plan, noting it did not apply. The Court did not determine whether the Board should have gone beyond this and explicitly provided reasons for its decision due to the change in the relevant development plan by the time the Board made its decision, but observed that there may have been a heightened onus on the Board in this regard. The Court noted and considered it "*highly relevant*" that the Board's Decision and Order did not refer specifically to the designation of the area as a SEZ beyond the observations on the appeal that were summarised by the Inspector. While the Board contended that it was unnecessary for it to explicitly set out that it found the proposed development to be compatible with the zoning of the lands, the Court took issue with the fact that the Inspector's Report only contained observations regarding the zoning of the land as a Business and Technology Park and designation as a SEZ but did not contain "*reasoning or balancing*" of the various zoning objectives. The Court found that the level of job creation was not consistent with the objectives of the Development Plan and, while the Board was not required to expressly refer to every part of the Development Plan under consideration, the objectives of the Development Plan and LUZO-15 were of sufficient importance that fair procedures required them to be considered transparently. The Board's reliance on the presumption that it had acted lawfully was therefore rebutted owing to there being sufficient evidence that the Board was required to explicitly consider these issues.

The Applicant also argued that the Board failed to have regard to LUZO-16 which requires that a Masterplan be considered. However, no Masterplan which would have required consideration was ever created and the Court found the absence of reference to LUZO-16 in the Board's Order and Direction, and the Inspector's Report, did not invalidate the Board's decision.

The Court found that it was not possible to ascertain from the Board's Decision or Order, or the Inspector's Report, why permission was granted for a development creating a low level of employment on a relatively large site within a SEZ. The Court determined that the Board had failed to provide sufficient reasons for rejecting the submissions made regarding employment and designation as a SEZ.

Irrelevant Considerations
The Inspector found that the proposed development would not "*fragment or impact"* significantly the overall parcel of lands that were zoned for Business and Technology and concluded that the proposed development would not "*act to mitigate against the future development*" of the lands in accordance with their zoning. The Court found that there is nothing in the Development Plan supporting an interpretation that the importance of a zoning objective is weakened towards the edge of the lands in question, and observed that this would erode the importance of zoning over time. This was held to be an irrelevant consideration.

The Applicant also argued that the Board relied on the absence of significant adverse environmental effects in considering the compatibility of the proposed development with the zoning objective of the lands and that this was an irrelevant consideration. While the Board was required to consider any significant adverse environmental effects in determining the appeal, the Court found that the absence of same did not equate to the proposed development being consistent with the zoning of the land and held that this was also an irrelevant consideration.

Failure to consider all environmental effects of the proposed development
The Applicant contended that the Board, when carrying out the EIA did not consider the cumulative effects specifically in relation to ecology as the Applicant suggested that these were not identified and considered in the EIAR. The Applicant also contended that the EIAR findings that there would be no significant effects on hedgerows and bats were not open to the Board.

The Applicant highlighted the fact the planning authority refused permission for the proposed development on the basis that, having considered the EIAR, it was not satisfied that the proposed development would not cause serious air pollution.

The Board submitted that these issues had not been raised by the Applicant in its observations made to the Board on appeal. However, the Court noted that the general proposition that an applicant for judicial review cannot raise issues which were not relied on before the decision-maker is qualified where the issues go to the jurisdiction of the Board or raise certain issues of EU law as per *Reid v An Bord Pleanála* (No. 1) [2021] IEHC 230. The Court found that the absence of submissions on deficiencies in an EIAR are not sufficient to enable the planning authority or the Board to rely on the contents of an inadequate EIAR.

The Applicant argued that a failure to comply with the Bat Mitigation Guidelines (the Guidelines) owing to the absence of a bat survey meant the Board was unable to carry out an adequate EIA or satisfy itself as to the potential impacts of the development and the associated removal of hedgerows on bats. This was refuted by the Board. No expert evidence was provided on this line of argument by the Applicant or the Board. The Court found that the Guidelines made it clear that the nature or level of the survey to be carried out is a matter for the consultant who is carrying out the survey, taking the Guidelines into account. The Court found that there was no evidence from which it could conclude that the failure to carry out a bat survey breached the Guidelines or meant that the reliance on the EIA was unreasonable. Accordingly, the Court held that the Applicant had not discharged the evidential burden on it to successfully challenge this aspect of the Board's decision. Similarly, the Court held that this evidential burden was not discharged in relation to the Applicant's contention that the EIAR was incapable of supporting the conclusion that no bat commuting pathways would be severed by the proposed development.

The Applicant also contended that the Board erred in how it interpreted and considered cumulative effects. The Applicant argued that the Board assumed that, as the proposed development was found not to have any significant environmental impacts, the possibility of cumulative effects could be discounted. The Court agreed with the Applicant's submission that what was required by the EIA Directive was "*both an assessment of the whole project **and** an assessment of the whole project with the cumulative effects of other relevant plans or projects*". It was clear to the Court from the Board's Order that this was the test which the Board sought to apply. The Applicant identified that the Board and the Inspector did not refer to any developments in the area with a view to assessing the cumulative impacts on the environment of these developments together with the proposed development. However, the Court was of the view that this did not automatically mean the Board failed to assess the whole project with the cumulative effects of other relevant plans or projects. Ultimately, the Court held that there was no evidence before it that raised any relevant developments or proposed developments which should have been considered but were not.

Failure to publish the EIAR in compliance with Article 114 of the 2001 Regulations
The Applicant contended, and the Board agreed, that the Board did not publish the EIAR on its website as required under Article 114 of the 2001 Regulations. The EIAR had been published by the planning authority on its own website. The Applicant alleged that the Board breached a mandatory requirement to publish the EIAR under Article 114 of the 2001 Regulations which provides as follows:

> *"An EIAR received by the Board in connection with an appeal shall, as soon as maybe following receipt of the EIAR, be made available on its website for inspection and for inspection or pur chase at a fee not exceeding the reasonable cost of making a copy during office hours at the offices of the Board or such other convenient place as the Board may specify."*

The Board maintained that it was not required to publish the EIAR on its website, contending that Article 114 had to be read in the context of Part 10 of the 2001 Regulations and that only an EIAR submitted to the Board under Article 109 of the 2001 Regulations required publication by the Board. The Court found that Article 114, when read literally and in isolation, is not restricted by reference to Article 109 and appears to require the Board to publish any EIAR received by it in connection with an appeal. Having considered the relevant authorities on statutory interpretation, including Section 5(2) of the Interpretation Act 2005, the Court found that "*the plain and literal meaning of the words to interpret Article 114 do not create an unworkable obligation for the Board, nor would such an interpretation be absurd or incoherent*". While the Court accepted that requiring the Board to publish an EIAR which has already been published by the planning authority would amount to duplication, it concluded that the Board was required to do so by Article 114 of the 2001 Regulations and granted the Applicant declaratory relief in this regard.

Key Takeaways

1. In circumstances where a new development plan is adopted after completion of the Inspector's Report, there may be a heightened onus on the Board to provide explicit reasons for its decision even where the Inspector's Report has considered the draft development plan as well as the development plan in place at the time of the preparation of the Report.

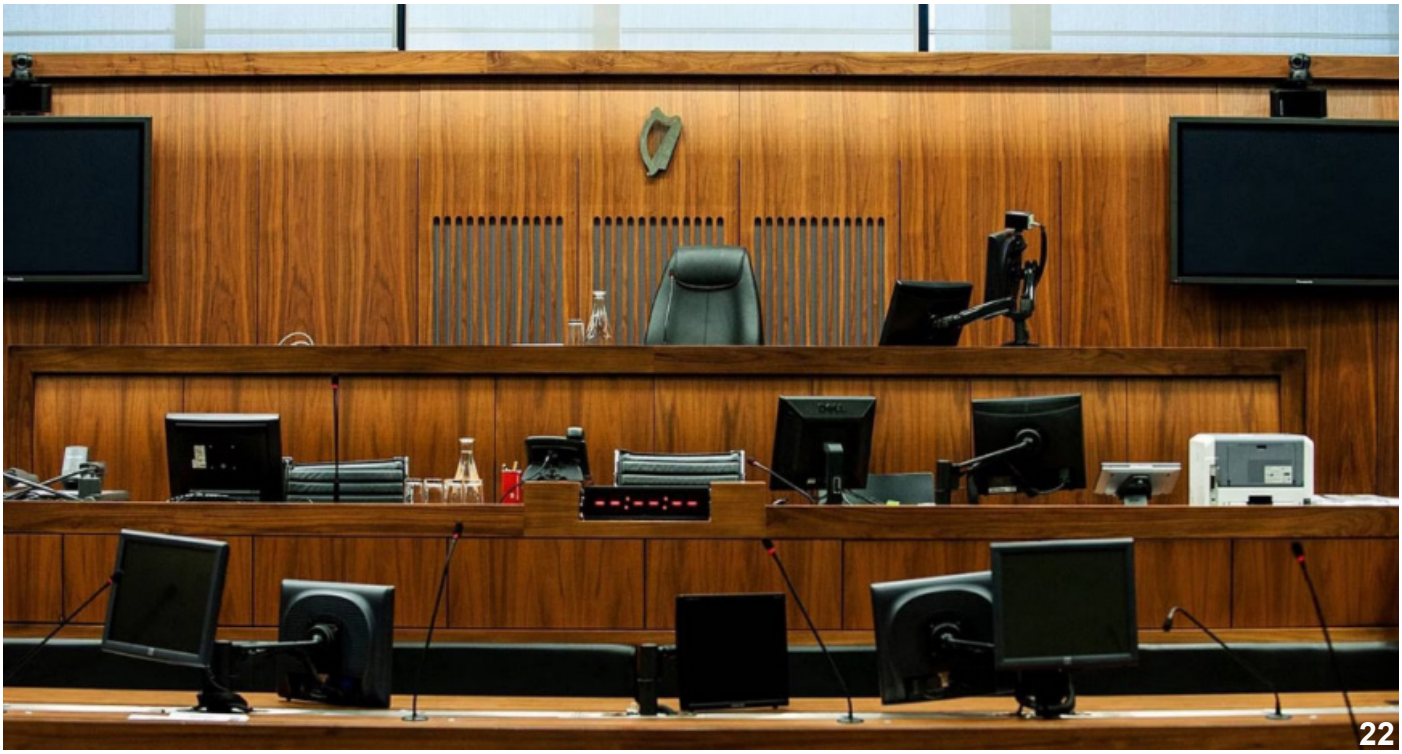
2. A statutory body is typically presumed to have acted lawfully. This presumption may be rebutted where sufficient evidence is produced. For example, certain matters that a statutory body is required to take into account in making its decision can be so important that they are required to be explicitly considered in order for the decision to be in compliance with fair procedures.

3. In considering cumulative impacts of a proposed development on the environment under the EIA Directive, what is required is an assessment of the whole project as well as an assessment of the whole with the cumulative effects of other relevant plans or projects. If a proposed development is found not to have any significant environmental impacts on a standalone basis, the possibility of cumulative effects still needs to be assessed.

4. The Courts will treat certain decisions that are carried out on the basis of expert evidence with an appropriate level of restraint in recognition of the qualifications of those providing this evidence. Typically, a Court will not seek to interfere with the conclusions reached in such matters where it does not have the expertise of those who provide or consider the expert evidence in question. However, if there is a legal error in the manner in which these decisions are taken then it is appropriate for the Court to intervene.

5. The Board is required to publish any EIAR received by it in connection with an appeal, even in circumstances where this EIAR has already been published by a local authority.

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



Case: Peter Sweetman v An Bord Pleanála and Ireland and the Attorney General
Date delivered: 25 April 2024
Citation: C-301/22
Judges: A. Prechal, President of the Chamber, F. Biltgen, N. Wahl, J. Passer (Rapporteur) and M.L. Arastey Sahun
Advocate General: A. Rantos

Background

Loch an Mhuilinn is a privately owned non-tidal inland lake located on Gorumna Island in County Galway with a surface area of 0.083km^2, or 8.3 hectares.

In July 2018 An Bord Pleanála (the Board) granted permission to Bradán Beo Teoranta for a development involving the abstraction of freshwater from Loch an Mhuilinn for the purpose of bathing salmon in the freshwater. These salmon were from fish farms located in the coast off Gorumna Island and the intention was to rid them of Amoebic Gill Disease and sea lice (the Proposed Development). The Applicant, Mr. Peter Sweetman, brought judicial review proceedings challenging this decision.

On 15 January 2021 the High Court (Ms. Justice Hyland) delivered judgment and found that the Board's decision was unlawful solely on the basis that the Board failed to comply with the requirements of the Water Framework Directive (Directive 2000/60/EC) (the WFD). In particular, the Court held the Board was obliged to ensure that the test articulated by Article 4(1)(a) of the WFD was fully applied in individual decisions on applications for development consent, using the detailed and complex framework of the WFD. As the Environmental Protection Agency (the EPA), the competent body in Ireland for classification of surface water bodies under the WFD, had not provided a status for Loch an Mhuilinn, the Court held that the Board was precluded from granting planning permission for the Proposed Development in circumstances where the Proposed Development would have an impact on a waterbody the status of which, for the purposes of the WFD, was unassigned.

Following delivery of the judgment, Bradán Beo Teoranta wrote to the EPA, who were not a party to the proceedings, to determine the up-to-date position as to the classification and categorisation of Loch an Mhuilinn. The EPA responded indicating that in its view it was not obliged to determine the ecological status of this lake and/or lakes with a surface area less than 0.5km^2 or 50 hectares. In support of this view the EPA referred to Annex II of the WFD, which set out physical descriptors of surface waters, and also to guidance issued by the European Commission.

The EPA response was brought to the attention of the Court by the Board and the judgment was re-opened and a preliminary reference made to the Court of Justice of the European Union (the CJEU).

Questions referred
The questions referred were as follows:

1(a) - Are Member States required to characterise and subsequently classify all water bodies, irrespective of size, and in particular is there a requirement to characterise and classify all lakes with a topological surface area below 0.5km^2?

1(b) - To what extent is the position different with respect to water bodies in a protected area, if at all?

2 - If the answer to question 1(a) is yes, can a competent authority for the purposes of development consent grant development consent for a project that may affect the water body prior to it being categorised and classified?

3 - If the answer to question 1(a) is no, what are the obligations on a competent authority when deciding upon an application for development consent that potentially affects a water body not characterised and/or classified?

Advocate General's Opinion
On 21 September 2023 Advocate General (AG) Rantos handed down his opinion. He answered the questions as follows:

- Question 1(a) – Answered "*no*".
- Question 1(b) – Deemed a hypothetical question and inadmissible.
- Question 2 - Not answered as question 1 was not answered in the affirmative.
- Question 3 – The competent national authorities must ensure, by means of an ad hoc analysis, that the project is not capable of causing deterioration in the status of that body of surface water as provided for in Article 4 of the WFD.

A link to the Advocate General's Opinion can be found **here.**

CJEU Judgment
The CJEU gave judgment on 25 April 2024.

Question 1
The CJEU reformulated the referred questions, finding that the procedure laid down by Article 267 and CJEU caselaw permitted this.[10]

The reformulated question 1 was as follows:
"by its first question, the referring court is asking, in essence, whether the first indent of Article 5(1) and Article 8 of Directive 2000/60, read in conjunction with Annexes II and V to that directive, must be interpreted as meaning that a lake with a surface area below 0.5km^2 is covered, first [11] *by the obligation to undertake, for each river basin district, an analysis of its characteristics and, second* [12] *by the obligation to establish programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district".*[13]

10 Para 21.

11 Para. 27 As regards, in the first place, Article 5 of Directive 2000/60, that provision requires Member States to ensure, inter alia, that, for each river basin district, an analysis of its characteristics is undertaken according to the technical specifications set out in Annex II to that directive.

12 Para. 32 As regards, in the second place, Article 8 of Directive 2000/60, that requires Member States to establish programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district and refers, in its title, inter alia, in general terms, to '*surface water*'.

13 Para. 25.

The CJEU referred to Annex II to the WFD which states that for each surface water category, the relevant surface water bodies within the river basin district shall be differentiated according to type. These types are those defined using either "*System A*" or "*System B*". The two systems are similar in that they contain the same obligatory factors: geographic position, altitude, geology, size and for lakes, natural, heavily modified, and artificial depth. Optional factors from System B can be used as desired by Member States (MS) and can be complemented with factors other than those mentioned in the WFD. However, the WFD requires that MS must achieve the same differentiation of water body types using System B as would be obtained using System A.

The CJEU states that as regards lakes and their size typology based on surface area, point 1.2.2 of Annex II of the WFD provides, for the purpose of System A, only for types of:

- 0.5 to 1km^2
- 1 to 10km^2
- 10 to 100km^2 and
- Greater than 100km^2

Furthermore, point 1.1(iv) of Annex II provides that, if System B is used MS must achieve at least the same degree of differentiation as would be achieved using System A. This allows MS opting for System B to also use the minimum size of 0.5km^2 as an obligatory factor for the characterisation relating to size within the meaning of point 1.2.2 of that Annex II.

The CJEU went on to say that Annex II defines surface water body '*types*' and as regards lakes, refers only to lakes having a surface area of at least 0.5km^2.

The CJEU, following the opinion of the AG, concluded this question by stating that in light of all the foregoing, the answer to the first question is that the first indent of Article 5(1) and Article 8 of the WFD, read in conjunction with Annexes II and V to the WFD, must be interpreted as meaning that a lake with a surface area below 0.5km^2 is not covered by the obligation to establish its type specific reference conditions or by the obligation to establish programmes for the monitoring of water status, which are laid down in those provisions.[14]

Question 2
Given the answer to the first question, this question was not answered.

Question 3
The CJEU again reformulated this question, stating that the referring court in essence was asking:

> *"what are the obligations on a competent authority under the WFD when such authority decides on an application for development consent for a project which potentially affects a lake in respect of which, because its surface area is below 0.5 km2, neither its type-specific reference conditions nor a programme for the monitoring of water status have been established pursuant to the first indent of Article 5(1) and Article 8 of Directive 2000/60, read in conjunction with Annexes II and V to that directive, respectively".*

The CJEU states that in interpreting a provision of EU law it is important to consider not only the wording but also its context and objectives of the legislation of which it forms a part of. Considering this, and notwithstanding the fact that Article 4(1)(a)(i) and (ii) accordingly refers to '*all bodies of surface water*', it follows from the wording of these provisions, interpreted in their context, that like the obligations arising from the first indent of Article 5(1) and Article 8 of that directive the two obligations laid down in Article 4(1)(a)(i) and (ii) do not cover lakes with a surface area below 0.5km^2.

14 Para. 41.

The CJEU referred to the series of provisions, in particular Articles 5 and 8 and Annexes II and V which establish a complex process involving a number of extensively regulated stages, for the purpose of enabling the MS to implement the necessary measures, on the basis of the specific features and characteristics of the bodies of water identified in their territories.

The CJEU said that it would be incompatible with the scheme of the WFD if the binding nature of the environmental objectives specified in Article 4(1) were also to concern surface water bodies which were not required to, undergo two stages of that process, namely the stages laid down in Articles 5 and 8.

The CJEU noted what AG Rantos had said, that surface waters can prove to be naturally connected with one another and as such the quality of a small surface water element can affect the quality of another larger element. Therefore, when a competent authority assesses an application for development consent for a project which potentially affects a lake with a surface area below 0.5km^2, "*it is not to limit that assessment to the effects of the project on that lake*". This does not necessarily mean that there is a standalone requirement to consider the obligation to prevent deterioration or the obligation to enhance (i.e. the binding obligations under Article 4) on that lake itself. Where the Court refers to the word "*assessment*" at paragraph 57 it seems to be referring to the competent authority's assessment of the project, rather than any assessment required under the WFD.

However, in order to determine whether that project may cause a deterioration of the status of a surface water body or compromise the attainment of good surface water status or of good ecological potential and good chemical status of such waters, it is to take into account the water bodies to which that lake is connected. Therefore, this would presumably require the competent authority to first consider the subthreshold lake's hydrological connection to other surface water bodies before deciding that the binding obligations under Article 4 do not apply at all (if that is the case).

Consequently, if it is established that the subthreshold lake is connected to a surface water body that has been or ought to have been characterised pursuant to Article 5 and for which there is or ought to be a programme of monitoring established pursuant to Article 8, the competent authority is required - unless a derogation is granted - to refuse consent for an individual project where it may cause the deterioration of the status of that other surface water body. Of note, if such a connected surface water body is above threshold and is not characterised but ought to have been, or is not subject to a programme of monitoring, but ought to have been, then the competent authority may also be required to refuse consent.

Although the judgment does not expressly state it, the corollary is that if the competent authority establishes that the subthreshold lake is not connected to a surface water body that has been or ought to have been characterised pursuant to Article 5 and for which there is or ought to be a programme of monitoring established pursuant to Article 8, the competent authority may grant consent. However, the competent authority will still have to take account of the programme of basic measures pursuant to Article 11(3) for the river basin district concerned, which apply to all surface water bodies and not just surface water body "*types*" characterised under Article 5 and subject to monitoring under Article 8. If the granting of the development consent conflicts with that river basin district programme of measures – or at the very least compromises the achievement of those basic measures in other water bodies – then this may give grounds to refuse the consent. The obligation under Article 11 is dealt with at paragraphs 62 to 64 and 69 of the judgment.

Therefore, the answer to question three is that a competent authority, when it decides on an application for development consent for a project which potentially affects a lake below 0.5km^2 must satisfy itself that:

a) the project is not liable to cause, on account of its effects on such a lake, a deterioration of the status of another surface water body which has been or ought to have been identified by that Member State as constituting a surface water body '*type*', nor is it liable to compromise the attainment of good surface water status or of good ecological potential and good chemical status of such other surface water body, and

b) the achievement of the project is compatible with the measures implemented pursuant to the programme established, in accordance with Article 11 for the river basin district concerned.

The CJEU Judgment is focused on the achievement of the objectives under Article 4(1)(a) of the WFD which relate to surface water bodies, however it does not deal with the achievement of objectives under Article 4(1)(b) which relates to ground water bodies. At a very high level, it would seem that the same principles should apply in respect of ground water bodies.

Key Takeaways

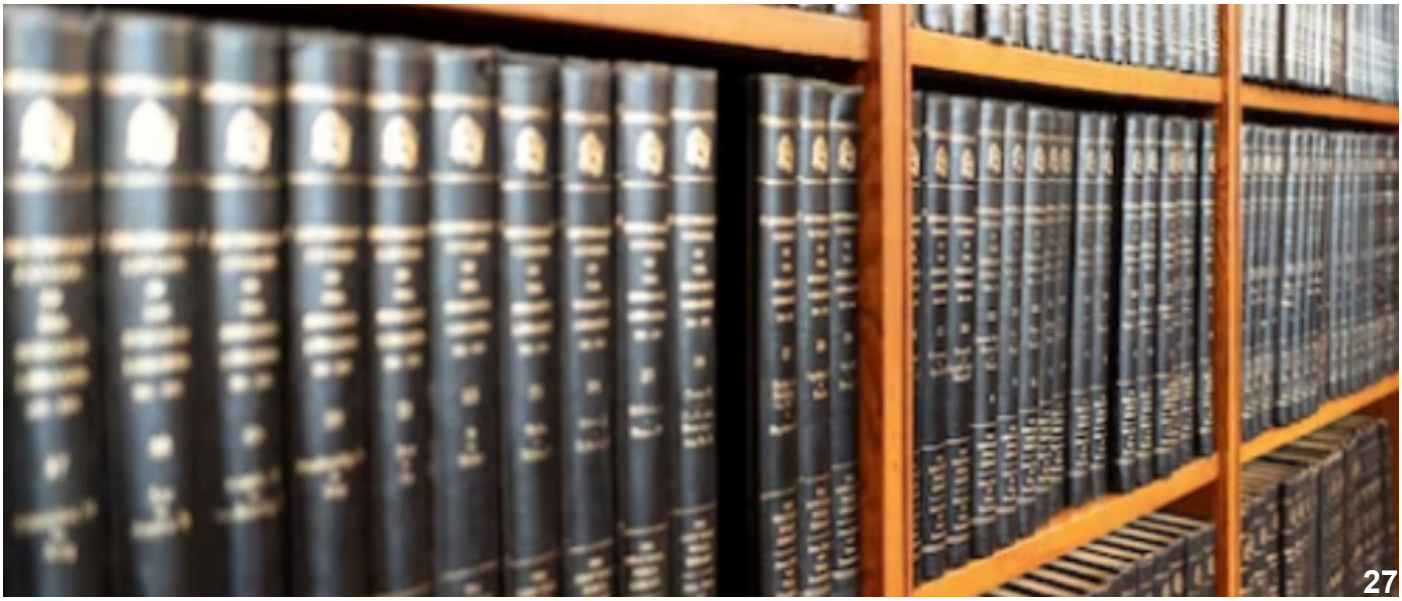
1. Lakes smaller than 0.5km² are not required under EU law to have established type-specific reference conditions or monitoring programmes.

2. Competent authorities in considering a development consent must assess the potential impacts on lakes below 0.5km², if they are connected to larger water bodies which have been characterised or are subject to a programme of monitoring under the WFD.

3. Despite the size exemption, competent authorities must ensure that projects do not deteriorate the status of connected water bodies that are identified as surface water body '*types*'.

4. The achievement of the project must also be compatible with the measures implemented under the programme established pursuant to Article 11 of the WFD for the river basin district concerned. This appears to apply regardless of whether there is a hydrological connection to a larger water body.

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



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