Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

fieldfisher

Legal Digest

Learning from Litigation

Issue 07: March 2025

Legal Cases:

DAA PLC v Fingal County Council [2024] IEHC 589

Friends of the Irish Environment Company Limited by Guarantee and Ors v the Minister for Housing, Local Government and Heritage, Ireland and the Attorney General and Ors [2024] IEHC 588

Pat O'Donnell and Company v Dublin City Council; and Uniphar PLC [2024] IEHC 671

Baile Bhruachlain Teoranta and Ors v Galway County Council [2024] IEHC 604

Prepared by Fieldfisher for the Office of the Planning Regulator

Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

Introduction

The Office of the Planning Regulator (OPR) is pleased to present the seventh 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: DAA PLC v Fingal County Council
Date: 17 October 2024
Citation: [2024] IEHC 589
Judge: Humphreys J.

This case involved a challenge taken by DAA PLC (the Applicant) to aspects of the Fingal County Development Plan 2023-2029 (the Development Plan) made on 22 February 2023. This case was heard alongside Friends of the Irish Environment CLG & Anor v the Minister for Housing, Local Government and Heritage and Ors [2024] IEHC 588 (the Friends case) which is summarised separately in this bulletin. Aspects of this challenge relating to noise insulation were postponed in light of the overlapping issues with the other case given the fact that the Court's decision in the Friends case could be determinative of the noise issues in this case.

Background
Dublin Airport hosts a sporting facility, ALSAA, which started in 1948 as a facility for Aer Lingus staff but is now open to the general public. The facility consists of a main complex and a pool. The pool is zoned High Technology and the use of that land for recreational purposes is not expressly permitted or prohibited by the uses set out in the Development Plan, so development is considered on a case-by-case basis.

The Applicant is the owner of the landholding. The current operators, ALSAA, are in place under a licence. The previous licence expired in April 2022 and ALSAA had been given a notice to vacate but the licence has since been extended. There has been an ongoing dispute between the Applicant and ALSAA in respect of the tenancy and usage of the landholding.

The Applicant informed Fingal County Council (the Council) that it intended to retain the facilities as sports and leisure facilities and that there was no intention to close the facilities but it intended to review the functionality of the facilities and the operator into the future.

The primary zoning applicable to Dublin Airport in the Development Plan is '*DA*'. The objective of DA zoning is to "*ensure the efficient and effective operation and development of the Airport in accordance with an approved Local Area Plan*". The DA zoning does not encompass sporting facilities so a general objective in the Development Plan, not specific to any given land, applies in respect of non-conforming uses (Objective ZO3).

At the issues paper stage of the plan-making process, the Applicant sought an expansion of the DA zoning to additional lands. This was not accepted by the Chief Executive of the Council.

At the draft plan stage, ALSAA made submissions to the Council requesting that the Council ensure and enshrine the continued existence of the complex and pool "*by way of appropriate zoning or through any other means available to the Council*".

The Chief Executive's report on the submissions on the draft plan was issued to the elected members of the Council. It addressed the ALSAA occupied lands by stating "*there is no change to the land use zoning associated with the ALSAA complex*".

The elected members approved a material amendment (PA SH 11.7) to the draft plan to change the zoning of the ALSAA complex from '*DA*' to '*CI*' (community infrastructure). The objective of the CI zoning under the draft plan was to "*provide for and protect civic, religious, community, education, health care and social infrastructure*". This material amendment was opposed by the Chief Executive for a number of reasons, that were explained to the elected members by the Council's Senior Planner, including that the ALSAA facility comprised a non-conforming use and the development plan already had provisions to allow for the ongoing operation and extension of such uses, if necessary. It was further noted that the CI zoning was most appropriate in towns and villages close to populations and therefore the CI zoning was not appropriate in this area and that the existing sports facility was supported by policies and objectives in the development plan.

During the course of a meeting in September 2022 to discuss the material amendments to the draft plan, the Council's Senior Planner, acting on behalf of the Chief Executive, spoke to the elected members about the importance of making a "*legally robust plan*" and reminded Councillors that in making the development plan the members were "*restricted to considering the proper planning and sustainable development of the area, statutory obligations, and relevant policies of the Government or any Minister.*"

The elected member who moved the motion for the material amendment responded that "*there were concerns over the ongoing use of the ALSAA site remaining as a sporting facility*" and "*that he would like to agree the motion to change to CI to protect the facilities and keep them as such.*"

The Applicant made a submission on the proposed material amendments which asserted that the proposal to rezone the ALSAA lands may have been influenced by knowledge of the ongoing dispute between the Applicant and ALSAA and observed "*that there was no discussion by Councillors of a strategic need, or justification on the basis of proper planning and sustainable development, for a sporting facility within the overall Dublin Airport precinct.*"

Following consultation on the draft material amendments, the Chief Executive's recommendation was that the development plan be made without the proposed material amendment noting the strategic importance of Dublin Airport, the fact that

provisions existed within the draft plan for the protection and expansion of non-conforming uses and that the CI zoning objective would typically be better utilised in or close to town/village centres. The Chief Executive also noted that the site was located within Airport Noise Zone A which seeks to resist new provision for other noise sensitive uses.

The elected members met to discuss the proposed material amendment and a number of contributions referred to the ongoing difficulties between ALSAA and the Applicant together with a number of other considerations. Ultimately the material amendment was approved and the ALSAA complex lands were zoned CI under the Development Plan.

Grounds of Challenge
The core grounds of challenge decided in this judgment are dealt with under the following headings:

Inadequate reasons
The Applicant alleged that in making the material amendment, the Council failed to give adequate reasons for zoning the lands as CI.

The Court identified that the obligation on the elected members was to provide the main reasons on the main issues. The Court considered that, leaving aside any question of irrelevant considerations which would be considered separately, the members favoured CI zoning as they thought it was appropriate to support the existing use. By implication, the elected members considered that the case for a CI zoning outweighed the case for a DA zoning.

The Applicant complained that multiple aspects of their submission were not considered. The Court held that there was no obligation to expressly provide reasons in response to every sub-aspect of a submission. Ultimately, the Court was of the view that no one could be in doubt as to the essential reason set out in the planning rationale which was that the elected members wanted to support and continue the existing social and recreational use.

The Court also noted that the level of reasons had to be read in context, namely that there were 164 material amendments making it impracticable for there to be extensive reasons for each individual motion. The Court also stated that the deliberative nature of the decision-making process at issue in the adoption of material amendments also made it impracticable for there to be elaborate reasons.

The lack of a live dispute between ALSAA and the Applicant about whether the ALSAA lands should continue to be used for recreational and sporting purposes also reduced the need for a more detailed set of reasons, in the Court's view.

This ground was dismissed.

Lack of regard to the Applicant's submissions
The Applicant alleged that the elected members had failed to have any or proper regard to the submissions made and failed to properly address those submissions or give reasons for not accepting them.

The Applicant made a detailed submission in respect of the material amendments in which it argued that the development plan should be adopted without material amendment PA SH 11.7.

The Court found that, while the Applicant's submissions were considered, there were conflicting submissions from ALSAA. The elected members preferred ALSAA's view to the Applicant's and there was nothing unlawful in doing so. The complaint of lack of "*proper*" regard to the Applicant's submissions was a merits-based complaint. In judicial review proceedings, the Court has no power to intervene in respect of the planning merits in respect of a decision that is being challenged unless the grounds amount to irrationality, which is a ground for judicial review that has a very high threshold which is only rarely reached.

As with the inadequate reasons ground, referred to above, the lack of an actual dispute as to the intention of either the owner or the operator of the lands to change the sporting use, combined with the fact that the Council was aware that the use was non-conforming, meant that the planning rationale was to bring the zoning and the existing use into harmony.

This ground was dismissed.

Inconsistency with relevant national and regional policy objectives
The Applicant alleged that the zoning of the lands as CI was inconsistent with relevant national and regional policies which seek to protect lands which are zoned DA for the purposes of the future development of Dublin Airport and was therefore unlawful and contrary to a number of the Council's obligations under the Planning and Development Act 2000, as amended (the 2000 Act).

The Council argued that neither the National Planning Framework's (NPF) National Strategic Outcome (NSO 6) nor the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy (RSES) Regional Policy Objectives (RPO 8.17 and RPO 8.19) dictated how the lands should be zoned. The zoning of lands was a decision vested in the Council.

The Court found that the Applicant's argument was a merits-based disagreement with the decision of the Council in the exercise of the Council's evaluative judgement. Whether a CI zoning that would have preserved the existing sporting use of the ALSAA lands is in conflict with NPF or RSES objectives to support Dublin Airport and ensure that lands in the vicinity of the airport is, in the first instance[1], a matter for the judgement of the Council. The Court found that there was nothing irrational about an evaluative judgement which has the implication that sports facilities on the airport campus do not undermine the airport use. In this regard the Court noted that the ALSAA facility supports the airport in effect by supporting its staff.

The Court reiterated that the decision had to be read in context and whilst the planning rationale was *'sparse'* it was implicit that the elected members had regard to the use of the existing facility and thought that the appropriateness of the CI zoning was not in conflict with, or outweighed, such other evaluative matters as may have pointed to a different conclusion.

Irrelevant considerations

The Applicant alleged that the zoning amendment was in breach of Section 12(11) of the 2000 Act as its adoption and inclusion was motivated by considerations other than that of the proper planning and sustainable development of the functional area of the Council, the statutory obligations of the Council or any relevant policies and objectives of the Government or Minister. In this regard, the Applicant alleged that the resolution of a private dispute fell outside the scope of Section 12(11) of the 2000 Act. The Court's attention was drawn to a number of matters in the record of the Special Meeting of the Council held on 20 February 2023 which the Applicant claimed demonstrated a desire to '*help*' ALSAA in its dispute with the Applicant.

The Council argued that there was a clear planning rationale underpinning the Council's decision, namely that the CI zoning was most appropriate at the location, having regard to the existing facility located there. The fact that the planning rationale was attached to the motion was, in the Council's view, determinative of the issue.

The Court considered that to be too rigid a position and that the Court should be able to look at all the evidence outside of the official record, not to find reasons but to consider whether irrelevant considerations had been taken into account in coming to that otherwise valid and reasoned decision.

In this regard the Court relied on the Supreme Court judgment in Killegland Estates Ltd v Meath County Council & Ors [2023] IESC 39 (the Killegland case) (See **Issue 03** of the Legal Digest) and noted that "planning and zoning decisions should, generally speaking, be blind as to issues of ownership."

1. The Court's use of the term *'in the first instance'* is presumably acknowledging that the OPR and the Minister may in the direction-making process exercise evaluative judgement as to the consistency of objectives of the development plan with, for example, regional and national policy objectives.

Some discretion is afforded to elected members in respect of irrelevant considerations as in the Court's view "*a collective group of non-lawyer councillors debating a quasi-political issue in a political forum is almost never going to completely stick to a legal script.*" The key question was whether the irrelevant considerations were central to the overall decision or were more marginal.

The Court found that the transcript of the elected members' Special Meeting of 20 February 2023 illustrated a number of comments that pushed at the boundaries of what was permitted by referring to personal or non-planning matters. In particular, the Court considered that certain comments placed reliance on supporting ALSAA in its dispute with the Applicant. These comments were not valid planning considerations and were not marginal in the sense that they could be disregarded.

The Court contrasted this situation with the Killegland case where there was an effort made to identify non-planning considerations that were mentioned and expressly disregarded. This had not happened here.

Having regard to the number of personal contributions on the motion which were non-peripheral and the fact that these were not identified and withdrawn, the Court found that the adoption of the material amendment did not comply with the obligation to consider only planning considerations.

The Court therefore quashed the zoning of the ALSAA lands on this basis.

The Court gave some best practice guidance for local authorities where the issue of irrelevant or non-planning considerations arises:

"*(i) members would be given a general briefing or refresher at each stage as to what is and is not a proper planning consideration that can be raised;*

(ii) officials would monitor the contributions, identify any significant non-planning considerations and point out that irrelevant comments should be disregarded;

(iii) if significant irrelevant comments are made, the chair would be advised that the members concerned could be invited to withdraw the comments or if they fail to do so, to recuse themselves from the motion concerned."

In circumstances where the Court had found against the Council on domestic law issues, it did not go on to consider a number of EU law grounds which had also been raised by the Applicant on the basis that the outcome of the case had already been determined by reference to the domestic grounds. While there can be exceptions, this is an approach that is typically taken by the Courts where numerous grounds of challenge are raised in judicial review proceedings.

Key Takeaways

- When making a development plan elected members are restricted to considering the proper planning and sustainable development of the area, statutory obligations and relevant policies of the Government or any Minister.

- Even if a clear lawful reason is provided, a decision can still be invalid if irrelevant considerations are taken into account when making a decision. In deciding that, the Court is not confined to the stated reason and can look at the contribution(s) of elected members at the relevant meeting(s).

- The Court will, however, afford some discretion to elected members given the nature of the deliberative decision-making process and comments on non-planning matters which are marginal to any decision may not warrant the quashing of the decision.

- The Court gave some best practice guidance for local authorities to assist with rectifying the position where irrelevant considerations arise as set out above in italics.

- An interested party, such as the Applicant, is entitled to the main reasons on the main issues but is not entitled to micro-sub reasons on sub-issues. The context within which the reasons are given is a relevant consideration for the Court in any challenge.

- In considering consistency with national and regional policy objectives, the elected members, at first instance, were exercising an evaluative planning judgement. This is not something that an Applicant can challenge in judicial review proceedings unless the grounds of challenge amount to irrationality, which is a ground for judicial review that has a very high threshold which is only rarely reached.

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

Case: Friends of the Irish Environment Company Limited by Guarantee and SMTW Environmental Designated Activity Company v The Minister for Housing, Local Government and Heritage, Ireland and the Attorney General, and Office of the Planning Regulator, Fingal County Council and DAA Public Limited Company (Notice Parties)
Date delivered: 17 October 2024
Citation: [2024] IEHC 588
Judge: Humphreys J.

This case was a challenge by the Applicants to a Ministerial Direction issued in respect of the Fingal County Development Plan 2022-2028 (the Development Plan). The Applicants challenged Part 2(b) of the Planning and Development (Fingal County Development Plan 2022-2028) Direction 2023 (the Ministerial Direction).

Background
The process in the Planning and Development Act 2000, as amended (the 2000 Act) which leads to a ministerial direction is complex. The Office of the Planning Regulator (the OPR) made recommendations to Fingal County Council (the Council) on the draft Fingal County Development Plan (the draft plan) and on the material amendments proposed to the draft plan by the elected members.

At material amendment stage the elected members adopted material amendment PA CH 8.1 which inserted text recognising the alleged inadequacy of the proposed noise insulation scheme at Dublin Airport. The OPR recommended that the text be removed as in its opinion it was inconsistent with National Policy Objective 65 (NPO 65) of the National Planning Framework.

The text of NPO 65 is as follows:

"*Promote the pro-active management of noise where it is likely to have significant adverse impacts on health and quality of life and support the aims of the Environmental Noise Regulations through national planning guidance and Noise Action Plans.*"

Minor amendments were made to the relevant text in the adopted plan and the final text inserted by material amendment PA CH 8.1, as modified, was as follows:

"*That the Development Plan recognises the inadequacy of the proposed noise insulation scheme to protect the health of those affected by aircraft noise and that in view of the increasing knowledge and scientific evidence of the serious health impact of*

aircraft noise on the physical health of Fingal residents that it is an objective to take measures including the expansion of noise insulation schemes operated by DAA to include all areas exposed to 40Dbl night or higher as produced by aircraft during night time. The insulation schemes should be designed to ensure that internal noise levels are in keeping with BSI Standards Publication BS 8233:2014 Guidance on sound insulation and noise reduction for buildings, table 4: Indoor ambient noise levels for dwellings, as referenced in Chapter 14: Development Management Standards of the Development Plan 2023 - 2029. This approach is in response to the knowledge that night-time aircraft noise above this level is associated with adverse effects including increased mortality, stress, high blood pressure and a deterioration in cardiovascular health."

In summary, the text inserted stated that the proposed noise insulation scheme at Dublin Airport was inadequate, and that it was an objective of the Development Plan that the current noise insulation scheme would be expanded to meet specified requirements.

The Chief Executive of the Council issued a notice to the OPR in accordance with Section 31AM(6) of the 2000 Act which indicated that the Development Plan had not been adopted in accordance with the OPR's recommendation, including that the text of material amendment PA CH 8.1, as modified, had been retained.

The OPR then exercised its power under Section 31AM(8) of the 2000 Act to make a recommendation to the Minister to issue a direction to, in effect, amend the Development Plan. This arises where the OPR is of the opinion that the Development Plan has not been made in a manner consistent with the OPR's recommendations, that the decision of the planning authority results in the making of a development plan in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned and as a consequence it merited the Minister using his or her functions to issue a direction under Section 31 of the 2000 Act.

In accordance with the OPR's recommendation, the Minister issued a draft direction requiring, amongst other things, the removal of the text inserted by material amendment PA CH 8.1 as modified. Subsequently there was a period of consultation with the public and elected members, in accordance with the 2000 Act, on the draft direction. The Chief Executive produced a report summarising submissions received on the draft direction.

The OPR considered the report of the Chief Executive and made a recommendation to the Minister pursuant to Section 31AN(4) of the 2000 Act to make the final direction.

The Minister subsequently issued the final direction on 28 July 2023 pursuant to Section 31 of the 2000 Act. Part 2(b) of the Ministerial Direction required the Council to remove the text inserted by material amendment PA CH 8.1, as modified, for reasons including that it was inconsistent with NPO 65. The Ministerial Direction also required the deletion of four zoning objectives and the reinstatement of one zoning objective but these matters were not the subject of the Applicants' challenge in these proceedings.

Management of Noise at Dublin Airport

There are a number of aspects to the management of noise at Dublin Airport relevant to the case which derive from EU law. The Environmental Noise Regulations 2006 (which implement Directive (EC) 2002/49/EC which relates to the assessment and management of environmental noise) require that a Noise Action Plan (NAP) be put in place for Dublin Airport. The Council is the competent action planning authority for the purposes of preparing a NAP for Dublin Airport. The Council adopted the NAP for Dublin Airport 2019-2023 and it contains the following key aim specific to the airport:

"*to avoid, prevent and reduce, where necessary on a prioritised basis the effects due to long term exposure to aircraft noise, including health and quality of life through implementation of the International Civil Aviation Organisation's 'Balanced Approach' to the management of aircraft noise as set out under EU Regulation 598/2014*".

Separately, the EU Regulation 598/2014 (which establishes rules and procedures with regard to the introduction of noise-related operating restrictions at airports within the EU) is implemented via the Aircraft Noise (Dublin Airport) Regulation Act 2019. The Council is the Aircraft Noise Competent Authority (ANCA) for Dublin Airport and the functions of the ANCA are to be exercised by the Chief Executive of the Council for those purposes. The Chief Executive is independent (including from the elected members of the Council) in the performance of those functions. Such functions include the exclusive power to impose operating restrictions. In carrying out its functions the ANCA must ensure that the '*Balanced Approach*'[1] to the management of aircraft noise as set out under EU Regulation 598/2014 is adopted where a noise problem at the airport has been identified.

Tying all of the above together, the OPR and the Minister were of the view that the text inserted by material amendment PA CH 8.1, as modified, by the elected members was inconsistent with NPO 65 because it did not support the aims of the Environmental Noise Regulations through the NAP. As the NAP itself set out as its key aim the implementation of the Balanced Approach to the management of aircraft noise as set out under EU Regulation 598/2014, the text of material amendment PA CH 8.1 was also inconsistent with the functions of the ANCA which were vested solely in the Chief Executive of the Council.

Grounds of Challenge

Core Ground 1. Errors in the process

The Applicants alleged that the Ministerial Direction was unlawful due to errors in the process. These included that the draft direction and the public notice wrongly referred to an earlier version of the relevant text of material amendment PA CH 8.1 which had since been modified.

1. See the International Civil Organisation's publication '*A Balanced Approach to Aircraft Noise Management*'.

The Court held that whilst there were some drafting errors in the documents from the OPR and the Minister towards the latter stages of the process, any such errors were not material to the Minister's central concern i.e. that the text was inconsistent with NPO 65. There was no real doubt about the provision which the Minister wanted deleted from the adopted Development Plan. Therefore, the Court found that these "*harmless*" errors were not a basis for quashing the Ministerial Direction.

Core Ground 2. Steps to be taken are erroneous

This ground was linked to Core Ground 1 whereby the Applicants alleged that the requirement of the Ministerial Direction was erroneous and therefore not capable of being put into effect by the Council. The direction to the Council was to "*delete the amended and additional text inserted under PA CH 8.1 as modified, consistent with the recommendation of the chief executive's report dated 15th January 2023*". The Applicants argued that the Chief Executive's report of 15 January 2023 referred to the previous version of the text before it was amended by the elected members and therefore the Ministerial Direction was seeking to remove text which was not in the adopted Development Plan. The Court held that whilst the wording of the Ministerial Direction was sub-optimal, in that it refers to the original Chief Executive's report rather than the report on the amendment ultimately adopted, the words have to be read in a way that renders the decision valid rather than invalid. In this regard, the Court held that a valid reading of the words was available as while technically incorrect, the Chief Executive's report of January 2023 was basically consistent with the later report on the material amendments.

Core Ground 3. No legal error in the adopted plan

Section 10(1A) of the 2000 Act requires the written statement of a development plan to include a core strategy which shows that the development objectives in the Development Plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements set out in Section 28 guidelines.

The Applicants alleged that the text inserted by material amendment PA CH 8.1, as modified, was not inconsistent with NPO 65 contrary to what the OPR and Minister had asserted.

In order for the OPR to make a recommendation to the Minister under Section 31AM(8) of the 2000 Act as set out above, the OPR had to be of the opinion that the Development Plan, as adopted, failed to set out an overall strategy for the proper planning and sustainable development of the area. The Court found that "*overall*" in this context has two dimensions. "*Firstly, the plan being overall horizontally – that is geographically joining up to make sense for the whole area.*"

Secondly, the plan has to be overall in a vertical sense, *"that it covers all policy areas and engages seamlessly with all relevant pieces of binding statutory architecture"*, including the requirements of Section 10(1A) of the 2000 Act. The Court found that whilst the plan on balance was overall in the geographical sense, it was open to the OPR and Minister to form the view that it was not overall in the vertical sense.

In this regard, the Court found that it was reasonably open to the Minister "*to conclude that inclusion in a development plan of an objective to take measures that are premised on the inadequacy of existing noise mitigation measures is not consistent with the division of functions envisaged by the 2019 Act and thus is not consistent with the current*" NAP. This was therefore not consistent with NPO 65 and was a valid basis for a finding of inconsistency with Section 10(1A) of the 2000 Act and ultimately a valid basis for finding a lack of an overall strategy for the proper planning and sustainable development of the area in the Development Plan.

The Court further held that what a binding standard means is a question of law for the Court (such as a requirement to have regard to ministerial policy) but that whether that standard has been applied in a given case is frequently a mixed question of law and fact. This can mean that the application of the policy to the facts requires the evaluative judgment of the OPR or the Minister, as applicable.

The Court held that the conclusion by the Minister that "*the inclusion of an objective in the Development Plan, which conflicts with and undermines these separate statutory provisions and processes, including the Noise Action Plan, is therefore inconsistent with National Policy Objective 65*", was not based on an error of law. The Court further found that insofar as this constituted an evaluative judgment as to the application of NPO 65, that had not been shown to fall outside the zone of legitimate planning judgement of the Minister.

Core Ground 4. Reasons

The Applicants alleged that the Ministerial Direction was invalid as the Minister failed to provide adequate reasons in respect of the issues raised in the submissions in circumstances where 167 of the 168 submissions on the draft direction asked the Minister not to make the direction in relation to material amendment PA CH 8.1.

The Court held that the main reasons for the Ministerial Direction were evident from the Minister's covering letter and the reasons in the Ministerial Direction itself.

The Applicants also complained that their submissions made during the process regarding procedural errors and an absence of proper Strategic Environmental Assessment were not adequately addressed by the Minister.

The Court considered that these legalistic complaints, to the effect that a decision was made in excess of jurisdiction, are not the sort of objections that require a reasoned response. In short, if there was no actual illegality, there was no obligation on a decision-maker to provide a fully reasoned rejection of a meritless complaint about legal errors.

All grounds of challenge were dismissed and the Ministerial Direction was upheld.

The High Court's judgment has been appealed by the Applicants and is listed for hearing in the Court of Appeal in March 2025.

Key Takeaways

- Harmless errors in the direction process are not a basis for quashing the direction of the Minister.

- A decision of a public body, including a direction of the Minister, has to be read in a way which is valid rather than invalid, where that decision can reasonably be read in a manner that makes it valid.

- An "*overall strategy*" (for the proper planning and sustainable development of the area) has both a horizontal and a vertical dimension. It has to geographically join up to make sense for the whole area but also has to cover all policy areas and engage seamlessly with all relevant pieces of binding statutory architecture in different fields of policy and provision.

- Whether a standard such as NPO 65, if correctly interpreted, has been correctly applied in a given case is often a mixed question of law and fact. Where the Minister is applying a standard to a set of facts, the Minister has a zone of evaluative planning judgement within which they may make their decision.

- A decision-maker must provide the main reasons on the main issues involved in a decision that it has made. However, a decision-maker is not required to provide reasons for rejecting an erroneous view of the law and adopting what they consider to be the correct application of the law.

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

Case: Pat O'Donnell and Company v Dublin City Council; and Uniphar PLC (Notice Party)
Date: 26 November 2024
Citation: [2024] IEHC 671
Judge: Holland J.

Background
This judgment of Mr. Justice David Holland concerned the decision of Dublin City Council (DCC) to adopt the Dublin City Development Plan 2022-2028 (the Development Plan), including material alteration MA D-0004 (the Material Alteration) to the previously published draft Development Plan.

The Material Alteration changed the zoning of lands, owned by Uniphar PLC (the Notice Party to the proceedings), at Chapelizod bypass/Rossmore Drive, Kylemore Road, Dublin 20 from '*Z6*' – '*Employment/Enterprise*' to '*Z10*' – '*Inner Suburban and Inner City Sustainable Mixed-Uses*' (the Uniphar Site). The Court identified that what most distinguishes Z6 from Z10 for the purposes of these proceedings is that "*Z10 envisages considerable residential development and Z6 does not.*" Uniphar PLC had been contemplating redevelopment of the Uniphar Site for a number of years and supported the Material Alteration. The Applicant asserted that the Material Alteration would facilitate primarily residential development on the Uniphar Site.

The Applicant, a supplier of heavy construction plant, machinery and equipment, operates an industrial site which includes training, repair and maintenance facilities on lands situated contiguous to the north and east of the Uniphar Site. This site operates 24 hours a day to cater for urgent work and the Applicant claimed these operations are incompatible with any adjoining residential use and friction with any potential adjoining residents would be inevitable. The Applicant asserted that it had previously had to relocate these activities from another site due to the imposition of what the Applicant described as "*severe*" operational restrictions by the EPA.

The Applicant asserted in a submission made by Doyle Kent Ltd. (explicitly named as planning consultant to the Applicant) on 31 August 2022 (the Applicant's MA Submission) that the Material Alteration and the proposed rezoning therein was *"likely to lead to a predominantly residential development"* on the Uniphar Site. This was not substantially disputed. While this submission set out other concerns, the Court was satisfied that the primary basis upon which the Applicant opposed the rezoning was that the residential use of the Uniphar Site would be incompatible with the existing use of the Applicant's lands.

A Chief Executive's Report was prepared on 21 September 2022 by DCC (the September 2022 CE Report). This report included a list of the "*persons or bodies who made submissions or observations*" (the List) and included an entry listing the Applicant's MA Submission. This entry identified a portal number, which the Court understood to "*refer to a location on a DCC website where the submission was publicly accessible from shortly after it was made*", and stated that the submission was submitted by Doyle Kent Ltd. This entry did not identify the Applicant. The Court also observed that this submission was not cross-referenced in the September 2022 CE Report to the Material Alteration on which the submission was made or to its reference number.

The Court noted that in circumstances where there have been over 1,000 submissions, as a matter of practicality the elected members of DCC very likely work off the Chief Executive's Report, at least as their starting point. In fact, the Court identified that Section 12(9) and Section 12(10) of the Planning and Development Act, 2000 (the 2000 Act) prescribe the documents which the elected members must consider in making the development plan. These documents do not include the submissions but they do include the Chief Executive's Report on the submissions.

In respect of the List entry noted above, the Applicant contended that unless one already knew that Doyle Kent Ltd. had made a submission for the Applicant, the List would not inform the reader that the Applicant had made a submission and where to find it. The Applicant also contrasted this with a submission made by Uniphar PLC in respect of the draft Development Plan, which was specifically identified as having been made by Uniphar PLC in the Chief Executive's Report prepared in April 2022 (the April 2022 CE Report) despite having been submitted in similar circumstances via a planning consultant. However, the Court did observe that the Applicant's MA Submission was available on DCC's website on a webpage which identified the Applicant.

In judicial review proceedings, the Court has no power to intervene in respect of the planning merits in respect of a decision that is being challenged unless the grounds amount to irrationality, which is a ground for judicial review that carries a very high threshold which is only rarely reached. In this case, the Applicant insisted that its objections were in respect of the legality of the process, which the Court does have the power to intervene in respect of. DCC contended that the Applicant's objections sought to challenge the planning merits of the decision and dressed these up as a legal challenge.

Grounds of Challenge

Core Ground 1. Failure of DCC to comply with Section 12(8)(b) of the 2000 Act in respect of the Applicant's MA Submission

Section 12(8)(a) of the 2000 Act requires the Chief Executive of a planning authority to prepare a report on any submissions or observations received and submit the report to the elected members of the planning authority for their consideration. Section 12(8)(b) of the 2000 Act lists certain requirements which this report should satisfy, including to list the persons or bodies who made submissions or observations under Section 12, provide a summary of these submissions and observations and to give the Chief Executive's response to the issues raised in these submissions and observations which takes account of:

- the directions of the members of the authority or the committee under Section 11(4)
- the proper planning and sustainable development of the area,
- the statutory obligations of any local authority in the area; and
- any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

Section 12(8)(a) requires the planning authority to publish any submissions or observations received under Section 12 on the website of planning authority within 10 working days of receipt.

Under Core Ground 1, the Applicant contended that the September 2022 CE Report failed to:

- identify the Applicant as having made a submission on the amendments,
- summarise that submission; and
- respond to the issues raised in that submission.

DCC contended that:

- the Applicant's approach to reading the September 2022 CE Report was incorrect,
- the Applicant sought an implausible interpretation of Section 12(8)(b) of the 2000 Act,
- the complaint of a failure to identify the Applicant as having made a submission was "*formalistic and trivial*" in circumstances where the submission was published online and the Applicant's planning agent was listed as having made the submission,
- the personal considerations, such as the identity of the party making a submission as being an employer, something which the Applicant asserted that the elected members should have been alerted to, are irrelevant to proper planning and sustainable development; and,
- the Applicant's MA Submission was considered by the Council and summarised in the September 2022 CE Report and this report did respond to the issues raised in the submission.

The Court observed that the word "*shall*" is used in Section 12(8)(b) of the 2000 Act (in describing what the Chief Executive's Report is to contain). The Court noted that generally this will be interpreted as imposing a mandatory requirement. The Court, therefore, took the view that Section 12(8)(b)(i) of the 2000 Act imposes a mandatory obligation on a Chief Executive to list in their report the persons and bodies who have made submissions, and to do so by the name of those persons specifically rather than by the name of their planning agents.

A number of reasons were given for this view, including that the elected members should be properly made aware of who, amongst the constituents who have elected them, has made submissions as it is not reasonably possible for elected members to read all submissions. In addition, given that submissions may be summarised and responded to thematically, the list is the only point in a Chief Executive's Report where the names of those who made submissions appear. While the matters raised in submissions may be grouped thematically and summarised in a Chief Executive's Report, the Court considered that the purpose of the list of submissions is to alert an elected member to the identity of persons who have made submissions in order to assist them in identifying those that may be of importance to the development plan or the local area and examine these submissions in more detail. While the Applicant's MA Submission was available on DCC's website on a webpage which identified the Applicant, the Court did not consider this to be sufficient as it would not assist the elected members in identifying the Applicant during their consideration of the September 2022 CE Report.

Having determined that there was a breach of the obligation imposed on DCC by Section 12(8)(b)(i) of the 2000 Act, the Court then considered whether this breach could be regarded as *de minimis* i.e. if the deviation from the obligation prescribed by the statutory provision is "*so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with*." [1]

Ultimately, the Court found that this breach could not be regarded as *de minimis* and quashed the decision of DCC in respect of the Material Alteration. However, the Court noted that it may have reached a different view in a different factual scenario. For example:

(i) had the name of the Applicant, which was omitted from the List in the September 2022 CE Report, been stated in the body of the report where the substantive consideration of the proposed Material Alteration was set out, or

(ii) had there been a link or cross-reference between the narrative relating to the proposed Material Alteration and the List entry.

1. As per Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] ILRM 64.

The Court then considered the alleged failure to summarise and respond to the issues raised in the Applicant's MA Submission. In considering what constitutes an adequate summary of submissions, the Court observed that "*a summary must be such as to allow a member to decide, on an adequately informed basis, whether (s)he needs to read the submission to which it relates.*" The Court determined that the test to apply here was whether the summary supplied was adequate in law as opposed to being "*whether a better or more complete summary could have been supplied.*"

The Court held that Chief Executive's summary of the Applicant's MA Submission met this test. The Court found that the text of the September 2022 CE Report "*explicitly referred to the Applicant's central objection – incompatibility of the Z10 zoning of the Uniphar Site with adjoining existing land uses on commercial/employment lands to the north – i.e. the Pat O'Donnell Lands and their existing use.*"

The Court considered the alleged failure to respond to the Applicant's MA Submission under Core Ground 3.

Core Ground 2. Breach of Section 12(11) of the 2000 Act

The Applicant alleged that DCC breached Section 12(11) of the 2000 Act by failing to take sufficient account of Regional Policy Objective 5.6 (RPO 5.6) set out in the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy (RSES) 2019-2031, which requires "*a sequential approach*" to the future development of employment lands in the Dublin Metropolitan Area, "*with a focus on the re-intensification of employment lands within the M50 and at selected strategic development areas and provision of appropriate employment densities in tandem with the provision of high quality public transport corridors.*"

Section 12(11) of the 2000 Act restricts the elected members to "*considering the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government*" in making the development plan. The Court accepted that this also obliges the elected members to consider such matters.

The Court found that the September 2022 CE Report specifically referred to the RSES policy to retain employment lands and, while not a direct reference to RPO 5.6, the Chief Executive's response clearly reflected awareness of the issues in respect of employment lands. The Court determined that the Applicant failed to provide sufficient evidence to prove that there was a substantive failure to have regard to RPO 5.6 as a relevant consideration. This ground was rejected.

Core Ground 3. Fair Procedures and Reasons
The Applicant alleged that DCC failed to provide reasons for not accepting the Applicant's MA Submission. The Applicant claimed that the response provided merely repeated the Chief Executive's response provided to the Uniphar submissions on the draft Development Plan.

The central complaint in this ground was not that no reasons were given for not accepting the Applicant's MA Submission. Instead, it was claimed that the reasons given in the September 2022 CE Report were a repetition of the reasons given in the April 2022 CE Report, prior to the making of the Applicant's MA Submission. The reasons contained in the April 2022 CE Report were in response to Uniphar's submissions on the draft Development Plan.

The Court stated that if it is unnecessary to repeat reasons previously given which remain valid, as the Supreme Court found in Killegland Estates Ltd v Meath County Council [2023] IESC 39, then logically their express repetition is not invalid. Here, the Court found that the "*essential thrust*" of the Applicant's MA Submission was that residential use of the Uniphar Site would not be compatible with the use of the Applicant's lands. The remainder of this submission was an argument in support of this view or articulating this view in other ways. The Court found that the September 2022 CE Report explicitly recognised the Applicant's central argument and made it clear that it had been considered and rejected. Accordingly, the Court rejected Core Ground 3.

Core Ground 4. Material Factual Errors in the September 2022 CE Report
The Applicant contended that the September 2022 CE Report contained the following two material factual errors:

- the Uniphar Site was incorrectly described as "*within*" an established residential area to the west and east. There is no residential development to the east; and
- the report baselessly asserted that rezoning the Uniphar Site to Z10 would provide a buffer between the residential and employment uses.

DCC contended that this was an attempt by the Applicant to challenge the planning merits of the decision, something which is not typically permitted in judicial review proceedings, and that Core Ground 4 relied on an over-literal reading of the September 2022 CE Report which read the report as being invalid rather than valid. An overarching principle of public law decisions is that they are to be read with the presumption that they are valid. The Court agreed with the above arguments made by DCC and rejected Core Ground 4.

Conclusion

Ultimately, the Court quashed the decision to zone the Uniphar Site as Z10. This decision was made on the sole basis of DCC's failure to list the Applicant's name as the person who made the submission on the Material Alteration. DCC included the name of the Applicant's planning consultant in the List. The Court's decision was made despite the fact the Applicant's submission was made available on DCC's website and the submission itself was dealt with in substance in the September 2022 CE Report.

Key Takeaways

- A high bar is placed on a Chief Executive's Report in the context of Section 12(8)(b) of the 2000 Act. Each person who makes submission(s) must be named and not their planning consultants.

- The purpose of the statutory requirement to include a list of submissions in the Chief Executive's Report in respect of a development plan is to alert the elected members to the identity of persons who have made submissions. This is in order to assist the elected members in identifying those that may be of importance to the development plan and may require a more detailed review beyond any summaries contained in the Chief Executive's Report. For example, to identify persons with particular local knowledge.

- Where reasons that have been provided at an earlier stage in the process remain valid following further submissions, repetition of these reasons does not invalidate them if it is clear that the issues raised have been considered and rejected.

- In judicial review proceedings, the Court does not have the power to intervene in respect of the planning merits of a decision except in limited circumstances. The role of the Court in judicial review proceedings is to ensure the decision being challenged was permitted within the legal framework in which it was made.

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

Case: Baile Bhruachlain Teoranta, Coill Bhruachlain Teoranta, Baile Eamoinn Teoranta and Glann Mor Cuan Teoranta and Glann Mor Ceibh Teoranta v Galway County Council
Date delivered: 1 November 2024
Citation: [2024] IEHC 604
Judge: Humphreys J.

This case was a challenge to the Galway County Development Plan 2022-2028 (the Development Plan) as adopted by decision of Galway County Council (the Council) on 9 May 2022 and which came into effect on 20 June 2022. The Applicants own lands at Moycullen, Spiddal and Carraroe, County Galway and had made submissions to the Council urging that their lands be re-zoned for a mix of uses in the Development Plan prior to its adoption.

In Core Ground 1 of their challenge, the Applicants alleged that the Report of the Chief Executive of the Council (the CE Report) on the Draft Development Plan (the draft plan) consultation process did not provide an accurate summary of the submissions made on the Applicants' behalf and therefore the Council was in breach of Section 12 of the Planning and Development Act 2000, as amended (the 2000 Act).

In Core Ground 2 of the challenge, it was alleged that the elected members of the Council failed to give reasons for their decision to reject the Chief Executive's recommendation not to zone the lands as proposed in Material Amendment No. RSA LUZ Sruthán Quay 19.1. This related to the Council's decision, effected by way of motion at its meeting on 12 January 2022, to zone the Fourth and Fifth Applicants' lands to '*Open Space, Recreation and Amenity*'.

In Core Ground 3 of their challenge, the Applicants alleged that the Council failed to make available to them the minutes and agendas of special meetings of the Council. They claimed that they were unlawfully denied access to an effective public consultation process during the course of the statutory process leading up to the decision of the Council on 9 May 2022 to adopt the Development Plan.

Certain Core Grounds were only pursued by particular Applicants in relation to the land owned by those Applicants.

Background
By way of background, the draft plan was published by the Council in May 2021 for public consultation. A public consultation period on proposed material amendments to the draft plan took place in February and March 2022 and the final Development Plan was adopted in May 2022 and came into effect in June 2022.

Agents on behalf of the Applicants made submissions to the Council on the issues paper in September 2020. The issues paper and the submissions received in respect of the paper informed the making of the draft plan. Agents on behalf of the Applicants made a submission in July 2021 on the draft plan and in March 2022 they made a submission on the proposed material amendments to the draft plan. The CE Report on the draft plan consultation process was published in October 2021 and the CE Report on the submissions received on the proposed material amendments was published in March 2022.

In April and May 2022, the elected members held special meetings of the Council to consider the proposed material amendments to the draft plan before it was adopted on 9 May 2022. On 3 June 2022, the Office of the Planning Regulator (OPR) made a submission on the Development Plan to the Minister of State for Housing, Local Government and Heritage (the Minister). The Minister issued a draft ministerial direction to the Council, pursuant to Section 31 of the 2000 Act on 16 June 2022 and the Development Plan came into effect on 20 June 2022. Copies of the minutes of all of the special meetings of the Council were sought, on behalf of the Applicants, by way of a request pursuant to the Freedom of Information (FOI) Act on 30 June 2022. The Applicants made a submission to the Minister on the draft ministerial direction on 8 July 2022. Access to the documents requested via the FOI request was refused by the Council on 13 July 2022 as it was said that the information sought was already in the public domain.

Failure to provide an adequate summary of submissions
Core Ground 1 asserted that the CE Report on the draft plan consultation process failed to provide an adequate summary of the submissions made on behalf of the Applicants, violating Section 12 of the 2000 Act. The particular summary complained of here was that of a submission made on behalf of the First and Third Named Applicants in July 2021. Section 12 mandates that the Chief Executive of a planning authority must prepare a report on submissions or observations received during public consultation on a draft development plan. This report must be submitted to the planning authority's elected members for consideration within 22 weeks of the notice of the preparation of the draft plan being given. Additionally, the report should list the individuals or bodies that made submissions or observations and provide a summary of the recommendations and observations made.

The Applicants case was that their lands should be re-zoned and they argued that the alleged inadequacy of fair procedures deprived them of a proper assessment of their proposed amendments. The Council argued that the summary was sufficient given the volume of submissions received and it categorised the issues raised as minor, maintaining that there was no legal breach. The Applicants only sought to complain about the summary made by the Council in July 2021.

The Court stated what is actually required by Section 12, at paragraph 54:

"*What can be noted here is that s. 12(4) does not compel the CE to summarise submissions individually. It requires a summarisation of the submissions generally, which can be done by group, by theme, by geographical area, or any other appropriate way. It doesn't require point-by-point refutation or hand-to-hand combat with each correspondent. It is not up to a judicial review applicant to dictate the form of a decision.*"

The Court found that the Applicants' submission was in fact considered in some detail and taken seriously and, in many instances, the word count of the summary of many of the Applicants' points exceeded that used for the CE response. The Applicants' submission was over 100 pages and the Court found that a summary must, by definition, leave out a lot of detail. The Court also found that the "*CE here didn't exceed the wide margin of discretion that must be inherently involved*" in what was chosen to be omitted from the summary.

The Court found that the main point of the submission was addressed, i.e. the re-zoning of the land. The Court noted that the CE Report divided the Applicants' submissions by theme and area, and set them out in six different sections in the report. Furthermore, the Court found that, even if there was a breach, the elected members were not wholly dependant on the summary provided in the CE Report as they had access to the full submissions. In addition, the Applicants could have easily notified the Council of any grievance they had about the summary in the CE Report when it was presented in October 2021 but they failed to do so. On that basis, the Court found that it would not be appropriate to quash the decision.

Lack of reasons

The Fourth and Fifth Applicants own land to the west of Sruthán Quay and in their July 2021 submission on the draft plan proposed that the lands be re-zoned to '*T – Tourism*'. The Court found that this submission was fairly summarised by the Chief Executive who recommended to the elected members that there be no change to the zoning. In the draft plan the land was unzoned. By resolution at material amendment stage, the elected members proposed to zone the Applicants' lands as '*Open Space, Recreation and Amenity*'.

The Court found that the minutes of a meeting of 12 January 2022 set out a planning justification for the zoning of the land, with reference to the area of Céibh an tSrutháin in particular, being of "*high scenic amenity and a historic site*". This was then given effect by the motion that was passed by the Council. The Applicants made a submission on the material amendment, again proposing that the lands be zoned for tourism. The CE Report summarised that submission, and recommended that there was no justification for zoning the lands and they should remain unzoned. On 9 May 2022 the elected members considered the CE Report on the material amendments and decided to adopt the Development Plan including the material amendment zoning the lands for '*Open Space, Recreation and Amenity*'.

The Court referred to the case of *Killegland Estates Ltd v. Meath County Council [2023] IESC 39,* where Justice Hogan found that it would be best practice to note the rationale for going against the Chief Executive's recommendation in meeting minutes. The Court found that had been done in the present case in the minutes of the meeting of 12 January 2022 and quoted a useful passage from Justice Hogan's judgment (paragraph 67):

"*the reasons for such a decision should be properly evidenced and justified. Accordingly, the reasons for such a decision should either be clear from the resolution itself or from the documentation before the councillors when the making of the resolution was discussed*".

The Court in this case found that the reason for the material amendment was clearly set out in the minutes as part of the motion put to the elected members before making their decision and the test was satisfied.

Lack of access to the agenda and minutes of meetings

The Court referred to the Local Government Act 2001 (as amended) which sets out the requirements for local authorities to prepare meeting minutes and make them available for inspection. The FOI request made by the Applicants had been refused on the basis that the documents requested were publicly available. However, the Court found this not to be factually correct as the documents were not accessible on the Council's website at the time the request was made. While the Court was concerned with regard to alleged delays in making documents available, it was held that the Council could not be faulted for failing to publish minutes of meetings before they were approved by the elected members and before they came into legal existence.

The Applicants in this case stated that their legal advisors *"identified a means of access to a directory of files on the 'extranet' of Galway County Council, which held PDF copies of 113 documents comprising agendas and minutes of the meetings of the Council from 2014 up to 2022."* The Court found that this was *"sub-optimal"* first because the public-facing page had no content and secondly because access to directories that ought to have been hidden was possible at all.

The Court found that the Applicants were not deprived of access to the actual information as the meetings were held in public and the Applicants could have simply attended. Furthermore, the Court found that the actual duty on the Council was to make meeting minutes available for inspection and there was no evidence that this requirement was actually breached. The provision relied on by the Applicants did not compel the Council to make draft minutes or agendas available. In conclusion, the Court decided that none of the points raised by the Applicants warranted quashing the Council's decision.

All grounds were dismissed.

Key Takeaways

- The Chief Executive of a local authority has a *"wide margin of appreciation in summarising submissions"* and should include the main points of the submissions, but by its nature, a summary must omit a certain amount of detail.

- The elected members are not limited to the Chief Executive's summary of submissions when considering a draft plan or, in fact, material amendments to a draft plan. They also have access to the full submissions.

- The reasoning for a decision of elected members ought to be properly evidenced and justified and should be set out in the minutes of the meeting in which the decision was made.

- Local authorities are required to make meeting minutes available for inspection, however, this does not apply to draft minutes before they are approved by the elected members or to agendas.

- Local authorities should take care to avoid unnecessary delay in the requirement to make certain information publicly available online and should ensure that webpages operate properly.

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

These case summaries were prepared by members of the Planning and Environmental Department of Fieldfisher Ireland LLP (Evan O'Brien, Jonathan Moore, Craig Farrar and Rory Ferguson).

Supported by the Law Society of Ireland, Environmental and Planning Law Committee.

fieldfisher

OPR

Oifig an Rialaitheora Pleanála

Office of the Planning Regulator

Publication date: 12 March 2025