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Rialaitheora Pleanála
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Legal Digest

Learning from Litigation

Issue 09: September 2025

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The Office of the Planning Regulator (OPR) is pleased to present the ninth 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 Coimisiún Pleanála, the OPR legal services provider Fieldfisher LLP, the County and City Management Association and the OPR.

It was agreed by the Group at the meeting held to discuss Issue 9 of the bulletin that a new Appeal Watch section should be included in the bulletin. In this section a summary will be included of any additional learnings from judgments of the Superior Courts in relation to cases dealt with in previous editions of the bulletin.

In this edition of the bulletin we feature the Court of Appeal judgment in respect of a case that was included in Issue 7 of the bulletin.

****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: Donegal County Council (the Applicant) **v Planree Limited and Mid-Cork
Electrical Limited** (the Appellants)

Date: 18 December 2024

Citation: [2024] IECA 300

Judge: Butler J.

This judgment of Ms. Justice Butler concerned an appeal taken by the Appellants against the decision of Holland J. in the High Court granting an order under Section 160 of the Planning and Development Act 2000, as amended (the 2000 Act), prohibiting the carrying out of further development at Meenbog Wind Farm, Co. Donegal. The Appellants are the developers of the wind farm and the Applicant is the planning authority within whose functional area the development is located, and which commenced Section 160 proceedings in the High Court.

Background

On 25 June 2018, An Coimisiún Pleanála¹ (the Commission) granted a strategic infrastructure development permission (the SID permission) to the Appellants to develop a 50MW+ 19-turbine wind farm at the Barnesmore Gap, in the townlands of Meenbog, Croaghonagh and Cashelnavean, Co. Donegal.

The SID permission was amended in June 2019 pursuant to Section 146B of the 2000 Act to allow for longer rotor blades. The decision to grant the SID permission was subject to both Environmental Impact Assessment (EIA) and Appropriate Assessment (AA).

Work commenced on site in November 2019. At the time of the High Court hearing, the wind farm was at a very advanced stage of construction, although there were some remaining groundworks to be carried out and the turbines and rotors had not been installed.

The High Court described the development site as '*highly delicate*' environmentally with a number of Special Protection Areas (SPAs) and Special Areas of Conservation (SACs) (under the Birds and Habitats Directives respectively) in close proximity. The majority of the site was covered by blanket bog and commercial forestry. The development was also near to a designated site² in Northern Ireland and the development was therefore capable of having transboundary effects.

[1] Formerly An Bord Pleanála.

[2] Under the domestic transposition of the Habitats Directive in Northern Ireland.

Following a number of peat slides at the site during construction, including a major one in November 2020 which caused significant environmental damage, the Applicant carried out a more general planning enforcement investigation of the wind farm works. Having observed the development as built, the Applicant required the Appellants to identify all deviations from the SID permission. While there was no evidence that any of the peat slides occurred as a result of works not permitted by the SID permission, nevertheless all works on site ceased after the November 2020 peat slide.

In July 2022, the Appellants sought leave to seek Substitute Consent for 25 deviations from the permitted development. Substitute Consent is a process by which retrospective consent can be sought for development which required planning permission. The Commission determined that as a preliminary issue the deviations were such as to require EIA and AA.

Work was subsequently recommenced on site in September 2022 following confirmation from the Environmental Protection Agency (EPA) and the Applicant that the remediation works completed following the peat slides were satisfactory. However, the Appellants ceased works again in November 2022 following receipt of Enforcement Notices from the Applicant. These notices were subsequently quashed by consent in February 2023 in judicial review proceedings.

In April 2023, the Applicant commenced proceedings under Section 160 of the 2000 Act in the High Court in respect of what it considered to be unauthorised development by way of 21 material deviations from the SID permission. The Applicant also sought to restrain all further works at the wind farm pending the determination of the Appellants' substitute consent application. There was initially some dispute between the Applicant and the Appellants as to the extent of the deviations and the materiality of the deviations. It was eventually agreed between the parties that the deviations in respect of which a Section 160 order was sought were material in planning terms such that they constituted unauthorised development.

Such deviations included the realignment of a number of roads to individual turbines and the creation/alteration of peat cells³ and borrow pits⁴ which were in some cases not within the original permission or were much larger than permitted. There were also instances of development outside the red line boundary i.e. outside the planning application site boundary. One deviation related to the access road to the entire site.

Under Section 160 of the 2000 Act any person can apply to the High Court or Circuit Court for orders preventing unauthorised development being carried out or continued, requiring that any land is restored to its condition prior to the commencement of any unauthorised development or requiring that any development is carried out in conformity with planning permission. These are a form of injunctive proceedings. Details of the High Court judgment are included hereunder.

[3] Structures for the placement of excavated peat from the development site.

[4] Areas from which rock is extracted to facilitate the wind farm construction works.

The High Court Judgment [2024] IEHC 193

The High Court case was heard before Mr. Justice Holland and in his judgment he relies on the definition of “*unauthorised development*” from Section 2 of the 2000 Act, which states that in relation to land, this is “*the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use*”. The Court noted that the default position is that all development is unauthorised and that it is only authorised if exempted from the need for planning permission or permitted by a permission. Whilst carrying out unauthorised development is an offence, the Court noted that a criminal prosecution for same is rarely pursued and generally the more proportionate route is to take enforcement action by way of Section 160 proceedings.

In relation to the deviations, the Appellants argued that the deviations were not material, and that unauthorised development of this nature was commonplace in projects of this scale where minor alterations to the development are normally required to respond to the ground conditions encountered. The Appellants further submitted that allowance for such unauthorised development was necessary on a pragmatic basis.

The Court rejected these submissions and highlighted the distinction between immaterial deviations to a planning permission which are authorised and lawful and material deviations which are unauthorised and illegal. The Court acknowledged that the scope of a planning permission does allow for flexibility and the practical considerations and unpredictability of construction work and that deviations from the precise terms of the permission can fall within that flexibility. However, allowing unlimited deviations within that flexibility would undermine the concept of authorised development and the integrity of the planning system.

The Court considered that the degree of flexibility in a planning permission was consistent with the imposition of ‘*Boland Conditions*’ i.e. where points of details are left to be agreed between a developer and a planning authority. In this regard, the Court considered that if such limited and technical matters required agreement with planning authorities such that conditions were imposed, a developer's entitlement to make changes unilaterally in reliance on the flexibility of a permission could be no greater than to make changes of a very limited and technical nature.

An order made under Section 160 of the 2000 Act could only permit restraint of the works required to complete the wind farm if it is deemed that those works are unauthorised development. The Applicant asserted that the wind farm comprises a single development the entirety of which was rendered unauthorised by the multiple material deviations. In addition, the Applicant claimed that completion of the wind farm, while the material deviations remained unauthorised, would constitute unauthorised works and/or would result in an unauthorised development in the form of a wind farm not in compliance with the SID permission. The Applicant also argued that the permitted wind farm was subjected to EIA and AA and comprised a single project for EIA and AA purposes.

The Appellants argued that the wind farm was one development and that it was authorised but contained unauthorised elements which they referred to as the material deviations. The Appellants claimed that the remaining works remained authorised as, considered on their own, they continued to comply with the SID permission. They also claimed that the material deviations could not render unauthorised those works which had been carried out in accordance with the SID permission.

In the Court's view, the Appellants had clearly proposed and got permission for a wind farm comprising all its parts. The Appellants did not get permission for multiple developments consisting of separate parts. The permitted wind farm was the project subjected to EIA and AA and was therefore clearly intended to function as a single wind farm.

Having considered the relevant caselaw, the Court concluded that the default position is that permitted developments are indivisible such that part-completed development and non-conforming development renders the entire development unauthorised and that a developer could not at his or her election implement a part only of the approved plans. The Court did note some exceptions to this principle, including multi-dwelling developments, where the protection of individual homeowners was a weighty counter-balance but also that the individual units were capable of being 'severed' from the rest of the development.

Were the material deviations severable from the wind farm?

The Court considered it would be artificial and unrealistic to seek to divide the development in this case into two parts consisting of the material deviations of the one part and the rest of the wind farm works on the other with a view to deeming the former unauthorised and the latter authorised development. In the Court's view, the access roads, peat cells and borrow pits had no purpose other than as ancillary to the wind farm. Therefore, they could not be severed from the wind farm.

Having excluded severance, the Court then went on to look at the deviations themselves noting that they must fall into one of two categories, immaterial or material deviations. Immaterial deviations are deemed not to matter in planning terms whereas material deviations do matter in planning terms. If the deviations were deemed material this meant that the entire development was unauthorised as it was not in conformity with the planning permission. The Court also rejected an argument from the Appellants that material deviations could be categorised into sub-types some of which render the entire development unauthorised and some of which do not. The Court determined that in circumstances where the deviations to the SID permission were material, the wind farm as built was unauthorised development.

Conclusion on material deviations and impact on future development

The Court concluded that the wind farm taken as a whole, in light of the material deviations, constituted an unauthorised development. Further works to complete the wind farm, even if those works in isolation were compliant with the planning permission, would entail the completion of an unauthorised development and would therefore be inconsistent with a proper approach to environmental risk and contrary to the integrity of the systems of planning and environmental law.

Therefore, the unauthorised development at issue in the proceedings consists, by reason of the material deviations, of the entire development. On that basis, the Court considered it had the requisite jurisdiction under Section 160 to restrain the Appellants further development of the wind farm, at least pending regularisation, via the substitute consent procedure, of its planning status.

Exercise of discretionary power under Section 160

As the Court had satisfied itself that it had jurisdiction to make orders under Section 160, it then considered, in circumstances where the making of orders was a discretionary power of the Court, whether it was appropriate to do so.

Noting that it was a fundamental principle of EU environmental law that EIA and AA must precede development consent, which prioritised the prevention of environmental damage rather than its remediation, the Court considered that this weighed heavily in favour of the Court exercising its discretion to restrain further development pending regularisation.

Having considered the relevant caselaw the Court concluded that if, as in this case, the entitlement to Section 160 relief is established, the discretion to refuse relief requires exceptional circumstances and the onus is on the offending party to establish that such circumstances exist. In the case of development requiring EIA and AA, to allow the development to continue, even temporarily, in the absence of a concluded assessment which would legally enable it to be permitted, could itself be a breach of EU law.

Finally, if relief was to be granted, the court has an extremely wide power to order anything it considers necessary to ensure the achievement of the aims listed in Section 160.



The Court considered a number of public interest factors in deciding whether to exercise discretion to grant orders under Section 160 including:

- The integrity of the systems of planning and environmental law;
- The nature of the breaches;
- The conduct of the infringer;
- The significance of onshore wind farms to the delivery of renewable energy generation;
- The reason for the infringement;
- The attitude of the planning authority;
- The developer's circumstances, hardship and consequences of any order;
- Whether the remaining works affected or exacerbated any environmental risk posed by the deviations; and
- The precautionary principle under EU environmental law.

Having considered the public interest factors in detail, the Court considered it proportionate and in accordance with the precautionary principle to restrain further works on the wind farm. Therefore, all development on the site was required to cease pending further order of the Court.

The Court of Appeal Judgment

The Appellants appealed the High Court's decision to the Court of Appeal. The main issue in the appeal was whether material deviations from the permission granted in the SID permission, on foot of which the development had been constructed, rendered the entire development unauthorised or merely those elements that did not conform to the SID permission.

The Court considered the fact that EIA and AA were required prior to the grant of development was a crucial factor in considering the status of a development which is not then carried out in accordance with the terms of the resulting permission.

In light of the peat slides that occurred during construction, the Court commented that any further environmental assessment of the development would have to take account of the historic fact that carrying out the works required for the development caused peat failure. This meant both that the receiving environment had changed but also the initial environmental assessments carried out in respect of the SID permission did not identify the areas of underlying weakness in the peat.

The Appellants argued that the deviations arose out of the site conditions and were an environmentally prudent response to those conditions and that they had to be understood and assessed by reference to the size, scope and complexity of the development. The Court however stated that no matter how prudent a developer might regard its own actions, it was fundamental to the planning system that the decision as to what is permissible is not made by the developer. Further in cases which involve sensitive environmental or ecological considerations, that decision will only be made after a full environmental assessment including public consultation.

The Court agreed with the High Court in that once the Appellants accepted the deviations were material, the degree of materiality was not relevant to whether that constituted unauthorised development.

The Court accepted that the size, scope and complexity of a development are factors in determining, in the first instance, whether a deviation is material or not. Other factors include the location of a development and its environmental sensitivity which might render a deviation material in one location but not elsewhere.

On the main issue as to whether the material deviations were severable from the rest of the development, the Court considered some factual examples which demonstrated this assertion to be a mistaken belief:

(i) Firstly, the access road, as constructed, materially deviated from the SID permission and any turbines transported to site using the access road would have the benefit of unauthorised development.

(ii) Secondly, in respect of the borrow pit/peat cell near turbine 12 a lot of rock was extracted from the borrow pit and extracted peat was placed in the borrow pit. Furthermore, it could not be said, with any real certainty, where the rock was placed on site or where the peat was extracted from.

Therefore, the Court found that the contention that the material deviations did not interact with the turbines was incorrect. The Court further considered there was a degree of artificiality to the Appellants' argument that the whole of the development was not unauthorised development as an order limited to prohibiting the use of the material deviations would at a minimum prevent access to the site along the altered access route.

The Court invited the parties to consider the proposition that the number or nature of material deviations in a development was relevant to whether the entire development was deemed unauthorised. The parties did not wish to engage in this exercise and the Court therefore did not decide the issue but indicated that it was firmly of the view that if the deviations were to be looked at cumulatively in this case, they would undoubtedly reach the threshold at which it would be appropriate to hold that the entire development was unauthorised.

The Court recognised a distinction between severance by law (i.e. the expiry of the duration of a planning permission) which is lawful and self-severance where the developer elects not to complete a development in accordance with a grant of permission which is not authorised. The Court stated that there is a material difference between not building something you are entitled to build and building something which you are not entitled to build.

On the issue of unauthorised development, the Court concluded that the planning permission for the wind farm development was a unitary permission and the developer was not entitled to choose which elements of the permission to implement and which not to. A developer could not decide unilaterally to vary a permitted development where the variations were material in planning terms.

This fell to be decided by the language used in Sections 2 and 3 of the 2000 Act where unauthorised development is defined by reference to the carrying out of any unauthorised works, and unauthorised works are defined by reference to any works in respect of which a planning permission has not been granted. The use of the word 'any' in both of these definitions suggested that the concepts so defined should not be construed narrowly as argued for by the Appellants.

In light of the nature, number, location and scale of the material deviations the Court did not consider they could be severed from the rest of the wind farm so as to leave intact a development which made planning sense on the ground. The material deviations were primarily to be found in the site infrastructure and the ancillary works, elements which served no purpose without the turbines they were intended to facilitate. The consequences of the material deviations were exacerbated by the fact that the project was subject to EIA and AA.

In conclusion, the Court found that the SID permission was a unitary permission and the material deviations rendered the entire development unauthorised. Therefore, the High Court was entitled to make orders relating to the whole of the development and restraining further works as such.

The Appellants further asserted that the High Court had wrongly exercised its discretion to grant relief. The Court considered that whilst the Court of Appeal was entirely at large to consider issues of law in an appeal, it should be more restrained in considering challenges to the exercise of discretion by the High Court and should be slow to do so even if it disagrees with the outcome of the High Court decision. In any event, the Court did not consider that the High Court had erred in any material respect in balancing the various factors to be considered when deciding to grant relief.

The Court therefore dismissed the Appellants appeal and upheld the judgment of the High Court.



Key Takeaways

- The developer, the competent authorities and the public all need reasonable certainty as to what the developer can, and cannot, develop on foot of a planning permission.
- The dividing line between authorised development and unauthorised development on foot of a planning permission is the materiality of any deviation from the permission. Immaterial deviations are authorised development whereas material deviations are unauthorised development.
- The size, nature and complexity of a development is a relevant factor in considering whether a deviation is material. However, the location of a development is also relevant particularly where it is in an environmentally sensitive area.
- The scope of a planning permission does allow for flexibility. The practical considerations and unpredictability of construction work and the deviations from the precise terms of the permission can fall within that flexibility. However, allowing unlimited deviations within that flexibility would undermine the concept of unauthorised development and the integrity of the planning system.
- Once unauthorised development is established in Section 160 proceedings, relief will be granted by the courts unless there are exceptional circumstances and the onus is on the infringer to show that such circumstances exist. The fact that unauthorised development has taken place in respect of a project which was subject to EIA and/or AA carries significant weight in considering whether or not to grant relief.

A full copy of the High Court judgment is available [here](#) and the Court of Appeal judgment [here](#)



Case: Concerned Residents of Coolkill, Sandyford Downs and Lamb's Brook and Aonghus O'Keeffe v An Bord Pleanála; and Midsal Homes Limited (Notice Party)

Date delivered: 19 May 2025

Citation: [2025] IEHC 265

Judge: Holland J.

This judgment of Mr. Justice Holland concerned a decision of An Coimisiún Pleanála, formerly An Bord Pleanála (the Commission), to grant permission to Midsal Homes Limited (the Developer) for a Strategic Housing Development (SHD) of 116 apartments contained in four blocks consisting of a range of 1, 2 and 3 bed units (the Proposed Development). The Proposed Development is located at a site fronting onto Sandyford Road, Dublin 18, about 300m outside of and south of the M50 motorway (the Site). The Commission's Inspector described the Site as being in a "*transitional location*" and the Court noted that the application documents made it clear that the transition is "*well advanced and the site is in a suburban area*".

Background

In January 2022, the Developer, Dún Laoghaire-Rathdown County Council (the Council) and the Commission attended a pre-application consultation for an SHD proposal to build 147 Build to Rent (BTR) apartments in four blocks. The Commission then issued a statutory opinion stating that the documents submitted by the Developer constituted a reasonable basis for an SHD application, identifying information to be submitted with any application.

In April 2022, the Developer submitted an application for planning permission for an SHD consisting of 137 apartments. This application identified a key change in the type of development from BTR to "*standard*" residential. This prompted observations from the Concerned Residents of Coolkill, Sandyford Downs and Lamb's Brook and Aonghus O'Keeffe (the Applicants), among others, objecting to the Proposed Development.

In June 2022, the Chief Executive of the Council submitted a report (the CE Report) which welcomed the redevelopment of the Site but raised concerns about the nature of the Proposed Development, recommending refusal of the scheme, as proposed. The CE Report suggested that the scheme could be approved if a number of changes were made including a reduction in the number of units, revisions to the layout and the inclusion of certain conditions.

The Commission's Inspector then prepared a report (the Inspector's Report) dated May 2023, which recommended that permission be granted for 129 apartments.

By Order dated 9 August 2023, the Commission generally adopted the Inspector's Report, but they granted permission (the Decision) for 116 apartments with certain differences in conditions to those recommended by the Inspector e.g. the amalgamation of certain units to form three-bedroom units.

Grounds of Challenge

The Applicants challenged the Decision on seven grounds, as listed below:

1. Material contravention of the density requirements of the Dún Laoghaire-Rathdown County Development Plan 2022-2028 (the Development Plan) in that the Development Plan incorporated the Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities (2020) (the Apartment Guidelines), which set out criteria for which a site can be identified as an Intermediate Urban Location (IUL) which the Site did not satisfy;
2. Material contravention of the Development Plan in respect of climate change in that the application failed to include the required assessment of and provision for the impacts of climate change on the Proposed Development;
3. The Commission misinterpreted and/or failed to apply the Development Plan requirement that childcare be provided in accordance with the Childcare Facilities Guidance for Planning Authorities (2021) (the Childcare Guidelines) and gave no adequate reasons for accepting the Developer's childcare demand assessment;
4. Material contravention of the separation distances and residential amenity requirements of the Development Plan;
5. Material contravention of the minimum apartment dimension requirements of the Development Plan;
6. Breach of Sections 4, 5, 6 and 8 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act) in that the mandatory pre-application consultations carried out related to a different type of residential development to that permitted; and
7. The Commission failed to comply with the EIA Directive in excluding the possibility of significant effects on the environment at screening stage in the absence of any information being provided by the Developer relating to the site geology and/or the potential need for rock excavation and blasting.

Ground 1: Incorrect classification of the Site as being in an IUL which resulted in material contravention of the Development Plan

The Applicants contended that the Site met none of the three criteria in the Apartment Guidelines relating to an IUL and the Commission erred in concluding that the Site was an IUL. An IUL is described in the Apartment Guidelines as being:

"generally suitable for smaller-scale (will vary subject to location), higher density development that may wholly comprise apartments, or alternatively, medium-high density residential development of any scale that includes apartments to some extent (will also vary, but broadly >45 dwellings per hectare net), including:

- Sites within or close to i.e. within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m), of principal town or suburban centres or employment locations, that may include hospitals and third level institutions;*
- Sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas) or within reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency (i.e. min 10 minute peak hour frequency) urban bus services or where such services can be provided;*
- Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) of reasonably frequent (min 15 minute peak hour frequency) urban bus services.*

The range of locations is not exhaustive and will require local assessment that further considers these other relevant planning factors".

The Inspector's assessment of the Site noted that the Site does not "exactly" meet the parameters expressly listed as justifying designation as an IUL. However, given that these IUL parameters are not exhaustive and local assessment is required the Inspector considered the Site to be generally in an IUL noting the proximity to a major employment centre at Sandyford and an adjacent bus stop served by several bus routes.

The Applicants argued that the Site was not remotely close to satisfying the criteria that they considered applied to an IUL and that it was not open to the Inspector to conclude that the site was an IUL by reference to two of the factors that form part of the definition of an IUL from the Apartment Guidelines. The Applicants submitted that the identification of an IUL is a straightforward, mathematical exercise which confers no planning judgement on the decision-maker.

The Commission argued that the Inspector correctly interpreted the Development Plan and Apartment Guidelines, which allow for planning judgment in their application, and it was open to the Inspector to conclude that the Site was within an IUL based on a local assessment and other relevant planning factors.

The Court agreed that the correct interpretation of the Development Plan and the Apartment Guidelines was at issue here, but found that if these documents provided scope for the decision-maker to exercise their discretion and judgment in respect of the facts then that decision is only reviewable by the Court for irrationality. Irrationality is a ground for judicial review that carries a very high threshold which is only rarely reached, it requires an applicant to show that the decision-maker had no relevant material before it that would support the decision made.

Here, the Court found that the IUL definition in the Apartment Guidelines clearly set out a description of an IUL which allowed for the exercise of planning judgement rather than an exhaustive definition which left no discretion for the decision-maker. For example, the parameters included in the definition of an IUL did not make reference to cycling as a factor relevant in identifying an IUL but the Court stated that it was entirely sensible to consider the practice of cycling to public transport nodes or an employment area in assessing whether an area was an IUL.

The Court also noted the decision of Farrell J. in *Murphy v An Bord Pleanála and Clonkeen Investments* [2024] IEHC 186 that a site may be considered to be an IUL based on an overall planning judgment even if it did not satisfy any of the three examples included as part of the definition of an IUL.

This ground was dismissed by the Court

Ground 2: Failure to include an assessment of and provision for the impacts of climate change on the Proposed Development

The Applicants argued that the Development Plan required an assessment of and provision for the impacts of climate change on the Proposed Development, and the Developer had failed to comply with this or even mention climate change in its Construction and Environmental Management Plan (CEMP). Accordingly, the Applicants contended, the Decision was invalid as there had been a material contravention of the Development Plan which had not been identified in the Statement of Material Contravention.

The Commission contended that the CEMP, among other documents submitted with the SHD application, contained an assessment of and provision for the impacts of climate change on the Proposed Development.

The Applicants argued that they and the Court should not be expected to review the entirety of these documents to identify relevant passages. Instead, the Applicants argued that the Development Plan required either a standalone document or at least a separate assessment of and provision for the impacts of climate change on the Proposed Development and neither had been provided. Furthermore, the Applicants contended that the Commission and the Developer had not intended to rely on the named documents to comply with this obligation rather in fact the issue had not been addressed at all. The Court rejected this ground, finding that to require a standalone document carrying out a climate assessment would be an "*unnecessary and wasteful*

reinvention of the wheel" in circumstances where much of the required assessment was already built in to the standards applicable to the Proposed Development, for example the requirement of a 20% climate change uplift of precipitation allowances. Ultimately, the Court determined that it was clear that the Developer's Flood Risk Assessment, Engineering Services Report, Sustainability Report and Waste Management Reports did include assessment of and provision for the effects of climate change on the Proposed Development, as required by the Development Plan.

Ground 3: Failure to provide childcare in accordance with the Childcare Guidelines and failure to give reasons for accepting the Developer's childcare demand assessment

Here, the Applicants argued that the Development Plan required that childcare be provided in accordance with the Childcare Guidelines.

However, the Inspector accepted the Developer's childcare demand assessment which considered that the childcare demand generated by the Proposed Development would most likely be absorbed by the existing and planned childcare in the area. The Proposed Development did not include a childcare facility and the Commission did not include any requirement to provide childcare by way of condition.

In considering the relevant provisions of the Childcare Guidelines and the Development Plan, the Court found that appreciable discretion and evaluative judgement were conferred on the decision-maker and there was sufficient evidence before the Commission to justify the Decision insofar as it related to childcare.

While the Court noted that the Commission failed to list the Childcare Guidelines as a matter to which it had regard, it did list the Inspector's Report and the Court found it would be impossible to have regard to the Inspector's Report without having regard to the Childcare Guidelines given the explicit references to those guidelines contained in the Inspector's Report.

In terms of reasons, the Court found that the Inspector was entitled to rely on the Developer's childcare demand assessment (which relied on the best data available) and no contrary views, which were evidence-based, were before the Commission.

The Court held the obligation to provide the main reasons on this main issue had been satisfied and it was difficult to see what further reasons could have been provided. This ground was dismissed.

Ground 4: Material contravention of the separation distances and residential amenity requirements of the Development Plan

The Applicants contended that the separation distances and residential amenity requirements of the Development Plan had been materially contravened. The alleged defects in separation distances related to the distances between the apartment blocks, the opposing windows in the blocks and the Proposed Development and neighbouring properties.

The Commission argued that the separation distances were intended to provide privacy and daylighting and where separation distances fell below the recommended measurement, the design achieved the goals of privacy and daylighting.

The Court found that it could not accept the Commission's position given that the measurement of separation distances is the means chosen by the elected members to achieve the goal of privacy, and the community is entitled to rely on the provisions of the Development Plan insofar as any such means are chosen. Furthermore, the Court's view was that the Commission's reading of the Development Plan as setting a goal of privacy was flawed on the basis that "*excessive overlooking, overbearing and overshadowing effects*" were listed as examples and were not an exhaustive list of what the separation distance requirements sought to achieve. The Court also noted that the Development Plan provided for a certain degree of flexibility in setting the separation distance requirements. The Court ultimately found that the Proposed Development did not go beyond the evaluative judgement which the Development Plan permitted to be exercised by the decision-maker. On this basis the Court dismissed this ground.

Ground 5: Material contravention of the minimum apartment dimension requirements of the Development Plan

This ground relied on the Development Plan requirement that the minimum size of habitable rooms was required to comply with the minimum dimensions set out in the Apartment Guidelines.

The Apartment Guidelines set dimensions for minimum room widths but also allowed for a variation of up to 5% where there was overall compliance with the required minimum dimensions for apartment floor areas.

The Applicants contended that the Development Plan did not import the flexibility provided for in the Apartment Guidelines and the Proposed Development, which relied on the 5% variation, was in material contravention of the Development Plan.

The Court dismissed this argument.

The Applicants also contended that the 5% variation was not available to bedrooms. While the Court did find this to be a convincing interpretation of the Apartment Guidelines, it declined to make such a finding. Instead, the Court determined that the problem with the size of these bedrooms appeared to have arisen from a typo contained in the Apartment Guidelines in respect of permissible variations.

In declining to make a finding on whether the 5% latitude was an exception to the norm or the standard to be applied, the Court gave two reasons:

(i) Firstly, this was an executive matter and fell to the Minister to resolve; and

(ii) Secondly, in order for the Apartment Guidelines to be given some clear and workable meaning, the Court proceeded on the basis that 5% latitude was not available to bedrooms but as an assumption rather than a finding of the Court given the lack of clarity surrounding the intended meaning of the Apartment Guidelines in this regard.

While the Court made this assumption, it had no hesitation in finding that any contravention as to minimum bedroom size was not material, noting that the Developer did not in fact avail of the full 5% variation that it had assumed was available to it. As such, this ground was dismissed.

Ground 6: The Decision was invalid as the mandatory pre-application consultations carried out related to a different type of residential development to that permitted

This ground related to the pre-application opinion of the Commission that was given in respect of a Build to Rent (BTR) development. Subsequent to this opinion being issued, the proposal changed to a Build to Sell (BTS) development.

The Court disagreed with the Applicants' contention that this gave rise to materially different planning considerations and prejudiced the public in that it gave rise to confusion over what type of development was the subject of the substantive application.

The Court held that the Applicants failed to show that the BTS application was so different from the BTR development to preclude in law the Commission's opinion in the pre-application consultation that it represented a reasonable basis for an SHD application.

The Court found that the Applicants suffered no prejudice which could contribute to a finding in their favour on Core Ground Six. The ground was dismissed.

Ground 7: Breach of the Environmental Impact Assessment (EIA) Directive in excluding the possibility of significant effects on the environment at screening stage in the absence of information required to reach this conclusion

The Applicants contended that the Commission erred in screening out the requirement to prepare an Environmental Impact Assessment Report (EIAR) in the absence of any site investigations having been carried out by the Developer in order to determine what excavations would be needed for the Proposed Development.

The issue of temporary effects arising from excavation work was also raised but the Court determined that this was dealt with and considered by the Inspector in their report.

The Court found that EIA Screening is intended to identify the relatively small number of cases in which a development is likely to have significant effects on the environment. The Court highlighted that the facts and circumstances of each case are crucial. The Court also recognised that it is possible in principle to have sufficient information to reach a decision in respect of the likelihood of significant environmental effects *"even if certain details are not known and further surveys are to be undertaken"*.

The Court found that the Applicants had failed to advance any evidence that the EIA screening was defective, and had instead relied on mere assertion, both as to the effects of any rock-breaking in the context of the conditioned noise management programme and the risk to an aquifer within the Site boundary. The Court held that the Commission had sufficient evidence before it to carry out EIA screening and that it was possible in principle to exclude the requirement to prepare an EIAR on the basis of this information. The Court dismissed this ground.

Ultimately, the proceedings as a whole were dismissed as the Court found against the Applicants on all grounds.



Key Takeaways

- Where a development plan, provides scope for a decision-maker to exercise their discretion and judgment in respect of the facts then the Court will not intervene to review the merits of the decision provided all the evidence required by the decision-maker to support the decision is available.
- Where a development plan seeks to achieve a particular goal and the means to achieve that goal are chosen by the elected members then the community are entitled to rely on both the goal contained in the development plan and the means set to achieve that goal.
- Where a development plan incorporates compliance with certain parameters or measurements from Section 28 guidelines, this should not be read as a partial or selective incorporation unless the development plan specifically excludes certain matters. Any variation associated with the parameters in question will also be incorporated into the development plan in the absence of any such explicit exclusion.
- Where a decision-maker has sufficient evidence to reach a valid decision in respect of EIA screening then a Court will not intervene unless evidence is advanced by an applicant contending that the EIA screening is defective. Mere assertion is insufficient.

A full copy of this judgment is available [here](#).



Case: Peter Carvill and Mannix Flynn v Dublin City Council, Ireland and the Attorney General

Date: 11 April 2025

Citation: [2025] IECA 84

Judge: Barniville P.; Collins J.; Faherty J. (All members of the Court contributed to this judgment)

This judgment of the Court of Appeal (the Court) concerned a decision of Dublin City Council (the Council) in 2021 to proceed with a cycle route trial (the Scheme) on the Strand Road in Sandymount, Co. Dublin (the Decision).

The Decision was subject to judicial review proceedings brought by Peter Carvill, on behalf of a local community group, and Mannix Flynn, an elected member of the Council (the Applicant) which resulted in the Decision being quashed by the High Court.

The findings made by the High Court included that the Scheme was not temporary as presented to the High Court and the screening exercises carried out in respect of the Environmental Impact Assessment (EIA) Directive and the Habitats Directive were fundamentally flawed. The High Court held that if the Scheme was to proceed the requirements of the EIA Directive and the Habitats Directive would have to be complied with and the Scheme would have to go through the planning process.

The Council appealed the judgment of the High Court and a cross-appeal was made by Peter Carvill and the Applicant, although Peter Carvill subsequently withdrew from the proceedings.

Background

The introduction of cycling facilities in this area was identified as an apparent continuing objective of the Council and the National Transport Authority (NTA) prior to the Covid-19 pandemic, but the Covid-19 pandemic likely prompted the acceleration of this.

Following numerous reports and a public consultation, a document describing the Scheme as a "*6-month rapid deployment trial cycle route*" which was "*removable*" was presented to the local community.

In the interim, EIA and Appropriate Assessment (AA) screening reports were prepared in relation to the proposed Scheme on behalf of the Council. The EIA screening report concluded that the Scheme could be screened out for EIA purposes and noted that the environmental effects of the Scheme would be temporary and would not likely be significant for the purposes of the EIA Directive. The AA screening report found that it was not likely that the Scheme would have any significant effects on European sites and concluded that full AA was not required.

On 8 February 2021, the Acting Executive Manager (Traffic) (AEMT) in the Council decided under Section 38 of the Road Traffic Act 1994 (as amended) (the 1994 Act) that the Scheme should proceed on 1 March 2021 (the 8 February 2021 Decision). The 8 February 2021 Decision was not recorded in writing or contained in any formal order.

During the course of the hearing before the Court, it became clear that the 8 February 2021, Decision was the actual decision that the Scheme would proceed. However, during the High Court hearing all parties had understood the relevant decision to be an Executive Manager Order dated 25 February 2021 (the 25 February 2021 Decision). However, it came to light that the 25 February 2021 decision merely facilitated the scheme by approving certain traffic management measures, and had subsequently been rescinded.

Furthermore, it became known during the Court hearing that the 8 February 2021 Decision was "*spent*" long before the High Court hearing as it concerned a temporary scheme which was to run for a six-month period from 1 March 2021 only.

The High Court Judgment

The High Court found that the Scheme was not temporary. This finding was reached on the basis that no definitive end date had been set by the Council for the Scheme. While it had been stated that the Scheme was to be a six-month trial, the High Court noted that the Council had stated at a meeting in November 2020 that a public consultation would be held five months into the trial and that a report would be prepared containing the results of the consultation and data collected during the trial and a recommendation would be provided on whether to continue or remove the measures put in place for the trial. The High Court found that it could not be concluded that the Scheme was temporary if there was a live possibility that it would be retained if the trial was successful.

In terms of the EIA Directive, the High Court found that the Scheme constituted "*urban development*" (albeit sub-threshold) and "*road development*", which are both classes of project falling under the EIA Directive. In considering the EIA Screening Report, the High Court found that it had been carried out on an incorrect assumption that the Scheme would be temporary and also noted issues with traffic data.

In respect of the Habitats Directive, the High Court again found that the AA Screening had been carried out on an incorrect assumption that the Scheme would be temporary and that this "*fatally undermines the credibility of the screening report for AA*".

The High Court held that both an EIA and AA were required, but this was incorrect as a matter of law and the Court recognised this in clarifying that defects in the EIA and AA screening reports meant that a correct and lawful screening for EIA and AA was required as opposed to a requirement for EIA and AA. The High Court concluded that the Scheme

would have to go through the planning process on the basis that it could not be exempted development in circumstances where an EIA or an AA of the development was required, and ultimately quashed the Decision.

The Appeal/Cross-Appeal

The Council brought an appeal against the judgment of the High Court.

In response, the Applicant submitted a number of grounds of cross-appeal. A cross-appeal arises where a respondent to an appeal identifies grounds which they allege were incorrectly decided by the Court. This does not prejudice their right to defend the grounds of appeal submitted by an appellant.

Arising from the confusion over the date of the Decision that the Scheme would proceed, the Court decided that it was required to determine a number of further issues including:

- the validity of the 8 February 2021 Decision,
- whether the appeal was moot on the basis that the 8 February 2021 Decision was spent and the 25 February 2021 Decision was rescinded, and
- whether the Council had breached their duty of candour due to their failure to bring these matters to the attention of the High Court and/or whether this amounted to an abuse of process.

The Court identified the following issues to be determined:

1. Whether the Court had jurisdiction to hear the appeal in light of the provisions of Section 50A(7) of the Planning and Development Act, 2000 (the 2000 Act) (the Section 50A issue);
2. Whether the High Court was entitled to find that the Scheme was not a temporary measure (the Scheme Status issue);
3. Whether the High Court's finding that the AA screening was inadequate was correct (the AA Screening issue);
4. Whether the Applicant should have been permitted to make the case that the Scheme was an "*urban development*" project and/or a "*road development*" for the purposes of the EIA regime (the EIA Pleading issue);
5. Whether EIA screening was required and, if so, whether the High Court was correct in finding that the EIA screening carried out was inadequate (the EIA Screening issue)
6. Whether the High Court was entitled to find that an EIA and/or AA was required and therefore planning permission was required for the Scheme (the Planning Permission issue);

7. Whether the Council's decision to proceed with the Scheme was invalidated by the absence of a written record of that decision or any written reasons for same (the Scheme Decision issue);

8. Whether the appeal is moot (the Mootness issue);

9. Whether the appeal is an abuse of process and/or whether the Council was in breach of its duty of candour (the Abuse of Process/Candour issue); and

10. The issues raised by the cross-appeal (the Cross-Appeal issues).

The findings of the Court in respect of each of the above issues are set out below.

Issue 1: The Section 50A Issue

This was a preliminary objection to the jurisdiction of the Court to hear the appeal. The Applicant contended that Section 50A(7) of the 2000 Act applied here and a certificate for leave to appeal was required for the Council to appeal the judgment of the High Court. This argument was rejected by the Court.

Issue 2: The Scheme Status Issue

The High Court found that the Scheme was not temporary on the basis that no definitive end date had been set, and the Council had stated that a review would take place prior to the end of the trial resulting in a recommendation on whether to continue or remove the Scheme.

The Council contended that the evidence showed that there was to be a six-month trial of the Scheme, and for the Scheme to continue beyond that period, a fresh decision would have to be taken by the Council. Despite the absence of a written record of the 8 February 2021 Decision, which was the actual decision to proceed with the Scheme, the Court found that the evidence made it clear that what was proposed and authorised was a six-month trial. While there was a possibility of a further decision being made to extend the Scheme, this did not mean that the Scheme as authorised by the 8 February 2021 Decision was not temporary.

The Court found that the High Court was incorrect in finding that the Scheme was not temporary

Issue 3: The AA Screening Issue

The High Court found that the AA Screening Report was inadequate on the basis that the conclusions reached were based on the premise that the Scheme was temporary, whereas the High Court had determined that the Scheme was not temporary.

The Court, having disagreed with the High Court in finding that the Scheme was in fact temporary, found that the High Court was also incorrect on this point.

Issue 4: The EIA Pleading Issue

The Council contended that the Applicant should not have been permitted to make the argument that the Scheme was an "*urban development project*" and/or a "*road development project*" and therefore falling within the scope of the EIA Directive as this had not been included in the Statement of Grounds challenging the Decision.

A Statement of Grounds is a preliminary document in judicial review proceedings which lists the grounds upon which an applicant contends a decision is invalid. While the Court indicated that it was minded to agree with the Council on this issue, ultimately it held that it should deal with the substantive issue as to whether or not the Scheme was an "*urban development project*" and/or a "*road development project*" falling under the EIA Directive, which is dealt with at Issue 5 below.

Issue 5: The EIA Screening Issue

The Council contended that EIA screening was not required. However, the Council did commission an EIA Screening Report. The EIA Screening Report concluded that the Scheme did not fall within any type of project falling under the EIA Directive, but went on to consider the Scheme against the usual criteria for an EIA Screening Report on the basis that the Roads Act 1993 (the 1993 Act) contained "*wide ranging requirements*" that any road development or road improvement project which would be likely to have significant effects on the environment should be subject to EIA. The EIA Screening Report concluded that the effects of the Scheme would be temporary and were not likely to be significant. Therefore, the EIA Screening Report concluded that there was no requirement to prepare an Environmental Impact Assessment Report (EIAR).

The High Court found that the Scheme constituted urban development and road development, and that EIA Screening was required. The High Court then considered the EIA Screening Report and concluded that it was "*fundamentally flawed*" having been based "*on an incorrect assumption that the cycleway would be temporary*".

The Court first conducted an analysis of caselaw on the meaning of an "*urban development*" project and found that there was no basis upon which it could be concluded that the Scheme fell within the bracket of urban development, noting that the suggestion that the nature of the works concerned could amount to urban development did not tally with the relevant caselaw or with guidance provided by the EU Commission on what constitutes urban development.

Next, the Court considered the High Court's finding that the Scheme constituted road development and found that the Scheme did not involve physical works involving "*construction*" type "*improvements*" so as to bring it within the scope of the EIA Directive, stating that the "*minimal ancillary works involved in the Scheme are not remotely equivalent to the construction-type improvement works that would be required to bring the Scheme within the ambit of section 50(1)(a)(iv) or (c) of the 1993 Act, or indeed Class 10(e) of Annex II of the EIA Directive*".

Having found that the Scheme did not constitute urban development or road development for the purposes of the EIA Directive, the Court was satisfied that the High Court had no basis to find that the Scheme required EIA screening.

The Court also dismissed the argument that the obligation to screen the Scheme for EIA as a sub-threshold development arose even if it did not fall within a project class described in the EIA Directive.

Issue 6: The Planning Permission Issue

The High Court, having found that the EIA Screening and the AA Screening were inadequate, stated in its judgment that the Council was required to carry out a full EIA and AA and that the Scheme would have to go through the planning process. The Court found that even if the High Court had been correct in concluding that EIA Screening and AA Screening were required and had been carried out inadequately, the High Court was incorrect in concluding that full EIA and AA were required. The Court held that there was no material before the High Court to justify this and that the finding that the Scheme had to go through the planning process was incorrect.

Issue 7: The Scheme Decision Issues

As outlined above, the 8 February 2021 Decision, which was not recorded in writing, was the decision that the Scheme would proceed but the hearing before the High Court proceeded on the basis that the 25 February 2021 Decision was the relevant decision.

The Council submitted that it was normal practice that such a decision would not be made in writing in the absence of any statutory requirement to do so, and disputed that there is a general principle that public law decisions must be made in writing.

The Court emphatically rejected this position, noting that decisions of this nature may have a significant impact on the community and are subject to judicial review. Accordingly, the Court found that "*[f]undamental principles of legality, legal certainty and good administration require that such decisions should either be made in writing, or at least, that there should be contemporaneous written record of it*". While the Court did accept that certain circumstances, such as urgency, may justify a failure to record a decision in writing, these did not arise here.

The Applicant also contended that the Decision should be set aside due to a failure to give reasons.

However, the Court found that it did not need to go further than holding that the 8 February 2021 Decision should have been recorded in writing. While the Court observed that as a matter of principle the Council was required to give reasons, it did observe that reasons may be found in materials outside of the decision itself and that a significant consultation process had been undertaken which appeared to satisfy the requirement to give reasons. The Court concluded that the 8 February 2021 Decision had lapsed and there would be "*no useful purpose*" served in considering the issue any further.

Issue 8: The Mootness Issue

The Applicant contended that this appeal was moot on the basis that the 8 February 2021, Decision had lapsed before the High Court hearing was held. While the High Court (and the parties) had not been live to this information, the Court was aware of this and it was submitted that even if the Court found in favour of the Council there would be no valid basis on which the Council could effect the Scheme under the 8 February 2021 Decision. Instead, a new decision would be required.

The Court disagreed and found that the appeal was not moot, noting that the Council intended to proceed with a cycle trial on Strand Road in Sandymount and this meant that there remains a live controversy between the parties on the legal issues raised.

Issue 9: The Abuse of Process/Candour Issue

Here, the Court considered whether the late disclosure by the Council of the existence of the 8 February 2021 Decision and the actual nature of the 25 February 2021 Decision, including that it had been rescinded, should result in any consequences for the Council.

The Council accepted that it was subject to a duty of candour but argued that this had not been breached where there had been a genuine oversight that was not deliberate and with no intention to mislead.

The Court noted that the Council had not complied with its obligation under the Rules of the Superior Courts to verify any facts which it relied on in the proceedings by affidavit. While the Court concluded that there had not been an abuse of process in the Council's conduct of this litigation, it did hold that the Council breached its duty of candour. While the Court found that this breach was unintentional, it took the view that this should have cost consequences.

Issue 10: The Cross-Appeal Issues

As part of the cross-appeal, the Court considered the two principal points which the High Court was said to have been incorrect on.

The first alleged error was the conclusion that there was no requirement for public participation in AA screening. The Court was satisfied that there was no such requirement.

The second alleged error related to the High Court's finding that the Applicant had not adequately made their argument that there was a breach of Article 9a of the EIA Directive, which prohibits a performance of the duties arising under the EIA Directive where there is a conflict of interest without ensuring that there is an appropriate separation between the conflicting functions. The Court agreed that this legal argument had not been made with sufficient precision, and further noted that even if the argument had been made adequately it would fall away as the Court had already determined that the Scheme did not fall within the scope of the EIA Directive.

Ultimately, the Council's appeal was successful and the cross-appeal of the Applicant was dismissed.

Key Takeaways

- Insofar as screening for EIA projects is required, that can only apply to projects that fall within a project class described in the EIA Directive. While projects that fall within such a project class but are below any thresholds set can require EIA Screening, projects that do not fall within a project class under the EIA Directive are not required to undergo EIA Screening.
- Where a project correctly requires screening for EIA or AA but an EIA Screening or AA Screening has flaws such that it has been carried out in a manner that is legally incorrect, this does not mean that full EIA or AA must automatically be carried out. Instead, a legally correct EIA Screening or AA Screening is required to remedy the inadequacies. Such a legally correct screening might conclude that full EIA or AA is required but the mere flaw in the initial screening does not give rise to any such requirement in and of itself.
- As a matter of public policy, any decisions taken by a public body should be recorded in writing so as to ensure that the fundamental principles of legal certainty and good administration are adhered to. While there may be circumstances where a failure to do so may be acceptable, such as urgency, these will be rare and best practice dictates that decisions are recorded in writing.
- Public bodies are subject to a duty of candour and even genuine oversights which are not deliberate will amount to a breach of this duty, albeit the consequences may be more limited than would be the case for a deliberate breach.

A link to the judgment can be found [here](#).



Case: Protect East Meath Limited v An Bord Pleanála, and Rockmill Limited (Notice Party)

Date delivered: 19 May 2025

Citation: [2025] IEHC 276

Judge: Farrell J.

This judgment of Ms. Justice Farrell concerned a challenge to a decision (the Decision) of An Coimisiún Pleanála (the Commission)⁵ to grant permission to Rockmill Limited (the Developer) for a Strategic Housing Development (SHD) of 201 residential apartments in five number five-storey blocks, including 181 car parking spaces and associated works (the Proposed Development). The Proposed Development is located adjacent to the Southgate Shopping Centre in Drogheda Co. Meath (the Site).

Background

The Developer engaged with the Commission in a pre-application consultation process and the Commission issued its pre-application consultation opinion on 16 January 2020. This opinion concluded that the proposal constituted a reasonable basis for an SHD application and identified information that should be submitted with any application for permission.

The Developer submitted the SHD application to the Commission on 5 August 2021, less than seven weeks before the new Meath County Development Plan 2021-2027 (the 2021 CDP) was adopted. The application documents were complicated by the fact that they were addressing both the 2013-2019 Development Plan (the 2013 CDP) and the new 'draft' plan i.e. the draft version of the 2021 CDP. In the introduction to the judgment the Court queried the logic of this approach by the Developer stating that many of the issues and arguments in the proceedings could have been avoided if the Developer had either submitted its application soon after the pre-application consultation or waited until the 2021 CDP had taken effect.

The consequence of this approach by the Developer was that the application was submitted under the 'old' Meath County Development Plan (the 2013 CDP) whereas the Commission was required to determine the application against the development plan in force at the time of the Decision i.e. the 'new' Meath County Development Plan (the 2021 CDP).

[5] Formerly An Bord Pleanála.

Grounds of Challenge pursued at hearing

Protect East Meath Limited (the Applicant) challenged the Decision on a number of grounds but only five were pursued at hearing as summarised below:

1. The Decision is invalid as the application for permission did not include a valid Statement of Consistency or Statement of Material Contravention contrary to the requirements of Section 8 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act);
2. Material contravention of the 2021 CDP in relation to the provision of car parking spaces;
3. Material contravention of the 2021 CDP in relation to the provision of accessible car parking spaces;
4. Material contravention of the 2021 CDP in relation to the provision of electric vehicle charging points; and
5. Material contravention of the 2021 CDP in relation to the provision of bicycle parking spaces.

The Court indicated at the outset of the judgment that due to the findings made on Core Grounds 2 and 3, it was not necessary to determine the remaining issues. While the Court did address Core Grounds 1, 4 and 5, the Court's comments in relation to those grounds are not binding. There were a number of other grounds which were not pursued at the hearing and are therefore not addressed in the judgment.

The Court addressed Core Grounds 2 and 3 followed by Core Grounds 1, 4 and 5 and this summary therefore takes the same approach.

Ground 2: Material Contravention of the 2021 CDP in relation to the provision of car parking spaces in accordance with development plan objective OBJ 89 and Table 11.2

The Court noted that the test for determining whether a contravention is material is that outlined by the High Court in *Roughan v Clare County Council 1997 WJSC-HC 2213* i.e. "*what is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention*". The Court also referred to *Byrnes v Dublin City Council [2017] IEHC 19* and *Redmond v An Bord Pleanála [2020] IEHC 151*⁶ in respect of the test for material contravention.

[6] at paragraph 22 and 23.

The Commission did not find any material contraventions as part of its decision and did not engage with the requirements of Section 9(6) of the 2016 Act (which provides that the Commission may grant permission for a proposed SHD development which materially contravenes the development plan except where the material contravention relates to zoning) or Section 37(2) of the Planning and Development Act 2000 Act, as amended (the 2000 Act) (which provides scope for the Commission to grant permission in material contravention of the development plan where certain conditions are satisfied).

Development Management Objective (DM OBJ) 89 in the 2021 CDP required car parking to be provided in accordance with Table 11.2 and associated guidance notes. This required two car parking spaces per residential unit and in the case of flats/apartments, one visitor parking space per four apartments. Table 11.2 also provides that for flats/apartments the Design Standards for New Apartments⁷ should be referred to in relation to reduced car parking requirements for development adjacent to existing and future rail stations and minimum requirements in peripheral/or less accessible urban locations.

The guidance notes applicable to DM OBJ 89 indicated that residential car parking *"could be reduced at the discretion of the Council, where development is proposed in areas with good access to services and strong transport links"*. The Court also referred to some other relevant development plan objectives, DM POL 14 and DM OBJ 39. There were therefore three possible scenarios where a reduced number of car parking spaces could be accommodated under the 2021 CDP namely:

- development adjacent to existing and future rail stations;
- minimum requirements in peripheral/or less accessible urban locations; and
- where development was proposed in areas with good access to services and strong transport links.

The Developer raised the number of car parking spaces as a possible material convention in the Material Contravention Statement submitted with the SHD application. The Material Contravention Statement submitted that no material contravention of the 2013 CDP arose because of discretion provided in the plan but proposed a justification for the grant of permission if the Commission determined that the proposed development did materially contravene the 2013 CDP.

In the Statement of Consistency submitted with the SHD application, the Developer stated that the 181 car parking spaces proposed were consistent with the draft 2021 CDP. The Commission's Inspector (the Inspector) identified the 2021 CDP requirement as being 402 car parking spaces and noted that the Developer's proposal was to provide 181 car parking spaces or 0.93 spaces per unit. The Inspector further stated that, whilst the quantum was below the standard set out in the 2021 CDP, it was their opinion that this was not material as it did not relate to a specific policy of the 2021 CDP and that there was flexibility in the plan regarding car parking standards.

[7] Noted in 11.1.2 of the 2021 CDP as Design Standards for New Apartments, Guidelines for Planning Authorities (2018).

The Inspector's report further noted the caveat in the 2021 CDP relating to reduced car parking requirements for development adjacent to existing and future rail stations. The Inspector went on to state that the subject site was located *"immediately adjacent to the Southgate shopping centre, c.2km from the rail station"* and in her opinion the site *"is well served by public transport and in close proximity to a variety of services and amenities and is not located in a peripheral or less accessible urban location and, therefore, in accordance with the plan"*.

The guidance notes associated with DM OBJ 89 permitted the number of spaces to be reduced at the Commission's discretion, where development is proposed in areas with good access to services and strong transport links. The car parking requirements in the draft 2021 CDP equated to 402 spaces for this development however the adopted 2021 CDP was different, requiring two car parking spaces per unit plus one visitor space per four apartments which equated to 452 spaces. The Court accepted the Applicant's contention that the Inspector incorrectly calculated the number of spaces required by the 2021 CDP and had started from the wrong baseline.

The Court found that in exercising the discretion to reduce the number of car parking spaces, the Commission had failed to have regard to the number of spaces which the 2021 CDP permitted it to reduce and had therefore erroneously exercised its discretion. In relation to the exceptions to this requirement, the Court indicated that the Apartment Guidelines were not incorporated into the 2021 CDP but were only *'in play'* in two limited circumstances i.e. for development adjacent to existing and future rail stations and minimum requirements in peripheral/or less accessible urban locations. The Court did not accept that the development was adjacent to an existing or future railway station and the Inspector had expressly stated that the development was not located in a peripheral/or less accessible urban location. Therefore, the caveat did not apply. The Court determined that the Commission was entitled to exercise planning judgement in deciding whether the site of the Proposed Development was in an area with good access to public transport, to justify a reduction of car parking spaces.

The Court determined that the Commission was only entitled to do so once a *'baseline'* number of car parking spaces was determined as required by Table 11.2. The Court found that the Commission cannot be said to have exercised its discretion permissibly if it did not correctly appreciate the nature of such discretion. The Court found that this was a material error which was relied upon in considering whether or not there was a material contravention. 181 car parking spaces were included in the Proposed Development instead of the 452 required by the 2021 CDP. This amounted to a 60% reduction. While the Commission was permitted to exercise discretion, here this discretion was not validly exercised in circumstances where the Commission did not rely on the correct baseline number of car parking spaces. Therefore, the Court found that there had been a material contravention of the 2021 CDP.

Core Ground 3 – Material contravention of the 2021 CDP in relation to the provision of accessible car parking spaces

The guidance notes associated with DM OBJ 89 indicated that “*accessible car parking spaces shall be provided at a minimum rate of 5% of the total number of spaces, for developments requiring more than 10 parking spaces, with the minimum provision being one space (unless the nature of the development requires otherwise)*”.

As indicated above, the Proposed Development provided for 181 car parking spaces of which six were accessible spaces. The Applicant contended that this was a material contravention of the 2021 CDP.

The Court found that the fact the requirement was contained in a guidance note was not significant as DM OBJ 89 provided that car parking shall be provided in accordance with Table 11.2 and the guidance notes. In the Court's view this provision required that of the 181 spaces at least 10 accessible spaces were required although applying the de minimis principle the provision of nine accessible spaces was consistent with the 2021 CDP.

The Developer argued that the wording “*unless the nature of the development requires otherwise*” created flexibility in the 2021 CDP and authorised the grant of a permission for a development which did not meet the minimum requirements. The Court did not consider that such an interpretation of the 2021 CDP was reasonably open having regard to other provisions of the 2021 CDP, including the desirability of facilitating ‘Access for All’. The Court was satisfied that the 2021 CDP did not leave a degree of flexibility to reduce the number of accessible spaces and the reduction of one third of the accessible spaces could not be regarded as de minimis. In any event the Commission had not sought to exercise its discretion in this regard.

The Court determined that only providing two-thirds of the minimum number of accessible spaces required by the 2021 CDP was a material contravention of the 2021 CDP. The Court noted that the Commission did not invoke Section 9(6) of the 2016 Act nor consider the appropriateness of granting planning permission in material contravention of the 2021 CDP for the reasons set out in Section 37(2)(c) of the 2000 Act. Therefore, the Court found that the Commission had failed to fulfil its statutory obligation and that the decision to grant planning permission was not made in accordance with the 2016 Act.

The Developer argued that the fact that neither the Applicant nor Meath County Council (the Council) had raised this with the Commission as a potential material contravention was determinative of whether this was a material contravention. The Court did not accept this argument, finding that this was not determinative or significant in the assessment of whether or not there was a material contravention, applying the *Roughan* test, referred to above. Therefore, the Court found this was a material contravention of the 2021 CDP.

The Developer made a further argument that the permission could be mended by way of Condition 7 which required a parking management plan to be prepared for the Site. This plan was to be submitted to and agreed in writing with the planning authority before the development was occupied. The Developer confirmed to the Court that it was prepared to provide an undertaking that it would amend the number of accessible spaces via the parking management plan. However, the Court found that Condition 7 did not require this and the fact that the Developer might voluntarily agree to provide something which was not required by the terms of the planning permission could not be relevant to the interpretation of the planning permission.

Ultimately as this was a material contravention of the 2021 CDP and the Commission did not consider the provision of accessible parking to be a material contravention and granted permission without applying Section 9(6) of the 2016 Act this was a legal error.

Core Ground 1 – Change of development plan between application and decision by the Commission (not binding)

There was an overarching argument from the Applicant that the coming into force of the 2021 CDP between the date of the lodgement of the SHD application and before the Commission's determination thereof, rendered the grant of permission under Section 4 of the 2016 Act invalid. The Court noted that both the 2016 Act and the 2000 Act are silent as to the effect of a change of plan on a live application.

The Court noted that the ability of the public to make meaningful submissions on material contravention was frustrated by the timing of the SHD application and the determination of the SHD application. In the Court's view it was not open to the Commission to grant permission for the Proposed Development as it was required to apply Section 9(6) in respect of the 2021 CDP without the benefit of submissions by the Developer, and without the public having had the opportunity to make meaningful submissions on the question of whether permission should be granted in material contravention of that development plan.

The Court noted the importance of the development plan in SHD applications and that it was the Developer who must bear the risk arising from the timing of an application, not the public. The Court also noted that this case was a stark illustration of the impact of the restrictions of the SHD regime regarding the inability of the Commission to make a request for further information and to facilitate further public participation.

Core Ground 4 – Electric vehicle (EV) charging points (not binding)

The Applicant contended that the Proposed Development materially contravened the requirements of Section 11.9.2 and DM OBJ 94 of the 2021 CDP and that the Commission erred in law by concluding that there was no such material contravention and failed to apply Section 37(2)(b) of the 2000 Act. The application did not include any EV charging points, or ducting or wiring to facilitate the installation of EV points stations at a future date. The 2013 CDP did not require wiring or ducting or functional EV spaces. The 2021 CDP included the following relevant objectives:

- DM OBJ 94 *"All car parks shall include the provision of necessary wiring and ducting to be capable of accommodating future Electric Vehicle charging points, at a rate of 20% of total space numbers"*.
- DM OBJ 93 *"New residential development should take account of the following regarding car parking: ... Provision of EV charging points"*.

The Inspector recommended a condition that 10% of all car parking spaces should be provided with functioning EV charging stations or points, and ducting for all remaining car parking spaces, facilitating the installation of EV charging points or stations at a later date. This condition was included in the Commission's Order.

DM OBJ 94 did not in fact require any functioning EV spaces but simply that 20% be wired and ducted for future EV use. The Commission's requirement, in substance went much further than this, requiring 10% of spaces to have EV charging facilities and the remainder ducted for future EV use. In the Court's view, DM OBJ 94 required wiring and ducting to be installed for 20% of the total number of car parking spaces and the 2021 CDP provided no flexibility or discretion, whether in relation to the percentage of the car parking spaces which require ducting and wiring for future EV points or stations, or as to whether the provision of some functioning charging stations or points may be required in lieu of providing wiring for a proportion of spaces. Therefore, the condition was not sufficient to bring the development as authorised into compliance with the 2021 CDP in circumstances where 10% of the spaces did not have wiring. Noting that whilst 10% of the spaces lack wiring, 10% of the spaces would have functioning EV charging stations or points, the Court was not satisfied that this amounted to a material contravention of the 2021 CDP. Despite the fact that public consultation was not invited on the issue, the Court did not consider that the effect of the contravention was such that *"the proposed development is being, or might reasonably be expected to be, opposed by local interests"*.

Core Ground 5 – Bicycle parking spaces (not binding)

The Applicant contended that the decision of the Commission was invalid as it was in material contravention of the 2021 CDP in relation to bicycle parking spaces. The Applicant further alleged that it was not open to the Commission to achieve compliance by attaching a condition which required the number of spaces to be increased to comply with the standards in the 2021 CDP. The minimum number of bicycle parking spaces required to comply with the 2021 CDP and Apartment Guidelines was 465 spaces. The proposed development only provided 300 bicycle parking spaces.

The requirement of the Apartment Guidelines was to provide a minimum of "one cycle storage space per bedroom... Visitor cycle parking.... One space per [unit]". Further "[d]eviation from these standards shall be at the discretion of the planning authority and shall be justified with respect to factors such as location, quality of facilities proposed, flexibility for future enhancement/enlargement".

The Inspector's report concluded that 300 spaces was adequate to serve the Proposed Development. The Commission imposed Condition 10, which increased the number of bicycle parking spaces to comply with the standards set out in the 2021 CDP, however, the Commission gave no reasons for deviating from the Inspector's report. The Court stated that the number of spaces proposed by the Developer would contravene the 2021 CDP.

The Court further referred to DM OBJ 97 which requires all long-term cycle racks to be protected from the weather. On this basis c.365 spaces in the Proposed Development needed to be protected from the weather. The Court then stated that as the 2021 CDP did not allow flexibility in relation to the number of cycle parking spaces required for a development of this nature, and the extent to which the Proposed Development failed to comply with the 2021 CDP could not be regarded as de minimis, the provision of 300 cycle spaces for a development of this size would materially contravene the 2021 CDP.

However, the Commission had applied a condition to bring the cycle parking space requirements up to the level required by the 2021 CDP. The Court stated that had the 2021 CDP been in force when the Material Contravention Statement was submitted, and the issue of cycle parking was not raised, the Commission would have been bound to refuse the application. The Court did not consider it necessary or appropriate to decide whether the Commission could grant permission subject to a condition which brings the development as authorised into compliance with the development plan, when the contravention which it addressed had not been raised in a Statement of Material Contravention.



Key Takeaways

- Where a development plan sets out standards but permits flexibility from those, a decision-maker must properly understand what those standards are before exercising its discretion to grant permission which permits a reduction in those standards.
- Lodging a planning application shortly before a new development plan is adopted can give rise to difficulties particularly as the draft development plan and the adopted development plan may differ.
- The *Roughan* test for what amounts to a material contravention refers to the extent to which people could reasonably object to the proposed development. This test contains an objective element i.e. just because people object does not necessarily make the contravention material.
- There is no hard and fast rule but where there are specific standards set out in a development plan a significant deviation from those is likely to be a material contravention. In this case, a 10% reduction in the required number of accessible parking spaces was considered de minimis whereas a one third reduction was considered to be a material contravention.
- The fact that a Developer agrees to voluntarily provide something that is not required by the planning permission is not relevant to the Court's review of the lawfulness of the planning permission.

A full copy of this judgment is available [here](#).



Case: Friends of the Irish Environment Company Limited by Guarantee and SMTW Environmental Designated Activity Company (the Appellants) **v the Minister for Housing, Local Government and Heritage, Ireland and the Attorney General** (the Respondents), **and Office of the Planning Regulator, Fingal County Council and DAA Public Limited Company** (the Notice Parties).

Date delivered: 5 June 2025

Citation: [2025] IECA 128

Judge: Hyland J.

The Appellants appealed against the judgment of Mr. Justice Humphreys in the High Court which was included in [Learning from Litigation Legal Bulletin Issue 7](#). Please refer to that issue for the full background.

The Appeal raised five main issues:

- The impact of admitted mistakes in the text of the direction and earlier documents in the direction-making process;
- Whether the High Court was correct to uphold the Minister's conclusion that material amendment PA CH 8.1 as modified was not consistent with National Policy Objective 65 (NPO65) of the National Planning Framework;
- The legal effect of PA CH 8.1;
- Whether the High Court's judgment should be upheld on an additional ground – namely the entitlement of the elected members of Fingal County Council (FCC) to adopt PA CH 8.1 as modified having regard to the provisions of the 2019 Act and PDA 2000 as amended by the 2019 Act (as sought by DAA); and
- The adequacy of the reasons given for the direction.

Errors in the text of the draft direction/public consultation documents

The Court found that the Appellants were not entitled to argue an alleged violation of the rights of unknown third parties where they could not show that any person was misled or that the Appellants' rights had been affected. The Court determined that the Appellants had failed to produce *“any evidence to show that any person was misled by the mistake in the public advertisement or the draft Direction and/or that it impacted on the submissions that were made”*.

However, as the High Court had dealt with it, the Court did consider the substance of the matter being argued by the Appellants. The Court ultimately agreed with the High Court that there was not such a material difference between the two versions of material amendment PA CH 8.1 such as to render the consultation fundamentally flawed. The Court found that the errors were not material and did not hinder the Appellants, or anyone else, in making submissions on the draft direction. The Appellants were clearly aware of the errors as they flagged these in their submissions and they were not misled by them.

In relation to the linked ground of appeal that the direction referred to the wrong Chief Executive's Report, the Court agreed with the High Court that the wording can be read in a way which makes it valid rather than invalid.

Inconsistency with NPO 65 and standard of review

The Court agreed with the High Court that the challenge to the direction involved mixed questions of fact and law. On this basis the Court determined that a somewhat "*deferential*" standard of review was required, given the reference to the Minister's opinion under Section 31 of the 2000 Act and the significant factual elements that the Minister was required to consider. Therefore, the direction could not be said to be a purely legal decision.

The Court identified the Dublin Airport Noise Action Plan 2019-2023 as the relevant Noise Action Plan (NAP). The core objective of the NAP was to address airport noise using the International Civil Aviation Organisation (ICAO) Balanced Approach as identified in EU Regulation 598/2014.

The Court was satisfied that the objective in PA CH 8.1 was inconsistent with the NAP and undermined its core objective, given that the elected members did not apply the Balanced Approach as the NAP required. The Court determined that the Minister/OPR therefore "*acted lawfully in concluding that the insertion of PA CH 8.1 was not in compliance with the NAP*" and was therefore inconsistent with NPO 65.

The Appellants alleged that the High Court had not carried out a full review of the relevant legal provisions i.e. the correct meaning of NPO 65 and the relevant parts of the statutory framework. The Court disagreed with this contention albeit noting that the High Court's reasoning was dense and presented in a summary fashion.

The Court conducted a detailed review of the provisions of the 2019 Act and concluded that PA CH 8.1 was a noise mitigation measure as defined in Section 20 of the 2019 Act and would have had substantive legal consequences if it had remained in the development plan.

The Appellants argued that the 2019 Act did not preclude FCC as the planning authority from adopting objectives relevant to noise from Dublin Airport via the development plan.

The Court disagreed, finding that the objective in PA CH 8.1 was inconsistent with the NAP and undermined its core objective, given that the NAP required the application of the Balanced Approach and no such approach was taken by the elected members. In those circumstances, the Court determined that there was no legal error in the High Court deciding that the Minister acted lawfully in concluding that the insertion of PA CH 8.1 was not in compliance with the NAP and was therefore inconsistent with NPO 65.

Legal effect of PA CH 8.1 (as modified)

The Court rejected FCC's argument that PA CH 8.1 was a general statement, finding instead that it was a clearly defined objective. The Court also found it was a noise mitigation measure within the meaning of Section 20 of the 2019 Act and as noted above, would have had substantial legal consequences had it remained in the development plan, contrary to what the Appellants argued.

PA CH 8.1 identified the inadequacy of a proposed noise insulation scheme which the Aircraft Noise Competent Authority (ANCA) had required as a condition of the decision to grant permission issued by FCC in 2022 that varied the 2007 North Runway planning permission. The Court found that PA CH 8.1 was entirely inconsistent with that planning condition, given the divergence in the decibel level at which insulation should be provided.

The Court stated that the potential for inconsistency (between the existing planning condition and the requirements of PA CH 8.1) came into sharp focus when considering the obligations of FCC as the planning authority and An Bord Pleanála (ABP)⁸ in determining the appeal against FCC's decision to grant permission in August 2022. ABP would be required to have regard to the objective in the context of the appeal and it was quite possible that ABP would, depending on its decision on the appeal, find a material contravention of the development plan in relation to PA CH 8.1. The Court also noted that Section 15 of the 2000 Act, which requires a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan, and Section 34(2), which requires a planning authority to have regard to the development plan when deciding a planning application, would have placed FCC in a difficult position in considering any future planning applications in respect of Dublin Airport involving noise mitigation measures.

Ultimately the Court found that PA CH 8.1 would have had substantial legal consequences had it remained in the development plan and would have created confusion in the minds of the public who would be faced with two competing decibel levels at which insulation is to be provided.

Lawfulness of PA CH 8.1 in light of 2019 Act obligations

The Court agreed with the High Court that the core basis for the OPR objecting to PA CH 8.1 was the incompatibility of the proposed amendment with NPO 65. The Court noted there was also an associated line of reasoning based on the 2019 Act. The Court noted that the OPR had observed that matters of noise control at Dublin Airport were subject to a separate statutory code under the 2019 Act and the inclusion of the amendment would create conflicting legislative provisions. The Court felt it was important to decide these additional grounds given the importance of the 2019 Act in the intricate statutory framework for noise management at Dublin Airport.

[8] Now An Coimisiún Pleanála.

The Court found that PA CH 8.1 was incompatible with the scheme established by the 2019 Act, which specifies that conditions relating to noise insulation schemes, relevant to planning applications for Dublin Airport, may only be made by ANCA. The legislature had made it clear that only one body (ANCA) may decide upon noise mitigation measures in the planning context. The Court found that the normal decision-making function of the planning authority on a planning application was entirely removed in this context. The Court also found that the statutory scheme precludes the elected members from adopting an objective in the development plan that treated the ANCA condition as inadequate and specified a different noise level at which the DAA is required to insulate homes.

The Court noted that it *"would be very strange indeed if the statutory preclusion of the planning authority deciding on noise mitigation measures at Dublin Airport co-existed with an entitlement on the part of the elected members to include in the Development Plan objectives on noise mitigation measures"* and that by including PA CH 8.1 in the development plan *"the elected members entered an arena that was already wholly occupied by ANCA"*. The Court found that the Minister did not err in law when finding that the inclusion of PA CH 8.1 was not in compliance with the provisions of the 2000 and 2019 Acts and the exclusive jurisdiction that they confer on ANCA in respect of the subject matter of the objective.

Another argument made by FCC and the Appellants was that the development plan contained other measures relating to airport noise and the Minister's approach was inconsistent in directing the removal of PA CH 8.1 but not those other measures. The Court dismissed this argument as it deemed that it was not comparing like with like. The Court noted that the elected members still had competence for land use planning and management other than functions relating to noise mitigation measures and operating restrictions within the meaning of the 2019 Act. PA CH 8.1 was, in the Court's view, *"an entirely different creature"*.

The adequacy of the reasons given for the direction

The Appellants contended that the High Court was wrong to find that the Minister had given adequate reasons for the decision. The submissions of the Appellants were made relatively late in the process and they complained that no reasons were given for the rejection of their submissions.

The Court noted that the duty to give reasons does not encompass a duty to respond to all submissions and there was a conceptual distinction between the two. If the submission is not relevant to the reasons why the decision was made, a response to the submission does not form part of the reasons and is not covered by the obligation to give reasons. The Court was clear that the extent of the obligation on the decision-maker is to address "relevant submissions" i.e. submissions relevant to the reasons for the decision.

As per the requirements of this particular statutory scheme, the Appellants' submissions were summarised in the Chief Executive's report, meeting the concern identified by the Supreme Court in *Balz* i.e. to ensure that the public trust that their voice will be listened to in the decision-making process. The Court was satisfied that the Minister was not required to address the specific points raised by the Appellants in the consultation process.

The Appellants had complained that the Minister ought to have addressed the issues raised in their submissions in relation to:

- the health implications of noise;
- the relationship between the development plan and the World Health Organisation (WHO) guidelines; and
- the Health Service Executive (HSE) submission.

However, given that, in the Minister's view, the proposed amendment to the development plan did not adopt the Balanced Approach, and was adopted by the elected members who lacked competence in the area, submissions on the merits of the decision could never be relevant and therefore did not require a response.

The Court dismissed the Appellants' contention that *Balz*⁹ imposes an entirely new obligation on a decision-maker to respond to all submissions made to him or her irrespective of their substance or content. Rather, it obliges decision-makers to respond to submissions that are relevant to the reasons for the decision. This, the Court found, flows from the basic obligation to give reasons. Adequate reasons must encompass an engagement with the relevant points that have been made in the submissions to the decision-maker.

The Appellants also contended that the High Court judge was wrong in finding that there is no obligation to give reasons where an argument asserting illegality is put forward which is not correct. The Court agreed with the High Court that there is no obligation to give reasons for rejecting a baseless assertion of illegality. Overall, the Court considered that the Minister provided adequate reasons for his direction and that he was not obliged to address the specific points raised by the Appellants. All grounds of appeal were dismissed and the Ministerial direction was upheld on the further basis identified above (i.e. lawfulness of PA CH 8.1 in light of 2019 Act obligations).



[9] *Balz v An Bord Pleanála* [2019] IESC 90.

Key Takeaways

- The objective which was removed by the Ministerial direction would have had significant legal implications for planning decision-makers if it remained in the development plan given the obligation to have regard to the development plan and the restrictions where a proposed development materially contravenes the development plan.
- The legislature made it clear that only ANCA may decide upon noise mitigation measures in the planning context (and An Coimisiún Pleanála in relation to appeals).
- The duty to give reasons does not amount to a duty to respond to all submissions. The extent of a decision-maker's obligation was to address relevant submissions.
- There is no obligation to give reasons where a baseless argument asserting illegality on the part of the decision-maker is made.

A full copy of this judgment is available [here](#).



These case summaries were prepared by members of the Planning and Environmental Department of Fieldfisher Ireland LLP (Craig Farrar and Rory Ferguson).

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