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Planning Case Law Update 2021

JANUARY – DECEMBER 2021

Introduction

2021 was a busy year for planning judicial review judgments. The Courts have provided useful commentary on different elements of the planning process that developers should be mindful of.

In total, we have 13 cases for this annual update covering a wide range of matters like inadequate Appropriate Assessments under the Habitats Directive, which continues to be a prevalent ground for planning judicial review cases. We look at mitigation measures in case 1 and the standard of expertise and level of evidence required by the planning authority in cases 3 and 8. The Kilkenny cheese manufacturing plant case, case 8, has been appealed directly to the Supreme Court so watch this space for 2022.

The Courts have rejected collateral attacks using court or administrative procedures seeking to overturn previous, unchallenged planning decisions and we look at these in cases 11 and 13.

Planning application requirements have been the subject of Court judgments in 2021. In case 5, the Court considered a planning application where the name of the prospective applicant for the pre-application consultation differed to the name of the applicant for planning permission. We also look at flexibility allowed for design parameters in plans and particulars in case 6.

Of course, the planning judicial review world is dynamic with many judgments being appealed and further judgments handed down. No doubt 2022 will be another busy one for the Courts, with planning authorities, An Bord Pleanála, and developers seeking to keep up with the legal landscape.

We hope you have a great 2022 and please don't hesitate to get in touch with a member of our Planning & Environment team should you have any queries.

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1. Are Standard Design Features a Mitigation Measure in an Appropriate Assessment?

Eco Advocacy CLG v An Bord Pleanála and Keegan Land Holdings Limited ([2021] IEHC 265

This High Court case concerned a proposed development in Trim, Co. Meath, which was to consist of 320 dwellings. Trim is designated as a heritage town and the site was close to a zone of archaeological potential and an architectural conservation area. There were several previous refusals of development on the site, for varied reasons. An Environmental Impact Assessment (EIA) screening report was prepared along with an ecological impact assessment which included proposed mitigation measures. An Appropriate Assessment (AA) screening report was also submitted which concluded that there would be no impact on the integrity of European Protected Habitats. An Bord Pleanála (the Board) granted permission in October 2020. Eco Advocacy CLG, a planning, environment and social justice registered charity, sought to challenge this.

Is a surface water drainage system a mitigation measure?

Eco Advocacy CLG raised questions of both domestic and EU law, including:

- Alleged failure to address compliance with the development plan
- Alleged failure to have regard to submissions
- Alleged lack of reasons
- Alleged unreasonableness of the decision

None of the domestic legal arguments succeeded.

The Judge, Mr Justice Humphreys, addressed the EIA and habitats issues at length in his judgment. The surface water run-off was to be collected below ground in storage tanks and be treated before outfalling to a stream around 100 metres south of the development.

He stated *"the real question here is whether the surface water drainage system constitutes a mitigation measure or not to be regarded as such because it is simply a standard feature of the design that has nothing to do with the nearby European sites."*

The Court of Justice of the European Union (CJEU) has previously decided in a 2018 case that regard should not be had to mitigation measures at the screening stage of an Appropriate Assessment. That case established the principle that in order to determine whether it is necessary to subsequently carry out an assessment, it is not appropriate at the screening stage to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

In deciding whether a measure is a "mitigation measures", the Judge referenced previous applications of that judgment in an Irish context and stated he did not find it *"quite as easy to reconcile the multitude of judgments as the board seems to suggest."* The main area of difference appears to be whether the measures are "intended" to reduce the impact on the site as opposed to whether they result in that "effect". He found no clear and consistent line of authority on that point and on the meaning of the CJEU decision.

Another question arose as to whether it is relevant that the measures are standard practice or not. The Judge did not give this point much further consideration in the written judgment, stating *"I certainly do not think that I can be totally confident that the Irish caselaw taken as a whole is completely clear and user-friendly as to what the [CJEU] decision means."*

Accordingly, the Judge has referred a question to the CJEU to provide clarity on this issue. Broadly, the Judge asked whether a competent authority is entitled to take account of project features that:

(a) Are not intended to reduce harmful effects on a European site even if they have that effect, and

(b) Would have been incorporated into the design as standard features

The Judge allowed the parties to make submissions on the proposed referral questions. In a subsequent decision ([2021] IEHC 610) he summarised the parties' positions on the questions. In giving his preliminary views, the Judge agreed with the applicant and considered the "effect" rather than the "intention" to be the only objective criterion. He also noted that whether the measures are standard design measures is not relevant to that determination.

Conclusion

This judgment shows that there is no consensus on the approach to be taken on mitigation measures if they are incorporated into the design as standard rather than with the intention of reducing a harmful effect on a European site. We must await the CJEU response for further guidance on whether it is appropriate to distinguish a mitigation measure from other design features. In the meantime, a developer following a more cautious approach should consider whether it is possible to discount from its Appropriate Assessment screening report, any stand-alone design feature that will reduce a harmful effect on a European site.

Following the Judge's preliminary views, a developer might want to treat a measure as a mitigation measure for the purposes of an AA screening assessment, even if the measure is not intended to have that effect or the measure is a standard design measure.

2. When Grounds and Evidence Must be Raised with the Decision-Maker First in a Judicial Review

Reid & Ors V An Bord Pleanála, High Court (No 1) [2021] IEHC 230

In this case, the question raised was whether or not evidence or grounds not previously brought before the decision-maker could be brought before the Court. The Judge, Mr Justice Humphreys, commented that a seemingly modest procedural application to exclude part of the applicant's grounds and evidence, actually raised questions that go directly to the heart of what judicial review is.

Facts of the case

Intel Ireland Limited applied to An Bord Pleanála (ABP) for planning permission for the development of a manufacturing facility at Leixlip, County Kildare. Kildare County Council decided to grant permission subject to 34 conditions. The developer and the applicant in this case, Mr. Thomas Reid appealed permission to ABP. Following the recommendation of the inspector, ABP granted the developer planning permission on 23 November 2019, subject to 18 conditions. The applicant lodged a legal challenge claiming ABP's decision was unlawful by providing various affidavits including one by a research scientist. The notice party lodged an application seeking to exclude the majority of the applicant's evidence.

Requirement to submit grounds and evidence to the decision-maker first

Mr Justice Humphrey noted that the general rule on grounds first raised in Court is set out in the case of *Lancefort Ltd. v An Bord Pleanála (No. 2) [1999] 2 I.R. 270*. In this case, the Supreme Court held that grounds not brought before the decision maker first, cannot be brought before the Court. As a general proposition, it is considered unfair to expect a party to defend proceedings that were not brought to their attention prior to the granting of the planning permission, and instead raised during a judicial review.

Mr Justice Humphreys considered this legal principle has been developed further and there are exceptions to this rule. However, the general rule did still broadly apply to evidence or grounds that ABP would not normally have been aware of in making its decision. Mr Justice Humphreys outlined a few circumstances such as a relevant consideration that the decision-maker failed to take into account but wouldn't normally have known about, or a special procedure that the decision-maker failed to follow, or a fact leading to bias.

The Judge gave an example to illustrate the point. If an applicant is seeking to use scientific evidence to cast doubt on a developer's assessment of adverse effects on European sites, that evidence should be submitted to ABP before it makes its decision. In this case, Mr Justice Humphreys struck out most of the applicant's scientific evidence, as these went to the merits of the planning decision.

Exceptions to the rule: EU Environmental Law and other instances

The Judge outlined 16 circumstances where new evidence or grounds that were not put before the decision-maker may be presented to the Court. Broadly an applicant can introduce new evidence or grounds regarding the decision-maker's failure to act within its legal powers or follow the correct procedure. Another circumstance is where the applicant is pointing out omissions by the developer which the decision-maker would have been expected to spot. Furthermore, if the decision-maker makes a decision which is wholly unreasonable, or didn't provide sufficient reasons, this would only come to light after the objection stage and so can be brought before the Court as a ground. New evidence can also be presented to explain material before the decision-maker, such as technical terms or facts. A new complaint may also be permitted if it engages the principle of access to justice under EU law.

In terms of the applicant's evidence, Mr Justice Humphreys allowed a decibel chart which helped explain information before the ABP, as well as information on the Habitats Directive that was in the public domain. New evidence comparing engagement by two different planning authorities was allowed to show prejudice to the applicant but not in terms of the merits of the decision.

Conclusion

The judgment in this case affirms the general rule, unless an exception applies, that any new evidence or grounds from the applicant must be brought before the decision-maker before it can be brought before the Court. That said Mr Justice Humphreys did provide a significant number of exceptions although the majority did not apply to the applicant's evidence.

As the Court is reviewing ABP's decision based on the evidence before it, an objector should be required to raise its points with ABP first. This also allows the developer to respond to the information and ABP to take that response into account. This should ensure robustness in assessing the merits of the planning application. Developers should carefully analyse the applicant's evidence and grounds, seeking to strike any out that don't meet exceptions to the general rule.

3. The Standard of Expertise Needed when Screening for an Appropriate Assessment

Reid & Ors v An Bord Pleanála, High Court (no 2) [2021] IEHC 362

In February 2019, Intel Ireland applied for an extension to a manufacturing plant. This extension was reported in the Irish times as costing around €3.76 billion to construct.

A few months later, Kildare County Council decided to grant that permission subject to 34 conditions. There was a limited appeal by Intel Ireland, and a third-party appeal by Thomas Reid, a farmer whose large farm holding is adjacent to the site. In October 2019, the inspector recommended a grant of permission with 18 conditions. On 23rd November 2019, the Board granted permission.

Mr Reid applied to the Court to quash the Board's decision for being unlawful. In Reid v. An Bord Pleanála (No. 1) [2021] IEHC 230 - case 2 above - the Judge, Mr Justice Humphreys, struck out a significant proportion of the applicant's evidence. In this case, the Judge dealt with the applicant's challenge to the grant of planning permission.

Obligations of a decision-maker

The High Court clarified the two distinct sets of obligations owed by a decision-maker:

(a) Obligations to deal with issues that apply only if such issues are raised by a party, and

(b) Obligations that the decision-maker has autonomously whether a party raises them or not

This distinction was important in this case because the points being raised by the applicant were not specifically raised in his appeal to An Bord Pleanála (ABP). Therefore, the Court could only consider such points if they are part of the autonomous obligation on ABP. The Court found that it is an autonomous obligation of the decision-maker to apply the law relevant to that decision-making process, regardless of whether it has been raised by a party or not.

Sufficient expertise

The Judge held there is an autonomous obligation on ABP to subject the developer's Appropriate Assessment (AA) reports under the Habitats Directive to analysis that is informed by sufficient expertise. Sufficient expertise means fully understanding the developer's material in all its aspects. The test is whether the applicant has showed that a "reasonable expert" could have a reasonable scientific doubt as to whether there could be an effect on a European site. A "reasonable expert" refers to a reasonable person with the relevant sufficient expertise who is aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker.

Sufficient expertise on the part of the Board requires that the Board be able to fully understand and properly evaluate the developer's material and the science underlying it. That must be done in the context of expert knowledge of prevailing general standards and scientific information.

The Court held that relying on the material of others would be an abdication of the ABP's independent statutory role. ABP needs to have, or have access to, equal competence and expert knowledge to know if the developer's advisers are in fact competent experts.

Failure to consider effects of ammonia emissions contrary to the Habitats Directive

The applicant alleged that the ABP should not have accepted the developer's thresholds for ammonia, as these were not based on the correct levels. The notice party defended the assessment, noting that the applicant's proposed levels were an exception that did not apply in this case. The applicant had failed to present these submissions before the Board when it made its decision. The Judge held that *"Board can accept the developer's material for AA purposes if there is nothing on the face of the material, as it appears to a reasonable person with sufficient expertise, that would create scientific doubt."*

The Judge dismissed the applicant's case. However, for this ground the Judge did so "without much enthusiasm". The Board had failed to realise that the scientific study referenced by the developer for setting the ammonia threshold was incorrect. For complex applications, a single planning inspector is unlikely to have sufficient expertise in all areas to adequately evaluate the developer's submissions. The Judge decided not to grant the applicant's proposed reliefs as the applicant had not sufficiently pleaded their case.

Conclusion

This recent case highlights the importance for developers to ensure any scientific studies followed in their Environmental Impact Assessment and Appropriate Assessment reports are the most relevant scientific studies available and are correctly referenced. Otherwise, if a planning authority or ABP grant permission, an applicant could cast doubt on whether that decision-maker had sufficient access to the expertise needed to evaluate the developer's submissions.

4. Potential Disruption to Developers: Questions on Building Heights Guidelines Referred to Europe

Kerins & Anor v An Bord Pleanála & Ors, High Court, [2021] IEHC 369

A strategic environmental assessment (SEA) is an environmental assessment required under the SEA Directive for "plans and programmes" which are likely to have significant effects on the environment. An SEA often relates to large scale government plans such as roads, water infrastructure and development plans. However, the SEA Directive does not have a list of "plans or programmes" similar to the Environmental Impact Assessment (EIA) Directive. As a result of this, the definition of what constitutes "plans or programmes" has been litigated on numerous occasions. In turn, this has led to definitions ultimately being set down by the Court of Justice of the European Union (CJEU).

The 2018 Urban Development and Building Heights Guidelines for Planning Authorities were issued under Section 28 of the Planning and Development Act 2000, as amended (the PDA). The 2018 Guidelines allow An Bord Pleanála (the Board) to grant planning permissions that materially contravene a development plan if it adheres to certain criteria on the basis of binding specific planning policy requirements (SPPRs). This has been utilised by developers in recent years to exceed building heights that have been set in development plans. This provision has turned out to be quite controversial and has led to numerous judicial review challenges in the Irish Courts.

The definition of "plans or programmes" and the scope of the 2018 Guidelines appear to be issues that are continuously appearing before the Courts. Mr Justice Humphreys of the High Court has consequently taken the view that the legal implications of these legal definitions and government policies require further clarification from the CJEU.

A decision was handed down by Mr Judge Humphreys on 31 May 2021 in *Kerins v An Bord Pleanála & Ors* where three questions relating to these issues were referred to the CJEU for determination.

The facts

A judicial review challenge was lodged relating to a planning decision to construct 416 dwellings in five blocks ranging from 2 storeys to 16 storeys, as well as associated amenities situated in Dublin's south inner city. The Board granted planning permission in September 2020 under the Planning and Development (Housing) and Residential Tenancies Act 2016, which is the strategic housing development legislation in Ireland.

The applicants contended that because the development, which was based on a masterplan, deviated from the development plan using the SPPR contained in the 2018 Guidelines, it had not been subject to an SEA. The applicants sought to have the planning permission quashed. They also sought a declaration that Section 28 of the PDA was invalid as it was contrary to EU law, specifically relating to the EIA Directive, on the grounds that mandatory guidelines under that section interfere with the process of the EIA.

Reliance on a masterplan not subjected to SEA

A masterplan for the area which was the subject of the initial planning application was prepared jointly by the notice party's advisers and Dublin City Council in January 2020. That was screened for an appropriate assessment required under the Birds and Habitats Directive but it was not subjected to an SEA. The area was also subject to the objectives of the Dublin Development Plan 2016-2022. It was also designated in the Development Plan as a Strategic Development and Regeneration Area (SDRA).

The use of masterplans to develop areas were expressly envisaged in the Dublin Development Plan 2016-2022. The Plan stated that *"Dublin City Council will prepare area-specific guidance for the SDRAs and key district centres, using the appropriate mechanisms of local area plans and schematic masterplans and local environmental improvement plans."* The development plan was subject to an SEA, but the masterplan was not. The making of a development plan is a statutory obligation under the PDA.

The Court found that the Board had properly applied SPPR 3 of the 2018 Guidelines, which permitted the contravention of the development plan. However, it stated that implementing the masterplan would amount to a deviation from the development plan as it expressly envisages a different set of developments, particularly in terms of height, and this had not undergone an SEA. In opposition to the argument that SEA should apply, it was submitted by the Respondent that the masterplan was not adopted by a local authority and is not in any event binding.

The Court stated these issues were not clear on the basis of CJEU case law and formed the view that there were two referable questions of EU law:

- Does the concept of a "plan or programme" within the meaning of the SEA Directive include a plan or programme that is jointly prepared and/or adopted by an authority at local level and a private sector developer as owner of adjacent lands to those owned by a local authority?
- Does the concept of a "plan or programme" within the meaning of the SEA Directive include a plan or programme that is not in itself binding but which is expressly envisaged in a statutory development plan which is binding, or which proposes or envisages in effect a modification of a plan that was itself subject to SEA?

Alleged breach of the EIA Directive arising from the 2018 Guidelines issued under Section 28 of the PDA

Section 3.1 of the 2018 Guidelines states that *"it is Government policy that building heights must be generally increased in appropriate urban locations. There is, therefore, a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility".*

The applicants objected to Section 28(1C) of the PDA, which provides that where the guidelines contain SPPRs, the Board shall comply with those requirements. The applicants argued that the outcome of a planning application relying on a SPPR was therefore "pre-determined". The Board argued that the guidelines are "permissive", in that they do not mandate a decision, but rather allow the grant of permission. The Court stated that it would appear that the SPPRs contained in the 2018 Guidelines are based on government housing policies and not on purely environmental considerations.

The Court was of the view that the core issue was whether the EIA Directive precludes regard being had to national mandatory policies particularly such as those stated at 3.1 of the 2018 Guidelines.

On that basis, the Court referred a further question to the CJEU:

Whether the EIA Directive has the effect of precluding regard being had by the competent authority in the process of environmental impact assessment to mandatory government policies, in particular those which are not based exclusively on environmental criteria, being policies that define in certain circumstances situations where a grant of permission is not to be ruled out?

Conclusion

A declaration from the CJEU that states the EIA Directive precludes regard being had to national mandatory policies could mean that any development that has undergone an EIA may not be able to rely on SPPRs in its planning application. As a result, to do so could be deemed a breach of EU law. The implications of the CJEU decision could be far reaching. It could have the potential to create significant roadblocks for SHD planning applications or any planning application which rely on SPPRs, or possibly those which rely on Section 28 Guidelines more generally.

If the CJEU finds that there has been a breach of EU law, SPPRs could be declared invalid and the national authorities must take action to comply with the Court judgment. This could result in the 2018 Guidelines being revoked so that SPPRs would not have a binding effect. The CJEU may however take the view of the Respondents that the SPPRs are "permissive", in that they do not mandate a decision, but rather allow the grant of permission and are therefore not mandatory national policies. The CJEU may also apply a pragmatic approach to the extent that the national mandatory policies are valid, provided that the development, which has applied the SPPRs, has been environmentally assessed and complies with the provisions of the EIA Directive.

Developers should also be wary of developments that have sought planning permission on the basis of a masterplan which has been incorporated into a development plan and has not undergone a SEA. An extension of the definition of "plans and programmes" to include such a masterplan could result in the planning decision being quashed so that the masterplan can undergo a SEA to comply with the SEA Directive. Traditionally, the CJEU has offered a wide definition of "plans and programmes" to give effect to the spirit of the SEA Directive to provide for a high level of protection of the environment.

As the law currently stands, developers relying on SPPRs or a masterplan that has been incorporated into the development plan which has not been subjected to a SEA, should proceed with extreme caution until the CJEU determines the issues.

5. Does a Prospective Applicant and Applicant for Permission Need to be the Same Person?

Cork Harbour Alliance For A Safe Environment v An Bord Pleanála, Indaver Ireland Limited, and Indaver NV T/A Indaver Ireland [2021] IEHC 203

This case involved a challenge by a Cork community environmental group (CHASE) to the decision of An Bord Pleanála (the Board) to grant permission for the building of a waste-to-energy facility in Ringaskiddy, in Cork Harbour. In a High Court judgment on 19 March 2021, CHASE succeeded on two of the eleven grounds it brought.

Objective bias and prospective applicant

The first successful ground of challenge brought by CHASE was the claim of objective bias. CHASE claimed that the decision was tainted by objective bias by reason of the prior involvement of the then deputy chairperson of the Board. The deputy chairperson had been employed by a firm of consultants in 2004 who had been engaged by Indaver to make submissions to Cork City and County Council on their waste management plans. The judge found that there was a "clear, rational and cogent connection with the planning application considered by the Board." The Board sought to emphasise that the previous waste management plans were not in respect of any planning application for an incinerator at Ringaskiddy. CHASE were clear that they were making a claim of objective bias and not actual bias. Objective bias is tested by considering whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair hearing.

The second successful ground of challenge was the "prospective applicant/ jurisdiction" ground. The first notice party, Indaver Ireland Limited (the Irish Company), is an Irish registered company and is a wholly owned subsidiary of Indaver NV (the Belgian Company). The Belgium Company has a branch in Ireland trading as Indaver Ireland. CHASE maintained that the Board did not have jurisdiction to determine the planning application submitted by the Irish Company on the basis that the Belgian Company was the "prospective applicant" which participated in the pre-application consultation process with the Board. The Irish Company had made the Board aware that a mistake had been made with the name of the applicant and it was intended to be the Belgium Company. CHASE contended that the legislation requires that the applicant for permission must remain the same in the Strategic Infrastructure Development substantive planning process (SID). The Judge gave the parties an opportunity to make further submissions before making an order on the reliefs.

Judgment on the reliefs

Having received further submissions on the reliefs, the Judge gave his judgment on the 1 October 2021.

Objective bias ground – the Judge considered whether he should grant an order of certiorari quashing the grant of planning permission by the Board. This would mean the Belgium Company would need to go through the whole planning application process again. Having regard to the relevant legal principles on remittal, including

fairness, the Judge exercised discretion to remit Indaver's application to the Board for further consideration and determination. This would be from the point in time when the Board's decision was made in relation to the circulation of the further information and material provided by the Irish Company, ie the date on which the decision was made having regard to Mr Conall Boland's involvement, the source of the objective bias. Although the Judge did not consider the failure to consult on the further information a successful ground, he did have reservations about it and the Board and Indaver had suggested remitting the decision back to this stage of the process.

Prospective applicant ground – the Judge was of the view that the error made by the Belgium Company, who had been the prospective applicant, in submitting the planning application in the name of the Irish Company was an unintended clerical error. He concluded that even if the planning permission was quashed on the other ground (objective bias), he would nevertheless exercise his discretion to refuse quashing on the basis of this ground. The Judge instead granted an appropriately worded declaration regarding the unlawful error, having regard to the following matters:

(a) "The nature of the clerical error involved

(b) The fact that the objective (or at least a very significant objective) of the SID provisions, namely, the importance of the applicant for permission having the benefit of the consultations and advice in the pre-application procedure, would not be undermined in this case where there is such a close relationship between the applicant and the entity which was the "prospective applicant" (the applicant being a subsidiary of the "prospective applicant")

(c) No other statutory objective would be undermined

(d) No issue as to compliance with the terms of the planning permission or enforcement of that permission would arise since such compliance can be enforced against the party carrying out the development or operating the facility outside the terms of the planning permission

(e) The applicant would not otherwise be prejudiced as a result of the fact that the application was made in the name of the wrong applicant due to a clerical error, and

(f) The Board would have the power to amend the planning permission and the impugned decision to correct the clerical error under s. 146A of the 2000 Act (assuming of course that the impugned decision was not being quashed on another ground)"

The Judge directed the Board to amend the planning application, so the applicant's name (the Irish Company) was corrected to that of the "prospective applicant" (the Belgium Company). Section 146A provides this power in respect of a planning permission, and the Judge held that this implied a similar power to amend a planning application.

Conclusion

This case shows that the prospective applicant in SID applications who engages in pre-application consultation with the Board must be the same as the applicant that applies for the SID planning permission. Ideally, applicants should be careful to avoid this early in the process. However, this may not always be possible. For example, if a subsidiary is established during or after the pre-consultation exercise for the purpose of progressing the development.

Based on this judgment, it will not be grounds to quash a planning decision provided the above principles can be satisfied. That said, developers should proceed with a degree of caution as the Judge did declare that the applicant under Section 37E should be the same person as the "prospective applicant" under Sections 37A-D. If a new company is to be the applicant for permission, the most legally robust route is to ensure that the new company is established before the pre-consultation process commences. Failing that, a developer will need to consider at what stage of the process to change the name, and how to relay that change to the Board, including demonstrating the close connection between the two companies.

6. Design Envelope Held to be Unlawful

Sweetman v An Bord Pleanála v Bord Na Móna Powergen Limited [2021] IEHC 390 and [2021] IEHC 662

The design envelope approach

Wind turbine technology is developing rapidly in Ireland. Developers normally seek flexibility in their permitted designs to allow them to procure the most cost-effective and efficient technology available at the point of construction. This can be years after the designs for the planning application were prepared. The design envelope approach to planning applications is based on a range of potential designs. This process is also commonly known as the "Rochdale envelope" and may include the precise location of the turbines; the cable route; the foundation type; the turbine heights and blade lengths within an "envelope".

A 2020 European Commission guidance document on wind energy developments and EU nature legislation advised that the "Rochdale envelope" is a proven and acceptable approach to granting permission where there is uncertainty in the design. This is provided the environmental impact assessment (EIA) and appropriate assessment (AA) evaluates the worst-case design possible.

Proposed windfarm at Derryadd

Peter Sweetman brought a case to challenge An Bord Pleanála's (the Board) decision to grant permission to Bord na Móna PowerGen Ltd to develop a windfarm on bogland in Derryadd, near Lanesborough, Co Longford in June 2020.

If constructed to the maximum dimensions allowed, the turbines would have been the joint tallest structures in Ireland. The judgment noted that the turbines would stand "higher than the Gherkin Tower in London", along with "extensive rail networks". The planning application was lodged with the Board under the strategic infrastructure development (SID) procedure.

The applicant brought a challenge based on alleged deficiencies in the EIA and AA, including making use of infrastructure constructed without EIA or AA where such assessments would have been required by EU law. Mr Justice Humphreys didn't consider the need to decide those "EU law points". He held the SID permission was unlawful on the basis that the plans and particulars were not sufficiently precise.

Inadequate design detail

Article 214 of the Planning and Development Regulations 2001 (as amended) (the PDR) require "plans and particulars of the proposed development" to be submitted with an SID application. The Board's General Guidance Note for submitting SID applications states that material must "generally accord" with the requirements for a planning application as set out in the PDR. Mr Sweetman complained that the plans and particulars lodged showed *"virtually no detail and no site-specific detail"*, leaving core elements of the design of the project to the post-consent stage. The Judge accepted that this broad complaint amounted to a breach of Article 214.

This was the case even though the applicant did not reference this article in his pleadings until final replying submissions were delivered.

Mr Justice Humphreys agreed with Mr Sweetman, stating, *"in particular, the turbine heights and blade lengths are expressed in terms of maxima, not the actual proposed dimensions. That is equivalent to applying for planning permission for a house on the basis that it could be anything from a one-storey bungalow to a ten-storey mansion."*

The Judge found that while the concept of *"plans and particulars"* is not defined by the legislation, it nonetheless requires something specifically measured. In particular, something capable of being drawn on a plan. Crucially, this cannot include a widely variable design envelope. The Judge referred to case law where modest variations between the plans submitted and the structures constructed have been allowed. However, he considered that this didn't apply to a case where a scale is open at one end.

Mr Justice Humphreys considered that *"even the English doctrine of the Rochdale envelope is not a blanket acceptable of variable applications, and the facts in Rochdale are a world away from the facts here."* In addition, the concept of the design envelope has a written basis in English law in the national guidelines. It is not simply a question of assessing a project by reference to a *"worst case scenario"* alone, but by reference to those parameters and any flexibility they involve.

At several points in the judgment, it was mentioned that planning law is an area of growing complexity. The judge said, *"to construct such a procedure out of whole cloth would be a hazardous, if not quixotic venture for a court to embark on, particularly at this stage of the evolution of planning law."*

Certificate of leave to the Court of Appeal

On 26 October 2021 the Judge certified a list of points of law that were allowed to be appealed to the Court of Appeal and provided some further useful commentary on his decision ([2021] IEHC 662).

The Judge made it clear that a certain limited degree of flexibility could be lawful and fall within the definition of plans and particulars in the PDR. The Judge even suggested an indicative margin of 10% for that level of flexibility, however it would depend on the facts of the case. In relation to assessment of the worst case, the Judge noted that a spectrum of different scenarios must be considered and assessed, not just the "worst case scenario". As such, you cannot provide maximum dimensions only as that does not allow for a range of reasonable options to be assessed.

The Judge recommended the Board appeal directly to the Supreme Court, rather than via the Court of Appeal, given the importance of the issues raised for the planning system. This may ultimately save time in reaching a final determination on the case. An application would need to be made to the Supreme Court for leave to appeal to them directly, and the Supreme Court will decide whether to allow it.

Conclusion

Given that a design envelope approach is a popular method to accommodate emerging technologies without the need for alterations to the consent, this judgment is likely to have significant implications for wind turbine planning applications. It is clear that the balance between flexibility and certainty in design particulars has swung towards the latter.

Developers must give reasonably precise plans for what they intend to build in order for third party objectors and other interested people to advocate for their own concerns. This judgment raises the concern that lack of specificity in design parameters, including being open at one end of the scale, could be fatal to a carefully crafted planning application. In addition, it leaves open the question of to what extent the design envelope approach is lawful in the context of an EIA or AA.

Developers will need to carefully consider how to approach this issue in applications.

7. Derogation Licences – A Question for the Court of Justice of the European Union

Hellfire Massy Residents' Association v An Bord Pleanála and Ors [2021] IEHC 424

The judicial review proceedings were brought by the Hellfire Massy Residents' Association (the Residents' Association) related to the proposed Dublin Mountains Visitor Centre, in the vicinity of the Hellfire Club at Montpelier Hill where planning permission was granted in June 2020 (the Planning Permission).

The Residents' Association issued proceedings on a number of grounds including an Order seeking to quash the Planning Permission. They also sought a declaration that the requirements for an Environmental Impact Assessment under Section 175 of the Planning and Development Act 2000 as amended (PDA) for a development carried out by or on behalf of local authorities, was invalid. This was on the basis that the process did not adequately provide for public participation.

Mr Justice Humphreys delivered the judgment on 2 July 2021 where he refused most of the reliefs and held that there was no error of domestic or European law that would support an order to quash the planning permission. He also held that the Residents' Association did not have legal standing to claim that there had been inadequate public participation under Section 175 of the PDA as the Residents' Association had been able to offer submissions on the planning application. If there had been some deficiency in law, it had not interfered with the Residents' Association legal rights.

The Residents' Association also sought a declaration that Regulations 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (the 2011 Regulations) were incompatible with EU law relating to the derogation licence process. This resulted in four questions being referred to the Court of Justice of the European Union (CJEU) for determination.

Derogation licences

The Residents' Association argued the following:

1. The reliance on post-grant derogation licences was incompatible with the requirements of strict protection for the purposes of the Habitats Directive
2. There is no system of strict protection for the protection of, among other things, bat fauna
3. The 2011 Regulations do not respect the Aarhus Convention or the Treaty on European Union because they do not provide for a system of public consultation for the grant of a derogation licence, and
4. Articles 51 and 54 of the 2011 Regulations fail to adequately implement aspects of the Habitat Directive.

Where a proposed development will affect a site known to be used by bats, consideration needs to be given to the likely impact on the bat population. Even when planning permission is granted, or the activity does not require permission, bats and their breeding and resting places are still protected. However, under the 2011 Regulations, the relevant Minister may however issue a derogation licence permitting certain activities *"where there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species to which the Habitats Directive relates at a favourable conservation status in their natural range."*

The issue of contention with derogation licences is that they may be issued post consent. This is due to the fact that in some instances a developer may not be in a position to ascertain whether a development would fall within the strict protection rules under the 2011 Regulations until after the grant of planning permission.

Mr Justice Humphreys held that, as the challenge to the 2011 Regulations related to post-consent matters, it did not form the basis to quash the planning permission. This is because An Bord Pleanála did not rely on the prospect of a grant of a derogation licence for anything that was being specifically authorised at the time of the grant of the Planning Permission. He, however, identified questions arising from these grounds to refer to the CJEU for determination, to the extent that they are relevant to the post-consent situation.

Question referred to the CJEU

1. Whether the general principles of supremacy of EU law have the effect that a rule of domestic procedure should be read in conjunction with the Aarhus Convention as an integral part of the EU legal order
2. Whether domestic procedural rules against "hypothetical" challenges are valid in the context of challenges based on EU law where there is a reasonable possibility of future damage
3. Whether the derogation licence system provided for in domestic law should be integrated within the planning process and whether a derogation licence should be applied for following the grant of development consent, and
4. Whether public participation should be provided for in the derogation licence process.

Conclusion

The issue that seems to be at the heart of the referral to the CJEU is the alleged inadequacy of the procedure if a derogation licence turns out to be needed as a result of a post-consent survey.

In this instance, the High Court concluded that the validity of the Planning Permission could be upheld, in spite of the fact the Court referred a question to the CJEU on an issue that is integral to that permission. On this basis, where it appears that a derogation licence may be required post consent, and a legal challenge is brought against the validity of this practice, it is unlikely to result in a planning permission being quashed. The CJEU referral should clarify the lawfulness or otherwise of this post consent procedure provided for under the 2011 Regulations.[1]

1. *On 13 October 2021, Justice Humphreys dismissed the applicant's application to appeal his decision to the Court of Appeal. The order for the reference to the CJEU was to be finalised [2021] IEHC 636*

8. A Kilkenny Cheese Platter of Judicial Review Grounds

An Taisce - The National trust for Ireland v An Bord Pleanála & Ors, [2021] IEHC 254, [2021] IEHC 422, [2021] IESCDET 109]

This case concerned a joint venture between Glanbia Ireland and Royal A-Ware. The companies sought planning permission to construct a cheese manufacturing plant in Co. Kilkenny. Kilkenny County Council (the Council) had granted planning permission for the development on 14 November 2019. The applicant, An Taisce, appealed the granting of this permission to An Bord Pleanála (the Board), who granted planning permission on 30 June 2020 following a favourable inspector's report. One of the arguments made by An Taisce was that the milk required for the cheese would need to come from 4,500 farms. The indirect effects from these dairy farms may adversely impact Ireland's ability to meet its climate and environmental policy targets.

Environmental Impact Assessment

The Court found that the planning permission was not invalid over ABP's failure to conduct an assessment of the upstream impact of milk production. The Inspector considered there would be an indirect impact from the milk production but that this would be mitigated by production efficiency and Glanbia's sustainability programme. The Inspector also considered these emissions are already accounted for and regulated through the National Climate Action Plan as part of dairy sector emissions.

The Court agreed with ABP and held that the effects of milk production are too remote and are sufficiently removed from the development to be assessed in site-specific terms. Therefore, it is not to be considered part of the development for the purposes of an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA). The CJEU had already given guidance on the key distinction, which is that between "programmatic" measures and the "procedures for grant of an environmental permit".

Policy decisions

Mr Justice Humphreys noted that the applicant's real grievance was with public policy. He considered that while policy decisions are not beyond the scope of judicial consideration, *"they aren't a basis for challenging a particular decision under the planning code"*. The applicant was trying to use the latter process to indirectly challenge the former which is not permissible as a collateral attack. For these reasons, An Taisce's case was dismissed.

The Board's appropriate assessment

One of the other applicant's grounds was that the Board's appropriate assessment was flawed. An AA must be carried out before planning permission is granted, to determine whether there are likely to be any adverse effects on the integrity of any European Sites from the proposed development.

The Board's assessment must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The applicant alleged that the Board's appropriate assessment contained gaps.

The applicant alleged that firstly, the inspector had erred in screening out certain interests in the AA, particularly Atlantic salt meadows, and secondly, the Board had not adequately considered the impact of treated effluent. Although these points were not raised with the Board before it made its decision, the Judge assumed the applicant still had standing to make them. The same judge had held in another case that if grounds and evidence are to be admitted in a legal challenge, they must have been put to the decision-maker before it made its decision, subject to limited exceptions (*Reid v the Board (no 1) [2021] IEHC 230* – for further information on that case, please see case update 2 above). Broadly the rationale behind the general rule is that it would be otherwise unfair for the decision-maker.

The Judge held that the main consequence of not having pursued these issues in the planning process is that there was no scientific evidence put before the Board to contradict the Natura Impact Statement. This statement was prepared by the developer and relied upon by the Board in making its AA. On the issue concerning treated effluent, the Judge didn't agree with the Board and developer that this would be a matter for the Environmental Protection Agency. However, evidence on the Board's assessment was not raised with the Board before it made its decision.

The High Court judgment on the application for leave to appeal

The Judge subsequently dismissed the applicant's application for leave to appeal his High Court judgment to the Court of Appeal ([2021] IEHC 422). The Judge did not consider any of the grounds raised comprised a point of law of exceptional public importance on which leave to appeal should be granted to the Court of Appeal.

The Supreme Court determination of the leave to appeal judgment

The applicant applied for leave directly to the Supreme Court - which is known as a "leapfrog appeal". The applicant contended that Mr Justice Humphreys required the applicant to put forward scientific evidence showing doubt in the decision-maker's AA. The Board argued that the Mr Justice Humphreys in fact required the applicant to point to some aspect of the evidence before the decision-maker.

The Supreme Court in allowing the applicant's application [2021] IESCDET 109] considered that: *"there are, in the Court's view, questions as to how evidence in that regard should be dealt with in a challenge brought to a consent granted"* and *"the Court does consider that bringing further clarity as to the proper approach to evidence or argument in relation to relevant scientific matters in judicial review proceedings of this type is a matter of general public importance which arises in these proceedings."*

Further Supreme Court judgment clarifying scope of the appeal

In a further judgment on 7 December 2021, Mr Justice Hogan clarified that the scope of the Supreme Court appeal will not be limited to the ground relating to the Habitats Directive. The applicant had filed submissions regarding whether the indirect effects from *"the off-site milk production"* were properly assessed in the Board's EIA (see case update 8). In addition, the Judge allowed within the scope of the appeal an argument by the applicant: *"whether the Board was precluded from granting permission in circumstances where this will lead to an increased discharge of pollutants into the River Suir and where it is said that that waterbody has not achieved what is termed "good' status for the purposes of Article 28 of the Surface Water Regulations."*

However, the Board or the notice party would be allowed to argue that the ground should not be determined, as it was not sufficiently raised or pleaded to the High Court.

Although these issues were not noted in the initial Supreme Court determination, the Judge clarified that, following a fuller oral hearing in which the parties have been given an opportunity to address the Court, the Court may clarify or modify the earlier determination. That approach is consistent with the general administration of justice and fairness to the parties.

Conclusion

This case shows that indirect effects from the source of materials or resources that are transported to, and used, in a separate manufacturing process, are normally considered too remote to be assessed as part of that second process in an EIA. Those effects need to be considered as part of any assessment for their production in the first place, and more widely as part of government policy. In this regard, there is a difference between programmatic or policy decisions and individual planning or environmental decisions for permits or permissions. The latter cannot be a basis for judicial intervention for the former.

Government policy can be challenged in the Courts in exceptional circumstances such as violations of statute. However, the fact that there are different views on a matter does not mean that governmental policy is incorrect. Questions of distributive justice, which means how common benefits and burdens are distributed in society, is a matter for elected representatives. Standalone court cases are too focused on individual facts to be an appropriate means of deciding policy.

That said, the Supreme Court will consider whether off-site milk production should have been included in the EIA or whether it was too remote. In addition, the Supreme Court will consider a question raised for appropriate assessments. There is a well-established principle that all scientific doubt must have been removed when determining if there are any adverse effects on the integrity of a European protected site. However, there is less clarity on the evidence required to show that scientific doubt to a decision-maker and the Supreme Court will provide its judgment on this issue.

The Supreme Court may also consider an issue about the Board's decision in the context of the Water Framework Directive. However, this issue may not be determined by the Supreme Court if the Board or notice party can show it was not sufficiently raised or pleaded in the High Court.

An inadequate AA or EIA are commonly raised grounds in judicial review applications and many planning permissions have been quashed as result. Commentary from the Supreme Court on these grounds, and if allowed, the Water Framework Directive ground, will be helpful for decision-makers and developers. However, this may cause delays in the interim for judicial review challenges where these grounds have been raised.

9. South Kerry Greenway – Planning and Compulsory Purchase Order Issues Raised

Clifford & Anor v An Bord Pleanála & Ors, O'Connor & Ors v An Bord Pleanála & Ors High Court, Humphreys J, 12 July 2021, [2021] IEHC 459

In this case, the High Court dismissed the Applicant's challenge of the decision to grant permission for the South Kerry Greenway. Judicial Review proceedings were heard by the High Court in July 2021 against the decision to allow the development of the South Kerry Greenway. The application challenged a decision of An Bord Pleanála (the Board) to grant permission for a 27km greenway in November 2020 subject to several conditions. This included the undertaking of an ecological pre-construction survey to check for the presence of protected species, such as the Kerry slug and lesser horseshoe bat and the recommendation that they be relocated to another similar habitat nearby. Some of the challenges included a claim that the permissions contravened EU directives on Environmental Impact Assessment and Habitats and, secondly, the process surrounding the Compulsory Purchase Orders (CPO's) from the landowners whose lands would be compulsorily purchased by the council.

CPO issue

The Court disagreed with the allegation of the applicants that the Roads Act 1993 (the 1993 Act) was used incorrectly to CPO the lands. It was contended by the Applicant that Section 207 of the Planning and Development Act 2000 would be the more appropriate course for the council to take. To secure a mere right of way over the lands, the Court held that there is a clear distinction between a mere right of way and the superior right of ownership, which the council was entitled to consider more appropriate for the proposed scheme.

In addition, it was argued by the Applicant that the project would fall outside the definition of a public road in the 1993 Act on the basis that the landowners would have to cross it to get to their properties and as such it would not be exclusively used by pedal cyclists and pedestrians. The Court rejected this proposition and reasoned that incidental crossing does not breach the exclusive use requirement any more than any other negligible use would. The Court also disagreed with the Applicant's contention that CPO and consent for the development should not have been combined or that the CPO had been inadequately considered. The Court was of the view that the CPO was a distinct and separate order, with separate CPO related reasons provided, and the inspectors report clearly distinguished the development consent and the CPO from one another.

In relation to claims that the CPO was a disproportionate interference, the Court found the greenway to be a legitimate objective and within the competence of the Board. It also found that the means to achieve the objectives are not only rationally connected to achieving that end but also that there could be no less invasive way of achieving them as there could be no greenway without the land. The Court took the view that the interference was in the public interest and found that the council did not err in having regard to population and economic factors in ascertaining whether the CPO was required.

Appeal

The Applicants lodged an appeal on the basis that the Board decided to omit sections of the greenway as set out in Condition 2 of the planning permission pending further investigations of estuarine dynamics and consideration of an additional setback from the shoreline. The Applicants submitted the appeal to clarify the obligations of a competent authority under the Environmental Impact Assessment (EIA) Directive and implementing legislation where it modifies a development proposal. The Court dismissed the appeal on a number of grounds including that the Board was not technically modifying a development proposal. Rather, the Board was giving permission, subject to a condition involving the omission of a section of the proposal.

The Court was of the view that it is clear from the EIA and Habitats Directives that a project can be amended following the EIA report or NIS, so an amendment in the final decision does not automatically necessitate revised statements or going back to square one. In this case, the environmental impact of the omission had not been supported by evidence and the Court was of the view that the condition requiring a change to the outcome did not create a new issue that had not been previously assessed. Accordingly, the appeal was dismissed. The Council will now therefore be able to proceed with the CPO and the Greenway project.

10. Who is the "Applicant" in a Planning Application?

Walsh & Anor v An Bord Pleanála High Court, Mr Justice Barrett, 22 July 2021, [2021] IEHC 523

This case involved judicial review proceedings where the applicants unsuccessfully sought to quash a permission granted to replace an existing agricultural entrance with a domestic entrance within an area of land attached to a protected structure. This case also provided an insight into Article 22(g) which requires the consent of the legal owner to accompany the application, where the applicant is not the legal owner of the land and who constitutes a 'person' under the Planning and Development Act (2000) (as amended).

Background

A planning application was submitted by Mr Sinnott on behalf of Mount Congreve, a trust, to the planning authority to replace the existing agricultural entrance with a domestic entrance. Mr Sinnott was the estate manager and also lived at the estate. The new development was an entrance for Mr Sinnott's house. The site is within the area of land attached to a protected structure. The applicants alleged that when they bought the house, they were guaranteed that the entrance would only be used for agricultural purposes, and if built, the new entrance would devalue their house by €100,000. Permission for the development was granted subject to conditions, which the applicants then appealed to An Bord Pleanála (the Board), alleging that Mr Sinnott did not have the authority to make the planning application, did not have the necessary consents for it and alleged that Mr Sinnott made the application on his own behalf, rather than on behalf of the trust.

An Bord Pleanála dismissed the appeal. The applicant then brought these proceedings judicially, reviewing the decision of An Bord Pleanála to dismiss their original appeal.

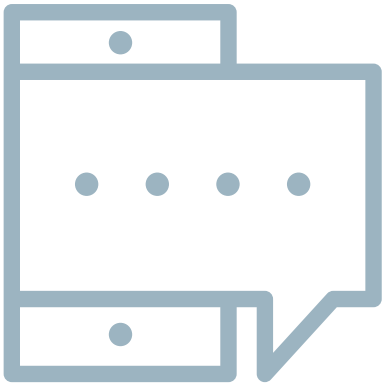
Article 22(g) requires the consent of the legal owner to accompany the application where the applicant is not the legal owner of the land. The judgment of the Court was concerned with the purpose of Article 22(2)(g) and the role of the Board in ascertaining title and legitimacy, which the Court noted was a limited one, with only certain obligations falling on the Board in this regard.

Conclusion

The applicants stated that as the trust was not a legal person, if the trust was making the application, then there was no valid planning application. The Court disagreed, as there was no definition of 'person' under the Planning and Development Act, 2000 (as amended) (the PDA). The Court also noted that the Board, with its planning acumen, was not concerned with the question of whether the trust or the trustees owned the estate. The issue to be asked by the Board was whether the trust has *"sufficient legal interest to develop the lands and to implement any planning permission granted on foot of the planning application."*

With regards to the complaints regarding title, the Court found that whilst the planning form may have been clearer about who was the applicant in the case, on the whole it made no difference given the weakness of the arguments involved.

The Court also found, in relation to the applicant, that they were excluded by the jus tertii rule, the rule governing the rights of third parties to assert the rights of someone else in a lawsuit. Jus tertii refers to the position of the applicant in relation to the particular defect in the law and whether they can rely on the rights of a third party in relation to this point. While Section 50(a) of the PDA granted the applicant's standing generally to challenge the Board's decision, this is not unlimited standing to raise any points. The applicant cannot rely on the protection of other people's property rights. The Court found that the applicants' were excluded by this rule from seeking to rely on Article 22(2)(g) as they were not the affected landowner.



11. Significant Court of Appeal Decision Clarifies How Planning Authority Decisions may be Challenged

Krikke & Ors v Barranafaddock Sustainable Electricity Limited, Court of Appeal, Mr Justice Donnelly, 30 July 2021, [2021] IECA 217

Planning permission for the erection of a windfarm was granted in 2005. A planning compliance submission was made by Barranafaddock Sustainable Electricity Limited (the Developer) to Waterford County Council in 2013 to agree the final turbine design.

Residents living near the windfarm in the townland of Ballyduff, County Waterford complained of noise and shadow flicker from the windfarm operated by the Developer. Investigations found that 9 of the 12 turbines had been built with larger turbine blades and lower hubs than was specified in the planning permission. In 2018, Waterford County Council made a Section 5 referral to An Bord Pleanála (the Board). This was to determine if the changes to the turbines "as built" compared to those specified in the planning permission constituted "development" under the Planning and Development Act 2000 (as amended) (the PDA).

On consideration of the Section 5 referral, the Board made a declaration that the alterations to the turbines did not come within the scope of the planning permission. The board stated that they constituted "development" and not "exempted development" under the PDA.

The High Court decision

The residents applied to the High Court to stop the operations of the windfarm under Section 160 of the PDA. They argued that the turbines were an "unauthorised development", and relied on the Section 5 decision of the Board. The Developer argued that the changes in the turbines had been agreed with the local authority in 2013. The Developer also submitted that the deviation of the rotor diameter from 90m to 103m was "immaterial" in terms of the planning permission. Judge Simons rejected this. He held that as the windfarm was subject to the requirements of the Environmental Impact Assessment (the EIA) Directive, the proposed increase in rotor diameter was a "change" or "extension" to the project the subject of an EIA which could only have been lawfully authorised by an application for planning permission.

The Court of Appeal decision

An appeal was brought to the Court of Appeal against the decision of the High Court. A number of arguments were raised, including:

1. Whether the Section 5 decision of the Board could decide whether the "as built" turbines amounted to an "unauthorised development"
2. Whether the applicants were prevented from arguing that the change in rotor diameter of the turbines was an "unauthorised development" in circumstances where the changes had been agreed by the planning authority on foot of the compliance submission submitted by the Developer in 2013, and
3. Depending on the above, whether the change in the rotor diameter of the "as built" turbines constituted a material or immaterial variation from what was permitted by the planning permission

Firstly, the Court of Appeal held that under Section 5 of the PDA, a declaration from the planning authority can only decide on what "development" and/or "exempted development" is. The Court added that the decision-making authority of the Board or the planning authority under Section 5 does not extend to making declarations regarding "unauthorised development". The Court of Appeal stated that where the development was carried out in accordance with an unchallenged and valid compliance decision, there was no basis to find that there had been "unauthorised development" in Section 160 proceedings.

Secondly, the Court held that the PDA provides that points of detail may be agreed between the planning authority and a developer. It also held that once a decision had been made by the planning authority or the Board on the conditions imposed in the permission for a development, this may only be challenged by way of judicial review.

The Court of Appeal rejected arguments that judicial review time limits do not apply where there has been an alleged breach of the EIA Directive. It held that there was nothing in the jurisprudence of the CJEU that prevented a member state from applying its own procedural autonomy in matters concerning the EIA Directive. This is provided the principles of equivalence and effectiveness were complied with.

Thirdly, the Court of Appeal held that where there has been compliance with a planning permission or any condition thereof, there can be no finding of "unauthorised development". Any challenge to the permission or condition must be taken by way of judicial review. To prove an "unauthorised development", the Court of Appeal stated that planning injunction proceedings under Section 160 of the PDA would be necessary and the appropriate test applied. The only way to determine whether "unauthorised development" had taken place would be to remit the matter to the High Court for a fact finding exercise. However, as the case was decided on other grounds, this was deemed unnecessary.

Conclusion

The Court of Appeal has made it clear that challenges to planning authority decisions must be made by way of judicially reviewing that decision under Section 50 of the PDA.

This recent judgment offers good news for developers, who will be able to securely rely on compliance submission decisions once they pass the normal judicial review time limits, except in the limited circumstances where the Court may extend this period.

12. "Leapfrog Appeal" Granted on Issue of Access to Environmental Information

Right to Know CLG; Commissioner for Environmental Information Minister for Communications, Climate Action; the Environment Ireland and the Attorney General and Office of the Secretary General to The President of Ireland. Supreme Court Determination, 30 July 2021, [2021] IESC DET 90

Background to the High Court judgment

Right to Know CLG (RTK) is a not-for-profit organisation active in freedom of information and data protection. RTK made requests for documentation to the Secretary General of the President of Ireland (the Office) in 2017. RTK sought information relating to a speech given by the President in Paris in July 2015 at the Summit of Consciences of the Climate. An address given by the President at the New Year's Greeting Ceremony in January 2016 was also requested. RTK also requested information held by the Council of State when it advised the President on two pieces of legislation in accordance with Constitutional requirements. RTK did not receive a response and appealed the deemed refusals to the Commissioner for Environmental Information (the Commissioner).

These requests were made under the European Communities (Access to Information on the Environment) Regulations 2007 (AIE Regulations). The Regulations transpose Directive 2003/4/EC (the Directive) and broadly requires public authorities to provide access to environmental information. Article 2.2 of the Directive states that a Member State 'may exclude' public authorities from this requirement where:

- A body is acting in a legislative or judicial capacity, or
- Where a Member State's constitutional provisions precluded a public body's decisions from being reviewed, eg by a Court

Article 13.8.1 of the Constitution broadly provides that any act done by the President in *"performance of the powers and functions of his office"* cannot be reviewed by the Oireachtas or any court. The State argued that the President and the Office, by extension, were not obliged to disclose the requested information under the Directive. This is because it was prepared in the performance of the President's functions, and those functions could not be reviewed.

In the AIE Regulations, Ireland specifically excluded legislative or judicial bodies from its scope but had not excluded bodies whose decisions could not be reviewed. This second exclusion occurred at a later date, in amending regulations which came into force in July 2018. The State argued that, although these amending regulations were brought into force, they were not needed to avail of the exclusions in the Directive. This was because these exclusions did not require a positive act. The Commissioner agreed with the State's submissions. He found that both the President's and Council of State functions could not be reviewed under the Constitution and therefore did not need to be disclosed under the Directive. As a result, the Commissioner refused both of RTK's appeals.

The Judge, Mr Justice Barr, agreed with the Commissioner that if a decision by the President were to be ultimately reviewable by the judicial system, it would be contrary to the constitutional provision on presidential immunity. The Judge also held that as the Council of State was advising the President, they also came within the immunity.

However, Justice Barr found that the AIE Regulations were in direct conflict with presidential immunity, and the Constitution requires that the AIE Regulations prevail where there is a conflict.

On the issue of whether Ireland as a Member State (MS) had to take a positive step to incorporate the exclusion provisions, the Judge considered EU case law and determined that it did. Ireland had not taken the positive step to exclude a body whose decisions could not be reviewed. However Ireland, as a MS, had taken the positive step to exclude judicial and legal functions from the scope of the regulations. Because of this, the information related to the Council of the State's consultation to the President on proposed legislation was not required to be disclosed to RTK. However, Justice Barr considered that the information on the two speeches did not fall within the President's legal functions and the Commissioner had erred on this point. That part of the decision was referred back to the Commissioner.

The Supreme Court's decision to allow the appeal and cross-appeal

The State sought leave to appeal three issues:

1. The High Court's findings on the need for a positive step to avail of the exemptions in the Directive
2. The conflict between the President's immunity, and
3. The Directive and the Directive prevailing over the presidential immunity

The State appealed directly to the Supreme Court on the grounds that the application raises several issues of general public importance and was in the interests of justice. This is known as "leapfrogging" above the next Court; the Court of Appeal.

RTK did not oppose the application but sought to cross-appeal the decision of the trial judge with regards to the Council of State.

RTK argued that all issues should be determined by the Supreme Court and the question as to Ireland's option to transpose the relevant exclusion in the Directive should be referenced to the Court of Justice of the European Union.

The Supreme Court was satisfied that the issues sought to be appealed and those sought to be cross-appealed were of general public importance and met the threshold. The Court also considered, *"the issues would be narrowed no further by an appeal to the Court of Appeal in the first instance, as they are wholly matters of law."* In addition to the issues considered by the High Court, the Supreme Court will also consider whether the President is a "public authority" for the purposes of the Directive. That is, regardless of whether an exclusion applies.

Conclusion

This case raises complex questions on the interaction between constitutional and EU law. Much EU legislation provides for exclusions, and it will be interesting to interpret this more widely to see whether transposition legislation must address this. Access to information is becoming an increasingly hot topic, particularly in the area of environmental activism and policy, where the relationship between state bodies and other actors may be opaque.

If the Court dismisses the appeal, the Commissioner will need to decide whether information on the President's speeches must be disclosed. It may also leave other information held by the President, not relating to his judicial or legal functions, in line for being disclosed if further requests are made. In a time when we are seeing a proliferation of environmental challenges, it will be interesting to observe how these new challenges may have an effect on our body of constitutional law.

13. The Validity of a Subsequent Section 5 Declaration on the Same Facts

Narconon Trust v An Bord Pleanála, Court of Appeal, Mr Justice Costello, 17 November 2021, [2021] IECA 307

The present proceedings related to (Narconon) Trust's drug rehabilitation facility at a former school building in County Meath which was subject to an existing planning permission permitting the building to be used as a nursing home. Prior to the acquisition of the property in 2016, Narconon sought a Section 5 declaration from Meath County Council that the change of use from a nursing home to a drug rehabilitation facility constituted "exempted development" under the terms of the Planning and Development Regulations 2001 and thus would not require planning permission.

Meath County Council granted the declaration despite extensive objections at the time. However, no appeal was ever lodged with the Board and no judicial review proceedings were issued in the High Court in relation to this decision. The development of the facility proceeded on the basis that no planning permission was required at a cost in excess of €7 million for the works and fit-out.

A community group which included some of the initial objectors and the local Municipal District Council sought further Section 5 declarations in 2018 as to whether the change of use was in fact "exempted development". No claims were made that the facts or circumstances had changed in anyway during the relevant time since the declaration was granted. Meath County Council sent the requests to the Board who issued a declaration confirming that the change in use constituted development for which planning permission was required in November 2018.

High Court and Court of Appeal

Judicial review proceedings were then issued by Narconon against the Board challenging their declaration that the change of use constituted development requiring planning permission. The High Court quashed the Board's 2018 decision which was subsequently appealed to the Court of Appeal by the Board who questioned whether they had the power to determine a Section 5 referral, in cases where (a) a planning authority had previously determined the same question in relation to the same land, and (b) there was no evidence of any change in the planning facts and circumstances since the decision of the planning authority.

The decision of the High Court was upheld in the Court of Appeal in deciding that the Board was precluded from determining the Section 5 referral, where in effect the same question arose in relation to the same land without any change in circumstances.

In arriving at its decision, the Court of Appeal noted the following:

- There was no basis for reviewing the Section 5 declaration with a further Section 5 application
- A Section 5 declaration does not constitute a development consent, rather it is a declaration of an existing right
- Section 5 requests are not a process for evaluation of what is "proper planning and sustainable development". Rather it is designed to deal with whether or not something is or is not development or exempted development

- Broadly, Section 50(2) of the Planning and Development Act, 2000 (the PDA) prohibits a challenge of the "validity" of any decision made or other act done by the Board or a planning authority when performing its functions under the PDA except by way of judicial review. This includes challenging the validity a Section 5 declaration
- The objectors intended that the Board's later decision should supersede that of the Council, and that Narconon no longer would be able to rely upon the decision of 2016. It is not permitted to use the administrative process as a collateral attack on the earlier decision
- By permitting the 2018 Declaration, Narconon would be deprived of the earlier declaration in 2016 which it had relied on in good faith, such could also unjustly expose Narconon to enforcement proceedings under the Planning and Development Acts
- The Court of Appeal said the Board could not simply disregard the 2016 Declaration and that the time for challenging to this had long expired and had been presumed valid. The position of the Board was contrary to the Section 5 process to provide an "authoritative ruling" of whether a particular development is or is not development, or exempted development. The correct approach was that the Board should have dismissed the referral once it was clear the same question decided in the 2016 Declaration was being referred
- Dealing with the Board's argument of lack of public participation, the Court of Appeal pointed out that the Section 5 process was not being challenged in these proceedings. In addition, there are good reasons to make the distinction between the public being afforded participation in other planning processes and not in the Section 5 process. For example, the Section 5 process does not involve evaluative consideration of proper planning and sustainable development
- Finally, the Court of Appeal agreed with the High Court in finding that the Board would not always be precluded from considering a Section 5 application where there was a pre-existing Section 5 declaration but there must be changes in facts and circumstances to alter the situation in terms of planning

Conclusion

This case confirms that a Section 5 declaration can be relied upon if it is not appealed or challenged by judicial review and the facts and circumstances have not altered the planning context. The "validity" of a Section 5 declaration must be challenged by way of judicial review within the requisite time. If the same question is referred to the Board in circumstances where there is a prior declaration and the circumstances have not changed, the Board should use its discretionary power to decline to determine the referral.

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