JUDICIAL REVIEW UPDATE

Eamon Galligan S.C.

COMPLIANCE WITH PROCEDURAL REQUIREMENTS

(i) VALIDITY OF APPEAL – NAMES AND ADDRESSES OF APPELLANTS

Dalton .v. ABP [2020] IEHC 27

The issue was whether the applicant had complied with one of the requirements for a valid appeal, namely that the names and addresses of the appellants be stated in accordance with s. 127(1)(b), PDA.

In his observation to PA, the applicant described himself as a *"broker advocate".*

The observation was made *"On behalf of my clients who are all of the owners/residents of the St. Michael's Cottages…"*

Council acknowledgment under s. 127 (1) (e) of the 2000 Act addressed to:

"Brendan Dalton for residents St. Michael's Cottages".

Dalton .v. ABP (Cont..)

Applicant submitted an appeal against the decision to grant permission

- *"prepared and submitted by Brendan Dalton, Dalton Brokers … on behalf of the owners/residents of St. Michael's Cottages"*

- Neither names nor addresses of owners/residents stated.

References to "*our client's properties", i.e. at St. Michaels Cottages*

NP responded to appeal – did not suggest appeal invalid

ABP rejected appeal as invalid on grounds that names and addresses of appellants not stated in accordance with s. 127(1)(b), PDA.

Dalton .v. ABP – decision

Court rejected submission that the Applicant was the appellant and held that he was acting as agent.

The requirement that names and addresses of appellants be stated was mandatory.

Section 127(2)(a) provides that an appeal which does not comply with the requirements of s. 127(1) *"shall be invalid".*

Non-compliance could not be excused on a *de minimis* basis.

Fair procedures did not apply as no discretion under s. 127(2)(a).

(ii) REQUIREMENT FOR BOARD TO MAINTAIN WEEKLY LIST OF APPEALS (Reg. 72/PDRegs)

Sweetman v ABP, Ireland, Attorney General, respondents, and IGP Solar 8 Ltd., (notice parties) [2020] IEHC 39

Applicant sought to quash the decision of ABP to grant planning permission for a development of a 67.8 hectare solar farm.

Applicant contended deprived of an opportunity of making an observation on a third party appeal.

Failure of ABP to include notice of the receipt of the appeal of the decision of the Council in the Board's weekly list of appeals not later than the third working day following the week ending 23rd February, 2018 as required by Regulation 72/PDR.

Sweetman .v. ABP (Cont..)

The revised list was not published until two weeks prior to the date of expiry of the time for making submissions.

Mr. Sweetman had not made any submissions in the planning application process before the Council.

However, under s. 130 (1) (a) PDA, any person other than a party to the proceedings before the planning authority may make submissions or observations in writing to the Board in relation to an appeal.

Sweetman .v. ABP (Cont..)

ABP argued:

Reg. 72 does not provide that a failure to comply with the obligation imposed by the regulation would render the appeal invalid.

Reg. 72 directory rather than mandatory.

Sweetman (IGP 8) - DECISION

McDonald J concluded that the obligation imposed by Regulation 72 (1) is mandatory for the following reasons:

(a) Use of the word *"shall"* is particularly important. Relied on the approach taken by Kelly J. in *Graves* and *McAnenley.*

(b) Use of the word "shall" *must be read in the context of s. 130 of the 2000 Act and in particular in the context of the strict four-week time limit for the making of submissions by persons who are not parties to the underlying planning process.*

(c) Serious consequences: Failure to publish the weekly list until very close to the four-week deadline for making submissions would undermine the scheme of public participation

SCREENING FOR APPROPRIATE ASSESSMENT (AA)

(i) REQUIREMENT NOT TO TAKE ACCOUNT OF MITIGATION MEASURES:

Sweetman v ABP, Ireland, Attorney General, respondents, and IGP Solar 8 Ltd., (notice parties) [2020] IEHC 39

Challenge to a decision of the Board to grant planning permission for a 67.8 hectare solar farm in County Cork.

Screening Report, stated:-

"Mitigation measures are proposed for the site's flora and fauna and none is required for any Natura sites".

However, CEMP set out steps that would be taken to prevent contamination of watercourses.

Sweetman .v. ABP, Ireland and Attorney General (Cont…)

Silt fences to prevent any silt laden waters entering the drainage ditches or seasonal streams which discharge to the Oakfront stream or the Ardglass stream.

CEMP stated that any recommendations made by Inland Fisheries Macroom *"to ensure the protection of the River Blackwater and its tributaries and the associated aquatic fauna and any fisheries".*

These streams discharged into the Blackwater River (SAC) where pearl mussel were to be found.

Sweetman .v. ABP, Ireland and Attorney General (Cont…)

Application of principles of facts

Applying these principles to the facts of the case, McDonald J concluded:

"Based on the content of the CEMP, it is impossible to avoid the conclusion that the purpose of the silt fences and the other protective measures described in the CEMP were intended for any purpose other than the protection of the watercourses draining into the River Blackwater where the various species in that river (including the freshwater pearl mussel) could potentially be adversely affected by ingress of silt-laden water migrating from the construction works on the development site."

"*having regard to the decision of the CJEU in People over Wind, the measures in question could not be taken into account at the screening stage."*

(iii) REMITTAL

Clonres CLG v ABP and Minister for CHG [2018] IEHC 473

ABP accepted that there was an error on the face of the record in terms of the recording of the test applied by the Board in carrying out an Appropriate Assessment in its decision granting permission for a large SHD development. Barniville J granted the following orders:

(1) an order of certiorari quashing the decision of the Board for the reason accepted by the Board;

(2) an order remitting the application for permission to the Board to be determined in accordance with law, such remittal to take effect from the point in time immediately following the time at which its Senior Planning Inspector signed her report on 23rd March, 2018;

(3) an order deeming that the time period set out in s. 9(9)(a) of the SHD Act should, in respect of the application remitted, expire six weeks from the date of the perfection of the orders made.

BUILDING HEIGHT GUIDELINES

Spencer Place Development Company v Dublin City Council [2019] IEHC 384

Concerned with the effect of Dublin City Council's interpretation of SPPR3 of the Building Height Guidelines (issued under PDA, s. 28) in the context of the consideration of applications made to the Planning Authority as distinct from an application to An Bord Pleanála.

Question was whether SPPR 3(A) applied to planning schemes where it stated it applied to "development plans".

A briefing note on the Guidelines prepared by the City Planning Officer stated that SPPR 3(A) did not apply to development proposed for a planning scheme area.

The applicant had two planning applications pending before the Council.

Spencer Place Development Company .v. Dublin City Council (Cont…)

The applicant sought declaration that

- the briefing note of 31 January 2019 was *ultra vires* and

- the Council was obliged to apply SPPR 3(A) of the Building Height Guidelines prior to undertaking any review of the North Lotts and Grand Canal Planning Scheme.

Spencer Place Development Company .v. Dublin City Council (Cont…)

Spencer Place - Relevant statutory provisions

Section 28(1)(C) of the PDA 2000 provides as follows:

‘(1C*) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply*.’

Spencer Place Development Company .v. Dublin City Council (Cont…)

Section 34(2) (aa) and (ba) of the PDA 2000 as follows.

‘(aa) When making its decision in relation to an application under this section, the planning authority shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28.

[…]

(ba) Where specific planning policy requirements of guidelines referred to in subsection (2)(aa) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.’

Spencer Place Development Company .v. Dublin City Council (Cont…)

The applicant relied on s.169(8A) of the PDA 2000 to give precedence to the SPPR over and above the provisions of the Planning Scheme:

'(8A)(a) A planning scheme that contains a provision that contravenes any specific planning policy requirement in guidelines under subsection (1) of section 28 shall be deemed to have been made, under paragraph (b) of subsection (4) of section 169, subject to the deletion of that provision.'

Applicant submitted that because *Section 169(9)* of the 2000 Act provides that a Planning Scheme for an SDZ is deemed to form part of the Development Plan for that area, the provisions of the SPPR 3(A) should apply rather than those under the Planning Scheme.

City Council argued that the reference to "development plan" should not be interpreted in SPPR 3(A) as including a reference to the planning scheme

Not how the ordinary intelligent layperson would read the matter (see **XJS Investments**).

Spencer Place Development Company .v. Dublin City Council (Cont…)

SPPR 3

'SPPR 3

It is a specific planning policy requirement that where;

(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and

2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;

Spencer Place Development Company .v. Dublin City Council (Cont…)

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Spencer Place Development Company .v. Dublin City Council (Cont...)

then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise.

(B) In the case of an adopted planning scheme the Development Agency in conjunction with the relevant planning authority (where different) shall, upon the coming into force of these guidelines, undertake a review of the planning scheme, utilising the relevant mechanisms as set out in the Planning and Development Act 2000 (as amended) to ensure that the criteria above are fully reflected in the planning scheme. In particular the Government policy that building heights be generally increased in appropriate urban locations shall be articulated in any amendment(s) to the planning scheme.

(C) In respect of planning schemes approved after the coming into force of these guidelines these are not required to be reviewed.'

Spencer Place Development Company .v. Dublin City Council (Cont…)

Spencer Place – decision of Court

Prematurity:

Simons J held that the proceedings were premature pending the determination of the two planning applications pending before the Council.

He found that no prejudice would have been caused to the Appellant had it awaited the outcome of the decision-making process.

The legal argument which the Appellant wished to make could have been made equally well in judicial review proceedings seeking to challenge the decision to refuse planning permission.

Spencer Place Development Company .v. Dublin City Council (Cont...)

Non- application of SPPR 3(A) to planning scheme area

The Court concluded that SPPR3(A) of Building Height Guidelines does not apply to planning applications made to the planning authority in the area of a Planning Scheme.

The Court held that ordinary meaning of the words “development plan” in SPPR 3(A) did not include a planning scheme, although the legal meaning of “development plan” under the PDA included planning schemes.

Spencer Place Development Company .v. Dublin City Council (Cont...)

Regard could be had to the SEA Statement in interpreting the Guidelines. It indicated that an earlier draft of the Guidelines had contained an express reference to planning schemes so that the omission in the adopted Guidelines appeared deliberate.

The Court held that the benefit of the new policy in respect of building heights is *deferred* in the case of planning schemes.

Pending the amendment of a planning scheme, any planning applications will fall to be determined under the existing planning scheme.

Spencer Place Development Company .v. Dublin City Council (Cont…)

Even after the review and amendment of the planning scheme, SPPR 3(A) will not apply in the case of applications to the planning authority.

By contrast, the legal effect of the guidelines in the case of a development plan or a local area plan is *immediate*, and a planning authority can rely on the guidelines to disapply conflicting objectives of the plans.

The decision addresses the position in respect of an application under Section 34 of the 2000 Act on foot of which the planning authority cannot grant permission for a proposed development that is inconsistent with the Planning Scheme.

Different considerations apply to an application made to An Bord Pleanala under *Section 4* of the 2016 SHD Act, which does not fall to be determined under *Section 170* of the PDA 2000.

REDMOND v AN BORD PLEANALA (unrep, HC, Simons J, 10 March, 2020)

SHD application in DLRCC area.

Two main issues in case

1. Whether an "INST" symbol (*"to protect and / or provide for Institutional Use in open lands".*) on the DLRCC Development Plan map related to the application site.

2. Whether the objective related to the "INST" symbol was a zoning objective.

WHETHER INSTITUTIONAL LANDS DESIGNATION APPLIED TO SITE

If *"institutional lands"* designation applied to the site, certain policies and objectives would then apply to the planning application in relation to –

(i) density;

(ii) open space;

(iii) the retention of sufficient space for possible future school expansion or redevelopment.

The Manager's Report on previous Draft Development Plan, 2010-2016 indicated

the "INST" symbol had been repositioned to *"the north-east corner of the defined site to more accurately reflect the residual bona fide institutional use remaining on the site."*

CDP: *"the Written Statement shall prevail"* over maps.

DEVELOPER'S ARGUMENTS

Court suggested that the developer's principal argument was the positioning of the symbol for institutional lands in the area of the schools.

However, the developer also argued that

- on a textual reading of the written statement of the Plan, the relevant policies and objectives applied to lands which were in institutional use.

- the relevant date to consider the use of the lands was the date of the planning permission.

This is in practice the appropriate date on which to determine the policies to be applied to a planning application.

COURT'S VIEW ON APPLICATION OF INST OBJECTIVE

However, at paragraph 56 of its judgment, the Court states as follows:

> *"56. The developer's argument ignores the fact that, as of the date of the adoption of the Development Plan, the lands had an established institutional use.* ***This established use and designation is not lost by dint of a transfer of ownership. Rather, it remains until such time as planning permission is granted for an alternative use, such as, for example, residential use. The relevant Development Plan policies are precisely intended to regulate the circumstances in which such a change in use might be authorised****…."*. (Emphasis added).

MATERIAL CONTRAVENTION RE ZONING?

"a question of law exclusively for the Court". (para 24)

But where objectives of a Development Plan are *"formulated in broad terms … it will be a matter of planning judgment as to how to apply those objectives to any given planning application."* (para 27)

Site zoned 'Objective A' , "*To protect and / or improve residential amenity*" and 'residential' is a 'permitted use' under this land use zoning objective.

The INST Objective is not one of the land use zoning objectives set out under the CDP.

INST Objective is a policy objective linked to various policies in the CDP, including RES 5

The first list in the Zoning Maps legend is entitled "Use Zoning Objectives".
The second list is entitled "Other Objectives". The "INST Objective" is included under the heading "Other Objectives".

COURT RULING ON ZONING ISSUE

The Court held that the institutional lands designation did not amount to a zoning objective.

So Court had jurisdiction to grant permission for SHD (see Section 9(6)(b)).

MATERIAL CONTRAVENTION – NON- ZONING GROUNDS

He then went on to consider whether the proposed development was in material contravention of a *"non-zoning objective"*.

Held –

the Inspector erred in finding that the proposed development was subject to the housing density set out at RES3 (which applied to residentially zoned lands generally);

the Inspector did not take into account the objective under RES5 (which applied to Institutional Lands) to retain the open character and/or recreational amenities of institutional lands.

Also a material contravention of the relevant Development Plan policy in respect of open space provision.

The Court took the view that a 25% open space requirement applied to the overall *"campus"* and that this requirement had been materially contravened.

MOUNT JULIET ESTATES RESIDENTS GROUP v KILKENNY COUNTY COUNCIL [2020] IEHC 128

Planning authority sought stay of JR proceedings pursuant to s. 50(4) and (5) of the PDA 2000 pending the determination of ABP appeal.

Developer seeking to vacate stay on appeal obtained by Residents Group in JR leave.

Residents pursuing an application for JR and appeal in parallel.

Residents claimed in JR that the development sought to be retained had been carried out in breach of the requirements of the EIA Directive and the Habitats Directive, and that retention permission should not have been granted : section 34(12), PDA.

Simons J *obiter:* it is only the decision-maker, before whom the matter is pending, who can apply for a stay under s. 50(4).

RULING OF SIMONS J IN MOUNT JULIET

Legal test to be applied is whether or not the “matter” before the planning authority or An Bord Pleanála is “within the jurisdiction of” the relevant decision-maker

Three categories of grounds:

1. Grounds which concern statutory constraints unique to a planning authority, e.g. material contravention.

1. Grounds which might *potentially* affect An Bord Pleanála's jurisdiction, but which An Bord Pleanála has power to correct.

1. Grounds which affect the planning authority and An Bord Pleanála equally, and which the Board is incapable of correcting.

Held, grounds of challenge fell into third category; stay refused.