THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 268

Court of Appeal Record Nos 2019/309

Costello J.

Donnelly J.

Collins J.

BETWEEN

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

Applicant/Appellant

AND

DUBLIN CITY COUNCIL

Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 2 October 2020

INTRODUCTION

1. The issue of building height in urban areas in the State has lately been the subject of considerable debate and discussion, particularly in respect of development in Dublin. Many consider that the low-rise, low-density pattern of development historically followed in the State has had negative consequences for proper planning and development and is now unsustainable in the face of significant population growth. Others are concerned at the impact of "*high-rise"* development on historic urban areas.

2. In December 2018, the Minister for Housing, Planning and Local Government ("*the Minister*") made a significant intervention in that debate by issuing the *Urban Development and Building Heights, Guidelines for Planning Authorities* ("*the Guidelines*"). The essential objective of the Guidelines is set out in paragraph 1.9. There it is stated that, reflecting the National Planning Framework strategic outcomes in relation to compact urban growth, the Government considers that there is significant scope to accommodate anticipated population growth by "*building up*" and consolidating the development of existing urban areas.

3. The Guidelines contain a number of specific planning policy requirements ("*SPPRs*"). In contrast with Ministerial guidelines generally – to which planning bodies must "*have regard*" but which do not impose binding obligations as such – planning authorities, regional assemblies and An Bord Pleanala ("*ABP")* are statutorily required to "*comply*" with SPPRs in the performance of their functions.

4. This appeal is concerned with SPPR 3 and in particular SPPR 3(A). It is set out in full later in this judgment but, in brief, provides that, where an applicant for planning permission satisfies a planning authority that a development proposal complies with certain specified (and complex) "*development management criteria*", then "*the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise*."

5. The substantive issue arising in this appeal is whether, in considering and determining two applications for planning permission made by Spencer Place Development Company Limited ("*the Developer*") in relation to proposed development within the North Lotts and Grand Canal Strategic Development Zone ("*the North Lotts SDZ")*, Dublin City Council ("*the Council*") was bound to apply SPPR 3(A). The Developer argues that it was and says that, as a consequence, the Council was entitled to grant the planning permissions sought even though, in each case, the proposed development exceeded the applicable height limits set out in the North Lotts and Grand Canal Planning Scheme 2014 ("*the Scheme*"). The Council says, to the contrary, that SPPR 3(A) has no application to existing planning schemes and that SPPR 3 generally has effect only on the review of such schemes and the adoption of an amended scheme.[1]

[1] The Court was informed at the hearing of this appeal that the Council has undertaken a review of the Scheme in light of the Guidelines, including SPPR 3, and, following a consultation process, had proposed amendments to it but that the amended Scheme had not yet been approved by ABP. That apparently remains the position as this judgment was being finalised.

Accordingly – so the Council says - the height limits in the Scheme continued to apply and thus the applications made by the Developer could not be granted.

6. In my view, the Council's position is correct. As I explain, there are significant differences between "*ordinary*" applications for planning permission and applications for permission for development within the area of a planning scheme (to which, for convenience, I shall refer as "*scheme applications*"). In particular, the nature and scope of the functions of the planning authority in relation to those different categories of application differ very materially. The application of SPPR 3(A) to scheme applications would radically alter the function of planning authorities in relation to such applications, to an extent and in a manner very difficult to reconcile with the structure of the Planning and Development 2000 (as amended) *("the PDA*"). In these circumstances, it appears to me that very clear words would be required in order to conclude that SPPR 3(A) applies to existing planning schemes. In my opinion, nothing in the PDA or the Guidelines themselves compels any such conclusion. On the contrary, in its natural and ordinary meaning SPPR 3(A) is not applicable to scheme applications and that construction is supported by consideration of SPPR 3 as a whole and of the language and structure of the PDA.

7. Accordingly, on the substantive issue raised by this appeal I would uphold the Judgment and Order of Simons J in the High Court.

THE STATUTORY CONTEXT

8. This question arises in the context of the elaborate and complex statutory regime founded on the PDA. As enacted, the PDA was a complex piece of legislation, effectively consolidating the Local Government (Planning and Development) Act 1963 and the many subsequent statues amending that Act. In *An Taisce v An Bord Pleanala* [2020] IESC 39, McKechnie observed that, by the time of the enactment of the PDA in 2000, the body of legislation dealing with planning and development was *"disparate, unwieldy and extremely difficult to locate or follow."* The PDA has itself been amended extensively since 2000 both by primary legislation enacted by the Oireachtas and by statutory instruments made under the European Communities Acts. In addition, there are thousands of pages of secondary legislation and statutory guidelines that impact on planning and development in the State. Successfully negotiating the resulting legislative sprawl is a challenging exercise indeed.

Development Plans and Planning Schemes

9. Every planning authority is required to make a development plan. Section 2(1) PDA defines *"development plan*" as meaning "*a development plan under section 9(1)*",[2] section 9(1) being the provision that imposes the obligation to make such a plan.

[2] That definition, in common with the other definitions in section 2(1), being subject to the proviso "*except where the context otherwise requires".*

Development plans were first introduced by Part II of the 1963 Act. Part II, Chapter 1 PDA now contains the detailed statutory framework relating to the making of such plans, their content, their periodic review, variation, publication and so on. The function of making and varying developments plans is a reserved function, that is to say one exercisable by the elected members of the planning authority.

10. The development plan is a critical element of the planning regime in the State, "*an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan…"*. [3] When an application for planning permission is made, the provisions of the development plan are the primary reference point for its assessment and determination by the planning authority: section 34(2)(a)(i) PDA. However, the statement of *"development objectives*", including objectives for land zoning, which a plan is required to include may be quite flexible in practice. Furthermore, a planning authority may grant permission for a development that would materially contravene the development plan, subject to compliance with the procedure set out in section 34(6) PDA. Where a proposed development is consistent with the development plan, planning permission *may* be given but it does not follow that it necessarily *will* be. A planning judgment - frequently one of significant complexity - remains to be made by the planning authority.

[3] Per McCarthy J for the Supreme Court in *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99, at 113.

11. The decision of a planning authority to grant or refuse planning permission may be appealed to ABP. ABP is not bound by the development plan in the same way as a planning authority. While it is obliged to have "*regard*" to the provisions of the development plan in deciding appeals, as a general rule it may grant permission for a development that materially contravenes the plan: section 37(2)(a) PDA. However, where a planning authority has specifically refused an application on the grounds of material contravention, ABP may grant permission only in certain circumstances: section 37(2)(b) PDA.[4] But in every case ABP has to make a planning judgment.

12. ABP has no role in the making or reviewing of a development plan by a planning authority. The Minister and the (relatively) newly-created Office of the Planning Regulator have potentially significant roles but, fortunately, the parameters of their respective roles do not require consideration in the context of this appeal.[5]

13. The structure just described governed all applications for planning permission in the period between the establishment of ABP by the Local Government (Planning and

[4] Which, notably, include where ABP considers that permission should be granted *"having regard to … guidelines under section 28 … and any relevant policy of the Government [or] the Minister…"*. In reality, section 37(2)(b) appears to give significant leeway to ABP to grant permission even where the planning authority has relied specifically on the material contravention ground for its refusal.

[5] See Part II, Chapter 4 (The Minister), especially section 31 (considered by the High Court (Clarke J) in *Tristor Limited v Minister for the Environment* [2010] IEHC 397) and Part IIB (Office of the Planning Regulator).

Development) Act 1976 and the enactment of the PDA.[6] An innovation of the PDA was the provision made in Part IX for strategic development zones (SDZs). Section 166 PDA provides for the designation of sites for the establishment of SDZs. Following on such a designation, section 168 PDA provides for the preparation of a draft planning scheme in respect of some or all of the site by the "*relevant development agency*" (which may be - and in this case is - the local authority) and the submission of that draft to the relevant planning authority. Section 168(2) provides for the contents of such a scheme. In general, a planning scheme is required to be more detailed and prescriptive than a development plan. It must, for instance, contain *"proposals in relation to the overall design of the proposed development, including the maximum heights, the external finishes of structures and the general appearance and design."*[7] No such requirement applies to development plans made under section 9 PDA.

14. The process by which a planning scheme is made - set out in detail in section 169 PDA - also differs significantly from the process applicable to a section 9 development plan. The planning authority must send the draft to the Minister and to ABP, carry out a public consultation process and then decide whether to make the scheme, as proposed or with modifications or variations, or not to make it. When a planning authority decide to make a scheme (and again the function is one reserved to the members), that decision

[6] A further – and significant – departure from the traditional two stage procedure for planning decisions was effected by the Planning and Development (Strategic Infrastructure) Act 2006 which provides for applications for permission for designated "*strategic infrastructure*" development to be made to ABP in the first instance: section 37A PDA and following.

[7] My emphasis.

may be appealed to ABP by the development agency or by anyone who has made submissions or observations in the course of the public consultation process and, on such an appeal, ABP may approve the making of the scheme, with or without modifications, or refuse to approve the scheme.

15. Where a planning scheme is in force, its effect is significantly different to that of a development plan. Section 170(2) PDA provides that, subject to Part X (environmental impact assessment) and Part XAB (appropriate assessment), a planning authority *"shall grant permission"*[8] for a development where it is satisfied that the development *"where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission, would be consistent with any planning scheme in force for the land in question"*. Thus, as a general principle, consistency with a planning scheme is a necessary and sufficient condition for the granting of planning permission in an SDZ and, as a result, the planning judgment that falls to be exercised by the planning authority at application assessment stage is significantly attenuated.

16. Conversely, "*no permission shall be granted for any development which would not be consistent with such a planning scheme".* That appears to be an absolute prohibition and there is no procedure analogous to section 34(6) PDA permitting a planning authority to grant permission for a development that would be inconsistent with a planning scheme. There is therefore no mechanism within Part IX whereby development that is inconsistent with a planning scheme may be permitted (short of

[8] My emphasis.

varying the scheme itself). The largely administrative nature of the assessment is also reflected in the fact that no appeal lies to ABP from a decision of a planning authority to grant or refused permission: section 170(3).

17. The objectives of Part IX appear to be co-ordinated, plan-led development, predictability and expedition. The adoption of a detailed and prescriptive development blueprint gives developers and other interested persons greater clarity as to the nature of the development that will (and will not) be permitted and expedites the application process by significantly constraining the scope of assessment by the planning authority. In *O' Flynn Capital Partners v Dun Laoghaire Rathdown County Council* [2016] IEHC 400, Haughton J thought it was reasonable to infer from Part IX that its objective was to facilitate significant development in the following three respects:

> *"(i) by providing certainty in that developers are assured that if their planning application is consistent with the relevant planning scheme they 'shall' be granted planning permission (subject only to any conditions that the planning authority may lawfully attach);*
>
> *(ii) that permissions will be obtained speedily in that the planning scheme has more detail than a Development Plan and is therefore a blueprint to enable matters to progress more quickly – and there is no appeal permitted to the Board; and,*

> *(iii) that the development is infrastructure led because the planning scheme provides for planned and coordinated development of infrastructures in the planning scheme area."*

I agree with this analysis, though I would observe that the "*certainty*" referred to in (i) above is not confined to developers but extends also to other landowners within an SDZ and to interested members of the public.

18. Finally, it may be noted that the manner in which section 9 development plans and Part IX planning schemes may be varied or amended also differs. Development plans may be varied by planning authorities (subject now to the possible involvement of the Minister and/or the Office of the Planning Regulator) and, as already mentioned, planning authorities are required to adopt a new development plan at regular intervals. Part IX as enacted did not in fact include any provision for the variation or amendment of planning schemes (though provision was made for their revocation). Presumably, it was considered that such a provision was not necessary on the basis that planning schemes once adopted would simply be "*built out*" in due course. In any event, section 170A - inserted by the Planning and Development (Amendment) Act 2015 - now provides for the amendment of such schemes. Certain amendments may be approved by ABP whereas more significant amendments require compliance with the full section 169 procedure.

19. Pausing here, it will be evident that there are significant differences between development plans and planning schemes at every point of their respective life-cycles.

For the purposes of this appeal, the most significant difference is the respective effect of section 9 development plans and Part IX schemes. Development plans are not required to be (and generally are not) as detailed and prescriptive as planning schemes and in any event may be departed from, even to the extent of permitting development that would materially contravene the scheme in question. Planning schemes, on the other hand, are required to be highly prescriptive in content and, as a result, effectively dictate the permission decision, one way or the other. Land-owners and developers, as well as members of the public, have much greater clarity and certainty as to the nature and scope of development likely to be permitted within an SDZ than would be the case with development elsewhere. It follows, in my view, that the provisions of a Part IX planning scheme give rise to much more significant reliance interests than do the provisions of a development plan (though always bearing in mind the provision for amendment of planning schemes in section 170A).

20. While "*development plan*" is defined in terms which *appear* to exclude planning schemes (because such schemes are not made under section 9), the Developer points to, and places significant reliance on, section 169(9) PDA which is in the following terms:

> *"(9) A planning scheme made under this section shall be deemed to be part of the development plan in force in the area of the scheme until the scheme is revoked, and any contrary provision of the development plan shall be superseded."*

21. The Developer also emphasises section 170(1) PDA, which provides that:

> *"(1) Where an application is made to a planning authority under section 34 for a development in a strategic development zone, that section and any Permission Regulations shall apply, subject to the other provisions of this section".*

I will discuss section 169(9) and 170(1) – both of which sections predate the amendments of the PDA made by the 2015 and 2018 Acts - further below.

Ministerial Guidelines and SPPRs

22. Section 28(1) PDA provides that the Minister *"may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions."* The *"have regard to*" formula is found elsewhere in the PDA and was used in earlier planning legislation also. The nature and extent of the obligation thus imposed on planning authorities has been considered in a number of decisions, including *Glencar Explorations plc v Mayo County Council No 2*) [2002] 1 IR 84, *McEvoy v Meath County Council* [2003] 1 IR 208 and *Tristor Limited v Minister for the Environment* [2010] IEHC 397. Each of those decisions indicates that the obligation to "*have regard to*" guidelines is not to be equated with an obligation to "*comply with*" such guidelines: see for instance *Tristor* at paragraph 7.11 (per Clarke J).

23. Section 28 was amended by section 20 of the Planning and Development (Amendment) Act 2010 so as to strengthen the obligation of planning authorities to have regard to

Ministerial guidelines and to demonstrate that they have done so but the basic character of the statutory obligation did not alter. However, section 28 was then further amended by section 2 of the Planning and Development (Amendment) Act 2015 which inserted a new sub-section (1C) providing that section 28(1) guidelines "*may contain specific planning policy requirements*" that would be "*required to be applied by planning authorities and the Board in the performance of their functions."* Section 20 of the Planning and Development (Amendment) Act 2018 then substituted a new form subsection (1C) 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 function, comply.*

A new subsection (1D) was inserted at the same time, providing that a *"strategic environmental assessment or an appropriate assessment shall, as the case may require, be conducted in relation to a draft of guidelines proposed to be issued"* under section 28(1).

24. The 2015 Act also amended section 34 of the PDA, inserting a new subsection (2)(aa) 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"*

It also inserted a new subsection 2(ba) in the following terms:

> *"(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."*

The 2015 Act also inserted a definition of "*specific planning policy requirements*" in section 34(2)(d).

25. Finally, it is necessary to notice the amendments to section 169 PDA effected by the 2018 Act. In the first place, section 169(8) was amended to require that, when considering a draft planning scheme, a planning authority or ABP (as the case may be) shall consider *"any specific planning policy requirements contained in guidelines under [section 28(1)]."* A new subsection was also inserted immediately after that subsection, as follows:

> *"(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.*
>
> *(b) Where a planning scheme contravenes a specific planning policy requirement in guidelines under subsection (1) of section 28 by omission of a provision in compliance with that requirement, the planning scheme shall be deemed to have been made under paragraph (b) of subsection (4) of section 169 subject to the addition of that provision."*

While a development plan is required to be consistent with any applicable specific planning policy requirement in section 28(1) guidelines,[9] the relevant provision of the PDA (section 10) does not contain any provision equivalent to section 169(8A).

26. No other SPPR-related amendments were made to Part IX PDA by the 2015 or 2018 Acts. In particular, section 170 was not amended by either Act.

27. These amendments to the PDA are undoubtedly significant. They permit locally-adopted development plans to be overridden by the Minister, which clearly impacts on the balance between central and local control of planning and development policy and decision-making. As Clarke J noted in *Tristor* - in the context of section 31 of the PDA which permits the Minister to require planning authorities to take *"specified measures*" in relation to the contents of their development plan - issues of this kind have been the

[9] Section 10(1A) PDA (inserted by the 2018 Act).

subject of debate over many years. These issues- political versus professional decision-making, national versus local policy making - are, as Clarke J observed, primarily matters of policy to be determined by the Oireachtas and it is not for the courts to seek to second guess the policy choices made by the Oireachtas.

28. On the other hand, it appears to me to be entirely proper and necessary to construe the terms of such legislation carefully. Clearly, effect must be given to such legislation in accordance with its terms. But those affected by such legislation – and planning legislation obviously engages the interests of the community generally, potentially in very significant ways - are, in my view, entitled to expect clear words where the Oireachtas is legislating in this area. While it is within the competence of the Oireachtas to amend the PDA so as to confer on the Minister additional powers that impact on existing planning structures and processes, it should do so clearly and precisely and the courts should avoid giving such legislation effect beyond what is clearly provided for. It is essential that the respective competencies of all of the actors involved – Minister, planning authorities and ABP – should be clearly delineated. In other words – so it appears to me - where the Oireachtas legislates to transfer competence from planning authorities to the Minister, it should do so in clear terms and not by a sidewind: see for instance *Minister for Industry & Commence v Hales* [1967] IR 50. While the Oireachtas may be entitled to empower the Minister to issue SPPRs which have the effect of overriding the provisions of existing planning schemes, I agree with the High Court Judge that any such power requires to be conferred by clear statutory language.[10]

[10] Paragraph 63 of the High Court Judgment.

THE GUIDELINES AND SPPR 3

29. In August 2018 the Minister issued a *Consultation Draft* of the Guidelines. The text of SPPR 3 was similar to what is now SPPR 3(A), save that it referred expressly to planning schemes as well as to development plans and local area plans. Thus, the text proposed would have applied, without differentiation, to development plans, local area plans and planning schemes.

30. As required by section 28(1D) PDA, a draft of the Guidelines was the subject of strategic environmental assessment (SEA) in accordance with the European Communications (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (SI 435 of 2004). Those Regulations give effect in the State to Directive 2001/42/EC of 27 June 2001, commonly referred to as the SEA Directive. Article 13 of the Regulations required a process of consultation/public submission in relation to the draft Guidelines. Article 15 required the Minister to take account of any submissions or observations made on the draft and Article 16 of those Regulations (which reflects Article 9 of the SEA Directive) required (*inter alia*) the publication of a statement setting out how such submissions and observations had been taken into account and "*the reasons for choosing the plan or programme .. in light of the other reasonable alternatives dealt with*…" The statement mandated by Article 16 is commonly referred to as an SEA Statement.

31. Submissions/observations were made to the Minister on the draft Guidelines. A number of them expressed concern about – and in some cases voiced outright opposition to –

the proposed application of SPPR 3 to planning schemes, including submissions/observations from the Irish Planning Institute, RTPI Ireland, local authorities (including the Council) and ABP (which suggested that *"further consideration"* might be given to the apparent conflict between SPPR 3 and the legislation which required a planning scheme to specify maximum heights). These submissions emphasised the particular status of planning schemes and the adverse consequences of applying SPPR 3 to such schemes and many suggested that any change of policy should instead be effected by the amendment of existing schemes.

32. The final form Guidelines issued in December 2018. The SEA Statement in respect of the Guidelines was published at the same time.

33. Looking firstly at the Guidelines themselves, they explain (at paragraph 1.13) that they are issued by the Minister under section 28 and refer in that context to the provisions of section 28(1C) as regards specific planning policy requirements. There is then a paragraph on which the Developer places significant reliance:

> *"1.14 Accordingly where SPPRs are stated in this document, they take precedence over any conflicting policies and objectives of development plans, local area plans and strategic development zone planning schemes. Where such conflict arises, such plans/schemes need to be amended by the relevant planning authority to reflect the context and requirements of these guidelines and properly inform the public of the relevant SPPR requirements."*

The reference here to *"development plans, local area plans and strategic development zone planning schemes"* may be noted.

34. SPPR 1 requires planning authorities to support increased building height and density in locations with good public transport links, particularly town/city cores, by identifying *"through their statutory plans*" areas where increased height will be actively pursued and by not providing for "*blanket numerical limitations on building height*." The expression "*statutory plans*" is not defined in the Guidelines or the PDA but it seems to be a compendious shorthand for section 9 development plans, section 18 local area plans and section 169 planning schemes.

35. SPPR 2 injuncts planning authorities to ensure provision for appropriate mixes of uses in "*statutory plan policy*".

36. SPPRs 1 and 2 are found in a chapter of the Guidelines headed *"Building Heights and the Development Plan*" . SPPR 3 is found in the next chapter, headed "*Building Height and the Development Management process*". Chapter 3 identifies certain *"development management criteria*" which, if demonstrated to apply in relation to a specific development proposal, trigger the application of SPPR 3. These criteria run over 1½ pages of text and involve assessment at a number of different levels, including at city/town level, district/neighbourhood/street level, site/building level and specific assessments such as micro-climatic effects and "*relevant environmental assessment requirements*." Assessment of these criteria clearly involves significant levels of planning assessment and judgment. Where the relevant planning authority or ABP

considers that such criteria *"are appropriately incorporated into development proposals*" (and the reference to "*development proposals"* here is emphasised by the Developer) SPPR 3 is to be applied. SPPR then provides that:

> *"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;*
>
> *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)*[11] *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*

[11] The Council is both Development Agency and planning authority for the SDZ.

> *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."*

37. SPPR 3 as adopted differs significantly from the text proposed in the August 2018 Consultation Draft. What is now SPPR 3(A) no longer refers to planning schemes and, on its face, it appears to apply to development plans and local areas plans only. That impression is reinforced by SPPR 3(B) & (C) which address planning schemes specifically.

38. However, the Developer contends that the reference to *"development plan*" in SPPR 3(A) encompasses "*planning schemes",* relying in this context on the provisions of section 169(9) PDA (already set out above), as well as on the language of the Guidelines. The Developer also relies on the combined effect of section 34(2)(aa) and/or (ba) PDA and section 170(1) which, it is said, requires that SPPR 3, including SPPR 3(A), be applied to applications for planning permission made under a planning scheme to the same extent as it applies to applications made under a development plan.

39. For completeness, I should refer to SPPR 4. It imposes certain requirements on planning authorities in the planning of future development of greenfield or edge of city/town locations for housing. Even though SPPR 4 is in the chapter concerned with Building

Height and the Development Management process (and the Developer placed significant stress on the chapter headings) it is in fact concerned with development planning rather than the management and assessment of development proposals.

40. As I have mentioned, the SEA Statement was published at the same time as the Guidelines. There was a dispute in the High Court as to its admissibility and/or relevance to the proper interpretation of SPPR 3. The Judge concluded that he should have regard to it and considered that it *"put beyond all doubt"* the correct interpretation of SPPR 3.[12] On appeal to this Court, the objection to the Court having regard to the SEA Statement was not pressed and Mr Galligan effectively accepted that it was legitimate to have regard to it. Instead Mr Galligan concentrated on seeking to persuade the Court that the SEA Statement did not in fact properly bear the meaning or effect attributed to it by the Judge.

41. The SEA Statement notes (at 4.3.3. under the heading "*Application of SPRRs on extant SDZ schemes")* that a *"significant number of submissions"* had referred to the application of the SPPRs to extent SDZ schemes, concern being expressed that applying SPPR 3 "*would adversely affect the operation of SDZ's and call into question the certainty that SDZs offer developers."* The "*settled*" nature of the scale and scope of SDZ development would be *"adversely affected*" (it was said) and, in the absence of any rights of appeal in an SDZ following the approval of a planning scheme, "*any move*

[12] At paragraph 99.

away from the scheme without public consultation would undermine confidence in the SDZ process."

42. The SEA Statement then sets out how such submissions had influenced the final Guidelines:

> *" The purpose of SPPR 3 is to allow planning authorities to consider, and where they approve, grant permission for taller buildings where they accord with the criteria set out and positively align with the objectives of the NPF, notwithstanding contrary objectives that may be in statutory plans. In relation to SDZs, their planning schemes do have a particular status, by virtue of their particular adoption process and operation. In view of this, on balance, it is appropriate that the implications of SPPR3 be further considered. However, while they are approved through a particular process, it should not be the case that an approved SDZ made at a particular time remains 'immune' to the evolvement of Government policy in relation to spatial planning. The Planning and Development Act 2000 (as amended) does allow for the capacity to amend a planning scheme. The purpose of Section 3 including SPPR 3 is to clearly and unequivocally support the promotion of taller buildings in appropriate urban locations, subject to appropriate safeguards. In this regard, SDZ's should be required to undertake a review of the planning scheme to ensure that the criteria and general policy, as set out, in Section 3 of these guidelines is fully reflected.*

> *Policy SPPR3 has been amended so that SDZ's are required to be reviewed to ensure the planning scheme fully reflects the criteria and general policy as set out in Section 3 of the Guidelines. It has been clarified that SDZ's coming into force after these guidelines will not have to be reviewed, as account will have to be taken of the criteria and policy in their formulation. …"* [13]

43. Finally, in the section of the SEA Statement containing the SEA assessment of the changes to the final guidelines, reference is made to the amendment of the policy by the inclusion of an additional Part B requiring schemes to be reviewed. The text notes that "*any modifications proposed to a planning scheme must be considered in the context of SEA, EIA and AA screening."*[14]

[13] Pages 14-15.

[14] At pages 23-24.

DISCUSSION

General

44. That section 28 PDA (as amended in 2015 and again in 2018) permits the Minister to issue what are, in effect, mandatory planning requirements is not in dispute in these proceedings.

45. Section 28 provides that guidelines - and therefore, it seems, any SPPRs contained in such guidelines – may issue regarding *any* of the functions of planning authorities under the PDA. It appears to follow that the ambit of permissible guidelines (and SPPRs) extends in principle to the functions of planning authorities under Part IX PDA (SDZs) as it does to their functions under other parts of the Act.

46. On its face, therefore, section 28 *prima facie* appears to give the Minister power to issue guidelines (and SPPRs) regarding the determination of scheme applications. That was not in dispute in this appeal and no argument was made to the effect that, notwithstanding its apparent breadth, section 28 ought to be construed more narrowly having regard to the provisions of Part IX PDA, and in particular section 170(2). Any such argument must await determination in proceedings where that issue properly arises.

47. However, even on the premise that the Minister has power to issue guidelines (and SPPRs) regarding the determination of scheme applications, it does not necessarily

follow that a power conferred in such general terms would extend to issuing SPPRs that override the terms of an existing planning scheme. Furthermore, and in any event, it is clear that section 28 gives significant flexibility to the Minister. He or she may issue guidelines applicable to certain functions only of planning authorities and/or which apply differently to different functions, such as the functions of planning authorities in relation to "*ordinary*" applications for planning permission and those relating to scheme applications.

48. It follows that there is no basis for any expectation or assumption that section 28 guidelines will necessarily apply, or apply in the same way, to scheme applications as to "*ordinary*" applications for planning permission. To the contrary, it appears reasonable to approach any such guidelines with an expectation that they will recognise and reflect the specific statutory characteristics of planning schemes and of planning authorities' functions under such schemes.

49. The decision-making process in relation to "*ordinary*" applications is significantly more flexible than its planning scheme counterpart. The section 9 development plan is much less prescriptive and such constraints as it may impose are not immutable – a planning authority may invoke the material contravention procedure and ABP is not, in general, constrained by the development plan (though bound to have regard to it). The addition of further matters to be considered by way of section 28 guidelines (including SPPRs) does not fundamentally alter the character of that decision-making process.

50. In contrast, scheme applications stand or fall by strict reference to the terms of that scheme. That is not an incidental feature of Part IX – it is its central and defining characteristic. Any section 28 guidelines (including SPPRs) affecting the basis on which planning authorities decide scheme applications give rise to a significant potential conflict with the very clear statutory mandate in section 170(2) to *grant* permission where a proposed development *"would be consistent with any planning scheme in force for the land in question*" and to *refuse* permission for any development *"that would not be consistent with such a scheme."* In my view, the addition of further matters to be considered (particularly ones requiring significant levels of individualised planning assessment) would significantly alter the character of the decision-making process.

51. That can be illustrated in concrete terms by reference to the terms of SPPR 3(A) here. If applicable to existing planning schemes, it would require planning authorities to undertake a complex assessment of any given "*development proposal*" against the "*development management criteria*" contained in Chapter 3 of the Guidelines, as well as taking account of "*the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines.*" Such a decision-making process would differ very significantly from that mandated by section 170(2) PDA.

52. Furthermore, if at the conclusion of that process a planning authority concluded that it should *grant* permission for a development exceeding in height the maximum height applicable under the relevant planning scheme, the planning authority would then be left to confront the significant conflict between the terms of SPPR 3(A) and the clear

and unqualified directive in section 170(2) requiring a *refusal* of planning permission in such a scenario.

53. There is a further point. In such a scenario, the decision of the planning authority would not be subject to appeal: section 170(3). Presumably - as the Judge observes[15] - the rationale for the exclusion of an appeal to ABP from a decision of a planning authority on a scheme application is that the decision simply involves a limited assessment of consistency against a scheme in whose adoption ABP has had a significant role. But in a scenario where SPPR 3(A) applied to scheme applications, that rationale has no application.

54. Thus, even if in principle the Minister's power under section 28 PDA extends to issuing guidelines/SPPRs that affect the decision-making of planning authorities on scheme applications, any exercise of such a power potentially gives rise to significant difficulty.

55. That the Oireachtas was alive to these issues is suggested by a consideration of the PDA following its amendment in 2015 and 2018.

56. In the first place, the only express reference to SPPRs in the context of planning schemes is in section 169(8) and (8A) both of which relate to the *making* of planning schemes (including, it would appear, amended schemes). There was considerable debate about section 169(8A) in the High Court, with the Developer arguing that its

[15] At paragraph 48 of the High Court Judgment.

effect was to alter the Scheme, with immediate effect, by the deletion of the height limits contained within it. The Judge did not accept that argument, holding that subsection (8A) applied to the making of a planning scheme in circumstances where an SPPR was already in place and had no application where - as here - the SPPR issued after a scheme had been made: paragraphs 66 and 67 of the High Court Judgment. In argument before this Court, Mr Galligan effectively accepted that this was correct. In my opinion, he was right to do so. As the Judge observed, section 169 is directed to the making of a scheme. Furthermore, the reference in subsection (8A) to a planning scheme containing a provision that "*contravenes*" an SPPR clearly indicates that the subsection is concerned with a situation where a scheme has been made that does not properly reflect an *existing* SPPR. So the provisions of section 169(8) and (8A) do not assist the Developer. On the contrary, those provisions suggest that, as regards planning schemes, the Oireachtas chose to give effect to SPPRs through the process of making/amending such schemes. If (as the Developer contends) SPPRs apply, without more, to planning schemes (including existing planning schemes) by virtue of section 169(9) and/or section 170(1) PDA, it is difficult to understand why the Oireachtas considered it necessary to enact section 169(8A) and why it did not consider it necessary to enact an equivalent provision in relation to section 9 development plans.

57. Secondly, the key provision in Part IX PDA relating to *decisions* on scheme applications - section 170(2) – makes no reference to SPPRs and on its face appears to exclude the possibility of such decisions being made by reference to anything other than the applicable planning scheme. The absence from section 170, and from Part IX

generally, of any provision providing for any role for SPPRs in planning authority decision-making on scheme applications appears to me to be highly significant.

58. But - so the Developer argues - the effect of section 169(9) and/or section 170(1) is that such decision-making is subject to Ministerial guidelines and SPPRs to the same extent as planning authority/ABP decisions on "*ordinary*" planning applications. According to the Developer, the effect of these provisions is effectively to apply section 34(2)(aa) and (ba) to scheme applications.

59. I do not agree.

60. For the reasons I have set out above, I agree with the Judge that clear and unambiguous words are needed if the PDA is to be construed as conferring on the Minister a power to issue SPPRs that can effectively override the provisions of extant planning schemes. None of the provisions identified in argument come close to satisfying that requirement. The Oireachtas has plainly provided that Ministerial SPPRs may override developments plans. In this context, it is noteworthy that the draftsman appears to have considered it necessary so to provide in express and specific terms: section 34(2)(ba). That is so notwithstanding the apparent breadth of section 34(2)(aa) and, indeed, the generality of section 28(1C) PDA itself. The absence of any equivalent such provision in respect of planning schemes is both striking and revealing. If the Oireachtas intended that SPPRs should have the same effect *vis à vis* existing planning schemes as they were to have *vis à vis* development plans, it is very difficult indeed to understand why no provision

equivalent to section 34(2(ba), referable to planning schemes, was inserted by way of amendment of the PDA.

61. Far from clearly having the effect contended for, it appears to me that the provisions relied on by the Developer, properly construed, do not provide for the application of SPPRS to existing planning schemes.

62. Taking section 170(1) first, it provides that section 34 and any Permission Regulations shall apply to a scheme application. However, that is expressly stated to be *"subject to the other provisions of this section"* and is thus subject to the provisions of section 170(2). I have already noted that section 170(2) was not amended by the 2015 or 2018 Acts. The application of section 34, including section 34(2)(aa) and (ba) to scheme applications is therefore "*subject to*" section 170(2). The effect of that proviso, in my opinion, is that, in the event of conflict, section 170(2) prevails. It follows that the terms of section 170(2) exclude the application of any provision of section 34 that would operate to permit or require a planning authority to decide scheme applications other than by reference to the relevant planning scheme and/or that would dilute the prohibition on granting permission for any development not consistent with such scheme.

63. As to section 169(9) PDA, the Developer says that this deems a planning scheme to form part of the relevant development plan. Thus, it is said, the Scheme here is deemed to form part of the Dublin City Development Plan – the "*relevant development plan*"

for the purposes of SPPR 3(A) – with the result that SPPR 3(A) was applicable to the applications for permission made by the Developer.

64. There are a number of considerations that lead me to conclude that this argument is incorrect. Firstly, and fundamentally, section 169(9) does not amend or affect the definition of *"development plan"* in section 2(1) PDA. If the Oireachtas intended references to *"development plan"* in the PDA to be read as including Part IX planning schemes, it could – and presumably would – have so provided in section 2(1). Secondly, the Developer's argument is wholly at odds with the fact that "*development plan*" is in fact used throughout the PDA in a way which clearly indicates that it does not mean or include planning schemes. Thus the provisions of the PDA that govern the making of development plans have no application to planning schemes. Neither do those provisions that regulate the variation of development plans. The reference to *"development plan or local area plan*" in section 34(6)(a) (permitting planning authorities to grant permission for development that would materially contravene such a plan) plainly has no application to planning schemes either. Equally, the reference to *"development plan*" in section 34(2)(a) cannot, in my opinion, be read as referring to a planning scheme because the obligation on planning authorities is not to have "*regard"* to a planning scheme but to apply it strictly in accordance with section 170(2). So any argument to the effect that section 169(8) requires references to *"development plan*" in the PDA to be read as including "*planning scheme*" is, in my opinion, clearly mistaken.

65. When this point was raised by the Court, Mr Galligan accepted that the references to "*development plan*" in the provisions of the PDA governing the making and variation

of developments plans clearly did not encompass planning schemes. The Developer's argument was, it was said, limited to section 34. No legal or logical basis on which section 169(9) might be interpreted so as to apply, and apply only, to section 34 was identified. In any event, the same difficulties arise from the Developer's point of view with respect to the references to "*development plan*" in section 34. Ultimately, it seems, the Developer is driven to contend that, of the very many references to "*development plan*" in the PDA, there is a single one – that in section 34(ba) – that bears an extended meaning by reason of section 169(9). In my view, such a contention is not plausible.

66. In my opinion, the purpose and effect of Section 168(9) (which of course pre-dates the amendments of 2015 and 2018) is limited (though important). The PDA does not provide for a separate application regime for applications for development in the area of a planning scheme. Such applications are thus made under section 34: see section 170(1). Section 34 provides generally for applications to be assessed by reference to the relevant section 9 development plan. Such a plan may, on its face, regulate development within the area of a planning scheme. In such circumstances, section 168(9) avoids conflict between the section 9 development plan and the Part IX planning scheme by deeming the scheme to form part of the development plan and giving the scheme effect over any contrary provision of the development plan.

67. Section 169(8) PDA is therefore, in my view, a purely mechanical or procedural provision intended to ensure the *primacy* of the planning scheme. The interpretation advanced by the Developer would effectively turn that provision on its head by equating

planning schemes and development plans, thereby undermining the statutory primacy of planning schemes. I would reject that interpretation.

68. As regards section 34(2)(aa) and (ba) PDA, if these were read to apply to scheme applications, that would create a serious conflict with the clear and unqualified terms of section 170(2) and, as a matter of basic statutory construction, such a result is to be avoided. But one does not have to have resort to general principles in this context. As already discussed, section 170(1) provides that section 34 applies to scheme applications subject to section 170(2). In my opinion, that proviso serves to avoid any such conflict and, accordingly, section 34(2)(aa) and (ba) have no application to a scheme application. That reading is consistent with the structure of the PDA as described in detail above.

69. But it seems to me that there is, in fact, no necessary conflict between section 34(2) and section 170(2). If the expression "*development plan of a local authority"* in section 34(2)(ba) is interpreted in accordance with section 2(1) – a development plan adopted under section 9 – then there is no conflict between that provision and section 170(2). Section 2(1) permits "*development plan*" to be given a different meaning where the context requires but the context does not require any different meaning here – quite the contrary in my view. The context points firmly to "*development plan*" in section 34(2)(ba) being given its section 2(1) meaning.

70. Furthermore, and in any event, even if Section 34(2)(aa) and/or (ba) were in principle applicable to scheme applications, their actual effect would depend on the terms of the relevant SPPR and it is to the interpretation of SPPR 3 that I now turn.

The Proper Approach to the Interpretation of the Guidelines

71. The parties agree that the principles set out in the Supreme Court's decision in *XJS v Dun Laoghaire – Rathdown Co Co* [1986] IR 750 apply to the interpretation of the Guidelines though there was some difference between them as to how those principles are properly to be applied.

72. *XJS v Dun Laoghaire – Rathdown Co Co* was concerned with the interpretation of an individual planning decision - a refusal of planning permission by ABP - and in his judgment McCarthy J emphasised that such documents were not Acts of the Oireachtas or subordinate legislation *"emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material*". They were, McCarthy J continued:

> *"to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."* (at 756)

73. In *Lanigan v Barry* [2016] IESC 46, 1 IR 657, which concerned the interpretation of a planning permission. Clarke J (as then he was) referred to *XJS Investments* and

indicated that the "*well-settled*" principles described by McCarthy J required "*the court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them"* (at 665).

74. There is High Court authority to the effect that similar principles apply to the interpretation of developments plans: *Tennyson v Corporation of Dun Laoghaire* [1991] 2 IR 127.

75. As I have noted, there was agreement that the principles in *XJS* were applicable and the differences between the parties were ones of nuance and emphasis. Mr Galligan emphasises that the Guidelines here are directed to planning professionals (both within planning authorities and ABP and in private practice – the "*agents*" of developers referred to by McCarthy J in *XJS*) and assume a significant degree of planning expertise. While not advocating that the canons of construction applicable to statutes should be applied to the Guidelines, he emphasised the need for certainty and submitted that it was appropriate to read the language of the Guidelines by reference to the terminology used in the PDA and, where the Guidelines use terms defined in the PDA – such as "*development plan*" – then, at least in the absence of any contrary indication in the Guidelines, it is reasonable to assume that those terms are intended to have the same meaning as in the PDA.

76. Mr Connolly, in response, emphasised the injunction of McCarthy J in *XJS* to construe planning documents in their "*ordinary meaning"* and expressed agreement with the

approach of the High Court Judge in rejecting the "*legalistic*" approach advocated by the Developer, an approach which (in the words of the Judge) was *"predicated on the legal nicety that a planning scheme is 'deemed' to form part of the development plan"* (Judgment, at paragraph 88).

77. I agree that section 28 guidelines ought not be construed as if they were a statute. However, the scope and effect of such guidelines differ materially from individual planning decisions. Guidelines issued under section 28 PDA, particularly those which contain SPPRs, may impact significantly on the performance by planning authorities and ABP of their functions under the PDA and may have broad and significant planning and development implications for the wider public. It therefore appears reasonable to expect that they should be drafted with care, that the nature and scope of the requirements thereby imposed on planning authorities and ABP should be specified clearly and that they should be capable of operating consistently with the PDA.

78. I therefore agree with Mr Galligan to the extent that section 28 guidelines should be construed in the context of and by reference to the PDA and, in particular, those provisions of the PDA that provide the statutory framework governing the performance of the "*functions*" to which such guidelines are directed. In my view, the "*ordinary and reasonably informed persons"* referred to by McCarthy J in *XJS* must, in this context, be taken to be aware of such matters. Even allowing that section 28 guidelines do not emanate from the Office of the Parliamentary Counsel, it does not appear to me to impose an excessive burden on the draftsman to assume that he or she is familiar with

the structure and language of the PDA and intends such guidelines to operate in a way consistent with it.

79. However, I do not think that the adoption of such an approach to the Guidelines, and in particular SPPR 3(A), assists the Developer. It is the interpretation of SPPR 3, including SPPR 3(A), advanced by the Council, rather than that advanced by the Developer, that appears to me to be consistent with the language and structure of the PDA. The Developer's interpretation would, in my view, give rise to significant conflict with the PDA's language and structure.

The Construction of SPPR 3(A)

80. The starting point is, of course, the language of SPPR 3, and particularly SPPR 3(A). It refers to *"relevant development plan or local area plan*" but does not refer to "*planning scheme*". That appears to be a meaningful omission because "*planning scheme(s)"* are referred to in SPPR 3(B) & (C). As one would expect, therefore, the draftsman appears to be alive to the distinction between development plans on the one hand and planning schemes on the other.[16]

[16] There is a further point about the language used in SPPR 3(A) which I mention though it was not identified in argument by either party. SPPR 3(A) refers to *"specific objectives of the relevant development plan or local area plan."* Section 10(2) PDA requires a development plan to include a series of objectives, including objectives for zoning. Local area plans may include such objectives: section 19(2). In contrast, section 168 (which governs the contents of planning schemes) makes no reference to development objectives. This aspect of SPPR 3(A) appears

81. The reasonably informed reader of SPPR 3 would also be alive to the distinction between development plans and planning schemes and, in particular, would appreciate the significant difference in the nature and scope of the assessment involved in determining ordinary applications for planning permission and that involved in relation to scheme applications. In that context, it seems to me, the reader would, in general, readily understand why developments plans and planning schemes might be considered to warrant differential treatment in this context and would, specifically, appreciate the significant difficulties that would arise for planning authorities if SPPR 3(A) was to apply to scheme applications.

82. Looking at SPPR 3 as a whole, it appears to have a logical and coherent structure, which in turn appears to reflect the structure of the PDA itself. SPPR 3(A) applies to development plans and local area plans (consistent with the provisions of section 34(2)(aa) and (ba)) and SPPR 3(B) applies to planning schemes (consistent with the provisions of section 169(8) and (8A) PDA). Both seek to give effect to Government policy but in different ways that reflect the significant differences between "*ordinary*" applications for permission and scheme applications. SPPR 3(B) gives effect to *"Government policy that building heights be generally increased in appropriate urban locations"* by requiring existing schemes to be reviewed (a review that, contrary to the Developer's submissions, has a specific time-frame in that it is directed to be

---

to support the construction of it urged by the Council. However, given that this argument was not made to the Court, I do not consider it appropriate (and nor is it necessary) to attach any weight to it.

undertaken "*upon the coming into force of these guidelines"* i.e. immediately) while also recognising the special character of planning schemes and avoiding the imposition of conflicting requirements on planning authorities administering such schemes.

83. On the other hand, if SPPR 3(A) is construed as the Developer contends it should be, the purpose of SPPR 3(B) is very difficult to discern. If SPPR 3(A) is an effective conduit for the immediate application of Government building height policy within SDZs – as the Developer submits – what is the need for an expedited review of existing planning schemes? And why is there no equivalent provision in relation to developments plans/local area plans? No satisfactory answer to these questions – which mirror issues that arise in relation to the PDA itself – was offered by the Developer.

84. Accordingly, the Council's interpretation of SPPR 3 is consistent with its language, gives coherent effect to all of its provisions and avoids the significant difficulties that would arise for planning authorities required to apply SPPR 3(A) to an existing planning scheme notwithstanding the potential conflict with the mandatory provisions of section 170(2) PDA.

85. The Developer makes a number of arguments by reference to the language of the Guidelines which I will examine before considering the SEA Statement.

- First, it is said, the Guidelines frequently use the term "*development plan*" so as to refer to development plans, local area plans *and* planning schemes. I do not think that is correct as a matter of fact. There are a limited number of

occasions when "*development plan*" appears to be used in such a compendious way but there are many instances where development plans, local area plans and planning schemes are separately referred to (not least in paragraph 1.14 on which the Developer places such reliance). The reality appears to be that the language used in the Guidelines is not always precise or consistent. However, it is certainly not the case that "*development plan*" is consistently used to refer to development plans, local area plans and planning schemes (or developments plans and planning schemes). There are many instances where separate reference is made to development plans, local area plans and planning schemes. Most significantly, and in any event, the language used in SPPR 3 itself refers separately to development plans, local area plans and planning schemes. "*Development plan*" in SPPR 3(A) clearly does not include "*local area plan"* because specific reference is made to both and "*planning scheme(s)"* are specifically referred to in SPPR 3(B) & (C).

- Second, reliance is placed on the statement in paragraph 1.14 of the Guidelines that "*where SPPRs are stated in this document, they take precedence over any conflicting policies and objectives of development plans, local area plans and strategic development zone planning schemes."* This is a general statement and is followed immediately by a similarly general statement to the effect, where such conflicts arise, *"such plans/schemes need to be amended".* That is consistent with the Council's interpretation of SPPR 3. It says that the "*precedence*" of SPPR 3 in relation to planning schemes is given effect to by SPPR 3(B) which requires the review and amendment of existing planning

schemes. The Judge accepted that submission and I do also. In any event, the "*precedence*" required to be given to SPRR 3(A), and in particular its interaction with existing planning schemes such as the Scheme, depends on the terms of SPPR 3, as properly construed and, in my opinion, paragraph 1.14 of the Guidelines (which is not part of SPPR 3) throws little or no light on that issue.

- Third, the Developer places significant reliance on the reference in the paragraph immediately preceding the text of SPPR 3 to *"development proposals*". That, it is said, is broad enough to encompass applications for planning permission for development in an SDZ and implies that SPPR 3(A) applies to such applications. I do not agree. Whether as a matter of language *"development proposals"* (a phrase not used in SPPR 3 itself) might be understood to include such applications is not the issue. The issue is whether the reference in SPPR 3(A) to *"development plan*" is properly to be read as including a "*planning scheme*". The apparent breadth of the phrase "*development proposals*" appears to me to be of no relevance to that issue.

The SEA Statement and the Changes to the Draft Guidelines

86. Looked at in its own terms, I would clearly conclude from the language of SPPR 3 that SPPR 3(A) is not intended to apply to applications for development in the area of existing planning schemes and that SPPR 3 applies to such schemes to the extent, and only to the extend, provided for in SPPR 3(B).

87. I agree with the High Court Judge that this conclusion is reinforced - indeed strongly reinforced - by a consideration of the nature and extent of the difference between the terms of SPPR 3 as originally proposed in the Draft Guidelines and the terms in which SPPR 3 was ultimately adopted in the Guidelines and the reasons for those differences as explained in the SEA Statement. Given the statutory context in which public submissions and observations on the draft Guidelines were made and having regard to the purpose of the SEA Statement, I can see no basis for excluding these from consideration. As the Judge correctly observed, the SEA Statement is not an extraneous document but is rather an integral part of the decision-making process under the SEA Directive. As I have said, that position was accepted on appeal by Mr Galligan.

88. Mr Galligan focused his submissions on persuading the Court that the changes made to SPPR 3 during the statutory process were not meaningful or, at least, did not have the meaning and effect attributed to them by Simons J. Notwithstanding the force with which those submissions were advanced, I am not persuaded by them. In my opinion, the changes made are consistent only with an intention to exclude planning schemes from the scope of what is now SPPR 3(A) (effected simply and clearly by the deletion of the reference to planning schemes from the text) and instead to make a different form of provision for the advancement of Government policy on building height in areas covered by planning schemes – the process of review and amendment provided for in (new) SPPR 3(B). The explanation for those changes in the SEA Statement seem to me simply to confirm what is evident from the text in any event.

The Ministerial Statements

89. The Council also seeks to rely on written answers given by the Minister which include statements as to the effect of SPPR 3 on planning schemes. I see no basis on which those statements are admissible. Asked by the Court whether an affidavit from the Minister as to the effect of SPPR 3 would be admissible in its interpretation, Mr Connolly appeared to accept that it would not be. I agree and I can see no basis for treating written answers given by the Minister - months subsequent to the adoption of the Guidelines – any differently. Ministerial statements as to the meaning and/or effect of the Guidelines are, in my opinion, no more admissible than Ministerial statements as to the meaning or effect of a Statutory Instrument made by a Minister, or a statute promoted by that Minister, would be. As the Judge observed, the interpretation of SPPR 3, and of the Guidelines generally, is ultimately a question of law for the Court and, as a matter of law, the opinion of the Minister as to its appropriate interpretation has no special status or effect.

Section 169(8)

90. As well as relying on section 169(8) as a basis for contending that the references to *"development plan"* in section 34 PDA (or, more correctly, in section 34(2)(ba)) should be understood to include planning schemes, the Developer relied on that provision to argue that the reference to "*development plan"* in SPPR 3(A) should be so understood. It was this argument that the High Court Judge dismissed as a "*legal nicety"* and that

he clearly considered to be inconsistent with the approach to interpretation mandated by *XJS*.

91. I agree with the Judge that it is very difficult to reconcile such an interpretative approach with the principles in *XJS* which, it was common case, are applicable to the Guidelines. The Developer's argument appears to me to go beyond interpreting the Guidelines in the context of and by reference to the PDA and to involve instead treating the Guidelines as if in fact they formed part of the PDA. I agree with the Judge that that is not an appropriate approach.

92. Furthermore, and in any event, for the reasons set out above, I do not accept that section 169(8) has the effect contended for by the Developer. In my opinion, section 169(8) does not compel SPPR 3(A) to be read in the manner contended for by the Developer or provide any proper basis for such a reading, which would be inconsistent with the clear language and structure of SPPR 3 and which would involve giving SPPR 3(A) a meaning and effect which the Minister very clearly did not intend. Far from ensuring the primacy of planning schemes, such a reading would significantly undermine that status and create very significant difficulties for planning authorities in deciding on scheme applications.

93. Thus, even if regard is had to section 169(8) in this context, in my view it does not avail the Developer.

CONCLUSION

94. In my view, the language and structure of SPPR 3 point clearly to the conclusion that SPPR 3(A) does not apply to scheme applications and that, in relation to development governed by planning schemes in place at the time of the adoption of the Guidelines, Government policy on building heights is intended to be implemented through the review and amendment of such schemes mandated by SPPR 3(B). That conclusion is strongly supported by consideration of the SEA Statement and the changes made to the draft Guidelines. That interpretation of SPPR 3 is consistent with the language and structure of the PDA, recognises the specific statutory characteristics of planning schemes and of planning authorities' functions under such schemes and avoids the difficulties that would arise for planning authorities - and for the public - in the event that they were required to apply SPPR 3(A) in the face of conflicting provisions in such schemes.

95. In the circumstances, the High Court Judge was correct to conclude that SPPR 3(A) does not apply to planning schemes and, specifically, that it had no application to the Scheme governing the two planning applications made to the Council by the Developer.

96. The High Court Judge separately concluded that these proceedings were premature and that the Developer ought to have awaited the outcome of its planning applications. This aspect of the High Court Judgment is considered in detail in the judgment of Costello JJ, with which I agree. The facts here are somewhat peculiar. These proceedings were

commenced a number of months *after* the making of the relevant planning applications. But for the extensions of time volunteered by the Developer the applications would have been determined by the Council by the time the proceedings were commenced. As the Judge observed, the costs of making the applications had been incurred and, in those circumstances, there appears to have no good reason why the Developer should not have awaited the Council's decisions on the applications. The refusal of the applications could have then been challenged in the manner contemplated by sections 50 and 50A PDA and the issue presented by these proceedings could have been raised and determined in such proceedings.

97. That is not to say that judicial review proceedings under the PDA are necessarily the exclusive means for determining planning-related legal issues in all circumstances. In different circumstances, the issue raised here might properly have been the subject of declaratory proceedings, though perhaps more properly between the Developer and the Minister given that it was the Minister rather than the Council that had issued the Guidelines. In principle, it appears to me that where a significant legal issue arises as to the proper framework within which a planning application falls to be assessed, there may be a compelling interest in having that issue determined definitively prior to the making of the application. Arguably, the issue presented here was such an issue. But that is not how the Developer proceeded here. It elected to make the two planning applications and, having done so, ought to have awaited their determination before bringing these proceedings.

98. Notwithstanding this Court's conclusion - agreeing with Simons J - that the proceedings were premature, given that Simons J went on to determine the substantive issue in the proceedings, it appeared to me to be appropriate, in the interests of legal certainty, that this Court should address this issue also.

In circumstances where this judgment is being handed down electronically, Costello and Donnelly JJ have indicated their agreement with it.