THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 557
[2020 No. 469 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A and 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SPENCER PLACE DEVELOPMENT COMPANY LTD.

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on Thursday the 12th day of November, 2020

1. In 2009, ministerial guidelines were issued on sustainable residential development in urban areas. These are one of a number of policy documents referenced in the decision of An Bord Pleanála that is challenged in the present case.

2. In May 2012, the government decided to wind up the Dublin Docklands Development Authority. That gave rise to a proposal to have a strategic development zone (SDZ) designation to allow continued fast track planning in order to maintain the focus on regeneration of the area.

3. The Planning and Development Act 2000 (Designation of Strategic Development Zone: North Lotts and Grand Canal Dock) Order 2012 (S.I. No. 530 of 2012), was made on 18th December, 2012 designating Dublin City Council as the development agency to prepare a planning scheme for the docklands area.

4. Such a scheme was then duly prepared by the council. In the process of drafting, a strategic environmental assessment (SEA) report dated November 2013 was prepared which considered various alternative scenarios for building heights. A SEA statement was also prepared dated November 2013. The planning scheme was approved by the council on 5th November, 2013. Central Government has described this as a "*world class*" scheme and a "*paragon"* of such development and the Department has noted that *"the scheme is one of the State's most successful strategic development zones in terms of delivery of development and establishing a new . . . urban block structure"*.

5. The scheme divides the docklands area into city blocks. The relevant ones for present purposes are blocks 2B and 2D, which allow for a maximum of six storey commercial and seven storey residential development. The site in question is on the eastward side of a city block bounded by Sherriff Street Upper, New Wapping Street, Mayor Street Upper and Park Lane.

6. The making of the scheme was appealed to the board and submissions were made seeking an increase in building heights. The board rejected those submissions and approved the planning scheme on 16th May, 2014.

7. On 4th December, 2015 a first planning permission was granted for a seven storey block of residential units on the site. Construction has commenced and I am told that internal construction is continuing.

8. On 19th July, 2016 the Rebuilding Ireland housing strategy was adopted. That plan gave rise to the Planning and Development (Housing) and Residential Tenancies Act 2016, which was enacted in December 2016 and indeed which unusually references the policy document in its long title. The Act provides for strategic housing development (SHD), which essentially, having regard to the definition of that term in the Act, means large housing developments. The present application comes within that definition. The Act provides for a procedure for planning applications directly to the board for a limited time period, potentially up to the end of 2021 (see s. 4(2)).

9. The current Dublin City Development Plan was made in September 2016 and came into operation in October 2016. It identifies the planning scheme as the means to achieve the planning objectives for the docklands area.

10. A National Planning Framework was published by Government in May 2018. That document is referred to in the board's decision here. The framework describes itself as a "*high level*" document to be followed by more detailed documents.

11. Two further planning permissions were granted in 2018: on 5th August, 2018 and 18th December, 2018 providing for modifications of the previous permission.

12. A consultation draft of guidelines on urban development and building heights was issued in August 2018. It proposed a specific planning policy requirement (SPPR) numbered SPPR3 that where guidelines regarding building height had been met, the planning authority could approve development even if the development plan, local area plan or planning scheme indicated otherwise.

13. The board a made a submission dated 1st October, 2018 to the Minister that "*legislation governing Strategic Development Zones requires a planning scheme to specify maximum heights of buildings … [t]he draft policy (particularly in the wording of SPPR3) might appear to conflict with that."* The reference to acting inconsistently with the planning scheme was dropped in the final version. The SEA document for the final version notes that SDZs "*do have a particular status by virtue of their particular adoption process and operation".* While an approved SDZ is not "*immune"* from evolution of government policy, it is clear from the SEA that the intention was that the mechanism to achieve this was "*a review of the planning scheme*."

14. The final guidelines were issued in December 2018 under s. 28 of the 2000 Act. They state that they are "*building from*" the National Planning Framework (p. 1), and the revised policy requirement, SPPR3, can be summarised as providing that:

(a). an application complying with the criteria in the guidelines may be approved even where the provisions of the development plan or local area plan indicate otherwise - this doesn't apply to a planning scheme for an SDZ: *see Spencer Place Development Company Ltd. v. Dublin City Council* [2020] IECA 268 (Unreported, Court of Appeal, 2nd October, 2020) *per* Collins J. (Costello and Donnelly JJ. concurring);

(b). the development agency shall review the planning scheme to fully reflect the guidelines - the government policy that building heights be generally increased in appropriate urban locations shall be articulated; and

(c). planning schemes approved after the coming into force of the guidelines don't need to be reviewed.

15. On 11th February, 2019 the developer here made a fourth planning application on the basis (at the risk of over-summarisation) that the guidelines should be complied with pending any formal amendment to the planning scheme. Accordingly, a height increase up to thirteen storeys was sought. That was refused on 31st May, 2019 by the city council.

16. The developers sought declaratory relief that the guidelines should be followed. That was refused by Simons J. in *Spencer Place Development Company Ltd. v. Dublin City Council* [2019] IEHC 384 (Unreported, High Court, 30th May, 2019). Costs followed the event: *Spencer Place Development Co. Ltd. v. Dublin City Council* [2019] IEHC 631 (Unreported, High Court, Simons J., 6th September, 2019). An appeal was rejected in *Spencer Place Development Co. Ltd. v. Dublin City Council* [2020] IECA 268.

17. Following a non-statutory public consultation process, the council submitted proposed amendments to the planning scheme on 31st May, 2019. On 12th October 2019, the board determined that the amendment constituted a material change under s. 170A of the Planning and Development Act 2000, and commenced a consultation process. The proposed amendments still await a decision by the board. The board is not itself entitled to amend the proposed amendment unless the provision so amended "*would not represent … a more significant change than that which was proposed*" (s. 170A(4)(b)). The amendment would retain the general pattern of six to seven storey maximum, but would allow up to twelve storeys at corners and an additional storey set back.

18. A fifth planning application was lodged on 20th August, 2019 by way of a SHD application directly to the board. That sought a height increase for up to thirteen storeys. The city council's view was that there would be "*significant negative impact"* and the development would represent "*a bulky and inelegant design response that would represent a monolithic appearance*". It also took the view that it "*would provide a poor standard of residential*

accommodation … and result in an insular form of occupancy". Issues were also raised with the design. Indeed the board inspector also had some reservations about the design saying for example that provision for *"blank walls for long stretches of the elevations together with service doors and venting is poor and could result in a barren and featureless street at eye level"*, that the retention of a pumping station in the centre of the development was "*regretted*" and that *"the erection of high railings is particularly unattractive"*. The inspector recommended refusal of permission essentially on the grounds that it was not compatible with the planning scheme as it stood at that point in time.

19. In December 2019, the board made a first decision disagreeing with the inspector and granting permission. A first set of judicial review proceedings were brought by the city council [2020 No. 68 JR], and *certiorari* was granted by consent on 20th January, 2020 with the matter being remitted back to the board.

20. A second decision, which is the one challenged here, was made on 3rd April, 2020 to grant permission for building heights in excess of those provided for in the scheme. The present judicial review was then instituted. Leave was granted by McDonald J., the primary relief sought being *certiorari* of the decision of the board of 3rd April, 2020. I have now received helpful submissions from Mr. Stephen Dodd S.C. (with Mr. Stephen Hughes B.L.) for the city council, from Mr. Brian Foley S.C. (with Ms. Rosalind O'Connell B.L.) for the board, and from Mr. Eamon Galligan S.C. (with Ms. Suzanne Murray B.L.) for the developer. On 16th October, 2020, following the hearing, I informed the parties of the order being made and indicated that reasons would be given later.

Costs rules

21. While *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 186 (Unreported, High Court, Simons J., 29th March, 2019), which is potentially relevant to costs, is currently under appeal, all parties nonetheless agreed that the case could proceed on the basis of applying the principles of s. 50B of the 2000 Act even if the law were to subsequently evolve in another direction.

Whether the board has jurisdiction to allow a material contravention of an SDZ planning scheme

22. Implicit in the impugned decision was the board's view that s. 9(6) of the Planning and Development (Housing) and Residential Tenancies Act 2016, together with s. 37(2) of the Planning and Development Act 2000, confer the jurisdiction on the board to grant permission in an SDZ in material contravention of a planning scheme. Four bases for this alleged jurisdiction were advanced.

23. Firstly, it was claimed that s. 9(6) of the 2016 Act allows the board to permit a material contravention of the development plan or a local area plan on certain conditions within an SDZ and that in this context "*development plan*" must include an SDZ planning scheme. But a planning scheme is not a development plan or a local area plan. While it is deemed to be part of a development plan under s. 169(9) of the 2000 Act, that is primarily for the purposes of the making of an application (*see per* Collins J. in *Spencer Place*).

24. Mr. Galligan drew an analogy with other provisions where certain documents are deemed to be part of the development plan, for example under s. 14(5)(b) of the 2000 Act, where proposals relating to rights of way were deemed to be part of such a plan. But those documents are drafted as part of the development plan and approved by members, so it makes sense to deem them part of the development plan as soon as they can become legally effective. Section 31(17) of the 2000 Act allows a ministerial direction to have effect as being deemed to be part of the plan. But in a sense that reinforces the point made by the applicant here, because the process for making such a direction is quite different from that for a development plan. So the context of the 2000 Act must frequently require the reference to development plan as not including such a direction (see in particular *per* Collins J. in *Spencer Place*, at para. 64, on this issue generally).

25. Section 1(2)(a) of the 2016 Act provides that that Act is to be construed as one with the 2000 Act; and s. 2(1) of the 2000 Act defines development plan, except where the context otherwise requires as meaning *"a development plan under section 9(1)".* A planning scheme is not adopted under s. 9(1) and the context doesn't require the expression "*development plan*" to include planning scheme in the context of a material contravention.

26. It seems to me that s. 9(6) of the 2016 Act has no application to material contravention of the planning scheme. That is reinforced by the fact that criteria for material contravention in s. 37(2) don't make a lot of sense in the context of their application to a planning scheme. In particular, the first criterion is where the development is of strategic or national importance, but that could apply to any development in the context of a planning scheme where the whole purpose of the scheme is to deal with developments of strategic or national importance. Thus, applying s. 37(2)(b) to the context of planning schemes would allow wholesale contravention of planning schemes notwithstanding that an additional criterion would still have to be met in terms of s. 37(2)(b). There is no clear basis to say that this is consistent with the legislative intention or the careful system for adoption and implementation of the planning scheme.

27. A further contradiction that would be created by such an interpretation is that it would be logically inconsistent with the limitation on the board's entitlement to amend a planning scheme, which it can only do in limited circumstances set out in s. 170A(4)(b) if the change "*would not represent, in the opinion of the Board, a more significant change than that which was proposed*." Under the board's interpretation, it can achieve results that it could never achieve in relation to amending the scheme simply by allowing material contraventions in the case of individual planning applications.

28. The overall statutory policy is clear that the planning scheme forms a very detailed framework for the area concerned with primacy over the development plan. It would seem to follow from that that not only the planning authority, but also the board, must work within the scheme and not make a decision in contravention of it. Thus, while s. 9(6) of the 2016 Act and s. 37(2) of the 2000 Act, give the board a jurisdiction to permit material contravention of a development plan, that does not include a planning scheme.

The same logic would seem to apply beyond the housing context under s. 37G(6) of the 2000 Act which allows the board to permit a material contravention of the development plan in the strategic infrastructure development context. Similarly, there is no reason to read "*development plan*" there as including a planning scheme either.

Section 4(4) of the 2016 Act

29. Much reliance is placed by the board and the developer on s. 4(4) of the 2016 Act which provides that, *"[i]n the case of an application for permission for a strategic housing development that is located in a strategic development zone, the applicant may elect to make the application to the planning authority under section 34 of the Act of 2000 rather than under this section and, accordingly, section 170 of that Act applies to the application to which the said section 34 relates*."

30. Thus, the Oireachtas has given a developer the option of applying either directly to the council with no appeal under normal SDZ rules or directly to the board under SHD rules. A conclusion that the board has no jurisdiction to depart from the planning scheme is in my view consistent with there being such an option in s. 4(4) of the 2016 Act, because it would be totally inconsistent and illogical if fundamentally different rules applied at the whim of the developer making the application. In a normal SDZ application the council is bound by the planning scheme (see s. 170(2) of the 2000 Act). It would be illogical to simply give an option that would fundamentally change the outcome, which would be the result if the board did in fact have jurisdiction to depart from the scheme. The board's interpretation was that the application of s. 170 is "*the price you pay*" if you choose the option of going to the council, but that seems to beg the question. Of course s. 170 applies to an application to a planning authority, but that doesn't mean that the rules of the process before the board have to be different. Mr. Foley also says that an interpretation that similar rules apply would deprive the election of a benefit, but that seems to be a desirable and rational outcome. Developers should not be able to game the system. There is no rational basis for giving an absolute choice between two entirely different regimes with different rules and potentially different outcomes. It's hard to see what's in it for the public interest. The legislation shouldn't make the outcome of a planning application a toss-up depending on the subjective choice of the developer as to which forum to shop his or her application into. Again, there is an analogy with the rules for strategic infrastructure development generally under s. 37A(4) of the 2000 Act, which provides for a similar choice. And again, it would be inconsistent and illogical if the mere choice of forum would permit the board to materially depart from the planning scheme in a way that the council could not. Mr. Galligan submits that (leaving aside the inferential reference in s. 4(4)), planning schemes aren't mentioned expressly in the 2016 Act and that therefore the obligation to have regard to the development plan in s. 9(2)(a) of that Act must mean that the development plan includes a planning scheme. But again, the ambiguous wording of the legislation is open to an opposite interpretation and it seems to me that a better reading is that the lack of reference to planning schemes in the 2016 Act is consistent with the intention that the board is simply bound by the planning scheme and doesn't have a jurisdiction to depart materially from it. If the board is so bound, it wouldn't make sense for the board to "*have regard to*" the planning scheme by

mentioning it in s. 9(2)(a) because that would be a weaker obligation. In any event, even if "*development plan*" in s. 9(2)(a) of the 2016 Act includes a planning scheme, that doesn't have the consequence that "*development plan*" in s. 37(2) of the 2000 Act includes such a scheme.

Argument that development plan incorporates the planning scheme

31. A fall-back argument is made, which to an extent is reflected in the wording of the board's decision here, to the effect that the Dublin City Development Plan incorporated the planning scheme, thus triggering an entitlement on the part of the board to allow a material contravention. But that argument can't hold water because that would create an entitlement to override the planning scheme simply by virtue of an attempt to give effect the scheme *via* the mechanism of the development plan. The intention of the legislation is that the scheme has priority (see *Spencer Place per* Collins J.), and accordingly that scheme could not be diluted simply by being mentioned or incorporated into the development plan.

Contention that there is no prohibition on material contravention

32. A final fall-back argument was that there was no express prohibition on material contravention of the planning scheme, the argument being that because s. 170(2) prohibits the planning authority from acting inconsistently with the scheme, there was nothing similar in relation to the board. But it would completely undermine the planning scheme to allow such a procedure based simply on the lack of an express provision, doubly so where material contravention of the development plan requires express provision. On the premise, as I have set out above, that in the s. 37 context *"development plan"* does not include a planning scheme, then the mere absence of a prohibition on overriding it couldn't give rise to a jurisdiction to do so. In fairness to the board and the developer, the drafting of the legislation does leave something to be desired in terms of expressly articulating some of these issues.

SEA directive

33. The applicant also argued that its interpretation of jurisdiction was consistent with the SEA directive 2001/42/EC, which is designed to give effect to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, done at Kyiv on 21st May, 2003. Without having to get to the question of what procedures would apply to a material contravention of a planning scheme (even assuming such were permitted, which I don't accept), the very fact that the SEA process applies to the scheme itself and to any amendment to it is a reinforcing reason not to infer any intention to create a jurisdiction to contravene the result of such a process without there being a clear and express procedure to do so. Whether such a hypothetical procedure would be even valid in EU law terms doesn't arise because there is no such express procedure. That, in my view, reinforces the conclusion that the board has no jurisdiction to grant an application in material contravention of a planning scheme. A more detailed examination of the substantive issue of the precise interface between the SEA and EIA directives in the context of departures from development plans and planning schemes will have to wait another day.

Section 28 guidelines

34. The council also contended that the board were in breach of the s. 28 guidelines, in particular SPPR3. It seems to me that that argument is not determinative having regard to the foregoing analysis, but given that the guidelines don't override the planning scheme (see *Spencer Place per* Collins J., at para. 60), and given that the wording of SPPR3 envisages that the appropriate mechanism to implement the guidelines in the planning scheme context is by way of an amendment to the planning scheme, the guidelines don't assist the board here. Rather, the outcome vindicates the judgment of the board's inspector who noted that the amendments to the planning scheme had not yet been determined so that the development would be premature pending the conclusion of that process. He specifically took the view that it would "*run counter to Ministerial guidelines"* to authorise the application for the simple reason that the guidelines envisaged a review of the scheme as being the mechanism to implement objective SPPR3.

35. A final dimension worth alluding to is that an interpretation that keeps the board within the parameters of a planning scheme is one that is more likely to lead to *"[a] high level of environmental protection and the improvement of the quality of the environment … in accordance with the principle of sustainable development*", to borrow the language of art. 37 of the EU Charter of Fundamental Rights (leaving aside the question of to what extent that provision formally applies here). Of course, at any given time or in any given context, there may be considerable pressure for particular developments or categories of development. Mr. Foley placed much stress on government policy regarding the need for more housing, for example. But the best way to ensure that such developments are "*sustainable*" in the sense that they are built in the right place, to the right design, rather than to have other policy considerations overwhelm environmental values, is to follow an overall plan that is adopted in a more holistic, overall and considered way than in the high-pressure situation of a given application. It is true, as Mr. Galligan says, the board must always consider proper planning and sustainable development, but that doesn't have the implication that giving a discretion to the board guarantees better environmental protection than following a detailed planning scheme.

36. It is important to distinguish the environmental impact of process issues from the impact of particular planning judgments. While the court is not in a great position to intrude on the latter, and while in fairness to Mr. Galligan one could advance an arguable case for more high rise, high density and compact city developments resulting in fewer transport emissions, that doesn't have the implication that any given development must be allowed. An overall plan seems more likely to promote a high level of environmental protection than *ad hoc* decisions.

37. Mr. Galligan also suggested that one should trust the board, and that's fine insofar as it goes, but one could to some extent ask here which board are we to trust? The one that approved the planning scheme or the one that departed from it? One could equally ask why not trust the city council who put together the detailed planning scheme after an extensive consultation process. Mr. Galligan calls the council the "*junior partner*" in the development consent process whereas the board is the "*national authority*". That is a

point that can be made in any similar hierarchical system, but it doesn't reach the process question. Comparing the council's decision on an individual planning application with the board's decision on appeal would be comparing like-for-like, but comparing an overall scheme with an individual consent is not.

38. Without trespassing on matters of planning judgment (such as how much high rise should be allowed and where), one can conclude that an interpretation that favours giving effect to a more considered, more holistic, planner-led analysis adopted after greater consultation is more likely (I would say significantly more likely), to promote proper planning and sustainable development than an analysis that focuses on individual developer-led projects as they arise. That is so even bearing in mind that developer-initiated projects do have to comply with certain objective requirements anyway, such as zoning and such as regard being had to the development plan.

39. Mr. Galligan submitted that there was no EU obligation to come up with plans that predetermined the outcome such that a particular planning application would be just a "*mechanistic*" process. I will assume that that is correct, so that where the plan leaves matters open for consideration then there is room for divergent judgment as to a particular application. But insofar as the plan is determinative of aspects of a proposed development, such an approach seems more likely to provide an environmentally sustainable answer than allowing *ad hoc* departures on the basis of particular developer's applications from time to time. That is not in itself to argue against the merits of this particular application or to dismiss the possible environmental benefits of high density development, but even acknowledging such possible benefits doesn't answer the question of what exactly and where exactly.

40. To clarify, however, this isn't a case where I am departing from the black-letter meaning of the statute in order to give effect to the more fundamental requirement of a high level of environmental protection. Nor is it a case of downgrading the policy of having more housing. Such a policy does not predetermine the question of where and how that housing should be built. Rather, it is a case where the result is independently arrived at in terms of statutory interpretation. That result is however reinforced by and consistent with the principle of a high level of environmental protection which is a fundamental principle of EU law that is better promoted by considered holistic plans over *ad hoc* departures from such plans, all other things being equal.

41. In circumstances where in my view the board had no jurisdiction to grant the application, the other administrative law points regarding complaints about the reasoning process, errors, irrelevant considerations and failure to give valid reasons for departing from the board's earlier decision to approve the scheme, or the EIA directive points, don't arise for decision.

Order

42. Before concluding, I might say that I don't in any way dismiss the argument for more high-rise in Dublin docklands or even for this particular development - those are matters for planning judgement in the correct statutory context. And I emphasise in fairness to

the board and the developer that the drafting of the legislation leaves something to be desired - the point at issue here is one that ideally would have been dealt with explicitly. Hindsight is perfect vision of course. But none of that takes away from the conclusion as to the lack of jurisdiction on the part of the board and accordingly, the order made on 16th October, 2020 was:

(i) to quash the board's decision as sought in para. D(1) of the statement of grounds; and

(ii) to decline to make an order referring the matter back to the board under O. 84, r. 27(4) RSC because the board has no jurisdiction to grant the application.