THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 58
[2020 No. 45 J.R.]

BETWEEN
RITA O'NEILL (ON BEHALF OF GLENHILL ESTATE AND PREMIER SQUARE RESIDENTS D.11)

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
RUIRSIDE DEVELOPMENTS LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 28th January, 2021

Introduction

1. This judgment addresses an application made by the respondent ("*The Board*") under s. 50A (7) of the Planning and Development Act, 2000 ("*The 2000 Act*") seeking leave to appeal against the determination made by me in my judgment delivered in these proceedings on 22nd July, 2020 whereby I made an order quashing the decision of the Board dated 15th November, 2019 to grant planning permission to the first named notice party ("*Ruirside*") for the construction of a strategic housing development proposed on part of the former Premier Dairies site at Finglas Road, Dublin 11 which is situated in close proximity to the applicant's home. The present application is opposed by the applicant. Ruirside has not participated in the application for leave to appeal. While it reserved the right to participate in the application and to make submissions, it ultimately did not do so. However, it continues to reserve the right to seek a remittal order under O.84 r.26 (4) of the Rules of the Superior Courts. This is an issue that will require to be addressed in the event that leave to appeal is refused.

2. Written submissions in support of the application for leave to appeal were delivered on behalf of the Board on 16th September, 2020 and a booklet of authorities was subsequently made available to the applicant (who acts in person) and the court. On 2nd October, 2020, written submissions were delivered on behalf of Ms. O'Neill. Ms. O'Neill also confirmed that she consented to the court addressing the application on the basis of the written submissions. Thereafter, on 5th October, 2020, the solicitors for the Board confirmed that the Board also agreed to proceed on the basis of the written submissions and without the need for an oral hearing. On that basis, the court reserved its judgment as of 5th October, 2020.

3. Under s. 50A (7) leave to appeal will only be granted where the court certifies (a) that its decision involves a point of law of exceptional public importance and (b) that it is desirable in the public interest that an appeal should be taken. For this purpose, the Board proposes that there are four points of law which meet those criteria. The precise text of the points of law are set out below. It is sufficient, at this point, to note that they relate, in broad terms, to a determination made by me in my judgment in relation to the application of a specific planning policy requirement ("*SPPR*") issued pursuant to s.28 of

the 2000 Act by the Minister of Housing, Planning and Local Government in December 2018 namely SPPR3(A) of the Guidelines for Planning Authorities on Urban Development and Building Heights ("*the Building Height Guidelines*") and also a determination made by me as to insufficiency of reasons given by the Board for its decision.

The judgment of 22nd July, 2020

4. In order to understand the issues which arise, it is necessary, in the first instance, to summarise the findings which I made in relation to SPPR3(A) and in relation to insufficiency of reasons in my judgment of 22nd July. In the first place, I drew attention to the relevant provisions of the 2000 Act and of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("*the 2016 Act*"). In this context, the development, the subject matter of these proceedings, is one which falls within the ambit of the 2016 Act and was addressed by the Board on that basis.

5. In para. 141 of my judgment, I drew attention to the provisions of s. 9 (3) (a) of the 2016 Act which is in mandatory language and under which the Board, in making its decision in relation to an application under the 2016 Act, is required to apply, where relevant, SPPRs contained in any guidelines issued by the Minister under s.28 of the 2000 Act. Section 9 (3) (a) is in the following terms:

> *"When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000".*

6. As Collins J. in the Court of Appeal observed, very recently, in his judgment in *Spencer Place Development Co. Ltd. v. Dublin City Council* [2020] IECA 268 at p. 2 (a judgment delivered on 2nd October, 2020 after I gave my judgment in July) planning authorities are statutorily required to "*comply*" with SPPRs in the performance of their functions. They therefore differ from ministerial guidelines generally to which the Board must have regard but which are not binding on the Board. The decision of the Court of Appeal in the *Spencer Place Development* case is examined in more detail at a later point in this judgment. For completeness, it should be noted that the decision does not address the 2016 Act. However, it does consider s.28(1C) of the 2000 Act which, as explained further below, imposes a similar obligation on planning authorities and the Board to comply with SPPRs in the performance of their functions.

7. In para. 142 of my judgment, I drew attention to the provisions of s. 9 (3) (b) of the 2016 Act which provides that, where SPPRs are contained in guidelines issued by the Minister, then, to the extent that they are different to any provision of the Development Plan, those requirements will apply instead of the relevant provisions of the Development Plan. At this point, I should explain that this provision is relevant in the particular circumstances of this case where the development proposed by Ruirside exceeds the maximum height permissible under the relevant Dublin City Development Plan. SPPR 3 (A) permits a planning authority or the Board to approve a development which exceeds the maximum height allowed under a development plan where certain criteria are met.

8. In paras. 144 to 145 of my judgment, I noted the provisions of s. 28 of the 2000 Act (which deal with ministerial guidelines generally) and to s. 28 (1C) of the 2000 Act which, as noted in para. 6 above, imposes a similar obligation on the Board to comply with SPPRs. In para. 144 of my judgment, I referred to the difference in language between s. 28 (1) under which planning authorities are required to have regard to ministerial guidelines in the performance of their functions and s. 28 (1C) which, in contrast, provides as follows:

> *"(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, … and the Board shall, in the performance of their functions, comply." (emphasis added).*

9. Having drawn attention to the provisions described in paras. 5 to 8 above, I next addressed, in my judgment of 22nd July, the provisions of s. 9 (6) of the 2016 Act in conjunction with s. 37 of the 2000 Act. The combined effect of ss. 9 (6) of the 2016 Act and s. 37 of the 2000 Act is that the Board may only grant permission for a development which materially contravenes a development plan where it considers that certain statutory criteria are met.

10. In this case, there was no dispute that the proposed development is inconsistent with the Dublin City Development Plan 2016-2022. Under s. 16.7 of that plan, a building height limit of 16 metres is prescribed for the location of the proposed development. In contrast, the height proposed for the development ranges from 18.9 metres to 32.7 metres.

11. In paras. 155 to 162 of my judgment I considered the relevant provisions of the Building Height Guidelines and in particular the provisions of SPPR3 (A). In para. 156 of my judgment, I emphasised that, as appears from para. 1.13 of the guidelines, it is clear that they are issued pursuant to s. 28 of the 2000 Act and that the Board is required to apply any SPPR specified in the guidelines. I also drew attention to para. 1.14 of the guidelines which, consistent with the provisions of s. 28 (1C) of the 2000 Act and s. 9 (3) (b) of the 2016 Act, states that the SPPRs contained in the guidelines take precedence over any conflicting policies and objectives of development plans.

12. SPPR3 (A) requires an applicant for planning permission to set out how a development proposal complies with a number of specific criteria which are set out in para. 3.2 of the Building Height Guidelines. In para. 157 of my judgment, I highlighted the requirement contained within para. 3.2 of the criteria referable to SPPR3(A) that the applicant is required to demonstrate to the satisfaction of the planning authority (in this case the Board) that the proposed development satisfies the criteria which are set out over the next three pages of the guidelines and which are broken down into four distinct categories. I also identified that, among the criteria that a proposed development must satisfy are the following:

(a) It is a requirement that the development site should be well served by public transport with high capacity, frequent service and good links to other modes of public transport;

(b) In the case of development proposals incorporating increased building height, there is a requirement that these should successfully integrate into/enhance the character and public realm of the area;

(c) There is also a requirement that the form, massing and height of a proposed development should be carefully modulated so as to maximise access to natural daylight and views and minimise overshadowing and loss of light;

(d) The guidelines also state that specific assessments may be required including an assessment that the proposed development allows for the retention of important telecommunication channels.

13. Having outlined the terms of SPPR3 (A) I next sought to summarise the relevant material placed before the Board in support of the case made by Ruirside that the requirements of SPPR3 (A) had been satisfied. These included a number of expert reports which it is not necessary to address in detail here but it is important to note that they included a report which addressed the contravention of the Dublin City Development Plan by reference to the specific criteria contained in para. 3.2 of the Building Height Guidelines – namely the criteria for the application of SPPR3 (A). The relevant summaries are to be found in paras. 163 to 168. In the following paragraphs of my judgment, I outlined the views expressed by the inspector (appointed by the Board) in her report. In para. 172 of the judgment, I described how the inspector had referred to the "*detailed assessment*" provided by Ruirside as to how the development was said to comply with the criteria for assessing building height at the scale of the city/town, district/neighbourhood/street and scale of the site/building. These are some of the criteria prescribed by para. 3.2 of the Building Height Guidelines. I noted that, in para. 12.4.6 of her report, the inspector referred to the expert material placed before the Board and expressed the view that the Board could grant permission for the development having regard to (*inter alia*) the Building Height Guidelines. In para. 174 of my judgment, I expressed the view that, considered on its own, the reasoning of the inspector in her report might appear to be quite sparse and lacking in detail but that, when read in conjunction with the expert reports before the Board, it seemed to me that the reasoning might arguably be sufficient to pass the test set by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31. That said, I also made an *obiter* observation that it would be advisable that, in any report of an inspector (or, in the absence of such report, in a decision of the Board) that an analysis should be carried out as to how the proposed development complies with the criteria set out in para. 3.2 of the Building Height Guidelines. As noted above, it is in para. 3.2 of the guidelines that the criteria for the application of SPPR3 (A) are to be found. I made clear that, in making that observation, I was not setting out any definitive view.

14. The reasons why I ultimately came to the conclusion that the decision of the Board must be quashed are to be found in paras. 175 to 187 of my judgment. In paras. 175 to 178, I referred to what I described as a fundamental inconsistency in the approach taken by the inspector in her report between her conclusion in relation to the application of the guidelines, on the one hand, and the findings made by the inspector elsewhere in her report in relation to a number of matters, on the other hand. In this context, in para. 177 of my judgment, I identified four areas of inconsistency:

(a) In para. 12.3.14 of her report, the inspector observed that public transport was limited to public bus and that the submissions from observers would suggest that capacity is poor. I drew attention in that context to the extensive evidence placed before the Board by local residents to that effect. The finding made by the inspector in para. 12.3.14 of her report is plainly inconsistent with the criterion contained in para. 3.2 of the Building Height Guidelines that the site must be well served by public transport with high capacity, frequent services and good links to other modes of public transport;

(b) In para. 177(b) I drew attention to the "*public realm*" and the "*setting of key landmarks*" criteria, on the one hand, and drew attention, on the other hand, to what was said by the inspector at para. 12.3.14 of her report that it was "*questionable*" as to whether the entrance to a local shopping centre requires a landmark building in order to promote legibility and wayfinding. In those circumstances, I formed the view that a question arises as to how the inspector (and in turn the Board) can have concluded that the public realm requirements of para. 3.2 of the Building Height Guidelines were satisfied. I noted that there may well be a straightforward answer to the question but it is not apparent either from the inspector's report or from the subsequent Board direction or decision.

(c) The third inconsistency related to the criterion in para. 3.2 of the Building Height Guidelines underpinning SPPR3(A) that the development must make a positive contribution to the urban neighbourhood and the criterion addressing the requirement to modulate a form, massing and height of a proposed development so as to maximise access to (*inter alia*) natural daylight and views. Of relevance, in this context, was the finding by the inspector in para. 12.3.15 of her report that the proposed heights of nine to ten storeys (particularly in the case of Block 2) will have an "*overbearing impact and would be visually obtrusive when viewed from the dwellings along Glenhill Road*". The inspector, in the same paragraph, also noted that there was a "*paucity of photomontages/CGI's*" submitted with the application to demonstrate the potential impact on Glenhill Road. While the inspector went on to say that the relationship between the proposed development and the houses on Glenhill Road (where Ms. O'Neill resides) was clearly shown on section drawings submitted, the fact remains that the inspector found the proposed building to have an overbearing impact on the houses on Glenhill Road and to be visually obtrusive when viewed from those houses. I expressed the view that no justification was subsequently articulated either by the inspector or by the Board as to how,

notwithstanding this finding, the development, as proposed by Ruirside, could be said to make a positive contribution to the urban neighbourhood as required by para. 3.2 of the guidelines. Equally, there was no explanation given in the report as to how, notwithstanding the inspector's finding as outlined above, the form, massing and height of the proposed development has been sufficiently modulated so as to maximise views from Glenhill Road. While I observed that there may well be a straightforward answer to this, the answer was not apparent from either the inspector's report or from the subsequent Board direction or decision. Furthermore, neither the inspector nor the Board articulated how, notwithstanding the "*paucity*" of photomontages, there was sufficient information available to reach a conclusion that the form, massing and height of the proposed development had been carefully modulated so as to maximise views from other areas.

(d) With regard to the retention of important telecommunication channels, I observed that it was clear from the expert report placed before the Board that it was predicted that the development will block some of the signal coming from the telecoms equipment currently situated on the roof of the nursing home on the opposite side of Finglas Road with the result that the telecommunications coverage to the north of the proposed development will be limited. In order to mitigate this loss of connectivity, the expert report submitted by Ruirside (as an express part of its justification for coming within SPPR3(A)) indicated that Ruirside was applying for permission for construction of antennae/telecoms equipment on the proposed development itself. Notwithstanding this, the Board decided, as a condition of the grant of permission, that no additional development can take place above roof parapet level of the development unless authorised by a further grant of planning permission. I came to the conclusion that this condition imposed by the Board was inconsistent with the requirements of SPPR3(A) that important telecommunications channels should be retained. As noted above, the material before the Board was clear that, if the development is constructed, it will interfere with telecommunications. Furthermore, there is no guarantee that planning permission will be granted in the future for new aerials and antennae on top of the development to compensate for the predicted loss of signal from the antennae and related infrastructure currently mounted on the roof of the nearby nursing home. This seemed to me to give rise to a very stark inconsistency.

15. Against that backdrop, I formed the view (as set out in para. 178 of my judgment) that this gave rise to a fundamental inconsistency between the approach taken in s. 12.4 of the inspector's report (to the effect that the Building Height Guidelines permitted the development to proceed) and the other findings made by the inspector as summarised in para. 13 above. Of course, the inconsistencies identified above could potentially have been remedied (assuming they are capable of being remedied) when the matter was subsequently considered by the Board. In that context, in para. 179 of my judgment I noted that the reasons given by the Board do not stop at the inspector's report. I referred to the note appended to the Board direction dated 15th November, 2019 in which the Board stated that it did not accept the inspector's recommendation to reduce the

height of certain elements of the proposed development. In that note, the Board stated that it had regard to the existing pattern of development and character of Finglas Road, the orientation and separating distance to existing buildings and the difference in level between the Finglas Road and Glenhill Road and the Board stated that it considered that *"the height of the proposed development would be acceptable and would not have material adverse impact on adjoining dwellings, and that the omission of floors as proposed by the Inspector would not be necessary for the proper planning and sustainable development of the area".*

16. I then referred to a number of considerations which I believed were relevant to the Board's obligation to provide reasons. I referred to the observations of O'Donnell J. in *Balz v. An Bord Pleanála* [2019] IESC 90 at para. 57 and I also referred to the extent of the concerns expressed not merely by Ms. O'Neill but many local residents (who submitted observations in opposition to the application for permission) about the height of the development and its impact on the residents in its immediate vicinity. In this regard, I highlighted in para. 180 of my judgment that the height of the proposed development was obviously of acute concern to a large number of local residents and that rational and detailed reasons had been given by the inspector as to why the height of certain elements of the development should be reduced such that, if the Board was to take a contrary view, it would seem to be a fairly basic requirement that, in those very particular circumstances, the Board should spell out, in an appropriate level of detail, why, notwithstanding the extent of the concern expressed by local residents (which was reflected in the findings made by the inspector) it was justifiable to permit the development to proceed without any reduction in height. At this point, I mentioned that this factor seemed to me to be particularly relevant in the context of an application under the 2016 Act which gives local residents only one opportunity to have their concerns and objections considered by an expert planning body. While I accepted that the Board is given a significant measure of latitude in the way in which it expresses itself and is not required to give reasons in the same detailed way as a court will do, the significance of the issue and the extent of the reasons given by the inspector for taking a contrary view made it difficult to understand or accept that the Board could properly adopt the broad-brush approach which had been taken in the note to the Board direction quoted in para. 15 above.

17. I also drew attention to what was said by Clarke C.J. in Connelly, at para. 9.7, that where the Board differs from its inspector, "*then there is clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable".*

18. In para. 182 of my judgment, I expressed the view that it would, of course, have been open to the Board, assuming that there was appropriate material before it, to reach a different conclusion to that reached by the inspector in relation to these matters and to address and remedy the inconsistencies summarised in para. 14 above. However, I observed that the brief note appended to the Board direction does not explain how the

Board arrived at the conclusion stated therein. In particular, it does not explain how, notwithstanding the view expressed by the Inspector about poor capacity on the existing public bus route, the requirement contained in para. 3.2 of the Building Height Guidelines that the site is well served by public transport could be said to be satisfied. I also expressed the view in para. 183 of my judgment that it is difficult to see how the decision of the Board in any way overcomes the finding of the Inspector that it is questionable as to whether the entrance to a warehouse style Clearwater Shopping Centre requires a landmark building. This was especially so in light of the express reliance by the experts in the Material Contravention Statement submitted to the Board on this factor as a basis for meeting the "*public realm*" criterion set out in para. 3.2 of the guidelines.

19. It is, however, important to keep in mind that the view expressed by me in para. 183 of my judgment must be read with what I had previously said in para. 182 of my judgment that it would have been open to the Board, assuming that there was appropriate material before it, to reach a different conclusion to that reached by the inspector. It is equally important to keep in mind that, as noted in para. 177 (b) of my judgment, there may well be a straightforward explanation for the approach taken by the Board but this is not apparent either from the inspector's report or from the subsequent Board direction or decision. While the note appended to the Board direction refers, in extremely general terms, to the existing pattern of development, the orientation and separation distances to "*existing buildings*" and the difference in level between Finglas Road and Glenhill Road, no detail is given as to how these factors individually or collectively address the inspector's specific finding that the development as proposed, will have an overbearing impact on Glenhill Road. I noted that this was especially puzzling given that the inspector expressly stated, in para. 12.13.17 of her report that, notwithstanding the separation distance, Block 2 of the development will appear as a six to seven storey development and will, as a consequence, have an overbearing impact.

I also indicated in para. 183 of my judgment that the same difficulty arises in relation to the finding of the Inspector that the development will have an overbearing impact on the homes on Glenhill Road and will be visually obtrusive. In para. 184 of my judgment, I observed that, in the absence of some explanation from the Board, it was not possible to see how the Board could conclude that the criterion that a development must be carefully modulated so as to maximise (*inter alia*) views could be said to be satisfied in circumstances where the inspector had found that there was a paucity of photomontages. Again, it is important to keep in mind that my finding to this effect is expressly stated to be made, in the absence of some explanation from the Board. It must also be seen against the observation made by me in para. 177(c) of my judgment that there may well be a straightforward answer to this but that answer is not apparent either from the inspector's report or from the subsequent Board direction or decision.

20. Furthermore, at para. 185 of my judgment, I expressed the view that it was not possible to understand, on the basis of the Board direction, how the Board came to the conclusion that the requirements of para. 3.2 of the Guidelines were satisfied in circumstances where, on the basis of the materials before the Board, there was a predicted interference

with telecommunication channels and where, as a consequence of the decision of the Board itself, the mitigation measures proposed by Ruirside (namely the erection of aerials and antennae on the roof of the proposed development in order to mitigate the blocking of signals from the telecommunications infrastructure on the nearby nursing home) would have to be made subject to a future application for planning permission (in respect of which there could be no guarantee that planning permission would be granted). Again, it is important to bear in mind that this conclusion is based on the obvious inconsistency in relation to this factor. While I did not expressly say this in my July 2020 judgment, this is an issue which may be capable of explanation. However, the explanation is not apparent from any of the materials placed before the court.

21. Ultimately, in para. 186 of my judgment I expressed the view that, in light of the considerations summarised above, I did not believe that the Board direction (on the subsequent Board order) could be said to successfully explain why the requirements of SPPR3(A) have been satisfied notwithstanding the issues identified in my judgment and summarised above. In those circumstances, I found that the Board was not lawfully entitled to grant permission for the proposed development which materially contravened the Dublin City Development Plan insofar as it will exceed the maximum height of sixteen metres permitted under that plan. I made it plain, however, that this finding was on the basis of the material before the court. I found that the case made to the contrary both by the Board and Ruirside in their respective statements of opposition must fail and that Ms. O'Neill must succeed in her case that the development materially contravenes the development plan. I also came to the conclusion that no sufficient reasons had been given which justify or explain the material contravention of the Dublin City Development Plan. On those grounds, I held that Ms. O'Neill must succeed in her claim for an order quashing the decision of the Board.

The principles governing an application for leave to appeal under s.50A (7)

22. Under s.50A (7) of the 2000 Act, leave will only be granted by the court where the court is in a position to certify:

    (a) that its decision involves a point of law of exceptional public importance; and

    (b) that it is desirable in the public interest that an appeal should be taken.

23. The leading authority on s. 50A (7) is the decision of MacMenamin J. in *Glancré Teo v. An Bord Pleanála* [2006] IEHC 250 in which he set out ten principles which must be borne in mind. Not all of these ten principles are relevant for present purposes. Insofar as they are relevant, they are as follows:

    "1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.

    2. The jurisdiction to certify such a case must be exercised sparingly.

3. *The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.*

4. *…*

5. *The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.*

6. *The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which, although they may overlap, to some extent require separate consideration by the court ….*

7. *The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.*

8. *Normal statutory rules of construction apply which mean* inter alia *that 'exceptional' must be given its normal meaning.*

9. *'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.*

10. *Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases".*

24. It is also clear from the decision of Clarke J. (as he then was) in *Arklow Holidays Ltd v. An Bord Pleanála No. 2* [2008] IEHC 2 at paras. 4.2 to 4.3 that, in determining whether or not to grant leave to appeal, regard is to be had to the decision itself and not to the merits of the arguments which resulted in that decision. Thus, the court's view as to the strength or weakness of the argument in favour of the points sought to be certified is not relevant in determining whether the point is an important question of law or not.

25. It is also important to bear in mind that, as noted by the Supreme Court in *Grace & Sweetman v. An Bord Pleanála* [2017] IESC 10 at para. 3.9 the court must also have regard to the effect of the 33rd Amendment to the Constitution and the enactment of the Court of Appeal Act, 2014 and to the new constitutional architecture thereby created (under which an appeal from a decision of the High Court in respect of proceedings of this kind might potentially be brought to the Court of Appeal or directly to the Supreme Court). In that paragraph, the Supreme Court identified that, while a direct appeal to the Supreme Court under the "*leapfrog*" provisions of Article 34.5.4 is potentially open, an appeal to the Court of Appeal should remain *"the more normal route for appeals from the High Court".*

26. Furthermore, as noted by Costello J. in *Callaghan v. An Bord Pleanála* [2015] IEHC 493 and by Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 429, the clear intention of the Oireachtas in enacting s. 50A (7) was that, in most cases, the decision of the High Court should be final.

27. In *Rushe*, Barniville J. also noted that, where a finding has been made against a party on the basis of an application of clear and established legal principles to the facts of a case, it is much more difficult for that party to satisfy the cumulative requirements of demonstrating that there exists a point or points of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal. Barniville J. referred, in this context, to the observations of Simons J. in *Halpin v. An Bord Pleanála* [2020] IEHC 218 at para. 15 where the latter expressed the view that the approach taken by the Supreme Court in determining applications for leave to appeal provides valuable guidance to the High Court in considering applications for leave to appeal under s. 50A (7). At para. 15 of his judgment in *Halpin*, Simons J. observed:

> *"In particular, the distinction drawn between (i) the interpretation of, and (ii) the application of, legal principles can usefully be applied by analogy. The case law of the Supreme Court indicates that it will not normally be enough for a putative appellant to complain that the High Court did not properly apply established legal principles to the particular facts of the case; rather it seems that the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect".*

28. In making that observation, Simons J. also noted that there may nonetheless be some cases where the application of well-established principles might satisfy the statutory test. In that context, Simons J. referred to the determination of the Supreme Court in *B. S. v. Director of Public Prosecutions* [2017] IESCDET 134 where the court stated:

> *"It obviously follows from what has just been set out that it can rarely be the case that the application of well-established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.*
>
> *However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts*

of an individual case, the less it will be possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met".

29. Having considered the decision of Simons J. in *Halpin* and the determination of the Supreme Court in B.S., Barniville J., in *Rushe*, stated in para. 36:

> *"It seems to me that while one cannot rule out the possibility of a point of law which satisfies the cumulative statutory requirements in s. 50A(7) … arising in respect of the application of well-established legal principles to the particular facts of the case, such is only likely to arise in exceptional circumstances and could not in any sense be said to represent the norm. Generally, where a court applies well-established legal principles to the particular facts of the case before it, it will be very difficult for an intended appellant to satisfy the cumulative statutory requirements in section 50A(7)".*

30. A further factor which must be borne in mind is that identified by Humphreys J. *in S.A. v. Minister for Justice and Equality (No.2)* [2016] IEHC 646 where, in para. 2, he observed that the question of law "*should be one which is actually determinative of the proceedings, not one which, if answered differently, would leave the result of the case unchanged".*

31. A similar approach was taken by Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820 where, in para. 52, he held that the second limb of the statutory test was not met in circumstances where the appeal would, in effect, be moot. At para. 53 he stated:

> *"… it would not be an efficient use of scarce judicial resources to entertain an appeal which is, in effect, a moot. Even if An Bord Pleanála were to succeed in an appeal on any of the three draft points of law, this would not affect the outcome of the judicial review proceedings. …".*

32. These are the principles which must therefore be applied by me in determining the present application by the Board for leave to appeal. Bearing those principles in mind, I now turn to the specific questions which are sought to be certified by the Board for this purpose.

The proposed points of law

33. The Board has put forward the following points of law for the purposes of this application. These are as follows:

    (a) Whether, in deciding to grant permission for development of a height greater than that permitted by the Development Plan, by invoking s. 9(6)(c) of the 2016 Act and

s.37(2)(b)(iii) of the 2000 Act and in having regard to the Building Height Guidelines, the Board is required to establish that SPPR3 applies, by demonstrating the satisfaction of all criteria set out in s.3.2 of the Building Height Guidelines, or whether the Building Height Guidelines may be relied upon more generally, even if it is not established that SPPR3 applies. For convenience, I will refer to this point as "*point number 1";*

(b) Whether, in making a decision to grant permission on the basis that SPPR3 of the Building Height Guidelines applies, the Board or its inspector is under a duty to provide reasons to explain why the individual criteria set out in s.3.2 of the Building Height Guidelines are satisfied and, if so, the nature and extent of that duty, having regard to:

(i) The nature of the criteria and, in particular, the extent to which they call for exercise of planning judgment;
(ii) The deference owed by a court to the Board's exercise of such judgment, having regard to the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39: and
(iii) The statutory duty:

(I) In s. 10 (3)(a) of the 2016 Act, to state the main reasons and considerations on which the decision is based; and
(II) Where permission is granted in accordance with s.9(6)(a), in s.10(3)(b) of the 2016 Act, to state the main reasons and considerations for contravening materially the Development Plan.

For convenience, I will refer to this question as "*point number 2*";

(c) Whether, in reaching a decision to grant permission on a basis that differs from that proposed by its inspector, in particular where that difference relates to the need to reduce the height of proposed development and therefore bares on the question of whether the proposed development may, having regard to the provisions of the development plan and the Building Height Guidelines, be authorised, the Board is under a duty to provide reasons to explain why it so differs and, if so, the nature and extent of that duty, having regard to:

(i) The extent to which the difference derives from the exercise of planning judgments;
(ii) The deference owed by a court to the Board's exercise of such judgment, having regard to the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála*; and
(iii) The statutory duty:

(I) In s.10(3)(a) of the 2016 Act, to state the main reasons and considerations on which the decision is based; and

(II) Where permission is granted in accordance with s.9(6)(a), in s.10(3)(b) of the 2016 Act, to state the main reasons and considerations for contravening materially the development plan;

For convenience, I will refer to this issue as "*point number 3*";

(d) Whether any such duty to give reasons is heightened where it arises in relation to a decision made under the 2016 Act. I will refer to this issue as "*point number 4*".

Submissions of the parties in relation to point number 2 and point number 3

34. I propose to deal first with points 2 and 3 as proposed by the Board. It seems to me to be convenient to deal with these points together since they both relate to the extent to which the Board is required to give reasons for its decisions. While point number 2 is addressed to the obligation to provide reasons, more generally, point number 3 is directed towards the duty to provide reasons to explain why the Board differs from the view taken by its inspector.

35. In its submissions in support of the present application, the Board makes the case that any determination as to whether the criteria contained in para. 3.2 of the Building Height Guidelines have been adequately met in the circumstances of a particular development proposal is *par excellence* based on the exercise of architectural, planning and aesthetic judgment. The Board submits that there is no clear or objective answer to the question of whether proposals "*successfully integrate into or enhance*" the surrounding area. Equally, the Board maintains that the issue as to whether a proposed development is sufficiently modulated is not susceptible to a clear objective answer. In such circumstances, the Board submits that, in determining these issues, it is necessarily called upon to exercise its expert judgment. According to the submissions made by the Board, the approach taken by me in my July judgment was to subject the Board's decision to close review by reference to particular criteria contained in para. 3.2 of the Building Height Guidelines. The Board submits that this raises a profoundly important issue concerning the interaction between such a review and the deference that the court has traditionally been held to owe to the Board in respect of matters falling within its sphere of expert judgment.

36. The Board draws attention to the provisions of s.10(3)(a) of the 2016 Act which limits the obligations of the Board to state the main reasons and considerations on which the decision is based. The Board also draws attention to s.10(3)(b) of the 2016 Act which, again, limits the obligation of the Board, in cases where its decision involves a material contravention of a development plan, to state the main reasons and considerations for its decision to that effect.

37. It is also submitted on behalf of the Board that an important philosophical question arises as to where on the spectrum of decision-making, a decision on an issue that essentially turns on the exercise of aesthetic, architectural or planning judgment falls and whether it is meaningful or helpful to require reasons to be given that go beyond (or much beyond) expressing the conclusion of the expert body on the particular issue. In this context, the

Board cites the observations of Clarke C.J. in *Connelly v. An Bord Pleanála* at para. 5.3 where he said:

> *"… other decisions involve much broader considerations involving general concepts, and often, to a greater or lesser extent, a degree of judgment or margin of appreciation on the part of the decision maker. Indeed, it may be said that, in the field of environmental law, issues at various points along that spectrum can arise. There may be specific issues as to whether, for example, a particular project conforms to a development plan or guidelines which the decision maker is required to take into account. On the other hand, a decision may also involve a broader question of whether, for example, a proposed development would involve an excessive impairment of visual amenity in a sensitive area. Many other examples could be given. However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached" (emphasis added by the Board).*

38. The Board also makes the point that a requirement to provide extensive detailed reasons explaining why a proposed development fulfils an aesthetic criterion may not be of much assistance to a person affected by the decision, by reference to either of the purposes for giving reasons derived from *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59. In this context, the Board referred to the observation made by Clarke C.J. in para. 6.9 of his judgment in *Connelly* that the decision in *Mallak* establishes that there are two purposes underlying the obligation to provide reasons for a decision namely:

    (a) To enable a person affected by the decision to understand why a particular decision was reached; and

    (b) To enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed.

38. In its submissions, the Board also addresses the suggestion that an appeal might be said to be unnecessary in circumstances where the principle of judicial deference to expert judgment is well established in the jurisprudence as evidenced, for example, in the decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. Consistent with the observations of Simons J. in *Halpin*, the Board refers, in this context, to the jurisprudence of the Supreme Court in its determinations on applications for leave to appeal to it. The Board cites in particular, the determination of the Supreme Court in *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61 where the Supreme Court observed, at para. 6:

> *"6… The mere fact that there may not be a dispute as to the overall broad principles applicable to a case does not mean that there may not still potentially be issues of importance concerning the way in which those general principles are to apply in a particular category of case although, of course, as has been pointed out, the closer*

one comes to the application of such more detailed matters of principle to the facts of an individual case the further one gets away from there being an issue of general public importance …".

39. The Board submits that the application of the principles in *O'Keeffe v. An Bord Pleanála* is fundamental to the operation of the Board and of the High Court, when called upon to review the Board's decision.

40. Insofar as point number 3 is concerned, the Board submits that differences between it and its inspector arise in many cases and frequently give rise to applications for judicial review. In such circumstances, the Board argues that it is important and desirable that the extent of the Board's duty should be clarified.

41. Finally, in support of its contention that it is desirable in the public interest that an appeal be taken, it is submitted that it is patently in the public interest that clarity be achieved in relation to the extent of the Board's duty and in relation to the extent of the role of the High Court in reviewing a decision of the Board.

42. In response, Ms. O'Neill has referred to the decision of Murphy J. in *O'Donoghue v An Bord Pleanála* [1991] ILRM. 750 and the decision of Clarke J. (as he then was) in *Christian v. Dublin City Council (No. 1)* [2012] 2 I.R. 506. Ms. O'Neill also referred to the observation of Murphy J. in the Supreme Court in *Ní Eilí v. Environmental Protection Agency* [1999] IESC 64 where, in the context of a decision by the respondent to grant an integrated pollution control licence, Murphy J. said at p. 26 of his judgment:

> *"Where a decision to grant a licence is made, the position is different. In that event, by definition, objections will have been made to, and submissions received by the Agency in relation to such objections. If a licence is indeed granted, it might be inferred that those objections had been overruled or the submissions rejected. That would not be an adequate compliance with the Regulation. Those who have gone to the trouble and expense of formulating and presenting serious objections on a matter of intense public interest must be entitled to obtain an explanation as to why their submissions were rejected…".*

43. Ms. O'Neill also referred to what was said by Clarke C.J. in *Connelly* at para. 9.7 (quoted in para. 17 above) to the effect that, where the Board differs from its inspector, there is "*clearly an obligation*" on the Board to set out reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the inspector and to enable a person to assess whether there is any basis for suggesting that the Board's decision is thereby not sustainable. Ms. O'Neill has submitted that the same principle applies, by analogy, in this case.

Discussion and analysis in relation to point number 2 and point number 3

44. In my view, the Board is correct in its submission that, while the principle of judicial deference to expert judgment is well-established, the application of that principle to the facts of an individual case is, nonetheless, capable, in principle, of giving rise to an

important point of law. That emerges very clearly from the approach taken by the Supreme Court in *Fitzpatrick v. An Bord Pleanála* and in *B.S. v. Director of Public Prosecutions* and from the decision of Simons J. in *Halpin*. I also entirely accept that issues relating to the exercise of architectural, planning and aesthetic judgment are matters which fall within the exercise of the Board's expert judgment. The court must show appropriate deference to a decision of the Board in relation to such matters.

45. The concern of the Board in the present case appears to be that my judgment in July 2020 involved a more expansive approach than had previously been taken in the case law. In my view, however, it is clear from the judgment of July 2020 that I did not stray beyond the parameters of the pre-existing and well-established case law. I have already sought to summarise the relevant passages from my judgment in paras. 7 to 22 above but it is necessary to refer to them again at this point in order to explain why the Board is mistaken in thinking that I have taken an impermissibly expansive approach. It is important to bear in mind that, as noted in para. 170 of my July judgment, I accepted that there is a measure of latitude given to a body such as the Board in relation to its obligation to state reasons including the extent of the reasoning to be given and the location where those reasons are to be found. I noted, in this context, a number of decisions to which I had been referred by the parties. I also expressly accepted in the same paragraph that there is generally no requirement that the Board should give a discursive decision. I also noted that, as a consequence of the decision in *Connelly*, the reasons can be found in a variety of documents and that it is not necessary that they should all be stated in the body of the Board's decision or in the inspector's report. For that reason, I fully accepted in para. 172 of my judgment that, in reaching her conclusions in relation to the Building Height Guidelines, the inspector was entitled to cross refer to the documents submitted by Ruirside and I highlighted, in para. 172 of my judgment, what was said by Clarke C.J. in para. 9.2 of his judgment in *Connelly* where he said that the reasons can be found anywhere in the material before the Board so long as it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the material in question formed part of the reasoning.

46. Furthermore, in para. 174 of my judgment, I accepted that, although the terms of paras. 12.4.4 and 12.4.6 of her report might appear to be "*quite sparse and lacking in detail*", the inspector was nonetheless entitled to adopt the material contained in Ruirside's expert reports. When read in conjunction with the expert reports, it seemed to me that the reasoning might arguably be sufficient to pass the *Connelly* test were it not for the fundamental inconsistency between those conclusions of the inspector and what she said, elsewhere, in her report, in relation to the matters summarised in para. 177 of my judgment. These inconsistencies were apparent on the face of the inspector's report.

47. As explained above, in para. 177 of my judgment I identified a number of findings made by the inspector which were inconsistent with the approach taken by her in s.12.4 of her report. In para. 179 of my judgment, I noted that the reasoning given by the Board did not stop at the inspector's report and I drew attention to the note which was appended to the Board Direction dated 15th November, 2019 which expressed a contrary view to the

opinion of the inspector in relation to the acceptability of the height of the development (the height being one of the issues on which the inspector made inconsistent findings). At this point, it should be noted, however, that not all of the inconsistencies identified by me in para. 177 of my judgment related to the height of the development. One of the inconsistencies related to the availability of public transport and another related to the retention of important telecommunications channels.

48. In paras. 179 to 185 of my judgment, I explained why, in the particular circumstances of this case, I did not accept that the Board was entitled to dismiss, in such a broad-brush way, the detailed reasons given by the inspector in s.12.3 of her report as to why the development should be reduced in height by two storeys . I also drew attention to the lack of any explanation as to how, notwithstanding the view expressed by the inspector about poor capacity on the existing public bus route and the lack of a readily accessible rail link, the relevant requirement contained in the Building Height Guidelines that the site is well served by public transport with high capacity, frequent service and good links to other modes of public transport could be said to be satisfied. I also noted that it was impossible to understand, on the basis of the Board Direction, how the Board came to the conclusion that the Board could have been satisfied that the proposal allows for the retention of important telecommunications channels.

49. The terms of the note appended to the Board Direction have already been quoted in my judgment of July 2020. It is nonetheless helpful to set out the terms of the note, at this point:

> *"The Board had regard to the existing pattern of development and character of Finglas Road, the orientation and separating distances to existing buildings and the difference in level between the Finglas Road and Glenhill Road and considered that the height of the proposed development would be acceptable and would not have a material adverse impact on adjoining dwellings, and that the omission of floors as proposed by the Inspector would not be necessary for the proper planning and sustainable development of the area".*

50. As is apparent from the terms of the note, it deals solely with the question of the height of the development. It does not deal either with the question of public transport or with the issue of the retention of important telecommunication channels. It thus does not assist in providing any explanation as to how the Board resolved the inconsistencies identified by me in para. 177 of my judgment in relation to those issues which are apparent from the face of the inspector's report.

51. The note does address the issue of height which is relevant to the remaining inconsistencies in the inspector's report identified by me in para. 177 of my judgment but it does not do so in a way that resolves those inconsistencies. In para. 180 of my judgment, I highlighted that, as is clear from the material before the court, the height of the proposed development was a matter of acute concern to a large number of local residents. Rational and detailed reasons were given by the inspector as to why the height of certain elements of the development should be reduced. In such circumstances, I

expressed the opinion that, if the Board was to take a contrary view to the inspector, it was a fairly basic requirement that, in those very particular circumstances, the Board would spell out in an appropriate level of detail why, notwithstanding the extent of concerns expressed by local residents (which were reflected in turn in the findings made by the inspector in s.12.3 of her report) it was justifiable to permit the development to proceed without any reduction in height. Those observations by me are, in my view, consistent with the observations of Murphy J. in *Ní Eilí* quoted in para. 43 above and with the observations made by Clarke C.J. in *Connelly*, at para. 9.7 of his judgment where he stated that, in cases where the Board differs from its inspector, there is "*clearly an obligation for the Board to set out reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board had differed from the inspector and also to assess whether there is any basis for suggesting that the Board's decision is thereby not sustainable".*

52. In para. 180 of the judgment, I also stressed that my finding was made solely with reference to the facts of the present case and that every case would have to be judged on its own facts. Consistent with *Connelly*, I accepted that the extent of the reasons to be given by the Board will vary from case to case. Furthermore, in para. 182 of my judgment, I accepted that it would, of course, have been open to the Board, assuming that there was appropriate material before it, to reach a different conclusion to that reached by the inspector in relation to these matters. However, I held that the note appended to the Board direction does not explain how the Board could have reached such a conclusion and I drew attention also to the fact that the Board does not address the findings by the inspector about poor capacity on the existing public bus routes or the predicted interference with telecommunications channels.

53. In taking the approach summarised in paras. 45 to 52 above, I believe that I, very plainly, applied the pre-existing case law in accordance with its terms. I had to apply those principles in the context of the particular facts of the case where (a) there were a number of very obvious inconsistencies in the findings made by the inspector; (b) there was a difference in the approach taken by the inspector, on the one hand, and the Board, on the other; and (c) the approach taken by the Board did not resolve the obvious inconsistencies in the inspector's report.

54. I fully accept, of course, that, as Clarke C.J. noted in *Connelly*, at para. 5.3 of his judgment, there may be decisions which involve broad questions of planning judgment and this may affect the type of reasons required to be given. However, it is important to also bear in mind what was said by the Chief Justice in the next following paragraph of his judgment where he said:

> *"5.4. In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to*

clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons". (emphasis added).

55. In my view, the approach taken by me in my judgment is entirely consistent with that principle. The fundamental problem arises from the inconsistencies in the inspector's report and the subsequent broad-brush approach taken by the Board in the note appended to its direction. Those are the factors that led to my conclusion as to the insufficiency of reasons in the present case. My conclusion was driven by the facts of the case and did not, in my view, involve any extension of the pre-existing well-established principles. The Board appears to be particularly concerned that, in some way, my July judgment, inappropriately trenched upon an area of expertise of the Board, in particular, its judgment on aesthetic or architectural issues. That is to misunderstand what I said in my judgment. I formed no view on issues of that kind. I simply drew attention to the obvious inconsistencies which appear on the face of the inspector's report which, in turn, were not resolved by the Board in its direction. While some (but not all) of those inconsistencies related to aesthetic issues, my judgment was based on the existence of the inconsistencies and not on any aesthetic judgment of my own. I fully accept that aesthetics are a matter for the expert determination of the Board and that is why I emphasised on several occasions in my judgment that the inconsistencies may well be capable of explanation. The difficulty for the Board is that the explanation is not apparent on the face of the materials before the Court. The position might be different if the Board had addressed the inconsistencies in its direction.

56. In those circumstances, I do not believe that the decision given by me in July in relation to insufficiency of reasons gives rise to any uncertainty in the law or in the application of the law. It simply involved the application of well-established principles in accordance with existing authority. Accordingly, I am of opinion that the Board has not demonstrated that points number 2 and 3 constitute points of law of exceptional public importance. It follows, that the first criterion for the application of s.50A(7) has not been satisfied in this case in relation to points numbers 2 and 3. I must therefore refuse leave to appeal in relation to these points.

The submissions of the parties in relation to point number 1

57. In its submissions, the Board has suggested that it is extremely important to clarify the circumstances in which the Board may grant permission in material contravention of a development plan, having regard to the Building Height Guidelines. The Board has stated

that many cases involving material contraventions are coming before the Board, in particular under the 2016 Act.

58. In para. 29 of its submissions, the Board draws attention to the way in which Ruirside made an argument, at the hearing of these proceedings, that the application of SPPR3(A) had the effect that the material contravention machinery provided for by statute was simply irrelevant, because there was no material contravention. To that extent, the argument required that SPPR3(A) be held to apply. By contrast, the Board had argued that it did not rely exclusively on SPPR3(A) and it sought to invoke the Building Height Guidelines more generally. The Board submits that, while recognising the difference in approach between Ruirside and the Board, the ultimate analysis undertaken by the court in the July judgment did not alter to take account of the difference in approach. The Board noted that, in its judgment, the court focused mainly on whether SPPR3(A) could validly have been held by the Board to apply. In such circumstances, it is argued that the analysis has created uncertainty as to whether it is possible to have regard to the general policy preference that finds expression in SPPR3(A) without also finding that all criteria for the application of the SPPR have been satisfied. Conversely, it is suggested that a question arises as to whether, if any regard is to be had to SPPR3(A), all criteria set out in para. 3.2 of the Building Height Guidelines must be met.

59. The Board submits that it is desirable in the public interest that an appeal be taken on this question. In support of that submission, it has highlighted that decisions under the 2016 Act must be made in a constrained timeframe. Achieving clarity in relation to a key issue that arises is therefore important from the perspective of the Board, in the performance of its public functions, and also from the perspective of the public. The Board has emphasised that the 2016 Act facilitates large scale housing developments being expedited, in order to address the ongoing housing crisis and the ambitious housing targets in the National Planning Framework. It is suggested that this objective is frustrated if decisions of the Board in cases under the 2016 Act (where greater density through increased height is sought) are vulnerable to judicial review arising from uncertainty as to the circumstances in which the Board may authorise a material contravention of a development plan height standard. The Board submits that clarification from the Court of Appeal on this issue will assist the Board in its decision-making and the High Court in determining judicial review applications in which non-compliance with the requirements for material contravention arises as a ground.

60. The Board also submits that the question whether SPPR3 applies necessarily involves a significant element of planning judgment and the question of what must be demonstrated, and the level to which it must be demonstrated, in order for SPPR3 to apply, is a question with implications much wider than the resolution of the present proceedings.

61. In response, Ms. O'Neill has drawn attention to the decision of Simons J. in *Spencer Place Development Company Ltd v. Dublin City Council* [2019] IEHC 631 and she has made the case that point number 1 was extensively analysed by Simons J. in that case. Ms. O'Neill

also noted that, in his judgment in that case, Simons J. recorded that the parties were in broad agreement as to the legal principles governing the interpretation of the Building Height Guidelines. Ms. O'Neill also submits that there is nothing in the Building Height Guidelines or the Planning Acts to suggest that a planning authority can "*cherry pick*" from the set of guidelines or principles that must be applied by statute.

Analysis and discussion in relation to point number 1

62. The Board is correct that, in my judgment of July 2020, I did not separately analyse the differing approaches taken by Ruirside, on the one hand, and the Board, on the other. As observed in para. 29 of the Board's written submissions, Ruirside relied on SPPR3(A) exclusively while the Board did not do so and also invoked the Building Height Guidelines more generally. However, in my judgment, I focused on whether, on the basis of the material placed before the court, SPPR3(A) had been validly applied.

63. A very similar issue to that canvassed in point number 1 was identified by Simons J. in his judgment in *Spencer Place Development* in paras. 53 to 58. In para. 53, he referred to the position which obtained prior to the enactment of s. 28(1C) of the 2000 Act as inserted by the Planning and Development (Amendment) Act, 2018. In para. 53 of his judgment, Simons J. referred to the pre-existing position under which planning authorities (including the Board) were merely required to have regard to guidelines and to state reasons for not complying with them. He referred, in this context, to *Tristor Ltd v. Minister for the Environment, Heritage and Local Government* [2010] IEHC 397. Having done so, he then referred to a number of amendments made by the 2018 Act including s.28(1C) which, as previously noted, provides that planning authorities and the Board "*shall, in the performance of their functions, comply*" with SPPRs. Simons J. then continued as follows in paras. 56 to 58 of his judgment:

> "*56. I pause here to note that the effect of the amendments introduced under the [2018 Act] is that a single set of Ministerial guidelines may contain within it two different types of requirement. The first type are policies to which a planning authority is merely required to have regard. The second type are policy requirements which a planning authority is obliged to comply with. It is important when reading through a set of guidelines to distinguish between the two different types and the legal effect of same.*
>
> *57. …*
>
> *58. The legislation does not expressly address the interaction between (i) the obligation to apply a [SPPR] instead of the objectives of the development plan, and (ii) the restrictions imposed under section 34(6) of the [2000 Act] on the grant of planning permission for proposed development which would involve a material contravention of the development plan. …".*

64. While s.34(6) of the 2000 Act is not immediately relevant, a similar issue arises, in the context of the Board, in relation to the interaction between, on the one hand, s.28(1C) of the 2000 Act and s.9(3)(a) of the 2016 Act (both of which are in similar terms) and, on

the other, s.9(6) of the 2016 Act under which the Board is specifically empowered to grant permission for a proposed strategic housing development notwithstanding that the development would materially contravene a development plan. For completeness, it should be noted that the latter power may only be exercised where the Board considers that, if s.37(2)(b) of the 2000 Act were to apply, it would grant permission for the proposed development. The relevant statutory provisions are addressed in paras. 141 to 147 of my July 2020 judgment.

65. Thus, there is an obvious parallel between the position described in para. 64 above and that described in para. 58 of the judgment of Simons J. in *Spencer Place Development*. The 2016 Act does not expressly address the interaction between the obligation to apply an SPPR instead of the objectives of the development plan, on the one hand, and the more general power of the Board to grant permission for a proposed strategic housing development which would involve a material contravention of the development plan.

66. The interaction between these provisions was not specifically addressed by me in my judgment. However, I proceeded on the basis that SPPR3(A) had to be applied. Against that backdrop, the Board has submitted that the approach taken by me has created uncertainty as to whether it is possible to have regard to the "*general policy preference that finds expression in SPPR3(A), without also finding that all criteria for the application of the SPPR are satisfied. To put it conversely, a question arises as to whether, if any regard is to be had to SPPR3(A), all criteria set out in Section 3.2 of the Building Height Guidelines must be met".*

67. I have to say that I am not convinced that a case was ever made in those precise terms in the course of the hearing before me. That said, the issue can, nonetheless be said to arise out of my judgment albeit that I did not expressly make any finding on the interaction between the statutory provisions identified in para. 64 above. As noted in para. 66 above, my judgment proceeded on the basis that SPPR 3(A) applied. It also proceeded on the basis that, once SPPR 3(A) applied, the criteria set out in para. 3.2 of the Building Height Guidelines had to be addressed. This seems to follow from the express language of SPPR 3(A).

68. Point number 1 is an issue which could be said, as of the date of my July judgment, to give rise to uncertainty. In the intervening period, there has, however, been a significant development in the form of the judgment of the Court of Appeal in the *Spencer Place Development* case. The relevant judgment for present purposes is that of Collins J. in *Spencer Place Development Co. Ltd. v. Dublin City Council* [2020] IECA 268 which was delivered on 2nd October, 2020. In his judgment in that case, Collins J. highlighted, in similar terms to Simons J. in the High Court, that the Building Height Guidelines contain a number of SPPRs and he added, in para. 3 of his judgment:

> *"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."*

69. In paras. 22-26 of his judgment, Collins J. expanded upon what was said in para. 3. In those paragraphs, he traced the amendments made to the 2000 Act by the 2018 Act including the insertion of s.28(1C). Later, at para. 44 of his judgment, he described the effect of these amendments as permitting the Minister to "*issue what are, in effect, mandatory planning requirements*" and that this was not in dispute in the proceedings. It is important to note that the Spencer Place Development case was not concerned with the 2016 Act. It was concerned with the 2000 Act (as amended) and with whether the Building Height Guidelines and in particular the SPPRs contained therein are applicable to a planning scheme. The Court of Appeal held that they were not. However, the court nonetheless proceeded on the basis that, if the SPPRs applied, then the relevant planning authority in that case would have been obliged to comply with, *inter alia*, SPPR3(A). This is clear, for example, from para. 51 of the judgment of Collins J. where he said:

> *"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.' …".*

70. It is clear from the language used by Collins J. in that paragraph that he envisaged that, in cases where SPPR3(A) applies, this requires a planning authority to undertake the assessment of a development proposal against the development management criteria contained in Chapter 3 of the Guidelines – namely the criteria specified in detail in para. 3.2 of the Building Height Guidelines.

71. It would seem to follow that, where the Guidelines contained an SPPR, the planning authority or, where applicable, the Board must carry out an assessment of any proposal for development against the specific development management criteria set out in para. 3.2 and that the ability to simply have regard to guidelines applies only in the context of requirements that fall short of constituting SPPRs. However, while that would appear to be the inexorable conclusion which follows from the terms of statutory provisions and from the position adopted by the Court of Appeal in the *Spencer Place Development* case, the decision in the latter case could not be said to go that far. In circumstances where the Court of Appeal decided that s. 28 (1C) does not apply to a planning scheme, the observations of Collins J. as to the effect of SPPR 3(A) are strictly *obiter*. Accordingly, the question might still be said to be open and to give rise to some level of uncertainty albeit that the observations of Collins J. seem to me to significantly reduce the scope for such uncertainty. In my view, it is, therefore, at least arguable, that point number 1 involves a point of law of exceptional public importance on the basis that, in the absence of a definitive decision of the Court of Appeal directly on the point, there is some level of uncertainty.

72. However, even on the assumption that point number 1 satisfies the "*exceptional public importance" criterion*, I do not believe that it can be said to be desirable in the public

interest that an appeal should be taken. This follows from the approach taken by Simons J. in *Heather Hill Management Company* and from the approach taken by Humphreys J. in *S.A. v. Minister for Justice & Equality (No. 2).* As Humphreys J. observed in the latter case, the question of law should be one which is actually determinative of the proceedings; not one which, if answered differently, would leave the result of the case unchanged. The same point is made by Simons J. in para. 53 of his judgment in *Heather Hill Management* (quoted in para. 31 above). He held that it would not be an efficient use of scarce judicial resources to certify an appeal which is, in effect, moot.

73. The problem is that, even if the Board were to succeed in an appeal on point number 1, this would not affect the outcome of the judicial review proceedings in circumstances where there is no appeal in relation to point numbers 2 and 3. At minimum, there would still be a decision adverse to the Board in these proceedings on the basis that the Board has failed to provide adequate reasons for disagreeing with the view expressed by its inspector and to address the inconsistencies on the face of her report. In such circumstances, it seems to me that the requirements of s.50A(7) have not been met in relation to point number 1. As Simons J. observed in *Heather Hill*, it would not be an efficient use of scarce court resources to pursue an appeal which is moot. It follows that it could not be said to be in the public interest that an appeal should be certified. As MacMenamin J. stressed in *Glancré* the jurisdiction to certify should be exercised sparingly. For all of these reasons, I refuse to grant leave to appeal in respect of point number 1.

Point number 4

74. Similar considerations arise in relation to point number 4. The Board is concerned that one of the observations made by me in para. 180 of my judgment is unprecedented and would mark a significant shift from the position as previously understood in relation to the Board's duty to provide reasons. In this context, I referred to a number of factors in para. 180 of my judgment which seem to me to require the Board, in this case, to spell out in an appropriate level of detail why, notwithstanding the concerns expressed by local residents and reflected in the findings made by the inspector in s.12.3 of her report, it was justifiable to permit the development to proceed without any reduction in height. I observed, in this context, that this was "*especially so in the context of an application under the 2016 Act which gave the local residents only one opportunity to have their concerns and objections considered by an expert planning body*". In its written submissions, it is argued on behalf of the Board that it is difficult to reconcile this observation with the obligation under the 2016 Act to merely set out the *"main reasons and considerations"* for its decision. It was also submitted that my approach creates a "*disturbance in the jurisprudence*".

75. It is important, however, to read my observation in context. I was not purporting to lay down any general principle that the Board, in cases under the 2016 Act, must always provide more detailed reasons for its decisions. My observation must be seen in the particular context of this case where, as previously explained, there were very obvious inconsistencies in the findings of the inspector and these were not explained by the

Board. My observation must also be seen against the backdrop that the applicant here was one of a number of residents living in the immediate vicinity of the development who would have to live with the consequences of the Board's decision for the foreseeable future. In this context, it is well established that proximity to a proposed development is a relevant factor in planning decisions. This is clear, for example, from the approach taken by the Supreme Court in *Grace & Sweetman v. An Bord Pleanála* [2017] IESC 10 in relation to standing. It is furthermore clear from the decision of the Supreme Court in *Connelly* that the extent of the requirement to give reasons will vary depending upon the individual circumstances of a case and of an applicant. It is also clear from the decision of the Supreme Court in *Ní Eili*, that participation in a process gives rise to an entitlement to obtain an explanation as to why submissions are rejected. The reference to the one-stop nature of the proceedings under the 2016 Act was merely an additional factor to be borne in mind in relation to the obligation to provide reasons. I fully accept that I did not set out any authority for that proposition. I did not think it was necessary to do so. In this regard, I had thought it to be well established that, in the context of the fairness of any particular process (and the obligation to provide reasons forms part of the overall obligations of fairness) the existence of an appeal from the deciding body is relevant. Thus, for example, in *Crayden Fishing Co. Ltd v. Sea Fisheries Protection Authority* [2017] 3 I.R. 785 O'Donnell J., at p. 806 observed that:

> *"While an appeal in any administrative procedure is not a requirement of natural justice, nevertheless the existence of a full appeal is always relevant in considering the overall fairness of a process. Again, if there is a full hearing at what might be termed first instance, then it may be unobjectionable if an appeal proceeds on a more limited basis…".*

76. Nonetheless, I accept that the observation made by me in relation to the elevated requirement to provide reasons in a one-stop situation is not one which was previously articulated in the context of proceedings under the 2016 Act and that it is open to argument as to the extent to which that is or is not a proper consideration. It is therefore an issue which is capable of fulfilling the first of the two statutory criteria contained in s.50(7) of the 2000 Act. However, as with point number 1, it seems to me that point number 4 runs into the same difficulty in relation to the second element of the statutory criteria. Even if the Board were to succeed on this question, it would not alter the outcome of the judicial proceedings. At minimum, there would still be a finding that the Board had failed to provide sufficient reasons to depart from the position adopted by its inspector or to resolve the inconsistencies in her report.

Conclusion

77. In all of the circumstances, it seems to me that the Board has not satisfied me that this is an appropriate case in which to certify any point of law for the purposes of an appeal to the Court of Appeal. I should add that I very much regret that I was unable to deliver judgment in this case in December 2020 as I had originally intended. Unfortunately, I had a number of other commitments at that time which prevented me from doing so.

78. In so far as the costs of this application are concerned, I am provisionally of the view that the Board is liable for the costs incurred by Ms. O'Neill but I will give the Board a period of 14 days from the date of delivery of this judgment to make any submissions to the contrary as it may be advised, any such submissions to be made by email addressed to the registrar and copied to Ms. O'Neill. If Ruirside wishes to apply to have the matter remitted to the Board, any such application should be made returnable for remote mention on Thursday 18 February, 2021 at 10.30 a.m., any such application to be served by email and filed not later than 12 February, 2021. On 18 February, I will fix a date for the hearing of any such application.