[2023] IEHC 178

THE HIGH COURT

JUDICIAL REVIEW

[2022 No. 474 JR]

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

BETWEEN:

JOHN CONWAY

APPLICANT

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SILVERMOUNT LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 18th day of April, 2023

1. The applicant challenges the constitutional validity of s. 28(1C) of the Planning and Development Act, 2000 and the legal validity of two guidelines made under that provision.

2. The issue arose out of a submission made by the applicant on a planning application made on 15th December, 2021 under s. 4 of the Planning and Development (Housing) and Residential Tenancies Act, 2016. In that application, the notice party sought permission for 545 build-to-rent apartments, commercial retail and office units, a childcare facility and associated development at Concord Industrial Estate, Naas Road, Walkinstown, Dublin 12.

3. The developer's application contained a material contravention statement dated December 2021 identifying a number of material contraventions of the Dublin City Development Plan 2016-2022 and the Naas Road Local Area Plan 2013 in relation to building height and unit mix. These contraventions were said to be justifiable by reference to the Urban Development and Building Heights Guidelines, December 2018 and the Sustainable Urban Housing Design Standards for New Apartments Guidelines, December 2020, both issued under s. 28 of the 2000 Act and containing specific planning policy requirements (SPPRs) under sub-s. (1C) of that section.

4. The board's inspector found that there was a material contravention of the relevant plans (see para. 12.3.13 of the report), but recommended that permission be granted notwithstanding that, on the basis of SPPR 3 of the Height Guidelines (see paras. 12.3.15 and 12.3.19) and SPPRs 4, 5, 7 and 8 of the Apartment Guidelines (see paras. 12.4.9, 12.4.11, 12.4.20, 12.4.30 and 12.4.54).

5. The board issued a direction on 19th April, 2022 recommending a grant of permission subject to conditions, and a formal order to that effect was made on 21st April, 2022. The board's order referred to the inspector's report, acknowledged material contraventions regarding building heights and made explicit reference to SPPR 3(A) in the Building Height Guidelines. While the board's

decision did not refer to the Apartment Guidelines, an apparent reliance on such guidelines to justify the material contravention is suggested by the board's adoption of the inspector's report. The board didn't seem to dispute this in their opposition papers, and while the State put the applicant on formal proof of the matter, the point wasn't strongly pressed at the hearing and I don't think anything turns on that.

Procedural history

6. The proceedings were commenced on 7th June, 2022. Leave was granted on 20th June, 2022 and statements of opposition were filed on 25th and 27th October, 2022.

7. Various skirmishes took place in relation to costs protection and, ultimately, a hearing date was fixed for 28th March, 2023. On the first day of the hearing, following the applicant's oral submission, the board indicated that it did not wish to contribute to the hearing and asked to be excused. On the second day of the hearing, 29th March, 2023, it was agreed by the parties that the applicant could proceed with the challenge to the legislation and guidelines without the need to involve the notice party or to challenge the specific decision in which the validity issues arose. The object of that agreement was to avoid the developer becoming, as the notice party put it, "collateral damage" in a constitutional action, but, at the same time, to allow the applicant to proceed with the challenge without impediment.

8. Thus, on the State respondents' undertaking, on the basis of this case only and not so as to create a precedent, not to raise in the High Court or any appellate court any issue regarding the applicant's standing, the form of the proceedings, or the entitlement of the applicant to rely on the factual matrix in which the issues against the State arose, and on the parties' agreement that the State respondents are also entitled to rely on such factual matrix, and that in the event of the applicant obtaining a declaration against the State, such declaration would not affect the validity of the notice party's permission, it was agreed that the court would order as follows:

(i) that relief 1 in the statement of grounds (*certiorari* of the decision of the board) be struck out;

(ii) that the notice party be excused from further participation;

(iii) that there be no order as to costs as between the notice party and other parties; and

(iv) that the foregoing order be perfected forthwith.

9. While the question of the impact on costs protection vis-à-vis the State wasn't specifically discussed at that stage, it certainly wasn't my intention in making that order (nor was it suggested by anybody) that the applicant would thereby be deprived of any costs protection rights that he would otherwise have enjoyed.

Relief sought

10. With relief 1 thereby addressed, the remaining reliefs are as follows:

"2. A Declaration that s. 28(1C) of the Planning and Development Act 2000 (as amended) is repugnant to Articles 15.2.1º, 15.2.2º and/or Article 28.1º of the Constitution.

3. A Declaration that the 'Urban Development and Building Heights Guidelines', dated December 2018, and/or the 'Sustainable Urban Housing: Design Standards for New Apartments', made by the Minister for Housing, Planning and Local Government under s. 28(1C) of the 2000 Act (as amended), and/or such parts of Guidelines insofar as they contain Specific Planning Policy Requirements (SPPRs), are *ultra vires* and/or void.

4. Such Declaration(s) of the legal rights and/or legal position of the Applicant and (if and insofar as legally permissible and appropriate) persons similarly situated, and/or of the legal duties and/or legal position of the Respondent as the Court considers appropriate.

5. A Declaration that the within proceedings are covered by the protective costs provisions of s. 50B of the Planning and Development Act 2000 (as amended), and/or the Environment (Miscellaneous Provisions) Act 2011 (as amended) and/or otherwise.

6. Such further or other order as this Honourable Court shall deem fit.

7. The costs of these proceedings."

Core grounds

11. The core grounds pleaded in the statement of grounds were as follows:

"1. The impugned decision is invalid. Section 28(1C) of the Planning and Development Act 2000 (as amended) is repugnant to Articles 15.2.1º and 15.2.2º of the Constitution insofar as it constitutes an unauthorised delegation of legislative power and/or is repugnant to Article 28A.1 and 2 of the Constitution, as an interference with the role of local government and the power and function of directly elected local authorities, as it purports to confer on the Minister the power to make Specific Planning Policy Requirements (SPPR) with which the Planning Authority and the Board must comply, when there are no principles and policies contained in the 2000 Act (as amended) which limits and/or sufficiently limits the power of the Minister under s. 28(1C) to formulate policies. As [a] result of the Board's reliance on SPPR 3 in the Height Guidelines, and SPPRs 4, 5, 7, and 8 in the Apartment Guidelines, which are invalid as being made under s. 28(1C) of the 2000 Act, the decision of the Board is thereby invalid. Further particulars of the above are set out at Part 2 below.

2. The impugned decision is invalid. Section 28(1C) of the 2000 Act is unconstitutional insofar as it constitutes an overly broad grant of administrative powers and is contrary to the rule of law under the Constitution insofar as it purports to confer a vague and untrammelled discretion and/or disproportionate power on the Minister to make binding policies which restrict the powers of local authorities and/or the Board and/or is contrary in particular to Article 28A(2) of the Constitution that the power of directly elected local authorities shall be exercised and performed in accordance with law. As a result of the Board's reliance on SPPR 3 in the Urban Development and Building Heights Guidelines ('Height Guidelines'), and SPPR 4, 5, 7, and 8 of the Sustainable Urban Housing: Design Standards for New Apartment[s], dated 2020 ('Apartment Guidelines') which are invalid as being made under s. 28(1C) of the 2000 Act, the decision of the Board is thereby invalid. Further particulars of the above are set out at Part 2 below.

3. The impugned decision is invalid. The Urban Development and Building Heights Guidelines, dated December 2018, in particular SPPR 3 and/or Sustainable Urban Housing: Design Standards for New Apartment[s], dated 2020, and SPPR 4, 5, 7, and 8 made by the Minister for Housing, Planning and Local Government under s. 28(1C) of the 2000 Act (as amended) are invalid and/or *ultra vires* the scope of s. 28(1C) of the 2000 Act (as amended) and insofar as the Board's decision relied upon the said invalid Guidelines and/or the said SPPR, the decision of the Board is thereby invalid. Further particulars of the above are set out at Part 2 below."

12. I should note for completeness that there was no challenge to the legislation or guidelines by reference to EU law.

Section 28 of the 2000 Act

13. Critical to the present application is s. 28 of the 2000 Act which reads as follows:

"(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

(1A) Without prejudice to the generality of subsection (1) and for the purposes of that subsection a planning authority in having regard to the guidelines issued by the Minister under that subsection, shall—

(a) consider the policies and objectives of the Minister contained in the guidelines when preparing and making the draft development plan and the development plan, and

(b) append a statement to the draft development plan and the development plan which shall include the information referred to in subsection (1B).

(1B) The statement which the planning authority shall append to the draft development plan and the development plan under subsection (1A) shall include information which demonstrates—

(a) how the planning authority has implemented the policies and objectives of the Minister contained in the guidelines when considering their application to the area or part of the area of the draft development plan and the development plan, or

(b) if applicable, that the planning authority has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why the policies and objectives of the Minister have not been so implemented.

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

(1D) A strategic environmental assessment or an appropriate assessment shall, as the case may require, be conducted in relation to a draft of guidelines proposed to be issued under subsection (1).

(2) Where applicable, the board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions.

(3) Any planning guidelines made by the Minister and any general policy directives issued under section 7 of the Act of 1982 prior to the commencement of this Part and still in force immediately before such commencement shall be deemed to be guidelines under this section.

(4) The Minister may revoke or amend guidelines issued under this section.

(5) The Minister shall cause a copy of any guidelines issued under this section and of any amendment or revocation of those guidelines to be laid before each House of the Oireachtas.
(6) A planning authority shall make available for inspection by members of the public any guidelines issued to it under this section.
(7) The Minister shall publish or cause to be published, in such manner as he or she considers appropriate, guidelines issued under this section."

14. It is also notable that insofar as SPPRs impact on individual planning applications, their function is to support Government or national policy. This is expressly stated in s. 34(2)(d) of the 2000 Act as regards normal planning applications and also in s. 9(3)(c) of the 2016 Act governing the strategic housing development procedure: "In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development".

15. Insofar as this case is concerned, the SPPRs and enabling legislation are challenged in the context of an impact on an individual planning application and, in such a context, the SPPRs must therefore logically be "to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development". The State agreed that it was not open to the Minister to adopt an SPPR in a context where it would impact on an individual planning application in a way that would not provide such support. That is relevant to our later discussion in terms of constraints on the delegation of power.

16. It is perhaps worth noting at this point that the word "guidelines" in sub-s. (1C) of the 2000 Act is to a degree misleading because, where they contain SPPRs, they are binding and must be complied with. They are not in fact mere guidelines. With all due respect to parliamentary counsel, while Irish legislative drafting is generally excellent, this is a rare example of questionable practice (arising, as usual, as a result of a later amendment rather than from any flaw in the original design). Terms should be used in legislation in a sense that is recognisable from their ordinary use. Insofar as caselaw has referred to s. 28 guidelines as mere guidelines (*Buckley v. An Bord Pleanála* [2015] IEHC 590, [2015] 9 JIC 1601 (Unreported, High Court, 16th September, 2015), *Brophy v. An Bord Pleanála* [2015] IEHC 433, [2015] 7 JIC 0306 (Unreported, High Court, 3rd July, 2015) at para. 36; *Cork County Council v. Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021)), that is in the context of guidelines under sub-s. (1), not sub-s. (1C). Statements about guidelines being merely guidelines are simply not applicable in the sub-s. (1C) context.

Other relevant provisions of legislation

17. There are a number of other provisions of the 2000 Act that are of relevance to the legal context here. Section 10(1A) of the 2000 Act provides as follows: "The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements specified in guidelines under subsection (1) of section 28".

18. Section 10(2A)(a) in effect requires a planning authority to ensure that the development plan is consistent with objectives in the National Planning Framework (NPF), the regional strategy and SPPRs under s. 28. Sections 12(18) (adoption of plans), 13(14) (variation) and 20(5) (local area plans) classify SPPRs alongside the NPF and regional strategies as statutory obligations.

19. Provision is also made in ss. 31(1)(ba) and 31AM for addressing non-compliance by development plans with the terms of SPPRs.

20. Section 34(2)(aa) provides in the context of the grant of permission for a development that "[w]hen making its decision in relation to an application under this section, the planning authority shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28".

21. Section 34(2)(ba) provides that "[w]here specific planning policy requirements of guidelines referred to in subsection (2)(aa) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan".

22. Turning to the 2016 Act, s. 9(3) provides:

> "(a) 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.
>
> (b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.
>
> (c) In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development."

The semantics of secondary law

23. For the purposes of the interpretation of instruments, s. 2 of the Interpretation Act 2005 provides that "'statutory instrument' means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to 'made' or to 'made under' include references to made, issued, granted or otherwise created by or under such instrument". For the purposes of formal publication as statutory instruments (with an S.I. Number), however, a narrower definition is contained in s. 1 of the Statutory Instruments Act 1947, which provides that "the expression 'statutory instrument' means an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute".

24. The fact that something is not an S.I. for the purposes of the 1947 Act does not mean that it is not a statutory instrument for the purposes of the 2005 Act (see *Clonres v. An Bord Pleanála* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May, 2021)). Indeed, the respondents' submissions here state that "[t]he State Respondents accept that, in general, guidelines may come within the definition of a statutory instrument within the meaning of section 2

of the Interpretation Act 2005 but note that guidelines clearly do not come within the scope of section 1 of the Statutory Instruments Act 1947".

25. So far so good. However, the submissions go on to say "[a]s such, while guidelines may fall to be interpreted in accordance with the rules of interpretation which apply to statutory instruments, as provided for in the 2005 Act, this does not mean that they are delegated legislation". Unfortunately, that is a merely semantic move. The term "delegated legislation" is not a magical term which only applies to instruments formally published as S.I.s. It is defined in Elizabeth A. Martin (Ed.) *Oxford Dictionary of Law* (5th Ed.) (Oxford, O.U.P., 2002) as "[l]egislation made under powers conferred by an Act of Parliament (and enabling Statute, often called the Parent Act)". The definition includes "byelaws, the Rules of the Supreme Court, and the codes of conduct of certain professional bodies".

26. The term "delegated legislation" is confusing and ultimately, I think, inappropriate, because it raises the red herring of conflict with the literal meaning of the requirement that the power of the Oireachtas to legislate is "sole and exclusive". It creates a complete dead-end argument as to whether guidelines are "legislation" or not. That is a semantic and pointless characterisation. A better distinction is to use the EU terminology which is to distinguish between primary and secondary law. In the EU context, as explained by the European Commission:

> "Treaties are the starting point for EU law and are known in the EU as primary law.
>
> The body of law that comes from the principles and objectives of the treaties is known as secondary law; and includes regulations, directives, decisions, recommendations and opinions." [https://commission.europa.eu/law/law-making-process/types-eu-law_en, accessed 29th March, 2023]

27. In the domestic context, the categories of law are different, but the logic is analogous. Primary law is law enacted in the form of Acts of the Oireachtas (and primary law enacted by parliamentary act or charter prior to independence). Secondary law is law made under such primary law (either directly under it or under other secondary law) or made directly under the constitutional power of the executive (or the executive power of the Crown directly or through its ministers prior to independence). It includes statutory instruments both in the 1947 and wider 2005 senses, and certainly includes the guidelines under challenge here. By definition, secondary law is not "legislation" *stricto sensu*, but it is quasi-legislative, and the question of how far one can go by way of secondary law raises the issue of whether the legislative power has been improperly delegated.

28. As to whether sub-s. (1C) confers a merely administrative power, that is clearly not so. An administrative power is a power of execution, not primarily of rulemaking or of the enactment of measures of general application. The "administrative" is normally although not always an operational sub-set of the "executive" (it doesn't itself automatically imply direct accountability to the executive in the sense of the government – one can have independent administrative agencies, like the Ombudsman for example). Administrative powers are defined by the *Oxford Dictionary of Law* as: "Discretionary powers of an executive nature that are conferred by legislation on government ministers, public and local authorities, and other bodies and persons for the purpose of giving detailed effect to broadly defined policy". Ultimately though, classifications as between legislative, executive and administrative are philosophical and theoretical at best, semantic at worst; and any given actor may enjoy a blend of such functions. A power to issue binding general

requirements (misleadingly called guidelines) that do not decide individual cases but apply in an overall way to categories of situations is quasi-legislative in nature, however one chooses to classify the actor issuing such requirements. By contrast, a power to issue binding requirements confined to individual cases would be executive or administrative, or even quasi-judicial depending on the procedure involved. That doesn't apply here.

29. Section 28(1C) confers a power to make secondary law in the form of instruments of a quasi-legislative nature. Calling this administrative is misconceived but, in any event, such a characterisation does not add anything. Contrary to the State's submissions, s. 28(1C) SPPRs are more than mere "administrative guidelines". They create legally enforceable, self-executing, binding obligations on actors to whom they are addressed, with directly legal implications for third parties thereby affected.

30. The State goes on to submit that sub-s. (1C) "does not confer the power on the Minister to make laws or legislate". The State's confoundingly hollow and semantic argument is essentially that, since legislation by anyone other than the Oireachtas is unlawful, ministerial instruments cannot be legislation. They must therefore be characterised as administrative. That is a masterclass in definitional circularity. It has the same energy as the more deadly argument that, since (broadly speaking) war is unlawful in international law terms, any use of force cannot be war, and must be characterised as a special military operation, as an intervention or even as a police action (*Dubsky v. Government of Ireland, Minister for Foreign Affairs, Minister for Transport, Ireland and the Attorney General* [2005] IEHC 442, [2007] 1 I.R. 63 at p. 88). The flaw in both arguments is that we need to ask what the impugned action is in substance and reality, rather than beg the conclusion that the action is lawful and frame our terminology and logic to suit.

Preliminary objections

31. In the light of the agreed order referred to above, issues of standing and the form of the action fell away. Also as noted above, the State put the applicant on proof that the decision relies on both sets of guidelines but that was not particularly pressed. Even assuming that the board's intention was to rely on the Building Heights guidelines to the exclusion of anything else in the inspector's report supporting a material contravention, which I don't think needs to be decided, but if the proposition had been pressed I probably would have leaned towards that conclusion on an *expressio unius* basis in the particular circumstances (as to the unnecessary lengths one has to go to in order to work out to what extent the board agrees with the inspector, I would respectfully second the comments of Holland J. in *Shadowmill Ltd. v. An Bord Pleanála* [2023] IEHC 157, [2023] 3 JIC 3106 (Unreported, High Court, 31st March, 2023) at para. 88), the fact that the Apartments Guidelines were invoked against the applicant's position during the process creates a sufficient factual foundation for the applicant to contend that he was disadvantaged or at least affected by those guidelines and hence making the present case a legitimate vehicle to challenge them.

32. Also, while there was some reference in written submissions to the invalidity of s. 169 of the 2000 Act, no relief was claimed in that regard, and it was clarified that that argument was merely an endeavour to look at the overall Act in terms of context and interpretation. So the reference in submissions to s. 169 does not in fact raise any preliminary issue that I need to decide. As regards the reference to s. 168, which also relates to planning schemes, I will deal later with the question of whether that argument properly arises.

Delegation of powers

33. Traditionally, the test for whether power, particularly legislative power, had been unconstitutionally delegated was stated by the Supreme Court as follows:

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power." [*Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 at p. 399]

34. Conventionally, in the legislative context, this requirement was located in Article 15.2.1° of the Constitution: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State".

35. That approach had some potential problems. First of all, while no doubt in 1937 the framers were conscious of the issue of statutory rules and orders, Article 15.2.1° was not primarily addressed to the issue of delegation. The main purpose of that provision was to reply firmly to the imperial mind-set articulated in s. 75 of the Government of Ireland Act 1920 which is headed "Saving for supreme authority of the Parliament of the United Kingdom", and which provided: "Notwithstanding the establishment of the Parliaments of Southern and Northern Ireland, or the Parliament of Ireland, or anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every part thereof". The enactment of Article 15.2.1° was first and foremost about national independence, sovereignty and jurisdiction.

36. In passing, one can note that nationalism made much of the repeal of the Government of Ireland Act 1920 (effected by s. 100 of and sch. 15 to the Northern Ireland Act 1998) as a *quid quo pro* for rephrasing Articles 2 and 3 of the Constitution. But there was a degree of smoke and mirrors involved because s. 5(6) of the 1998 Act re-enacts the basic point, and provides, in relation to s. 5 (which allows Stormont to legislate for Northern Ireland), that "[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland".

37. A second problem with an emphasis in caselaw on Article 15 is that the issue of unauthorised delegation applies across all branches of government, not merely the legislative. There is a general need for a concept of what constitutes excessive delegation, above and beyond the purely legislative context, and thus for a theory that is not rooted in Article 15 exclusively.

38. A third problem is that the concept of "principles and policies" implies that the Parent Act must, in essence, predict what the issues that might arise will be, and, in the light of such clairvoyance, constrain the exercise of any discretion conferred. Recent caselaw at Supreme Court level has questioned the concept of elevating the issue of "principles and policies" to being in itself the test: *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1, *O'Sullivan v. Sea Fisheries Protection*

Authority [2017] IESC 75, [2017] 3 I.R. 751, *Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1.

The test

39. It seems to me in the light of that recent caselaw that the State is correct to say in submissions that: "[t]he Cityview Press 'principles and policies' test is no longer determinative. Rather, it is necessary to consider whether the Oireachtas has abdicated its function".

40. Overall it is best, in the interests of rule of law considerations such as legal certainty, to make this expressly clear. Therefore the issue of the existence or otherwise of principles and policies should not be regarded as being in itself the test, but that issue lives on as an important factor within the test.

41. The more appropriate test is to ask whether, by reason of the delegation, the parent decision-maker has abdicated its function having regard to all the circumstances, and in particular having regard to (i) any principles and policies governing the delegated function, (ii) the nature of the functions delegated and the issues to which they relate, (iii) the system of which the delegated function concerned forms part, and (iv) the safeguards restricting or regulating the exercise of the delegated function.

42. Such an approach can also be applied with any necessary modifications to delegation by any other branches of government. I will explain the critical headings in some further detail.

43. Under the first heading, the court can firstly consider the existence and extent of principles and policies discernible in the legislation itself (see *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381; *Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1 at para. 32; *O'Sullivan v. Sea Fisheries* [2017] 3 I.R. 751 at 777). The court is not confined to the particular section which confers the delegation. Under this heading, the court can also consider the overall function and purpose of the parent legislation (*O'Sullivan*; *Naisiúnta Léictreach Contraitheoir Éireann*), the extent to which the legislative purpose is clearly articulated by reference to the long title, any other provisions, or the legislation as a whole, and the extent to which the purposes are linked to objectives or outcomes.

44. While not in itself representing the test, this nonetheless remains an important factor to be considered, and indeed in some cases, as O'Donnell J. noted in *O'Sullivan*, this can be a sufficiently weighty factor to point the way to the result. However, the court is not confined to the principles and policies in the parent legislation alone but can also consider the principles governing the exercise of the power that derive from other binding legal requirements applying to the subordinate decision-maker (*O'Sullivan*).

45. The second heading is the nature of the functions delegated and the issues to which they relate. Under that heading, a key consideration is any objective need for flexibility that arises from the subject-matter and the inherent nature of the issues concerned. Thus, the court can consider the extent to which the regulation of the subject area involves "changing circumstances" (*per* Gilligan J. in *Bederev v. Ireland* [2014] IEHC 490, [2014] 5 JIC 2903 (Unreported, High Court, 29th May, 2014), at para. 46, see also the Supreme Court decision in that case, *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1, and *O'Sullivan*, *Naisiúnta Léictreach Contraitheoir Éireann*). Relevant to this is the aptness or practicability of more detailed provision by the parent decision-maker (*per*

McKechnie J. in *Bupa Ireland Ltd. v. Health Insurance Authority* [2006] IEHC 431, [2006] 11 JIC 2301 (Unreported, High Court, 23rd November, 2006) at para. 158).

46. The court, under this heading, can consider the extent to which the matter delegated is technical or complex in nature (*per* Feeney J. in *John Grace Fried Chicken Ltd. and Others v. Catering Joint Labour Committee and Others* [2011] IEHC 277, [2011] 3 I.R. 211, *Maher v. Minister for Agriculture* [2001] IESC 32, [2001] 2 I.R. 139 at 245, *Bederev* at p. 42). Relevant also is the extent to which expert assessment would be required (*Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413).

47. The extent of the power delegated is also relevant, including whether that power creates criminal offences (*John Grace Fried Chicken Ltd.*) or imposes financial liability (*Cityview Press*), areas traditionally associated with a more penal approach. Even outside the penal context, the extent to which the regulation cuts across private law rights may be relevant (*Naisiúnta Léictreach Contraitheoir Éireann*) as is the subject-matter of the delegation generally (*McGowan v. Labour Court* [2013] IESC 21, [2013] 3 I.R. 718, paras. 24-25), as well as the corresponding issue of the extent to which freedom of action of the subordinate body remains (*O'Sullivan* at para. 40).

48. I would reject as impracticable the applicant's suggestion that policy-making cannot be delegated at all, although the extent to which the formulation of policy is delegated is certainly a factor, as is the nature and status of bodies impacted by the delegated power, the impact on fundamental human rights and the question of whether the delegation allows something that would otherwise be a contravention of primary legislation, or only of other subordinate law.

49. The third heading to be considered is the system of which the delegated function concerns forms part. In that regard, the court can consider the extent to which subordinate bodies have historically been conferred with functions of the sort under consideration (*Naisiúnta Léictreach Contraitheoir Éireann per* MacMenamin J. at para. 94). Also relevant is the extent to which matters of policy feature in the decision-making framework overall, including by reference to unchallenged provisions. This may also raise what one might call the *Bush v. Gore* 531 U.S. 98 (2000) problem, namely whether a litigant can legitimately be allowed to re-programme a process by only challenging certain aspects of the procedure but not other aspects to which similar objections could be launched. To obviate such cherry-picking, the court can consider the statutory scheme holistically to identify whether other unchallenged provisions of the parent legislation also rely on subordinate discretion such that validating the impugned provision alone would create an imbalance.

50. The fourth heading to be considered is the question of controls and restrictions on the delegated function (*Naisiúnta Léictreach Contraitheoir Éireann*) and the extent to which the terms of such limitations are clear and predictable. Under this heading, the court can consider limitations or restrictions that exist autonomously of the parent legislation, for example, under EU law or other domestic law (*per* MacMenamin J., *Naisiúnta Léictreach Contraitheoir Éireann* at para. 66). Insofar as constraints exist, a relevant question is whether those are matters to which regard is to be had or, alternatively, whether they are binding and must be complied with, as well as the extent to which discretion will be limited in practice or effect by the need for consistency with other procedures under the Parent Act or other legislation.

51. One factor to be mentioned is the existence or otherwise of a requirement to give reasons in respect of the exercise of the power, bearing in mind that reasons may be required as a result of

autonomous EU law requirements. Finally, the extent of supervision and oversight where retained by the parent decision-maker is relevant, including whether it has power to annul the decision (*Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1 at p. 31).

Application of the law to core ground 1 – unconstitutional delegation

52. We can now turn to an application of these factors to the legal provisions challenged here, and it is appropriate to approach that in the first instance by considering each heading of relevant factors separately, before seeking to tie the strands together.

First heading – principles and policies

53. The first heading to be considered is that of principles or policies.

54. As regards policies in the parent legislation, it is true that there is not much in s. 28 itself to constrain the power delegated. However, one must consider the overall function and purpose of the parent legislation including the extent to which the legislative purpose is clearly articulated by reference to the long title and other provisions. The long title is instructive in that it refers *inter alia* to the purpose as being "TO PROVIDE, IN THE INTERESTS OF THE COMMON GOOD, FOR PROPER PLANNING AND SUSTAINABLE DEVELOPMENT INCLUDING THE PROVISION OF HOUSING". That doesn't of course mean that housing is a desideratum that overrides proper planning and sustainable development – the word "including" reinforces the point that housing is a desirable objective insofar as it constitutes such development. In any event, the broader concept of "proper planning and sustainable development" occurs throughout the legislation (149 references in the consolidated version of the 2000 Act).

55. Nonetheless, I would broadly accept that, as suggested at one point by the applicant, the concept of "proper planning" embodied in the Act is in itself somewhat "amorphous". However, that phrase cannot be taken in isolation but has to be read in the light of the Act generally and of the concept of "sustainable development" in particular, which has a clear meaning. While not defined in the legislation, it is apparent from public domain material that there is a consistent interpretation of this phrase. The European Commission's definition (https://eur-lex.europa.eu/EN/legal-content/glossary/sustainable-development.html, accessed 29th March, 2023), is as follows:

> "Sustainable development was defined in the World Commission on Environment and Development's 1987 Brundtland report 'Our Common Future' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It seeks to reconcile economic development with the protection of social and environmental balance.
>
> In 2001, the EU adopted a strategy in favour of sustainable development. This was revised in 2006 providing 'a long-term vision for sustainability in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting'.
>
> The European Commission's review of the strategy in 2009 highlighted the persistence of some unsustainable trends and the need for greater efforts in their regard. However, it also noted the EU's progress in mainstreaming sustainable development in many of its policies (including trade and development) and pointed to the lead it has taken in regard to climate change and promoting a low-carbon economy.
>
> Sustainable development formally became one of the European Union's long-term goals under Article 3(3) of the Treaty on European Union."

56. This is linked to Article 37 of the European Union Charter of Fundamental Rights which states as follows:

> "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

57. This concept is embedded in Irish primary legislation, particularly s. 3 of the Climate Action and Low Carbon Development Act 2015, as amended by the Climate Action and Low Carbon Development (Amendment) Act 2021. Subsection (1) provides as follows:

> "For the purpose of enabling the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the 'national transition objective') the Minister shall make and submit to the Government for approval —
>
> (a) a national mitigation plan, and
>
> (b) a national adaptation framework."

58. All of these key principles inform the meaning of "proper planning and sustainable development" which constrains the exercise of all functions under the 2000 Act including those under s. 28(1C).

59. However, it is important to note that the State cannot have it every way under this heading. Either the concept of "proper planning and sustainable development" is a genuine principle and policy constraining what seem to be wide powers under the Act, in which case there is the potential that an individual guideline or even an individual planning decision could be set aside by reason of a legally inadequate consideration of the concept or an irrational application of the concept to a clearly unsustainable development; or, on the other hand, it is a purely aspirational phrase which does not in reality amount to any form of principle, policy, constraint or limitation on the exercise of such powers and, consequently, cannot be relied on to support the constitutionality of the Act.

60. One cannot have an illogical situation whereby the concept of proper planning and sustainable development is held to be relevant to upholding the legislation, but irrelevant in relation to any challenge to the exercise of powers under the legislation. Given the choice between such a contorted, contradictory and illogical approach that drains the concept of proper planning and sustainable development of all real meaning, or one that gives it its ordinary meaning that can potentially be applied in practice to the exercise of statutory powers, the latter option is overwhelmingly preferable.

61. For the avoidance of doubt, of course, the application of this test in any particular case is subject to normal judicial review requirements, so that if a decision-maker correctly directs itself as to the legal meaning and effect of proper planning and sustainable development and applies that in a rational way which would be reasonably open to it, and does not infringe any other relevant legal requirement, then the result should be upheld whether the court might be inclined to agree with the outcome or not. But it does leave open the possibility that an environmentally unsustainable decision, or the adoption of unsustainable guidelines, could be open to challenge on the grounds of breach of this basic limitation on the exercise of powers under the Act. Cases like *An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021), might have been more difficult had the central argument been that the board had misapplied the concept

of sustainable development. Fortunately for the court, that point can be postponed to some other case.

62. In addition to the concept of proper planning and sustainable development, there are a number of other key provisions in the 2000 Act which provide for principles or policies that constrain the exercise of functions under s. 28(1C). These include provision for the NPF (pt. II, ch. III), strong protections for architectural heritage and protected structures (pt. IV), the requirement for environmental impact assessment (EIA) (pt. X) and appropriate assessment (AA) (pt. XAB), and provision for protection of amenities including landscapes and trees (pt. XIII).

63. David Browne B.L. in *Simons on Planning Law* (3rd Ed.) (Dublin, Round Hall, 2021) at p. 307, para. 4-04, says that:

> "It is also submitted that for a planning permission to be consistent with proper planning and sustainable development, it should be consistent with the concept of cultural and ecological sustainability as well as the need to preserve natural resources and minimise environmental impacts. This obligation is arguably enhanced by the Climate Action and Low Carbon Development Act 2015."

64. That analysis is broadly compatible with the foregoing, although I would phrase it somewhat differently. The concept of "proper planning" must be read in the light of and be compatible with the concept of "sustainable development", which has a clear definition as set out above. This inherently involves "ecological sustainability" and "the need to preserve natural resources" (which is a part of sustainability, not a separate item). This is consistent with the 2015 Act, as amended by the 2021 Act. The concept requires not only that environmental impacts be minimised, but also that they be avoided altogether where this would breach the concept of sustainable development.

65. It seems to me, therefore, under this heading, that while the power on the face of sub-s. (1C) is wide, there are very significant principles and policies that govern its exercise when one has regard to the other provisions of the 2000 Act. These reflect principles governing the exercise of the power that derive from other legal requirements, including from legally operative and applicable provisions of EU law on EIA and AA that are reflected in the 2000 Act, as well as the principles of the 2015 and 2021 Acts.

Second heading – nature of functions involved

66. The second heading relates to the nature of the functions delegated and the issues to which they relate.

67. One initial issue is the extent of the function delegated and to what degree it allows modification of outcomes envisaged by other law. Importantly, s. 28(1C) contains no power to modify primary legislation, and nor could such guidelines modify secondary law except insofar as that is provided for or is implicit in the subsection. Since the SPPRs are binding on local authorities, regional assemblies and the board, they could, in effect, modify secondary law made by such entities (for example planning schemes, development plans or regional strategies), but not secondary law made by other organs of State power such as instruments made under the aegis of national government. For example, the NPF could not be modified by SPPRs, a conclusion that is consistent with the fact that the level of parliamentary scrutiny in relation to the NPF is much higher. Section 20C(8) requires the NPF to be positively adopted by both Houses.

68. For completeness, one can note in passing that SPPRs are also binding on the board, but that is almost always in the context of individual decisions rather than any instrument of general application that the board is empowered to make. The only obvious piece of secondary law adopted by the board is where it makes a planning scheme on appeal under s. 169(7), and in that context, the SPPRs could cut across the board's powers also, subject to provision in primary law (which the applicant did attempt to argue and with which I will deal later).

69. While SPPRs cannot modify any secondary law other than strategies made by regional assemblies, development plans made by planning authorities, or planning schemes including as made by the board, they could legitimately constrain any discretion otherwise left open by national policy or primary legislation. That is inherent in the concept of the guideline having any meaning or effect. Thus, the guideline or SPPR could particularise matters of detail, deal with new areas that have arisen since the adoption of national policy, or deal with issues that weren't addressed in such policies.

70. Reinforcing this is the fact that, as noted above, SPPRs for the purposes of individual planning applications are defined as "guidelines issued by the Minister to support the consistent application of government or national policy and principles by planning authorities, including the board, in securing overall proper planning and sustainable development". Hence the guidelines in that context can only be made if and insofar as they support the consistent application of national policy. In general terms, guidelines in any context are a highly desirable thing to promote the rule of law and to enhance equality and consistency of approach. Where general discretions are created, soft law or even binding guidelines (as here under sub-s. (1C)) serve an important purpose by ensuring consistency, as the 2000 Act itself recognises. Far from being unconstitutional, this is a procedure that strongly promotes the constitutional values of lawful decision-making and equality as between similar persons and situations.

71. Bearing that limitation in mind, it seems to me there is a very clear objective need for flexibility here arising from the inherent nature of the subject-matter concerned. The following factors seem particularly pertinent:

(i) This is a technical and complex area, requiring expert input.

(ii) The area of planning is one affected by changing circumstances such as technical developments, as with advanced forms of renewable energy, and changing conceptions of best practice, ongoing evolution of European law and of laws and standards at the international level. Planning and environmental law could not be described as a static area at the present time.

(iii) The function primarily relates to the regulation of administrative decision-making, rather than direct interference in civil or criminal law such as the imposition of penal requirements or the nullification of contracts.

(iv) The bodies primarily impacted by the delegated power are organs of local and regional government, and the board, albeit that there is a downstream impact on participants in the planning process (such as this applicant).

(v) There is a limited impact on fundamental human rights. This applicant's public participation rights are not in question, albeit that the guidelines made his desired outcome for the particular planning application here less likely. But even for a

landowner, there is no right to development as such, and certainly no such right to do anything that is not in accordance with proper planning and sustainable development. That limitation derives from the fundamentals of environmental law, the social contract embodied in the Constitution, and the common good, as well as specifically from the 2000 Act, and is not something created by s. 28(1C).

(vi) As noted above, the delegation of functions here does not allow something that would otherwise be a contravention of primary law. It does not cut across primary legislation or indeed national policy but only other secondary law, specifically only instruments of local or regional government, or of the board, albeit that it can direct the exercise of discretion left open by primary law or other secondary law.

(vii) The blend of soft and hard law in planning policy documents and the use of practical examples and photographs and graphics as appears from perusal of the sort of guidelines that have been issued to date under s. 28, renders them inappropriate for incorporation in primary law.

(viii) It would be impractical to engage in the required level of detail by means of primary legislation.

72. Overall, there is a clear objective need for the detailed and technical requirements of planning policy to be developed by means of flexible instruments such as the secondary law mechanism at issue here.

Third heading – the overall system concerned

73. The third heading is consideration of the system of which the impugned function forms part.

74. Overall, the applicant's complaint is a classic case of an argument that proves too much. By the logic advanced by the applicant, the power of local authorities to make development plans must also be unconstitutional, given the vast discretion given to such authorities to develop policies and objectives, including land use objectives, which are then applied to every single piece of real property within the functional area of the local authority concerned.

75. Indeed, the argument that the power to make development plans is unconstitutional but the Minister's power to issue specific planning policy requirements is valid is a lot more convincing than the reverse, because the Minister's power is more limited.

76. The hypothetical reply that it would be valid to confer such broad powers on local authorities because of Article 28A of the Constitution doesn't have any more fire-power than the counter-argument that conferral of policy powers on Ministers is valid by reference to Article 28.

77. The power to make planning documents setting out policies (whether the adoption of plans by local authorities, or the furnishing of guidance by national government) has existed for a long time. Under the Town and Regional Planning Act 1934, local authorities had power to make what were called planning schemes, but under s. 29 of that Act the schemes had to be approved by the Minister. Noting in passing that the legislation was roughly contemporaneous with the Constitution, it conferred on the Minister not the limited power with which we are concerned here, namely, to issue requirements with which local authorities must comply in making development plans and planning decisions, but the power to veto the entire text of the land-use plan.

78. A ministerial power to issue guidelines appeared in s. 7 of the Local Government (Planning and Development) Act, 1982, albeit that that did not include specific planning policy requirements.

79. At the broad level, I accept that something unconstitutional doesn't become constitutional merely because it has happened for a long time, but it is too simplistic to say that history is entirely irrelevant. Insofar as concerns procedural matters, historical understandings of constitutional concepts can sometimes be legitimately illuminating. To say that is not, of course, to endorse the discredited theory that the content of human rights must be determined by reference to some form of fossilised originalist understanding as of the date on which the relevant provision was enacted. Long practice can however illustrate the possible understanding of procedural concepts, albeit not the substantive content of rights which, by definition, must be relevant to contemporary society. Procedures fall into a different category, and we are dealing with procedures here, specifically the power of the legislature to devolve functions.

80. On that basis, history is relevant; but even without history, the vast powers given to local authorities under the 2000 Act renders it implausible that a more limited power given to the Minister must be unconstitutional, especially insofar as it is challenged in isolation.

Fourth heading – controls and restrictions

81. The fourth heading to be considered is the question of controls and restrictions on the delegated function.

82. At the outset, one can note that the level of parliamentary scrutiny of the guidelines provided for in the legislation itself is virtually non-existent. The State in submissions attempted to categorise the laying of guidelines before the Houses of the Oireachtas as a form of "oversight", but this is a bit of an exaggeration. "Oversee" is defined by the Concise Oxford Dictionary, in the definitive 6th edition ((1976, Clarendon Press, Oxford), pp. 786-787) as "Superintend (workers, doing of work, etc.)". "Superintend" means "Have the management (of), arrange and inspect working (of)" (p. 1159). Laying a document merely involves placing a copy in the Oireachtas Library, with the consequence that its title appears in the order paper of the House or Houses concerned. That is the *provision of information* only, which is about the most minimal form of oversight one could imagine and is barely worth the name – it certainly isn't inspection, let alone management. Yes, theoretically, an individual member could call into the Library, obtain the guidelines and seek to have them debated, but the latter could happen anyway even without the laying of the instrument before the Houses. The possibility of raising the issue in the Houses derives from the fact that the Minister is accountable to the Dáil, not from any control or restriction in the 2000 Act.

83. However, the fact that the level of supervision retained by the Oireachtas is at virtually the most minimal level possible is not in itself fatal to the constitutional validity of sub-s. (1C). It is a factor to be considered but is not in itself determinative.

84. As regards Article 28A of the Constitution, this does not itself confer functions on local authorities but provides that such functions are to be conferred by law. That flexibility doesn't in itself have the consequence that no meaningful functions can be so conferred.

85. In *Spencer Place Development Co. Ltd. v. An Bord Pleanála* [2020] IECA 268, [2020] 10 JIC 0202 (Unreported, Court of Appeal, 2nd October, 2020), Collins J. did not preclude the possibility of legislative authorisation to the Minister to override development plans, although he did emphasise that that should be done clearly, and also noted that there was no constitutional challenge in that case (para. 28).

86. It is true perhaps that Article 28A is on its own terms a rather thin recognition of local government and falls some way short of the European Charter of Local Self-Government (discussed recently by the UK Supreme Court in *Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42 (and on one perhaps overly defeatist view, the rich British caselaw on the wide powers of the three devolved legislatures and their relationship to the UK parliament perhaps illustrates that our anxieties about delegation of minor areas of quasi-legislative power in Ireland are small potatoes by comparison)).

87. That said, Article 5 of the Constitution describes Ireland as a democratic state, and the modern concept of democracy would be incomplete without a strong and effective layer of local government. As with legislation, the Constitution is always speaking, and must be read in the light of modern conceptions and values (with due regard to history when one is dealing with purely procedural matters). One can see an argument that Article 5 may have some relevance to the superficially untrammelled freedom of the Oireachtas to confer on local authorities only minimal functions. However, that is something of a theoretical consideration in circumstances such as arise here, because s. 28(1C) does not skeletonise local government but merely qualifies the exercise of certain defined functions.

88. A related control or limitation is the fact that in general, s. 28 cannot be used in respect of individual cases and thus can only operate at the general level. Section 30 provides:

> "(1) Notwithstanding section 28 or 29 and subject to subsection (2), the Minister shall not exercise any power or control in relation to any particular case with which a planning authority or the Board is or may be concerned save as provided for by sections 177X, 177Y, 177AB and 177AC.
>
> (2) Subsection (1) shall not affect the performance by the Minister of functions transferred to him or her by the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2020 (S.I. No. 339 of 2020) or transferred (whether before or after the coming into operation of section 5 of the Planning and Development, Heritage and Broadcasting (Amendment) Act 2021) to him or her from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media by an order under section 6 (1) of the Ministers and Secretaries (Amendment) Act 1939."

89. Finally, insofar as s. 28 guidelines including SPPRs are required to be subjected to Strategic Environmental Assessment (SEA) under directive 2001/42/EC, that will impose a degree of obligation to give reasons (art. 9(1)(b)) and will also involve a public participation process (art. 6(2)); and similarly if AA applies there will be corresponding informational and public participatory processes. Sub-section (1D) specifically envisages either or both processes applying to guidelines under the section, and that provision (as well as a conforming interpretation) involves an obligation for the exercise of that procedure where EU law so requires.

Conclusion in relation to core ground 1

90. In fairness to the applicant, there are some indicia in favour of his position, specifically the fact that s. 28 itself is light on principles and policies, and the lack of meaningful parliamentary scrutiny beyond the bare minimum. Important as those points are, they are in my view outweighed

by the cascade of factors favouring the conclusion that this is a permissible delegation of power, in particular the following:

(i) the overall principle that the powers conferred by s. 28(1C) can only be exercised for the purposes of proper planning and sustainable development;

(ii) the fact that sustainable development has a clear meaning;

(iii) the reinforcing principles set out in Article 37 of the EU Charter of Fundamental Rights and s. 3 of the Climate Action and Low Carbon Development Act, 2015, as subsequently amended;

(iv) the extensive principles and policies set out in other provisions of the 2000 Act beyond the terms of s. 28, particularly Parts II, IV, X, XAB and XIII;

(v) the fact that some of these principles and policies derive from legally operative provisions of EU law;

(vi) the fact that s. 28(1C) does not allow modification of primary law, or of secondary law other than as made by the board, regional assemblies and local authorities,

(vii) the constraint that insofar as individual planning applications are concerned, guidelines can only be made insofar as they support the consistent application of government or national policy and principles;

(viii) the objective need for flexibility arising from the inherent nature of the subject-matter concerned;

(ix) the technical, complex and expert nature of the field;

(x) the fact that the planning area is particularly subject to changing circumstances;

(xi) the fact that s. 28(1C) is primarily addressed to public bodies rather than directly to private law entities and that the sub-section does not directly create criminal offences, impose financial penalties, cut across fundamental human rights, or interfere with freedom of contract;

(xii) the inaptness and impracticability of incorporating guidelines in this area into primary law;

(xiii) the fact that the delegation-of-policy argument is much stronger if applied to the delegation of power to local authorities to make plans in the first place, hence implying that if planning policy powers cannot be delegated, virtually the whole 2000 Act is unconstitutional, not merely s. 28(1C);

(xiv) the historical precedents for the power in question and in particular the much wider power to approve or veto land-use planning schemes given to the Minister in 1934;

(xv) the limited nature of the powers conferred directly on local authorities by Article 28A of the Constitution;

(xvi) that fact that the powers under s. 28 cannot, in general, be exercised in respect of any individual case; and

(xvii) the requirement for public participation and reasons in any instance where guidelines invoking sub-s. (1C) are required to be subjected to SEA or AA.

91. Having regard to the four headings discussed above, in my view the overwhelming conclusion is that while sub-s. (1C) appears wide on its face, there are in fact sufficient principles, policies and constraints to limit it significantly, that it is a reasonable and non-abdicatory conferral

of a power to make secondary law in circumstances where there is an objective need for flexibility in relation to the subject matter, and where the system of which the power forms part is one that relies very considerably on the delegated exercise of functions, including policy-making functions, by local authorities. Section 28(1C) of the 2000 Act is not an unconstitutional delegation of legislative power.

Application of the law to core ground 2 – unconstitutional delegation of administrative power

92. As noted above, the function conferred on the Minister to make guidelines including specific planning policy requirements is not an administrative power properly considered, so this point does not arise. Anyway, as also noted above, calling it an administrative power is only a semantic rephrasing of the question as to whether it is a permissible delegation of the power to make secondary law, so the result would be the same whether considered under this heading or the foregoing one.

Application of the law to core ground 3 – *ultra vires*

93. The applicant's argument in relation to *ultra vires* of the specific guidelines was somewhat elusive. It essentially boiled down to the proposition that even if sub-s. (1C) was not unconstitutional by reason of lack of principles or policies, the lack of such principles and policies meant that the impugned instruments where themselves invalid. It is essentially thus a reformulation of the original argument in a considerably weaker form. The basic problem with this argument was that it is predicated on there being a lack of relevant principles and policies, whereas I consider that there are such principles and policies applicable here, as set out above.

94. The second problem with this fall-back argument is that it hasn't been shown that these particular guidelines go beyond the contours, terms and safeguards set out above as applying to s. 28(1C). The applicant didn't particularly point to anything in these guidelines that breached the principles of proper planning and sustainable development, for example by mandating the approval of projects that were impermissibly unsustainable. Maybe in another case, guidelines (even perhaps these guidelines) hypothetically could be open to debate by reference to that standard, but no sustained effort to make that point was launched here.

95. Insofar as it was pleaded that the height guidelines are *ultra vires* as being in conflict with what is envisaged by s. 168(2)(c) of the 2000 Act, that is a far from trivial or tenuous point but it is not an issue that arises on the facts here because the development is not governed by a planning scheme. It would normally (and would be here) be an improvident exercise of the power to invalidate a measure of general application to consider an argument that presupposes an application that did not occur as part of the factual narrative complained of and that did not affect the applicant.

Procedure in the event of a declaration

96. The State requested that, if any declaration was to be granted in favour of the applicant, there would be an opportunity to argue that that should be suspended pending an appeal as happened in *Naisiúnta Léictreach Contraitheoir Éireann v. Labour Court* [2020] IEHC 342, [2020] 7 JIC 3104 (Unreported, High Court, 31st July, 2020), *per* Simons J. One should note however that that was a quite different case in that the judgment had ramifications for other measures that were not challenged in those proceedings (see para. 27). That doesn't apply here (except as regards the *ultra vires* argument): if s. 28(1C) were to fall, that doesn't in itself put in question any other

provision of law so there isn't quite the same need for suspension. Perhaps understandably, the State wasn't rushing to explain how the hypothetical suspension would be meant to work. If it involved only a pause on challenges to existing decisions, one could certainly see an argument for that at least until any appeal or amending legislation had been progressed. If however the suspension involved a position whereby the hypothetically successfully impugned guidelines could continue to be the basis of future decision-making, one could see counter-arguments. Nonetheless, I would have been minded to accede to the request for a separate hearing on the form of the order, if only so that the matter could be discussed in an orderly manner with a view to deciding whether there was a basis for such a suspension or not. But having regard to the foregoing, this question of procedure does not arise.

97. I might however respectfully add that in the event that this matter is appealed (a development I am not advocating specifically but merely considering as a hypothetical), it may be worthwhile to consider whether a leapfrog appeal should be contemplated in order to bring finality to the issue as soon as possible, as any continuing uncertainty could affect a substantial number of pending cases before the High Court. Also, since the test for excessive delegation arises from decisions of the Supreme Court, if it is to be asserted that there is a need for definitive interpretation of those decisions, that could ultimately fall to that court in any event.

Order

98. Having regard to the foregoing the order will be that:

(i) the proceedings be dismissed;

(ii) in the absence of submissions to the contrary within 7 days, the order be perfected at that point with no order as to costs.