

[2023 IEHC 186]

**THE HIGH COURT  
JUDICIAL REVIEW**

[2020 No. 830 JR]

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

**BETWEEN:**

**SINEAD KERINS AND MARTIN STEDMAN**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**DBTR-SCR1 FUND, A SUB FUND OF TWTC MULTI-FAMILY ICAV**

**NOTICE PARTY**

**(No. 4)**

**JUDGMENT of Humphreys J. delivered on the 24<sup>th</sup> day of April, 2023**

**1.** The application for planning permission that is challenged in these proceedings was made directly to the board under the strategic housing development procedure on 25<sup>th</sup> May, 2020. It was ultimately consented to in the form of a development at 326-328 South Circular Road, Dublin 8 to include 416 residential units in 5 blocks.

**2.** On 11<sup>th</sup> August, 2020, the board's inspector recommended permission be refused. The board however disagreed and decided to grant permission by direction of 10<sup>th</sup> September, 2020 and order of 14<sup>th</sup> September, 2020.

**3.** The present judicial review application challenging that decision was initiated on 9<sup>th</sup> November, 2020.

**4.** In *Kerins & Anor v. An Bord Pleanála & Anor (No. 1)* [2021] IEHC 369, [2021] 5 JIC 3102 (Unreported, High Court, 31<sup>st</sup> May, 2021) I dismissed the applicants' case on domestic law grounds and indicated an intention to refer the matter to the CJEU.

**5.** In *Kerins & Anor v. An Bord Pleanála & Anor (No. 2)* [2021] IEHC 612, [2021] 10 JIC 0408 (Unreported, High Court, 4<sup>th</sup> October, 2021) I issued certain clarifications of the No. 1 judgment at the request of the opposing parties.

**6.** In *Kerins & Anor v. An Bord Pleanála & Anor (No. 3)* [2021] IEHC 733, [2021] 11 JIC 3001 (Unreported, High Court, 30<sup>th</sup> November, 2021) I made the formal order for reference.

**7.** In Case C-9/22 *NJ and OZ v. An Bord Pleanála & Ors (Site de St. Theresa's Gardens)* (Judgment of 9<sup>th</sup> March, 2023), the CJEU (seventh chamber) ruled as follows:

"1. Article 2(a) and Article 3(2) and (3) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, must be interpreted as meaning that a plan comes within the scope of that directive where (i) it has been prepared by an authority at local level in collaboration with a developer of the project concerned by that plan and has been adopted by that authority, (ii) it has been adopted on the basis of a provision in another plan or

programme and (iii) it envisages developments distinct from those envisaged in another plan or programme, provided, however, that it is at least binding on the authorities with competence to grant development consent.

2. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, must be interpreted as not precluding national legislation which requires the competent authorities of a Member State, when deciding whether or not to grant development consent for a project, to act in accordance with guidelines which require the height of buildings to be increased, where possible, and which have been subject to an environmental assessment under Directive 2001/42.”

**8.** The matter then returned to the court in order to enable these answers to be applied to the balance of the case.

**Relief sought**

**9.** The applicant has had the benefit of a more than usual number of orders allowing amendments of pleadings, and the operative statement of grounds appears to be the Fifth Amended Statement of Grounds dated 14<sup>th</sup> April, 2021 (the Fourth Amended Statement of Grounds has the same date, for some reason).

**10.** The only substantive relief arising from the Fifth Amended Statement of Grounds that now requires to be addressed is relief number 1 which is as follows:

“1. An Order of Certiorari quashing the decision of the first named Respondent dated 14th September 2020 to grant planning at lands on 326-328 South Circular Road, Dublin 8 for strategic housing development consisting inter alia of 416 residential units in 5 blocks.”

**11.** Relief number 2 is as follows:

“2. Such Declarations as to the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or the legal position of the Respondents as to this Honourable Court doth seem fit and meet.”

**12.** Nothing arises under this heading that doesn’t arise more appropriately under relief 1.

**13.** Relief 3 is as follows:

“3. A Declaration as against the Second and third Named Respondents that Section 28 of the Planning and Development Act 2000 (as amended), is inconsistent with Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU in that it unlawfully and inappropriately limits the competent authority in carrying out an Environmental Impact Assessment for the purposes of Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU and/or failed to transpose and/or be consistent with the requirements of that Directive.”

**14.** This relief was not pursued following the CJEU judgment.

**15.** Relief number 4 states:

“4. A Declaration as against the Second and third Named Respondents that Section 28 of the Planning and Development Act 2000 (as amended), is inconsistent with Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU in that it unlawfully and inappropriately limits the competent authority in carrying out an Environmental Impact

Assessment for the purposes of Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU and/or failed to transpose and/or be consistent with the requirements of that Directive.”

16. Again, this is not being pursued following the judgment of the CJEU.
17. Relief 5 is as follows:  
 “5. If necessary, a preliminary reference to the Court of Justice of the European Union (CJEU) pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU).”
18. It isn’t necessary to claim interlocutory relief in a statement of grounds, but in any event, as noted in the procedural narrative above, that has already been dealt with.
19. Relief 6 seeks an order as follows:  
 “6. An Order providing for the costs of the application and/or an Order approving costs protection pursuant to either Section 50B of the Planning and Development Act, 2000 (as amended) and/or Section 3 of the Environment (Miscellaneous Provisions) Act, 2011 and/or otherwise pursuant to EU law and/or the Aarhus Convention.”
20. Costs protection in favour of the applicants has already been agreed to by all parties. The question of the costs of the proceedings has to be viewed in the light of the outcome of the present module.
21. Relief 7 is as follows:  
 “7. A stay on the implementation of planning permission ABP-307221-20 pending the determination of the above entitled proceedings.”
22. No issue appears to have been made of this in any way that needs to be addressed at this stage.

#### **Core grounds and their disposition**

23. Core ground 1.1 states as follows:  
 “1.1 The First Named Respondent erred in law and acted contrary to the requirements of the Strategic Housing Act in having regard to pre-application consultations in the consideration and determination of the substantive application. The Respondent Board in their consideration and determination of the application had regard to the pre-application consultations as referenced in Inspector’s report and expressly on the face of their decision referenced these pre—application discussions and /or incorporated by reference to the report of the Chief Executive of the City Council these discussions contrary to Section 6 of the Strategic Housing Act.”
24. This was rejected in the No. 1 judgment.
25. Core ground 2.1 states as follows:  
 “2.1 The Respondent Planning Appeals Board failed to comply with their obligations under Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU in the consideration and determination of the application. The Planning Appeals Board appointed a Senior Planning Inspector to prepare and advise in respect of the Environmental Impact Assessment (EIA) which specialist advisor is now a mandatory requirement under Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU. The Inspector’s report concluded that the proposed development would have significant adverse landscape and visual impacts arising from the number, form, bulk, scale and height of the proposed

development, would have an overbearing impact on the surrounding residential area inclusive of a residential conservation area, significant adverse effects on the amenities of residential properties in the immediate vicinity of the development and that the said adverse impacts could not be mitigated and accordingly recommended that the development consent in respect of the development be refused.”

**26.** This was also rejected in the No. 1 judgment.

**27.** Core ground 2.2 states as follows:

“2.2 The Respondent Board acted contrary to the requirements of the EIA Directive in seeking to particularise the EIA procedure, and failed to carry out an Integrated Assessment in selecting and adopting those parts of the Inspector’s report which were positive in respect of the development but substituting their own opinion for those of the Inspector in respect of those issues which had been identified as having significant adverse effects that could not be mitigated, and in the manner that the Respondent carried out the EIA it failed to provide the integrated approach required under the Directive and did not have the appropriate expertise which is now required under Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU to form the opinion and the judgment necessary in order to grant the development consent, did not give any and or any adequate reasons and could not having regard to the findings made by the expert person appointed by them and or having no or no appropriate basis for making the findings that they did and/or in failing to properly apply the requirements of the Directive failed to comply with and/or have appropriate regard to the requirements of the Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU.”

**28.** This was likewise rejected in the No. 1 judgment.

**29.** Core ground 3.1 states as follows:

“3.1 The Respondent erred in law in the manner in which it considered the proposed development relative to the acknowledged material contravention of the Dublin City Development Plan, notwithstanding that the proposed development amounted to a material contravention of the Dublin City Development Plan and that notwithstanding the Development Plan requires 10% of the lands the subject matter of the application be required to be provided as public open space, no such public open space was being provided, and which was the subject matter of definitive findings by the Inspector in his report to the Board and in respect of such findings the Board concurred.”

**30.** This was also rejected in the No. 1 judgment.

**31.** Core ground 3.2 states as follows:

“3.2 The Respondent Board, in considering and determining the matter considered that it could have regard to future open space that might be provided in phase 2 and 3 of the development and in reliance on the proposals that might be contained in future planning application and which does not and could not amount to public open space and on this basis decided to permit the development in breach of the requirements of the Plan. In so doing the Respondent acted to contrary to the statutory scheme, erred in law and acted irrationally and inappropriately, predetermined future applications, failed to provide for any public open

space as is required for this large-scale development as part of this application, had regard to irrelevant and inappropriate considerations and acted unreasonably and contrary to law.”

**32.** This was also rejected in the No. 1 judgment.

**33.** Core ground 3.3 states as follows:

“3.3 The Respondent erred in having regard to a masterplan that had been prepared which did not comply with the requirements of the Strategic Environmental Assessment Directive 2001/42/EC in respect of the masterplan and /or SDRA 12.”

**34.** As a domestic law point, that was rejected in the No. 1 judgment. As an EU law point, that falls following the CJEU judgment. It is clear that strategic environmental assessment (SEA) isn't required for plans that are not binding in themselves, even if (like the master plan here) they are made under statutory plans, are required by statutory plans or give effect to statutory plans.

**35.** It would be hard for me or anybody to improve on the summary of the position set out at para. 1 of the board's written legal submissions:

“The Board's position following the judgment of the CJEU in Case C-9/22 is straightforward:

- the CJEU determined (§51) that only if the masterplan is binding on the Board under Irish law, would it be necessary to consider that the masterplan comes within the scope of the SEA Directive,
- this Honourable Court has already determined that the masterplan is not itself binding on the Board under Irish law, and so
- the masterplan therefore does not come within the scope of the SEA Directive.”

**36.** Thus the disposition of this point is beautifully syllogistic in a way that one rarely sees put with such elegance. Even down to correctly outlining the major premise first. Such an approach compares favourably with that of some litigants in other cases who might have a potentially winning point but who see no need to state it at an early stage. Such parties find it preferable to deplete the court's finite mental resources to dwindling point first with a labyrinth of preambular material in their written, or particularly oral, submissions. The logic here is compelling. The applicants sought in effect to dispute the premises but I am afraid that those propositions are fairly clear.

**37.** Core ground 4.1 states as follows:

“4.1 The first named Respondent erred in law in its determination that the proposed development is consistent with the zoning objectives of the site in circumstances where the issue of open space is critically integrated within the zoning provisions and where in respect of each of the two principal zoning provisions apply to the residential development that is Z1 which applies to sustainable residential neighbourhoods and Z14 which applies to strategic development and regeneration areas, the development of public space and/or public open space is required to be provided within easy reach and is as consequence integral to the zoning provisions applicable to the site of the proposed development. In failing to provide for the appropriate public open space within the development as required by the Plan, the proposed development is inconsistent with the zoning provisions which integrate this requirement as a condition precedent to satisfying the test in respect of compliance with zoning objectives which relate to the residential development.”

**38.** This was rejected in the No. 1 judgment.

**39.** Core ground 5.1 states:

"5.1 The first named Respondent erred in law in its imposition of condition 22 in circumstances where there is no clear proposal in respect of how the Notice Party intends to comply with Part V or the inclusion of a clear and precise proposal in that regard. Further the proposal in respect of Part V are inconsistent with and contradictory to condition 2 and 3 of the decision in circumstances where the proposal provides for an allocation for residential units albeit in contradictory locations included within the application and where a certain number of specified units are intended to be leased to the housing authority but where condition 2 requires that a legal agreement be submitted to confirm that the development permitted shall remain and operated by the institutional entity for a period of not less than 15 years, and that is in direct conflict with the obligation imposed at condition 22."

**40.** This was rejected in the No. 1 judgment.

**41.** Core ground 6.1 states as follows:

"6.1 Conditions 2 and 3 are void as they are a restriction on the right of alienation, are contrary to public policy and are matters which are inappropriate to and inconsistent with the provisions of the Planning and Development Act, 2000 and in particular Section 34(4) thereof."

**42.** This was also rejected in the No. 1 judgment.

**43.** Core ground 7.1 states as follows:

"7.1 The First Named Respondent erred in law and failed to comply with Council Directive 2011/92/EU as amended by Council Directive 2014/52/EU in a manner in which it relied on and applied Ministerial Guidelines made pursuant to Section 28 of the Planning and Development Act, 2000 (as amended) in carrying out an Environmental Impact Assessment. The first named Respondent had regard to, applied or complied with Ministerial Guidelines or elements thereof so as to fetter their its discretion to act as a competent authority for the purposes of the Directive and in so doing had regard to irrelevant considerations."

**44.** This wasn't pursued following the judgment of the CJEU.

**45.** Core ground 7.2 stated as follows:

"7.2 Further or in the alternative, the statutory requirements that the first named Respondent have regard to, comply with and apply Ministerial Guidelines or elements thereof made pursuant to Section 28 of the Planning and Development Act, 2000 as amended are inconsistent with and contrary to Council Directive 92/43/EEC and/or Council Directive 2011/92/EU as amended by Council Directive 2014/42/EU as such amounts to a restriction or limitation of and/or political interference with the obligations of the competent authority under those Directives. Further or in the alternative, such provisions fail to transpose the requirements of both Directives into Irish domestic law. The assessments required by the Directives are incompatible with statutory requirements to have regard to, comply with and apply political directions, and Irish domestic legislation fails to exclude the application of such requirements to the competent authority in exercising its functions under the Directives."

- 46.** This seems to have been removed from the Fifth Amended Statement of Grounds (although it isn't struck through, just omitted altogether) but in any event there was no attempt to resuscitate the point following the judgment of the CJEU.
- 47.** Core ground 8.1 states as follows:  
"8.1 Section 28 of the Planning and Development Act, 2000 (as amended) is inconsistent with and contrary to Council Directive 92/43/EEC 2014/52/EU insofar as it restricts and limits a competent authority both in carrying out an Appropriate Assessment and/or screening for Appropriate Assessment for the purposes of Council Directive 92/43/EEC."
- 48.** This wasn't pursued following the judgment of the CJEU.
- 49.** Core ground 9.1 states as follows:  
"9.1 The First Respondent failed to comply with Council Directive 92/43/EEC in failing to carry out screening for Appropriate Assessment in accordance with the requirements of the Habitats Directive in respect of the proposed development. The First Respondent in applying the requirements of the Directive considered and determined that there was no pathway in respect of which emissions and/or discharges could affect or impact on the neighbouring European Sites, i.e. site code 004024 and 00210 both of which are located proximate to the site and/or hydrologically connected to the site.  
The First Respondent failed to properly consider the existing hydrology and hydrogeology of the lands in this regard, failed to have regard to other plans or projects in combination with the proposed development required under Council Directive 92/43/EEC, did not have the information and/or the level of expertise to make a determination in accordance with the standard required in respect of screening for Appropriate Assessment that complies with the requirements of the Directive and failed to apply or adopt the appropriate tests that applied in respect of Appropriate Assessment and in so doing failed to properly consider and apply the requirements of the Directive."
- 50.** This was rejected in the No. 1 judgment.
- 51.** Core ground 10.1 provided as follows:  
"10.1 The Second Named Respondent failed to transpose the requirements of Council Directive 2001/42/EC, and/or provide for its implementation in a manner so as to ensure its effective operation."
- 52.** The applicants amended their statement of grounds to delete that issue, so that ground has been removed from the case.
- 53.** Core ground 11.1 states as follows:  
"11.1 The First Named Respondent made a fundamental error of law and fact in its determination that the lands, the subject matter of the application, were designated for a tall (mid-size) building either in the Dublin City Development Plan or in any Plan or at all, and or failed to properly consider whether the Plan / the SDRA 12 was appropriate to and or consistent with the statutory Development Plan and or failed to properly consider and have appropriate regard to the expert Inspector's conclusions, failed to give reasons and or have appropriate regard to the Plan and constitutes an error of law of the face of the record."
- 54.** This was rejected in the No. 1 judgment.
- 55.** Core ground 11.2 states as follows:

"11.2 The First Named Respondent erred in law in failing to ensure that the plans and particulars lodged complied with the requirements of the Planning and Development Regulations such as to allow for precise determinations as to the height of all buildings, distance from boundaries and failed to consider the obligations of the validity of the application so as to ensure the requirements of the Regulations were complied with which is a condition precedent to its consideration and determination."

**56.** This wasn't pursued, as noted in the No. 1 judgment.

**57.** The disposition of the various sub-grounds can be taken to follow the fate of the associated core grounds.

**Order**

**58.** Two final contextual points. Firstly, at the risk of stating what will be obvious to lawyers, it isn't part of the court's function to adjudicate on the planning merits of any given proposal, and nor should any order made by the court be read in that sense. The order made is a function of the arguments pleaded and pursued, not the planning merits; albeit that all other things being equal, a poor proposal might be more likely to stumble into a larger number of legal tripwires because the applicable legal norms generally serve the interests of quality, under the rubric of proper planning and sustainable development. But that is only a statistical perspective, not something that dictates the outcome of any given case. I don't in any way wish to reflect on the quality of this particular development, acknowledging that the parties have differing views on that. But viewing the matter in purely general terms, permission for a say low quality development that is challenged on misconceived legal points will be upheld, whereas permission for a say high quality development that trips on even a single meritorious legal point going to validity will be quashed. Where this particular development lies on the merits spectrum is something for the court of public opinion: any given judge in any given case is only concerned with legality, and more specifically only with legality by reference exclusively to the particular legal points that are both properly pleaded (including on pleadings as amended, where appropriate) and pursued at the hearing. For the avoidance of doubt, that isn't to suggest that there is some other point that would have changed the outcome had it been pleaded or pursued here.

**59.** A final point that I might be forgiven for concluding on is that, in this case, as in all cases in this list, I have been greatly assisted by the legal practitioners on all sides. The recent Practice Direction HC119 sets out the court's expectations of parties (and naturally their legal representatives) in terms of business-like processing of cases, and the lawyers both in this case and in cases generally have been providing sustained co-operation with each other and the court in that regard. The lawyers in the list, if my experience so far is anything to go by, generally do an admirable job in implementing the desiderata of efficiency and mutual respect and co-operation contained in PD HC119. The present case is a good example, as the lawyers agreed to compress the hearing of the present module into about an hour, rather than have it take up a full day or more. That said, while legal practice comes with some obligations and expectations, it also has rights: parties have an entitlement to access to justice, and for that purpose to be represented by lawyers of their choice. Both dimensions should be acknowledged.

**60.** For the reasons set out in the judgment, the order will be:

- (i) that the proceedings be dismissed;



- (ii) that the foregoing order be perfected with no order as to costs (including no order as to costs before the CJEU) unless a written legal submission is delivered setting out reasons to the contrary, or setting out reasons in relation to any other consequential issue, within 7 days of the date of delivery of this judgment; and
- (iii) that in the event of such application, the matter be listed on the next convenient Monday.