[2023] IEHC 280

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 830 JR]

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

BETWEEN

SINEAD KERINS AND MARK 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. 5)

JUDGMENT of Humphreys J. delivered on the 25th day of May, 2023

1. In *Kerins v. An Bord Pleanála (No. 1)* [2021] IEHC 369, [2021] 5 JIC 3102 (Unreported, High Court, 31st May, 2021) I dismissed the applicants' case on domestic law grounds.

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

3. In *Kerins v. An Bord Pleanála (No. 3)* [2021] IEHC 733, [2021] 11 JIC 3001 (Unreported, High Court, 30th November, 2021) I made a formal order for reference to the CJEU.

4. In Case C-9/22 *N.J. v. An Bord Pleanála* (Court of Justice of the European Union, 9th March, 2023, ECLI:EU:C:2023:176), the CJEU ruled on the questions referred.

5. In *Kerins v. An Bord Pleanála (No. 4)* [2023] IEHC 186 (Unreported, High Court, 24th April, 2023), I dismissed the proceedings on foot of the CJEU judgment.

6. The applicants now apply for leave to appeal and costs.

Leave to appeal

7. The caselaw on leave to appeal has been recently summarised by Barniville J., as he then was, in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26th April, 2022) at para. 32 and by Holland J. in *Monkstown Road Residents' Association v. An Bord Pleanála* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, High Court, 19th January, 2023) so I do not need to rehearse the jurisprudence in further detail.

8. Above and beyond the abstract criteria, whether one is seeking leave to appeal or arguing the point at appellate level, it is important in practical terms to engage with the process and explain how the appeal points arise. In an ideal world, a party seeking leave to appeal, or who is actually appealing, would proceed as follows:

(i) identify how the point arises on the facts and in the applicable legal context;
(ii) address the pleadings and identify where the point was made;
(iii) move to the written submissions and identify how it was developed;
(iv) then move to the first instance judgment to explain how the point was addressed;
(v) if, hypothetically, a point properly pleaded and argued was not addressed in the judgment, the appropriate application would be one to re-open the judgment to address the issue before going on to seek leave to appeal; and
(vi) finally, the submissions on leave to appeal would demonstrate that doubt arises in relation to the decision of the court or, if one prefers, show how the decision could plausibly be wrong, which effectively amounts to the same thing.

9. If, sub-optimally, any given applicant does not do that, the court has the option of itself considering those issues and evaluating whether the point is an appropriate one for appeal. But it is far better for the applicant to do the spadework.

10. The applicants here propose four questions on the basis of which leave to appeal is sought. Questions 3 and 4 can be disposed of summarily before turning to the key issue which arises under questions 1 and 2.

Question 3

11. Question 3 is as follows:

"Whether the Sustainable Urban Housing Design Standards for New Apartments are such as to permit the interference with and undermining of a fundamental element of the ownership of lands, namely the restriction on the right of alienation provided for and protected under Article 40.3 and 43 and of the Constitution, and under the European Convention of Human Rights, and whether it is appropriate to this by means of guidelines issued under Section 28."

12. This question involves a reconfiguration of the pleaded case. Sub-ground 6.1 as pleaded asserted that "[c]onditions 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." Ground 8.2.1.2(g) alleged that there was an obligation to comply with the guidelines. On that basis it does not seem to be open to the applicants now to argue that the guidelines are not "appropriate". The basis on which I rejected the pleaded argument was that the restriction on the right of alienation was envisaged in the guidelines. The applicants now pivot at the proposed appellate stage and effectively challenge those guidelines when they did not do so originally. Insofar as question 3 involves an issue of the interpretation of the guidelines, the applicants do not engage with the interpretation as set out in the judgment.

13. There is no reference to the Constitution in this context or possibly any context in the fifth amended statement of grounds, and the only reference to the European Convention on Human Rights appears to be in relation to pre-application consultation. In any event, these applicants cannot argue third parties' constitutional rights. As the State correctly submits, "proposed Question 3 does not engage any alleged property rights *of the Applicants*."

Question 4

14. Question 4 is as follows:

> "Whether a Masterplan which under the provisions of the Dublin City Development Plan has the same status and fulfils the same functions for the purposes of that Development Plan as a Local Area Plan, and where both options i.e. Masterplan and Local Area Plan have been selected as the appropriate vehicle for detailing the principles for the detailed development of the lands within the SDRA and which terms are interchangeable for the purposes of the Dublin City Development Plan."

15. But the masterplan does not have the same status as a local area plan and I did not suggest otherwise. There is no issue here on which doubt arises.

Questions 1 and 2

16. We can return now to the first and second proposed questions of exceptional public importance, which are:

> "1. Where in the Dublin City Development Plan there is a requirement of 10% open space be provided for all residential schemes which will normally be provided within the site except where the site is too small or inappropriate to fulfil a useful purpose, is it permissible to provide that such a requirement can be complied with by the making of planning applications in the future, although without any obligation to do so and where the basis of the approach is predicated upon a non-binding Masterplan and which approach is not provided for and inconsistent with the Dublin City Development Plan.
>
> 2. Was it appropriate to rely upon a non-binding Masterplan as modifying the Dublin City Development Plan and in particular on the Masterplan as excusing the absence of public open space in condition 2 and ground the approach to open space provisions in a manner inconsistent with Dublin City Development Plan."

17. In the present case, the relevant zonings of the development site and adjacent lands are Z1, Z4, Z6 and Z14.

18. This particular area, Strategic Development and Regeneration Area [SDRA] No. 12, is addressed in chapter 15 of the development plan. Paragraph 15.1.1.15 provides somewhat non-grammatically:

> "The overall guiding principles for SDRA 12 are set out below: ...
>
> There is potential for one or two midrise buildings (up to 50 m) within the site, subject to the criteria set out in the standards section of this plan. To acknowledge the existing sports lands of St Teresa's gardens and its environs and act to retain and augment these lands as sporting facilities for the benefit of the wider community and use by local sports clubs. That at least 20% of the SDRA 12 be retained for public open space, recreation & sporting facilities including an area to facilitate organised games."

19. Chapter 15 does not have a financial contribution get-out clause in relation to the 20% open space. On the other hand, that open space requirement applies to the area overall rather than to each individual development; but the applicants ask in effect how this can be guaranteed unless the board requires the 20% provision in each individual application or alternatively a legally enforceable way to ensure that the overall target is met. Obviously, if enough individual developments in the area are permitted without each having the necessary open space provision, the requirement will be subverted by default and will be crowded out by an accumulation of housing without spaces.

20. Paragraph 16.3.4 of the 2016 to 2022 Development Plan states *inter alia*:

> "16.3.4 Public Open Space – All Development
>
> Public Open Space – All Development
>
> (See also Chapters 10 and 14)

In order to progress the city's green infrastructure network, improve biodiversity, and expand the choice of public spaces available, the provision of meaningful public open space is required in development proposals on all zoned lands.

There is a 10% requirement specifically for all residential schemes as set out in Section 16.10.1. This requirement also relates to other zonings such as Z6 and Z10. In the case of developments on Z12 zoned lands, the requirement will be 20% accessible open space, and for Z15 zoned lands the requirement will be 25% accessible open space and/or provision of community facilities.

Depending on the location and open space context, the space provided could contribute towards the city's green network, provide a local park, provide play space or playgrounds, create new civic space/plaza, or improve the amenity of a streetscape. Green spaces can also help with surface water management through integration with sustainable urban drainage systems. Soft landscaping will be preferred to hard landscaping which will be given consideration only in schemes where soft landscaping would not be viable or appropriate.

Where adjacent to canals or rivers, proposals must take into account the functions of a riparian corridor and possible flood plain.

Financial contribution in lieu:

In the event that the site is considered by the planning authority to be too small or inappropriate (because of site shape or general layout) to fulfil useful purpose in this regard, then a financial contribution towards provision of a new park in the area, improvements to an existing park and/or enhancement of amenities shall be required (having regard to the City's Parks Strategy)."

21. That provision appears to prescribe precisely when a financial contribution should be required – if the site is too small or inappropriate to fulfil a useful purpose. However, another provision of the plan is worded in different and more permissive terms at para. 16.10:

"Public open space will normally be located on-site, however in some instances it may be more appropriate to seek a financial contribution towards its provision elsewhere in the vicinity. This would include cases where it is not feasible, due to site constraints or other factors, to locate the open space on site, or where it is considered that, having regard to existing provision in the vicinity, the needs of the population would be better served by the provision of a new park in the area (e.g. a neighbourhood park or pocket park) or the upgrading of an existing park. In these cases, financial contributions may be proposed towards the provision and enhancement of open space and landscape in the locality, as set out in the City Council Parks Programme, in fulfilment of this objective."

22. One potential interpretation of this difference in specific wordings is that there is something of a conflict in the plan. The legal context for conflicting provisions within the plan is that s. 37(2)(b) of the Planning and Development Act 2000, applied to SHD developments by s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016, states:

"Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

23. In favour of the applicants, the inspector considered that there was a material contravention in relation to open space, specifically:

"Public Open Space Provision

13.5.1 I note the provisions of Dublin City Development Plan as they relate to public open space. This must first be understood in the context of the City Development Plan's provisions as they relate to 'Sustainable Communities and Neighbourhoods' as set out in Chapter 12 of the Plan and in relation 'Zoning' as set out in Chapter 14. The role of the provision of public recreational space in helping to create sustainable communities is recognised in Chapter 12. Policy provisions include:

> 'SN19: To enhance and improve the provision of playgrounds, play spaces, playing pitches and recreational spaces in residential areas and in the city centre in accordance with the City Council's standards and guidelines.
> SN29: To promote built environments and outdoor shared spaces which are accessible to all. New developments must be in accordance with the principles of Universal Design, the City Development Plan's Access For All Standards, and the National Disability Authority's 'Building For Everyone'.

13.5.2 With regard to Zoning, I note that three land use zoning objectives affect the lands - Z1 'Sustainable Residential Neighbourhoods' in the north-west section, Z4 'District Centres (incorporating Key District Centres) to the west, and Z14 'Strategic Development and Regenerations Areas (SDRAs) forming the main body of the site. The following is noted from the Plan in relation to Z1 and Z14 lands:

Z1

The vision for residential development in the city is one where a wide range of accommodation is available within sustainable communities where residents are within easy reach of services, open space and facilities such as shops, education, leisure, community facilities and amenities, on foot and by public transport and where adequate public transport provides good access to employment, the city centre and the key district centres.

Z14

The Plan notes that, in the case of each of the SDRAs, a number of development principles to guide development of each area have been identified. Relevant guiding principles for SDRA 12 include:

> 'The development of a network of streets and public spaces will be promoted to ensure the physical, social and economic integration of St Teresa's Gardens with the former Player Wills and Bailey Gibson sites, with further integration potential with the sites of the Coombe Hospital and White Heather Industrial Estate
> A vibrant mixed-use urban quarter will be promoted with complementary strategies across adjoining sites in terms of urban design, inter-connections and land-use. To provide for an area zoned sufficient in size to accommodate a minimum 80 m by 130m playing pitch
> A new public park is proposed as a landmark feature with passive supervision by residential and other uses; it will have a comprehensive landscaping strategy to provide significant greenery within the scheme and will make provision for a diverse range of recreational and sporting facilities for use by the wider neighbourhood'

13.5.3 It is clear from the above that the role of public open space is integral to the zoning provisions applicable to the site of the proposed development.

13.5.4 Turning then to the Plan's Development Standards (Chapter 16), I note that Section 16.3 relates to 'Public Open Space – All Development'. The Plan states:

> 'In order to progress the city's green infrastructure network, improve biodiversity, and expand the choice of public spaces available, the provision of meaningful public open space is required in development proposals on all zoned lands.
> There is a 10% requirement specifically for all residential schemes …'

13.5.5 It is pertinent to note that the Plan's provisions in relation to a financial contribution in lieu of public open space is in the event that a site is considered to be too small or inappropriate to fulfil useful purpose in regard to open space.

13.5.6 I acknowledge the applicant's 'Planning Statement & Statement of Consistency with Dublin City Development Plan 2016-2022'. Therein it is stated:

> 'The proposed development does not provide for public open space within the bounds of the application area.' (Section 7.4)

13.5.7 It is my submission to the Board that the proposal to develop the site without providing public open space fails to meet with the provisions of the City Development Plan. The Plan's policies as they relate to developing sustainable residential communities, the zoning provisions as they relate to the development of this site, and development standards all require the provision of public open space within this site to meet the needs of those which the proposed scheme on this site seeks to serve. The proposed development is an independent application, albeit that it is intended to form part of a wider master plan area. As an independent application for development, it is required to meet with basic public open space, recreation and amenity provisions of the Plan. There is no provision within the Plan which allows for future development of public open space elsewhere to which this development can seek to avail and which may relate to another possible future scheme on a separate site.

13.5.8 Having regard to the above, I can only reasonably conclude that the lack of public open space in the proposed development constitutes a material contravention of the City Development Plan."

24. The board however purported to avail itself of the exception to the open space requirement by adding a financial contribution by way of condition. The analysis of the issue by the board is as follows:

"Furthermore, the Board did not accept the Inspector's recommendation that the quantum of public open space in the proposed development would constitute a material contravention of the City Development Plan.

Notwithstanding that *(sic.)* the Dublin City Policy contained in section 16.3.4 of the Dublin City Development Plan, whereby all developments are required to provide a minimum 10% open space generally and at least 20% of the Strategic Development and Regeneration Area Number 12 lands be retained for public open space, recreation and sporting facilities, including a new public park, significant greenery, sports facilities for use by local sports club and wider neighbourhood, the Dublin City Development Plan also provides for 'Financial contributions in lieu: In the event that the site is considered by the planning authority to be too small or inappropriate (because of site shape or general layout) to fulfil useful purpose in this regard, then a financial contribution towards provision of a new park in the area, improvements to an existing park and/or enhancement of amenities shall be required (having regard to the City's Parks Strategy).' This is further strengthened by Section 16.10.3 as cited hereunder.

Section 16.10.3 - In new residential developments, 10% of the site area shall be reserved as public open space.

Public open space will normally be located on-site, however in some instances it may be more appropriate to seek a financial contribution towards its provision elsewhere in the vicinity. This would include cases where it is not feasible, due to site constraints or other factors, to locate the open space on site, or where it is considered that, having regard to existing provision in the vicinity, the needs of the population would be better served by the provision of a new park in the area (e.g. a neighbourhood park or pocket park) or the upgrading of an existing park. In these cases, financial contributions may be proposed towards the provision and enhancement of open space and landscape in the locality, as set out in the City Council Parks Programme, in fulfilment of this objective.

To this end, having regard to the Chief Executive's report, which proposes a financial contribution in lieu of public open space within the proposed development site itself, by way of recommended planning condition and the agreed Master Plan which indicates how and where the preferred open space location and provision would be met and would serve the wider area (i.e. on Dublin City Council lands), the Board is satisfied that the applicant, with the support of the planning authority, has demonstrated that the needs of the population would be better served by the provision of a new public park and playground and recreational space including sports pitches in the adjoining Dublin City Council owned lands, and that a financial contribution in lieu is applicable and the location of the new park and amenity facilities have been identified and are in accordance with Dublin City Council's strategy for the area (based on the agreed Master Plan). In light of the policies, objectives and development plan standards of the Development Plan, which specifically provide for contributions in lieu of open space. In appropriate circumstances such as this, and in so far as this has been proposed and agreed by the planning authority with the agreement of the applicant as evidenced in the jointly prepared Master Plan, the Board is satisfied that there is no material contravention of the Development Plan relating to open space provision."

25. One notable point at this stage in relation to that wording is that it treats the financial get-out clause (which in its own terms is phrased as an exception to a policy within chapter 16) as applicable to *both* chapters 15 and 16 ("[n]otwithstanding ... the Dublin City Policy contained in section 16.3.4 ... whereby all developments are required to provide a minimum 10% open space generally and at least 20% of the Strategic Development and Regeneration Area Number 12 lands [in chapter 15] be retained for public open space, recreation and sporting facilities, ... the Dublin City Development Plan also provides for 'Financial contributions in lieu ....'"). One can see an argument that this is not actually what the wording of the plan says.

26. Condition 24 of the board's order is:

"The developer shall pay the sum of €4,000 per unit (four thousand euro) (updated at the time of payment in accordance with changes in the Wholesale Price Index – Building and Construction (Capital Goods), published by the Central Statistics Office), to the planning authority as a special contribution under section 48 (2)(c) of the Planning and Development Act 2000, in lieu of public open space provision. This contribution shall be paid prior to commencement of development. The application of indexation required by

this condition shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine.
Reason: It is considered reasonable that the payment of a development contribution should be made in respect of the delivery of public open space within the wider masterplan area given that no public open space is provided for within the boundary of the application site"

27. That order was signed on 14th September, 2020 by the board's former deputy chairperson, Mr Paul Hyde.

28. Turning to the pleadings, core grounds 3.1 and 3.2 in the fifth amended statement of grounds are 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.
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."

29. The applicants' written legal submissions develop this point as follows:

"**Public Open Space.**

2.11 The guiding principle of retaining and augmenting the existing sports lands in SDRA 12 for the benefit of the wider community and use by local sports clubs is recorded in Section 15.1.1.15, where the following development principle is stated in respect of public open space:

'That at least 20% of the SDRA 12 be maintained as public open space, recreation and sporting facilities including an area to facilitate organised games.'

2.12 The Board had regard to future provision of open space in later phases of the Hines plan. This approach is contrary to the statutory scheme. It is predicated on a pre-determination of future applications, and affords unmerited status to a developer's blueprint. There is no certainty whatsoever as to whether any such application shall be made, much less as to whether they would be granted. Every application for planning permission under the statutory scheme falls to be considered on its own merits, and an applicant cannot attempt to import planning gain from potential future development to offset the failings of its application or to justify a material contravention of the Development Plan.

2.13 The requirement to provide public open space is integrated into the zoning provisions of the Development Plan. Z1 applies to sustainable residential neighbourhoods and Z14 applies to strategic development regeneration areas. In both zonings, the creation of public open space is required so as to be integral to and a precondition of the zoning itself. By abandoning the obligation to ensure the provision of public open space, the Board granted permission for a development inconsistent with the zoning objectives for residential development into which this requirement is integrated.

2.14 When granting permission for SHD under s.9(6)(a), the Board is required to state in its decision the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be pursuant to s.10(3)(b). The Board stated its reason for materially contravening the general height restriction, but no reasons were given for the material contravention of ... the general and SDRA 12 public open space requirements. This is ... because the Board tried to force the promise of more public open space in later phases of the Hines plan into the 'small site' public open space exception.

2.15 In its Statement of Opposition, the Board asserts that it was entitled to provide for a financial contribution in lieu of provision of public open space because this is 'expressly provided for in the Development Plan', and places emphasis on the fact that this was suggested by Dublin City Council as author of the Development Plan. This reveals a perspective as to the democratic will of the people involved in the making of a Development Plan by their elected representatives. If it was indeed the reasoning of the Board that the

requirement to provide public open space could be relieved if the Council wanted, then it manifestly misdirected itself. The Statement of Opposition simply does not engage with the fact that financial contribution in lieu is only envisaged where the site cannot accommodate public open space by reason of its configuration. There is no general exception that allows developers buy their way out of providing public open space.

2.16 It is respectfully submitted that the interpretation placed by the Board on the Development Plan ... in respect of ... public open space ... is untenable. An interpretation that keeps the Board within the parameters of a planning scheme is 'one that is more likely to lead to '(a) high level of environmental protection and the improvement of the quality of the environment…in accordance with the principle of sustainable development', to borrow the language of art.37 of the EU Charter of Fundamental Rights…'"

30. The No. 1 judgment, as we know at this stage, rejected the argument made by the applicants. What I said in that regard at para. 15 was:

> "At core grounds 3.1 and 3.2, the applicants allege an error in terms of material contravention of the development plan regarding the provision of public open space. The development plan itself however provides that "[p]ublic open space will normally be located on-site, however in some instances it may be more appropriate to seek a financial contribution towards its provision elsewhere in the vicinity' (para. 16.10.3). That does not amount to a sufficiently definite criterion which could be said to have been breached here. Paragraph 15.1.1.15 of the plan envisages that at least 20% of SDRA 12 would be maintained as public open space, but that is an overall requirement which does not render a particular application regarding a portion of the SDRA a material breach of the plan."

31. Viewed from the standpoint of leave to appeal, the issue is not so much whether I was correct, but whether there is a plausible argument that I was wrong such that doubt could arise warranting appellate clarification. I am going to confess that I didn't immediately see a whole lot of doubt in the matter, and sat down to write a judgment saying so, but the more I have thought about it since the leave to appeal hearing, the more the applicants' concerns have grown on me. There is much wisdom in the view that reasons are mainly for the losing party (see *per* Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January, 2022) at para. 259); and indeed from a realist point of view, it is only marginally too jaded to suggest that reasons are often primarily of interest only to the junior counsel on the losing side who has been tasked with drafting the notice of appeal – everyone else just wants to know who won. However, there is another side to the coin which is that reasons are for the decision-maker, to help and indeed compel her to organise her thoughts and write something that hangs together. Occasionally one sits down to explain a proposed conclusion, but the argument "doesn't write". And one has to revise the reasoning, even the conclusion itself. This may be one of the latter instances.

32. It is open to the court at the leave to appeal stage to reformulate the questions involved, and there are numerous instances of that happening, both where questions were proposed by applicants and by opposing parties. Adopting that approach, there are a number of questions implicit in the applicants' submissions that satisfy the criteria for leave to appeal:

(i) Was it open to the board to find that the specific terms of para. 16.4.3 of the plan were "further strengthened" by different and more permissive specific terms of para. 16.10.3?

(ii) Does the difference in the provisions give rise to "conflicting objectives", triggering the provisions of s. 37(2)(b) of the 2000 Act as applied by s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016 relating to material contravention; or alternatively does the difference amount to a conflict of text not related to objectives which falls *qua* conflict outside s. 37, and thus is a situation whereby preferring either provision amounts to a material contravention of the other provision, which cannot be resolved under s. 37?

(iii) Was it open to the board to rely on paras. 16.4.3 and/or 16.10.3 as a reason to depart not just from the 10% open space provision required by chapter 16, but also from the 20% open space required by chapter 15?

(iv) Was it open to the board to approve the development without either compliance with the 20% requirement within the development site itself, or a legally enforceable means of ensuring that the 20% requirement overall would be achieved in another way?

33. So I will grant leave to appeal by certifying those questions. I might also respectfully add that either or both parties might perhaps consider whether to apply to the Supreme Court to accept the matter on a leapfrog basis, given the nature of the issues and the fact that the application has surmounted the exceptional public importance threshold here. Respondents to an appeal to the Court of Appeal have an express right to apply to the Supreme Court since the insertion of s. 50A(13)

in the 2000 Act by s. 6 of the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021, and hopefully (if I can be forgiven for saying so) there might be potential for this to be generalised to declare a jurisdiction to accept *any* appeal at the instance of a respondent to the appeal, not just regarding planning or where leave to appeal is required. Many issues are rather more urgent to responding parties than to appellants, so an appellant should not have a stranglehold on how many levels of the system are to be engaged. One can potentially see an argument for an inherent jurisdiction to allow the Supreme Court to cut to the chase, should that be appropriate in a given appeal, and indeed s. 50A(13) potentially recognises that insofar as it is phrased as being "[f]or the avoidance of doubt". Anyway, that's all a matter for that court

34. I had better also acknowledge that the questions that now appear to be the pertinent ones are somewhat more specific in their terms than the relevant paragraph of the judgment. That doesn't in itself mean that they don't "arise from" the judgment in the sense of the caselaw. These issues seem to me to be implicit in the applicants' pleadings, which is what I was trying to deal with, successfully or otherwise, in the judgment, so the questions arise from that attempt, albeit that I am now assisted by an added layer of submission and argument. The latter process inevitably carries the possibility that it might to some degree refine and re-focus the critical inflection points. It can be a fine line between that and impermissibly reprogramming the entire case to take it outside the pleadings, but I don't think that that boundary is transgressed here. Rather the reformulated questions should bring out the real issues in controversy about which doubt could arise and which are implicit in the applicants' pleaded case and reflected to a greater or lesser extent in their written and oral submissions at the substantive hearing and the leave to appeal stage.

Costs of the substantive proceedings

35. The applicants sought costs at least to some extent against all of the opposing parties. But contrary to what appeared to be suggested at one point, an application for costs by a losing side is not an *ad misericordiam* process.

36. In the planning context, costs are governed by s. 50B of the Planning and Development Act 2000, so the default rule is that where an applicant loses there is to be no order as to costs.

37. The complexity of planning law is a bit of a cliché, but even assuming for the sake of argument that we take it as read that this area is complex, mere complexity is not in itself a basis for a losing side to get costs.

38. Likewise, the fact that a reference to Luxembourg is involved does not itself modify the normal approach to costs, especially given how pervasive EU law is in the domestic legal order: see *M.S. (Afghanistan) v. Minister for Justice and Equality (No. 2)* [2021] IEHC 164, [2021] 3 JIC 1608 (Unreported, High Court, 16th March, 2021).

39. It's true that certain legal issues were ambiguous, hence the need for a reference to the CJEU, and also that both I and, rather more importantly, the CJEU agreed with certain sub-aspects of the applicants' submissions regarding EU law. But the hearing and the reference would have been pretty much the same length even if the opposing parties had not incorrectly contested the limited number of points of EU law where the applicants were correct. Therefore, *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 240 doesn't properly apply here. The opposing parties have not materially added to the costs in the way that makes it appropriate to award partial costs against them.

40. More fundamentally, many aspects of planning law are structurally favourable to applicants, not least regarding costs (see issues referred to in *Marshall v. Kildare County Council* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023)). It would make the system even more one-sided than it already is to award costs to a losing applicant, save in highly exceptional circumstances. These are not such circumstances. As the State correctly says, sub-s. 50B(4) of the 2000 Act, which the applicants have not in any event expressly relied on, is "not engaged on the facts of this case." Exceptional public importance is a necessary condition for sub-s. (4) to be triggered, but not a sufficient condition. There must also be "special circumstances of the case" such that "it is in the interests of justice to do so." So the bar for costs to be awarded to the losing side is materially higher even than the high bar for leave to appeal. There has to be some reasonable degree of fairness for opposing parties, and, not for the first time, this is a case where the default position of no order as to costs under s. 50B(2) of the 2000 Act is the obvious and appropriate outcome.

41. Costs of the leave to appeal issue are different, having regard to the order now being made, and I would propose to include a default order in favour of the applicants in that regard.

Order

42. For the foregoing reasons it will be ordered that:

(i) leave to appeal be granted on the basis of certifying the four re-worded questions set out in this judgment at para. 32;

(ii) there be no order as to costs (including costs in the CJEU) in the proceedings, up to and including the No. 4 judgment; and

(iii) in the absence of submissions to the contrary lodged with the court within 7 days, the substantive order in the proceedings on foot of the No. 4 judgment and the order on foot of the present judgment be perfected with an order for the applicants' costs against the board in relation to the leave to appeal application including the costs of written submissions.