THE HIGH COURT

JUDICIAL REVIEW

2019 No. 239 J.R.

BETWEEN

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

APPLICANT

AND

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 30 May 2019.

INTRODUCTION

1. The underlying dispute between the parties to these proceedings concerns the interpretation of a set of statutory guidelines issued by the Minister for Housing, Planning and Local Government. The guidelines are entitled "*Urban Development and Building Heights*" and were issued in December 2018 ("*the building height guidelines*"). The issue of interpretation is net, and centres on the interaction between the guidelines and statutory planning schemes adopted in respect of strategic development zones ("*SDZs*").

2. The parties are in disagreement as to whether the relevant policy under the building height guidelines distinguishes between a planning scheme and the development plan simpliciter. The resolution of this disagreement will depend, in part, on the correct inference to be drawn from the fact that a planning scheme is "deemed" to form part of a development plan. (Section 169(9) of the PDA 2000). It will also depend on whether the guidelines must be read in conjunction with the SEA statement prepared for the purposes of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("*the SEA Directive*") and the implementing national regulations, the EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (as amended).

3. The practical significance of the underlying dispute lies in its implications for two applications for planning permission submitted by Spencer Place Development Company Ltd. ("*the Developer*"). These applications are pending before Dublin City Council. The proposed development would exceed the maximum building heights prescribed under the relevant planning scheme. The Developer maintains, however, that the legal effect of the building height guidelines is that the planning authority is now authorised to grant planning permission notwithstanding this exceedance.

4. The Developer seeks certain declarations as to the meaning and effect of the guidelines in these judicial review proceedings. In particular, the Developer seeks a declaration that the building height guidelines apply to the determination of planning applications for development within the area of any SDZ planning scheme as and from the date of the publication of the guidelines. The proceedings have an urgency in that Dublin City Council is required to make a decision on the planning applications by Friday, 31 May 2019. A judgment on the correct interpretation of the guidelines *might* be conclusive of the outcome of the planning application. This is not certain however: for example, the planning authority might decide to refuse planning permission for reasons entirely unrelated to building height.

5. This lack of certainty as to the implications of a judgment for the outcome of the planning application process gives rise to a second area of dispute between the parties. The planning authority objects that the proceedings are inadmissible on the basis that any application for judicial review should have awaited the making of a decision on the two planning applications. It is submitted that —pending the determination of the two planning applications—there is as of yet no "decision" or "act" on the part of the authority which is amenable to judicial review. It is said, therefore, that the proceedings are premature. In response, the Developer contends that a briefing note issued by the City Planning Officer setting out his interpretation of the building height guidelines is justiciable.

6. I propose to address this procedural objection first, before turning to consider, if necessary, the substantive issue, i.e. the interpretation of the building height guidelines.

7. Before turning to that task, however, it is necessary first to set out a brief summary of the factual background.

FACTUAL BACKGROUND

8. The Developer is the leaseholder of lands at Spencer Place, Spencer Dock, Dublin 1. The lands are located in an area which has been designated as a strategic development zone, namely the North Lotts and Grand Canal Strategic Development Zone. A statutory planning scheme was prepared in respect of the SDZ in 2014. This is known as the North Lotts and Grand Canal Planning Scheme 2014 ("*the North Lotts planning scheme*"). Insofar as relevant to the Developer's sites, the North Lotts planning scheme prescribes maximum building heights of 5 to 8 storeys (commercial), and 6 to 10 storeys (residential), with one possible set back floor.

9. The Developer seeks to rely on the building height guidelines in order to obtain planning permission for *additional* storeys on two sites. In each instance, the Developer already has the benefit of extant planning permissions which authorise building heights of a scale allowed for under the North Lotts planning scheme. Following on from the publication of the guidelines in December 2018, the Developer submitted planning applications in January 2019, and February 2019, respectively, which seek amendments to the permitted development in order to increase the height of same. The first planning application relates to office buildings at Spencer Dock described as the "*Salesforce Building*"; and the second planning application relates to proposed residential development and an aparthotel at Spencer Place. This second planning application seeks, *inter alia,* amendments to increase the maximum height of Block 1 of the permitted development from 7 storeys to 13 storeys, and to increase the maximum height of Block 2 to 11 storeys.

10. The Developer maintains the position that the two planning applications fall to be determined by reference to the building height guidelines. It is suggested that the guidelines authorise Dublin City Council to grant planning permission notwithstanding that the scale of the development now proposed conflicts with the building heights prescribed in the North Lotts planning scheme.

11. Prior to the institution of the within judicial review proceedings, the Developer had sought to articulate its position in this regard by way of correspondence with Dublin City Council. This correspondence commenced on 2 January 2019. During the course of the

exchange of correspondence, the Developer furnished Dublin City Council with no less than four opinions from two senior counsel as to the correct interpretation of the building height guidelines.

12. In parallel to this correspondence, members of Dublin City Council had also raised queries as to the applicability of the building height guidelines. In response, the City Planning Officer, Mr John O'Hara, prepared a document entitled "*Briefing Note on the City Development Plan and Height Guidelines"* dated 31 January 2019. Given that one of the principal reliefs sought in these judicial review proceedings is an order declaring this briefing note to be invalid, it is necessary to rehearse the relevant parts of same in full.

> "4. In relation to the Building Height Guidelines, SPPR No. 1 requires PA's to explicitly identify through future statutory plans, areas where increased height will be actively pursued to secure the urban consolidation objectives of the NPF *'and shall not provide for blanket numerical limitations on height'.*
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> SPPR 3 states that where an applicant demonstrates how a proposal complies with certain criteria (e.g. proximity to good public transport, contribution to place-making/streetscape, daylight/microclimatic impacts, effect on the historic environment etc.), to the satisfaction of the Planning Authority, then permission may be granted, *'even where specific objectives of the relevant Development Plan or Local Area Plan may indicate otherwise'*
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> 5. These requirements do not apply to an approved SDZ Planning Scheme. However, the Planning Authority/Development Agency must, on the coming into force of the Guidelines, carry out a review, to ensure the NPF/Guidelines are reflected in the Scheme. The review of the existing DCC SDZ Planning Schemes has commenced. The Guidelines at 2.11 state that it is crucial that Development Plans identify and provide policy support for specific locations or precincts where increased height is not only desirable, but a policy requirement. In this regard, the review of the current City Development Plan must commence by September 2020. It is not necessary or proposed to review the current City Development Plan to take account of the new Building Height Guidelines."

13. Mr O'Hara explains the genesis of this briefing note as follows in his affidavit of 14 May 2019. The Corporate Policy Group of Dublin City Council, at its meeting of 25 January 2019, had raised a query as to the impact of the new height guidelines on the development plan. Mr O'Hara states that the query was about the guidelines *in general* and did not concern the two planning applications nor indeed SDZs. Mr O'Hara explains the purpose of the briefing note as follows.

> "11. On foot of this, I prepared a short report on the matter dated 31st January 2019. The report was prepared to address the CPG's concerns about the effect of the Guidelines on the Development Plan, especially as there were a number of SHD (Strategic Housing Development) applications for over 100 units submitted directly to An Bord Pleanála around that time. The reference to SDZ's in the briefing note was incidental to the main purpose of the report and was included for the sake of completeness. […]
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> […]

13. It is important to note that this was a briefing note, not a recommendation or a decision on specific planning applications, nor was it specific to any development in the SDZ."

14. It seems that the intention had been that the briefing note would be put before the elected members at the Council meeting in February 2019. It was not, however, reached on that occasion, and went back to the meeting on 4 March 2019.

15. Counsel for the Developer places emphasis on the fact that the Chief Executive of Dublin City Council, Mr Eoin Keegan, was in attendance both at the meeting on 25 January 2019 when the preparation of a briefing note was agreed upon, and at the subsequent meeting on 4 March 2019 when the briefing note was "noted" by the elected members. Emphasis is also placed on the fact that the Assistant Chief Executive, Mr Richard Shakespeare, was also at the meeting of 4 March 2019. The function of determining planning applications has been delegated to Mr Shakespeare. All of this, it is submitted, is indicative of the fact that the senior executives of Dublin City Council were all in agreement that the building height guidelines did *not* govern an application for planning permission in respect of an SDZ planning scheme. This is said to be relevant to Dublin City Council's objection that the proceedings are premature. I will return to consider this objection presently.

16. All the while these events were occurring, the statutory time-limit for the determination of the two planning applications was running. A planning authority is under a statutory duty to determine an application for planning permission within a period of *eight weeks* beginning on the date of receipt by the planning authority of a (valid) application. This time-limit can, however, be extended by the written consent of the applicant for planning permission. See section 34(9) of the PDA 2000. The planning consultants acting on behalf of the Developer, John Spain Associates, wrote to Dublin City Council consenting to an extension of time. The giving of this consent was a unilateral act on the part of the Developer, in the sense that the planning authority had not requested such consent. In each instance, the Developer consented to an extension of time up to 31 May 2019.

17. The rationale for this approach has been explained by Mr Spain in his second affidavit (17 May 2019) as follows.

> "6. The extension of time was the appropriate route for the Applicant to follow where the Council's interpretation of the Building Height Guidelines as set out in the Briefing Note would mean that planning permission would have to be refused for the two applications as the increase in height for which planning permission was sought was not in compliance with the Planning Scheme. The purpose of the extension was to allow time for this matter to be resolved prior to the Council making a decision on the application."

18. On behalf of Dublin City Council, Mr O'Hara makes the following observation in his affidavit of 14 May 2019.

> "16. It is most unusual for an applicant to unilaterally consent to an extension of time. There is no record of this procedure being used in the last 5 years, until these two applications. In my experience this procedure is used extremely rarely, for example where there is an unexpectedly large number of submissions to be considered or when the case officer is out sick, and in order to avoid default permission being granted. In such rare cases the time extension is agreed between the City Council and the Applicant."

19. The within proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 23 April 2019. The proceedings were case managed by the Judge in Charge of the Judicial Review List (Noonan J.). The matter came on for full hearing before me for two days commencing on Tuesday 28 May 2019.

BUILDING HEIGHT GUIDELINES
20. The dispute in the proceedings centres largely on the interpretation and application of a particular provision of the guidelines known as "SPPR 3". The abbreviation "SPPR" refers to a "specific planning policy requirement". The full text of this requirement, and the relevant extracts from the SEA statement published for the purposes of the SEA Directive pursuant to regulation 16 of the EC (Assessment of Plans and Programmes) Regulations 2004 (as amended) will be set out presently.

21. For introductory purposes, the overall objective of the building height guidelines might be summarised as follows. In accordance with government policy to support increased building height and density in locations with good public transport accessibility, particularly town/city cores, planning authorities are required to explicitly identify areas where increased building height will be actively pursued, and not to provide for blanket numerical limitations on building height. Planning authorities are also required to ensure an appropriate mixture of uses, such as housing and commercial or employment development. The guidelines identify development management criteria which are to be taken into account in assessing individual planning applications. Where the relevant planning authority considers that such criteria are appropriately incorporated into development proposals, then the planning authority is required to apply SPPR 3.

RELIEF SOUGHT
22. The Developer seeks three declarations which can be summarised as follows. First, a declaration that the legal interpretation in the briefing note of 31 January 2019 is *ultra vires* and/or incorrect as a matter of law. Secondly, a declaration that Dublin City Council is obliged to apply SPPR 3 (A) in the determination of planning applications for development within the area of any SDZ planning scheme, including the North Lotts and Grand Canal Planning Scheme 2014, as of the date of the publication of the building height guidelines. Thirdly, a declaration that Dublin City Council is obliged to apply and/or comply with the building height guidelines prior to undertaking and/or completing any review and/or amendment of the North Lotts and Grand Canal Planning Scheme.

(1). PROCEDURAL OBJECTION

INTRODUCTION
23. The case was heard on 28 and 29 May 2019, and the parties have requested that judgment be delivered prior to Friday, 31 May 2019, i.e. the date upon which the two planning applications must be decided. The very tight timelines which the court faces in this regard give rise to the following practical difficulty. If the court were to decide the *procedural* objections in favour of Dublin City Council, and to refuse to address the *substantive* issue, i.e. the interpretation of the guidelines, then this might result in an overly convoluted appeals process.

24. More specifically, were this court to decide the case solely by reference to the procedural objection, only for that finding to be set aside on appeal, it would then be necessary for the matter to be remitted to the High Court for a determination on the substantive issue. There might then be a second appeal to the Court of Appeal. It seems preferable, therefore, that this judgment should address both the procedural objection and the substantive issue. Thereafter, in the event that the parties wish to exercise their right of appeal, all issues will come before the Court of Appeal and can be disposed of at a single hearing. This is so notwithstanding that, as explained immediately below, I would have resolved the procedural objection in favour of Dublin City Council and this finding on its own would have been sufficient to dispose of the proceedings.

25. The gravamen of Dublin City Council's procedural objection is that the briefing note of 31 January 2019 impugned in these proceedings has no formal legal standing. There is no statutory provision under the PDA 2000 which allows for a planning authority to provide an advisory opinion on the correct interpretation of planning policy, still less a purported interpretation of a statutory provision. The closest one finds are the provisions of section 5 of the PDA 2000 which allow for a planning authority to make a formal determination as to whether a particular act constitutes development or exempted development for the purposes of planning permission. This does not apply in this case.

26. Dublin City Council also makes the point that Mr O'Hara, although occupying a senior position in Dublin City Council, is not the person ultimately responsible for making the decision on the two planning applications. The implementation of the planning scheme for the North Lotts and Grand Canal SDZ, and the function of determining planning applications, has been delegated to the Assistant Chief Executive, Mr Shakespeare, by order dated 23 November 2018 (Order No. CE 5429). See written submissions as follows.

> "18. In addition to the question of justiciability of the position taken by the Chief Planner in his letter of advices to the Elected Members, there is an issue of prematurity where an application is pending for planning permission which is not due to be delivered until the 31st May next, by which time the decision-maker (the Chief Executive of the respondent) can take a view different from that of the Chief Planner as expressed in the memorandum of advices (of a general nature) which were furnished to the Elected Members in March 2019. For that reason it is not appropriate to grant relief without allowing the planning process to be fully exhausted before seeking to challenge the decision, which ultimately will be the outturn of the termination of the planning process currently under consideration. The timing of the issue of the present proceedings was therefore misconceived.
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> 22. Moreover, the advices given by the Planning Department (which were of a general rather than a specific nature) regarding the Guidelines on height restrictions was a set of advices given to the Elected Members who are not the ultimate decision-makers regarding the Applicant's applications for planning permission in this case so that the advices, even if flawed were not going to have any adverse impact on the outcome of the process ultimately leading to the grant or refusal of the Applicant's application for planning permission. It will also constitute a form of prejudgment and a fettering of its discretion for the Council to state that it was going to adopt the same position set out in the briefing note in determining the planning applications."

27. In a sense, however, all of this has been overtaken by the events. The fact that the Developer instituted the within judicial review proceedings necessitated the planning authority adopting a formal stance in its opposition papers on the substantive question, namely, the applicability of the building height guidelines to a planning scheme. Dublin City Council has formally pleaded that SPPR 3 (A) does not apply to planning schemes. See, in particular, paragraphs 20, 26, 28 and 29 of the Statement of Opposition.

28. Against this background, any argument that the views expressed by Mr O'Hara in the briefing note of 31 January 2019 merely represent his own personal view, as opposed to the corporate view of Dublin City Council, falls away. Dublin City Council has committed itself in its pleadings to a particular interpretation of the building height guidelines. Specifically, the authority has adopted the position that SPPR 3 (A) does not apply to a planning scheme and, accordingly, the authority cannot rely on the guidelines to authorise development in a SDZ which is not consistent with the relevant planning scheme.

29. Counsel on behalf of the Developer submits that Dublin City Council's interpretation of the guidelines as set out in the briefing note is justiciable. In this regard, counsel helpfully opened a series of cases wherein non-statutory advices were found by the Courts of England and Wales to be reviewable by the courts. Reliance was placed, in particular, on *Gillick v. West Norfolk and Wisbech Health Authority* [1986] A.C. 112; R. *v. Worthing Borough Council* (1983) 49 P. & C.R. 53; and *R. v. Agricultural Dwelling-House Advisory Committed for Bedfordshire, Cambridgeshire and Northamptonshire* (1986) 19 H.L.R. 367.

FINDINGS OF THE COURT

30. The procedural objection raised by Dublin City Council presents an important issue of principle as to the *timing* of judicial review proceedings in the planning process. Dublin City Council has settled upon a particular interpretation of the building height guidelines. On this interpretation, it appears to be almost inevitable that the two pending planning applications will be *refused* in circumstances where it is common case that the scale of the proposed development would exceed the maximum height requirements prescribed under the North Lotts planning scheme. A planning authority is required under section 28 of the PDA 2000 to have regard to Ministerial guidelines and to comply with specific planning policy requirements. It follows as a necessary corollary that a planning authority must properly interpret the guidelines: the authority cannot be said to have had regard to or to have complied with guidelines which it has not properly understood. If a planning authority *misinterprets* the guidelines, then this represents an error of law which is amenable to judicial review. This is consistent with the case law on the interpretation of a development plan: see, in particular, *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527; *Brophy v. An Bord Pleanála* [2015] IEHC 433, [24] and *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181 (citing *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13).

31. The issue for this court is whether the Developer is entitled to challenge Dublin City Council's interpretation of the building height guidelines now, or, alternatively, whether the Developer must first await the outcome of the decision-making process in respect of the two planning applications. This issue must be determined by reference to the statutory judicial review procedure provided for in the case of planning decisions under section 50 and 50A of the PDA 2000. It appears from this scheme that the legislative intent is that where a matter is within the jurisdiction of a planning authority then recourse to the courts should, generally, be a matter of last resort.

32. In this regard, express provision is made under sections 50(4) and (5) of the PDA 2000 for judicial review proceedings to be stayed as follows. (This test was recently applied by the High Court in *Sweetman v. Clare County Council* [2018] IEHC 517 and *Dunnes Stores (Limerick) v. Limerick City and County Council* [2019] IEHC 59).

> "(4) A planning authority, a local authority or the Board may, at any time after the bringing of an application for leave to apply for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned.
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> (5) On the making of such an application, the High Court may, where it considers that the matter before the authority or the Board is within the jurisdiction of the authority or the Board, make an order staying the proceedings concerned on such terms as it thinks fit.

33. Whereas no formal application was made by Dublin City Council to stay the within proceedings, the court is nevertheless entitled to have regard to the legislative intent which informs the above sections. This legislative intent is consistent with a well-established line of case law which indicates that the planning legislation, in its previous guise of the Local Government (Planning & Development) Acts, represented a self-contained administrative code. See *State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381.

34. On the particular facts of the present case, I am satisfied that no prejudice would have been caused to the Developer had it been required to await the outcome of the decision-making process in respect of the two planning applications before instituting judicial review proceedings. In circumstances where the Developer has sought, in its planning applications, to rely upon the building height guidelines, it will be necessary for Dublin City Council to address this issue in its decisions. It will be evident from the face of the planning decisions as to what view the planning authority took in relation to the interpretation of the building height guidelines. As noted in paragraph 30 above, if a planning authority *misinterprets* the guidelines, then this represents an error of law which is amenable to judicial review. Accordingly, the very legal argument which the applicant wishes to make in these proceedings, can be made equally well in proceedings directed to a decision to refuse planning permission.

35. During the course of the hearing before me, counsel for the Developer suggested that one reason for allowing judicial review proceedings at this stage is that a potential developer should not be put to the trouble and expense of preparing a detailed planning application in circumstances where the stated position of the planning authority meant that such an application would inevitably fail. In another case, there might have been some merit in this argument. However, on the facts of the present case, the two planning applications had been submitted *before* the judicial review proceedings were instituted. Thus, the costs of preparing the planning applications had *already* been incurred. Indeed, but for the fact that the Developer took the highly unusual step of unilaterally consenting to an extension of time, the two applications would have been determined prior to 23 April 2019, i.e. the date on which the within judicial review proceedings were instituted.

36. It would have been more satisfactory had the Developer allowed the two planning applications to be determined in the ordinary way, and to defer any judicial review proceedings pending the outcome of the planning process. In the event that planning permission were granted, then judicial review proceedings would be unnecessary. In the event that planning permission were refused, the fact that any judicial review proceedings would take place by reference to an actual decision, and by reference to the reports of Dublin City Council's planners, would give the case a less abstract air.

37. For the reasons indicated earlier, I do not intend to dispose of the case on this procedural objection, rather I intend to consider the substantive issues *de bene esse*.

(2). SUBSTANTIVE ISSUES

LEGISLATIVE SCHEME

38. The dispute as to the interpretation of the building height guidelines takes place against a complicated legislative background which requires consideration not only of principles of national law but also of EU law. In particular, the implications of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment must be considered ("*the SEA Directive*").

39. In order to better understand the competing arguments of the parties, it is first necessary to explain what is meant by the terms "strategic development zone", "planning scheme" and "specific planning policy requirement". It is also necessary to explain the role of

the development plan in the planning process, and how the objectives of a plan *appear* to be vulnerable to being overridden by a "specific planning policy requirement".

40. The general position is that an application for planning permission is determined by having "regard to" the relevant development plan. A development plan is drawn up after a public participation process, which includes an environmental assessment for the purposes of the SEA Directive. The making of a development plan is a "reserved function", i.e. it requires a resolution of the elected members of the local authority, and, thus, the plan carries a democratic imprimatur.

41. The adjudication upon planning applications involves a two-stage process: the application is made at first instance to the planning authority, and there is a statutory right of appeal thereafter to An Bord Pleanála. An Bord Pleanála hears the appeal *de novo*, i.e. as if the planning application had been made to it in the first instance.

42. A planning authority is required "to have regard" to the development plan in determining an application for planning permission. If a planning authority intends to grant planning permission for a proposed development which would involve a material contravention of the development plan, it is necessary to invoke a special statutory procedure which involves enhanced public participation and requires a vote of a qualified majority of the elected members.

43. An Bord Pleanála is also required "to have regard" to the development plan. The board is not, however, constrained by the development plan in the same way as is the planning authority. The board can grant planning permission in material contravention without the necessity for invoking any special procedure. If, however, the planning authority at first instance had decided to refuse permission on the grounds that the proposed development materially contravenes the development plan, then An Bord Pleanála can only grant planning permission if one of the four contingencies identified in section 37(2)(b) of the PDA 2000 is fulfilled.

44. As part of the amendments introduced under the PDA 2000, a streamlined planning application process is now available in respect of areas which have been designated as strategic development zones ("*SDZs*"). Development within SDZs is subject to a "planning scheme". The content of a planning scheme is more prescriptive than that of development plans generally. Relevantly, a planning scheme must prescribe maximum building heights. See section 168(2)(c) of the PDA 2000.

45. The making of a planning scheme is subject to a detailed public participation procedure including a requirement for confirmation of the scheme by An Bord Pleanála. The making of the scheme is subject to the requirements of the SEA Directive.

46. An application for proposed development within an SDZ subject to a planning scheme is distinguished from a conventional planning application principally by the following two features.

47. First, a planning authority is obliged to grant planning permission ("*shall*") where it is satisfied that the proposed development would be consistent with a planning scheme. See sections 170 (1) and (2) of the PDA 2000 as follows.

> "(1) Where an application is made to a planning authority under section 34 for a development in a strategic development zone, that section and any permission regulations shall apply, subject to the other provisions of this section.
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> (2) Subject to the provisions of Part X or Part XAB, or both of those Parts as appropriate, a planning authority shall grant permission in respect of an application for a development in a strategic development zone where it is satisfied that the development, where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission, would be consistent with any planning scheme in force for the land in question, and no permission shall be granted for any development which would not be consistent with such a planning scheme."

48. Secondly, there is no right of appeal against the planning authority's decision to An Bord Pleanála. See section 170(3) of the PDA 2000. The perceived advantage of this is that the delays which might otherwise arise from a full *de novo* appeal to An Bord Pleanála are avoided. The absence of an appeal at the level of individual planning applications can be justified by the fact that An Bord Pleanála has a crucial role in approving the planning scheme.

49. Notwithstanding that section 170(1) indicates that section 34 and any permission regulations shall apply to an application under section 170, the decision-making function which a planning authority exercises under section 170 is entirely different from that which it exercises in the case of a conventional planning application. The function is confined to determining whether the proposed development is *consistent* with the planning scheme.

50. The limited nature of the function is explained as follows in the judgment of the High Court (Haughton J.) in *O'Flynn Capital Partners v. Dun Laoghaire Rathdown County Council* [2016] IEHC 480. The court drew a comparison between the function under section 170 of the PDA 2000 and the function of certifying development proposals under the Dublin Docklands Development Authority Act 1997.

> "122. Apart from the foregoing there are two particularly important features common to both: both contain, in accordance with statutory requirements, a significant level of detail, and far more than would be contained in the usual Development Plan. Most relevantly, both contain a radical provision providing that, where a proposed development is 'consistent with [the] planning scheme', then the development must be permitted; under s. 25(7) of the DDDA Act a Certificate of Exemption from the requirement of planning permission is given; under s. 170(2) the planning authority "shall grant permission", subject in both instances to such conditions as may be lawfully attached. *This introduces a major constraint on the decision-maker, because the detail against which the proposed development must be assessed has been pre-determined to large extent by the prior planning and consultative process."*
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> *Emphasis (italics) added.

51. One consequence of the limited function is that the planning authority's decision as to whether a proposed development is consistent with the planning scheme is not subject to the attenuated form of review allowed for under the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. See *O'Flynn Capital Partners* at [123] and [124].

52. As discussed presently, on the Developer's interpretation of the building height guidelines, the planning authority's function under section 170 would be extended beyond recognition. Rather than being constrained by the objective criteria prescribed under the planning scheme, a planning authority would instead be at large to conduct a project-specific assessment of the detail of the planning application with a view to applying the subjective criteria under the guidelines. There would be no appeal to An Bord Pleanála against the outcome of this assessment.

THE ROLE OF MINISTERIAL GUIDELINES

53. Prior to amendments introduced under the Planning and Development (Amendment) Act 2018, the ability of the Minister to influence planning policy was limited. Whereas the Minister was empowered to issue statutory guidelines pursuant to section 28 of the PDA 2000, planning authorities were merely obliged to "have regard to" the guidelines. This meant that a planning authority was not required to comply with guidelines; the planning authority simply had to demonstrate that it had had regard to the guidelines and, possibly, to state reasons for not complying with the same. See, for example, the judgment in *Tristor Ltd. v. Minister for Environment, Heritage and Local Government*. [2010] IEHC 397, [7.11]

> "[…] As was pointed out in *Glencarr Explorations Plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84 (by Keane C.J. at p. 142) it may be inferred that, if the Oireachtas intended that there be an obligation to comply with a particular matter rather than simply have regard to it, it might be expected that the Oireachtas would have said so in the legislation concerned. Likewise, Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208, noted, in relation to an obligation to 'have regard' to matters, that the local authority concerned was not 'bound to comply with the Guidelines and may depart from them for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility'. I adopt the view of the Quirke J. as being applicable to this case."

54. The status of Ministerial guidelines has since been enhanced as a result of the introduction of the concept of a "specific planning policy requirement" under the Planning and Development (Amendment) Act 2018. Such a requirement is defined as follows under section 34(2)(d) of the PDA 2000.

> "(d) 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."

55. A planning authority is required to *comply* with a specific planning policy requirement. See section 28(1)(C) of the PDA 2000 as follows.

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

56. I pause here to note that the effect of the amendments introduced under the Planning and Development (Amendment) Act 2018, is that a single set of Ministerial guidelines may contain within it two different types of requirement. The first type are policies to which a planning authority is merely required to have regard. The second type are policy requirements which a planning authority is obliged to comply with. It is important when reading through a set of guidelines to distinguish between the two different types and the legal effect of same.

57. One of the most striking features of a specific planning policy requirement is that same appears to take precedence over the objectives of the development plan. This is provided for under section 34(2) (aa) and (ba) of the PDA 2000 as follows.

> "(aa) When 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.
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> […]
>
> (ba) Where 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."

58. The legislation does not expressly address the interaction between (i) the obligation to apply a specific planning policy requirement instead of the objectives of the development plan, and (ii) the restrictions imposed under section 34(6) of the PDA 2000 on the grant of planning permission for proposed development which would involve a material contravention of the development plan. On one reading of the legislation, the effect of the making of a specific planning policy requirement may be to authorise a planning authority to grant a material contravention of its development plan without having to observe any special procedural requirements. If this is the correct interpretation, then it represents a radical change in planning law and an attenuation of the status of the development plan.

59. The legal position in respect of the interaction between a specific planning policy requirement and a planning scheme is, if anything, even more difficult to state. As appears from section 170(2) of the PDA 2000, the principal determinant of an application for proposed development within an area subject to an SDZ is consistency with the relevant planning scheme. The amendments introduced under the Planning and Development (Amendment) Act 2018 do not include a provision—analogous to that applicable to a development plan under section 34 (2) (aa) and (ba)—which states that a planning authority is to apply the provisions of a specific planning policy requirement in the case of a difference between same and the planning scheme.

60. The Developer argues nonetheless that the same result is, in practice, achieved by one or other of the following two routes. First, the Developer relies on the fact that a planning scheme is *deemed* to be part of a development plan under section 169(9) of the PDA 2000. The Developer submits that the reference to "development plan" in section 34(2) (aa) and (ba) must accordingly be understood as encapsulating a planning scheme. On this extended interpretation of "development plan", it is said that the planning authority is authorised to apply the provisions of a specific planning policy requirement in preference to any contrary requirement of a planning scheme.

61. Secondly, the Developer relies on the provisions of section 169(8A) of the PDA 2000 as follows.

> "(8A)(a) A planning scheme that contains a provision that contravenes any specific planning policy requirement in guidelines under subsection (1) of section 28 shall be deemed to have been made, under paragraph (b) of subsection (4) of section 169, subject to the deletion of that provision.
>
> (b) Where a planning scheme contravenes a specific planning policy requirement in guidelines under subsection (1) of section 28 by omission of a provision in compliance with that requirement, the planning scheme shall be deemed to have been made under paragraph (b) of subsection (4) of section 169 subject to the addition of that provision."

62. The Developer submits that the effect of this section is that any provision of a planning scheme which is inconsistent with a specific planning policy requirement is deleted from the planning scheme.

63. Notwithstanding the skilful submissions on the part of leading counsel on behalf of the Developer, Mr Eamon Galligan SC and Mr Patrick Butler SC, I do not think that either argument is correct. First, the function and role of a planning authority in determining an application under section 170 of the PDA 2000 is so different, and so much more limited, than that arising in the context of a conventional planning application, that I do not think that it is correct to read across the requirements of sections 34(2) (aa) and (ba). It would completely change the role and function of the planning authority from an almost mechanical confirmation that the proposed development is consistent with the prescribed criteria under the planning scheme, to one where the planning authority exercises a general discretion similar to that which it would enjoy in the case of a conventional planning application. Such a significant change would require express statutory language. It seems to me, therefore, that the term "development plan" must be understood in the context of section 34 as referring to the development plan *simpliciter*. The extended definition of "development plan" argued for on behalf of the developer by reference to the deeming provisions of section 169(9) of the PDA 2000 does not apply to section 34.

64. For the sake of completeness, I should also record that I do not think that the deeming provision under section 169(9) has the legal effect contended for by the Developer. The very use of the phrase "*shall be deemed to form part of*" the development plan under section 169(9) indicates that a planning scheme does not form part of the development plan in the normal sense. In this regard, a development plan is defined under section 2 as "*a development plan under section 9(1)".* The definition section does not make any reference to a planning scheme nor to the provisions of section 169(9).

65. Even if I am incorrect in this—and the normal definition of "development plan" should be understood as referring to the "development plan plus planning scheme"—it does not necessarily follow that this extended definition is applicable on each instance where the term "development plan" appears in the planning legislation. The statutory definitions under the planning legislation are subject to the general proviso under section 2 that the definitions apply *except where the context otherwise requires*. The context of section 34(4) (aa) and (ba) is such that it should properly be interpreted as confined to the development plan *simpliciter*.

66. Turning to the second argument, I think that the counterargument advanced on behalf of Dublin City Council by Mr James Connolly, SC is correct. Section 169(8A) of the PDA 2000 is engaged in the context of the process of the making of a planning scheme. It therefore only applies in circumstances where there is already a specific planning policy requirement in force at the time a planning scheme is being made. If, notwithstanding the obligation upon it to have regard to the specific planning policy requirement under 169(8), An Bord Pleanála nonetheless purports to approve a planning scheme which contains a provision that contravenes any specific planning policy requirement, then the effect of section 170 is the planning scheme shall be deemed to have been made as if the provision was deleted.

67. Section 169(8A) has no application where—as in the present case—Ministerial guidelines are issued *after* a planning scheme has already been made. It would undermine the public participation process leading up to the making of the planning scheme and be contrary to the SEA Directive were the legislation to be interpreted in such a way as to allow the Minister to change *retrospectively* the content of a planning scheme by issuing guidelines.

68. Strictly speaking, it is not necessary for the court to make a definitive determination in respect of these two issues of statutory interpretation in order to resolve the present case. This is because—as explained in detail at paragraph 80 *et seq*. below—I am satisfied that the intended effect of the building height guidelines is much less ambitious than that argued for on behalf of the Developer. More specifically, I am satisfied that the guidelines are not intended to disapply the provisions of a planning scheme. Rather, the extent of the obligation under the guidelines is a requirement upon planning authorities to review and amend planning schemes. Until such an amendment is made in accordance with the public participation procedure provided for under section 170A of the PDA 2000, the existence of the building height guidelines does not affect planning applications made in the interim. Put shortly, during the interregnum between the issuing of the building height guidelines in December 2018 and the making of an amendment to a planning scheme, the extant planning scheme continues to govern applications for planning permission in the area of an SDZ.

SEA DIRECTIVE

69. The initial approach taken under the PDA 2000 seems to have been that there was no obligation to subject Ministerial guidelines to an environmental assessment for the purposes of the SEA Directive. However, as a result of an amendment introduced under the Planning and Development (Amendment) Act 2018, there is now an express recognition that the carrying out of an environmental assessment may be required.

70. This is provided for under a new subsection, namely section 28(1D) of the PDA 2000 as follows.

> "(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)."

71. This amendment is, presumably, intended to reflect the fact that the legal landscape in respect of the SEA Directive has changed as the result of two important judgments of the CJEU. The first judgment confirmed that the obligation to carry out a strategic assessment applies even in the case of what might be described as a *voluntary* plan or programme, i.e. where it is not mandatory under legislation to make such a plan or programme. Ministerial guidelines are voluntary in this sense. See C 567/10 *Inter-Environnement Bruxelles*, [28] and [31].

72. Secondly, it follows from the judgment in Case C 290/15 *D'Oultremont* that the obligation to carry out an assessment is not confined to plans or programmes which are directed to specific geographical areas. Thus, guidelines such as the building height guidelines, which apply generally throughout the State, are, in principle, subject to the SEA Directive.

73. One vestige of the fact that there was originally no obligation under national law to carry out a strategic assessment in respect of Ministerial guidelines is that the newly introduced requirement under section 28(1D) entails an assessment under the EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (as amended). The assessment of all other plans and programmes under the planning legislation takes place under the planning regulations, as amended by the Planning and Development (Strategic Environmental Assessment) Regulations 2004.

74. At all events, it is necessary that a decision to make Ministerial guidelines be subject to a screening exercise, and if it is concluded that the proposed plan is likely to have significant effects on the environment, then it is necessary to carry out the SEA process. This includes public participation and, relevantly, the publication of an SEA statement as part of the decision-making. The question which then arises is as to whether it is appropriate and necessary in interpreting the Ministerial guidelines to have regard to the content of the SEA statement. This question assumes a crucial importance in the present case where, as we shall see, the

original draft of the building height guidelines was amended so as to treat differently of planning schemes.

75. The relevant provisions of the SEA Directive were opened to the court in full by Mr James Connolly, SC on behalf of the City Council and provide as follows.

> "Article 9
>
> Information on the decision
>
> 1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:
>
> (a) the plan or programme as adopted;
>
> (b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and
>
> (c) the measures decided concerning monitoring in accordance with Article 10.
>
> 2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States."

76. Mr Connolly also opened the relevant provisions of the EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 which implement the SEA Directive as follows.

> 16. (1) As soon as practicable after the adoption of a plan or programme, or modification to a plan or programme, the competent authority shall—
>
> (a) send notice of adoption of, and a copy of, the plan or programme, or modification to a plan or programme, and a copy of the statement referred to in sub-article (2)(b) to the environmental authorities specified in article 9(5), as appropriate, and
>
> (b) publish notice of the adoption of the plan or programme, or modification to a plan or programme, in at least one newspaper with a sufficiently large circulation in the area covered by the plan or programme, or modification to a plan or programme.
>
> (2) A notice under sub-article (1)(b) shall state that
>
> (a) a copy of the plan or programme, or modification to a plan or programme, and associated environmental report are available for public inspection at the offices of the competent authority during office hours and on the website of the authority or any other stated place or places at the stated times during a specified period which shall be not less than 4 weeks from the date of the notice (and the copy shall be kept available for inspection accordingly), and
>
> (b) a statement is also available for inspection which summarises—
>
> (i) how environmental considerations have been integrated into the plan or programme, or modification to a plan or programme,
>
> (ii) how
>
> (I) the environmental report prepared pursuant to article 12,
>
> (II) submissions and observations made to the competent authority in response to a notice under article 13, and
>
> (III) any consultations under article 14,
>
> have been taken into account during the preparation of the plan or programme, or modification to a plan or programme,
>
> (iii) the reasons for choosing the plan or programme, or modification to a plan or programme, in the light of the other reasonable alternatives dealt with, and
>
> (iv) the measures decided upon to monitor, in accordance with article 17, the significant environmental effects of implementation of the plan or programme, or modification to a plan or programme."

PRINCIPLES OF INTERPRETATION

77. The parties were in broad agreement as to the legal principles governing the interpretation of Ministerial guidelines. Both parties cited the judgment of the Supreme Court in *In re X.J.S. Investments Ltd*. [1986] I.R. 750 at 756. The parties submitted that the guidelines fall to be construed in their ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents.

78. The principles in *X.J.S. Investments Ltd*. have been recently affirmed as follows by the Supreme Court in *Lanigan v. Barry* [2016]

IESC 46; [2016] 1 I.R. 656. The test is that of an "ordinary and reasonably informed person".

> "[30] The principles applicable to the construction of a planning permission are, of course, well settled and were described by McCarthy J. in the oft-quoted passage from *In re X.J.S. Investments Ltd*. [1986] I.R. 750 as requiring the court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them. It might, in passing, be appropriate to note that this was, perhaps, an early example of the move towards what has been described as the 'text in context' method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. This approach has now become well established. The 'text in context' approach requires the court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself."

79. This requirement to consider the text used in the context of the circumstances in which the document concerned was produced has a special significance in the case of Ministerial guidelines which have been subject to an environmental assessment. This is because the rationale for the guidelines is to be found in the SEA statement published at the time of the decision to issue the guidelines. I return to this point at paragraph 98 below.

DISCUSSION

SPPR 3

80. The dispute between the parties in the present case centres on the interpretation and application of the third of the special planning policy requirements set out in the building height guidelines, referred to in the guidelines by the shorthand "SPPR 3". This requirement reads as follows.

> "SPPR 3
>
> It is a specific planning policy requirement that where;
>
> (A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and
>
> 2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;
>
> then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise.
>
> (B) In the case of an adopted planning scheme the Development Agency in conjunction with the relevant planning authority (where different) shall, upon the coming into force of these guidelines, undertake a review of the planning scheme, utilising the relevant mechanisms as set out in the Planning and Development Act 2000 (as amended) to ensure that the criteria above are fully reflected in the planning scheme. In particular the Government policy that building heights be generally increased in appropriate urban locations shall be articulated in any amendment(s) to the planning scheme
>
> (C) In respect of planning schemes approved after the coming into force of these guidelines these are not required to be reviewed."

81. The Developer also attaches significance to §2.15 as follows.

> "2.15 In light of the above, planning authorities should critically evaluate the existing written statements and development objectives of their statutory development plans, local area plans and planning schemes for consistency of approach and where any policy departures arise, to undertake the necessary reviews, variations or amendments to ensure proper alignment of national and local planning policies."

82. On its ordinary meaning, SPPR 3 treats differently of development plans and local area plans under paragraph (A), and planning schemes under paragraphs (B) and (C). In the case of the former, the effect of the guidelines is to authorise a planning authority to approve development even where specific objectives of the relevant plan indicate otherwise. Put shortly, the planning authority can rely on the guidelines to disapply objectives of the development plan or the local area plan.

83. In the case of the latter, namely planning schemes, the requirement under paragraph (B) is confined to an obligation to undertake a review of the planning scheme. The purpose of the review is to ensure that the building height criteria will ultimately be reflected in an *amended* planning scheme. Crucially, however, the amendment of the planning scheme must comply with the statutory requirements in this regard which include public participation and the possibility of a (further) environmental assessment for the purposes of the SEA Directive. The amendment of a planning scheme is subject to confirmation by An Bord Pleanála.

84. Paragraph (C) addresses the position of a planning scheme approved *after* the coming into force of the guidelines. There was no need to insert an obligation under the guidelines to carry out a review in circumstances where An Bord Pleanála is required to have regard to a specific planning policy requirement under section 169(8).

85. An "ordinary and reasonably informed person" would understand that the building height guidelines draw a distinction between a development plan and local area plan, on the one hand; and a planning scheme, on the other. This distinction is obvious from the structure of SPPR 3. Paragraph (A) refers only to development plans and local area plans, and paragraphs (B) and (C) refer only to planning schemes.

86. One practical consequence of this difference in treatment between development plans/local area plans and planning schemes is that the benefit of the new policy in respect of building heights is *deferred* in the case of planning schemes. It is necessary first to review and amend the planning scheme, and this statutory process will take some time to complete. During the interregnum pending the amendment of a planning scheme, any planning applications will fall to be determined by reference to the extant planning scheme. By contrast, the legal effect of the guidelines in the case of a development plan or a local area plan is *immediate*, and a planning authority is able to rely on the guidelines to disapply conflicting objectives of the plans. This reflects the provisions of section 34(2)(ba) of the PDA 2000.

DEVELOPER'S INTERPRETATION
87. The Developer in the present case seeks to advance an *alternative* interpretation of the guidelines, which would result in their having an immediate effect on planning applications in respect of planning schemes. This is done in circumstances where, as explained earlier, the Developer has two applications for permission to construct higher buildings pending before Dublin City Council in respect of sites within the North Lotts planning scheme.

88. The alternative interpretation advanced on behalf of the Developer necessitates departing from the "ordinary meaning" of the guidelines in favour of a legalistic one. More specifically, the Developer's argument is predicated on the legal nicety that a planning scheme is "deemed" to form part of any development plan. See Section 169(9) of the PDA 2000 as follows.

> "(9) A planning scheme made under this section shall be deemed to form part of any development plan in force in the area of the scheme until the scheme is revoked, and any contrary provisions of the development plan shall be superseded."

89. The logic of the Developer's argument is that a member of the public, armed with this legal knowledge, would then understand SPPR 3 (A) as applying to planning schemes by dint of their being *deemed* to form part of the development plan.

90. With respect, this is precisely the sort of legalistic interpretation which has been deprecated in *X.J.S. Investments Ltd*. The Supreme Court, per McCarthy J., expressly stated that planning documents are to be construed in their ordinary meaning as it would be understood by members of the public *without* legal training.

91. The Developer has also sought to attach significance to §1.14 of the guidelines.

> "1.14 Accordingly, where SPPRs are stated in this document, they take precedence over any conflicting, policies and objectives of development plans, local area plans and strategic development zone planning schemes. Where such conflicts arise, such plans/ schemes need to be amended by the relevant planning authority to reflect the content and requirements of these guidelines and properly inform the public of the relevant SPPR requirements."

92. It is submitted that the ordinary member of the public would interpret this provision as indicating that a planning authority is authorised to override the provisions of an SDZ planning scheme which conflicts with SPPR 3 (A). With respect, this argument does not appear to be correct for the following two reasons. First, the paragraph must be read as a whole. The second sentence indicates that the "precedence" is to be afforded to the SPPRs by the amendment of the plans/schemes. In other words, §1.14 on its own does not indicate that the requirements are self-executing but rather indicates that the further procedural step of a review process, which would involve public participation, must be carried out.

93. Secondly, an SPPR can only take "precedence" on its own terms. If SPPR 3, on its proper interpretation, merely requires that a planning scheme be reviewed and amended, but does not require *immediate* implementation in the context of individual planning applications, then there is no inconsistency between §1.14 and SPPR 3.

FINDINGS OF THE COURT

ORDINARY MEANING OF GUIDELINES
94. I am satisfied that the interpretation of SPPR 3 advanced on behalf of the Developer cannot be correct for the following reasons. First, as already noted, it necessitates imputing a level of legal knowledge to a member of the public which is impermissible under the "ordinary meaning" test.

95. Secondly, it is inconsistent with the general approach of the building height guidelines whereby the terms "development plan" and "planning scheme" are used disjunctively. At a number of points in the guidelines, development plans, local area plans and planning schemes are referred to as separate items within the same paragraph. Examples of this are be found at §1.14; §2.7; and §2.15. This indicates that the guidelines are employing the term "development plan" in its ordinary meaning, and not the extended meaning of "development plan plus planning scheme".

96. The Developer's approach jars with this and requires that, uniquely, the reference to a "development plan" under SPPR 3(A) must be understood as referring to a composite of the development plan *simpliciter* and the planning scheme.

97. Thirdly, if SPPR 3(A) was intended to include a composite reference to a "planning scheme", then the subsequent paragraphs at (B) and (C) would be superfluous. This is because if paragraph (A) applied to a planning scheme, then the guidelines would have the immediate effect of overriding the planning scheme, and such an effect would not be contingent on the carrying out of and completion of a review and amendment of the planning scheme. The inclusion of paragraphs (B) and (C) only makes sense when one understands that the guidelines are treating differently of (i) development plans and local area plans, and (ii) planning schemes. It is precisely because paragraph (A) does not apply to planning schemes that it was necessary to make separate provision for planning schemes under paragraphs (B) and (C).

SEA STATEMENT
98. For the reasons set out above, I am satisfied that, on its ordinary meaning, SPPR 3(A) does not apply to a planning scheme in respect of an SDZ. This finding is sufficient of and in itself to dispose of the Developer's argument.

99. As it happens, the correct interpretation of the building height guidelines is put beyond all doubt when one has regard to the SEA statement published as part of the decision-making process required under the SEA Directive. This document not only identifies the amendments between the draft guidelines and the "as issued" guidelines, it also explains the precise rationale for distinguishing between a development plan *simpliciter* and a planning scheme.

100. The relevant extracts from the SEA statement have been set out as an Appendix to this judgment. As appears therefrom, the original version of SPPR 3 in the *draft* guidelines published in September 2018 contained a single paragraph which expressly referred to the relevant development plan, local area plan or planning scheme. This paragraph was otherwise broadly similar to what is now paragraph (A). However, the draft guidelines were subsequently amended so as to delete the words "planning scheme" from the paragraph, and to introduce what are now paragraphs (B) and (C). This is indicated by the striking through of the words "planning scheme" in the table.

101. The rationale for these amendments is explained in detail at §4.3.3 of the SEA statement (*Application of SPPRs on extant SDZ schemes*). In brief, the amendments were introduced to reflect the particular status of planning schemes. Crucially, as part of the assessment of the environmental impact of the guidelines, it is noted that any subsequent amendment to a planning scheme will itself

be subject to assessment.

> "In respect of these recommendations it should be noted that any amendment to a planning scheme that is material will have to include appropriate consideration of its environmental effects (SEA/ AA)."

102. The fact that there would be a future assessment allowed the decision-maker, the Minister, to reach the conclusion that SPPR 3 (B) would not itself have an immediate environmental impact which required to be assessed under the SEA for the guidelines. Rather, the environmental impact of any amendments would be assessed separately in the context of section 170A of the PDA 2000.

103. Counsel for the Developer sought to persuade the court that regard should not be had to the SEA statement when interpreting the guidelines. In particular, it was submitted that the guidelines must be interpreted on their own terms, and that it is not permissible to have regard to an extraneous document as an aid to interpretation. Reference was made in this regard, by analogy, to the judgment of the Supreme Court in *Ferris v. Dublin Corporation*, unreported, 7 November 1990. With respect, this argument is untenable for the following reasons.

104. First, the SEA statement is not an extraneous document. Rather, it is an integral part of the decision-making process mandated by the SEA Directive. Article 9 of the SEA Directive imposes an obligation to publish an SEA statement at the time of the adoption of a plan or programme, in this case, the building height guidelines. The provisions of Article 9 have been faithfully implemented into national law by Regulation 16 of the EC (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (as amended). It is expressly provided that the SEA statement is to summarise the reasons for choosing the plan or programme as adopted. The SEA statement must be published as soon as practicable after the adoption of a plan or programme.

105. In the circumstances, it is legitimate to read the building height guidelines in conjunction with the SEA statement. The SEA statement is the output from the public participation process, and is precisely intended to inform members of the public. Accordingly, it is material of which an "ordinary and reasonably informed person" would be aware.

106. Secondly, it would undermine the effectiveness of the SEA Directive if a court were precluded from having regard to the SEA statement with the consequence that the relevant "plan or programme", in this instance, the building height guidelines, were given a contrary interpretation to that intended by the decision-maker. The entire elaborate process of public participation would have been set at naught. As appears, the Minister's conclusion that the potential significant environmental impacts associated with the implementation of the guidelines have been identified and that these impacts have been given appropriate consideration was informed, in part, by the fact that any amendments to a planning scheme would themselves be subject to a *separate* process of environmental assessment. If the court were to interpret the guidelines as having a different effect, then this would mean that the Minister's decision had been reached on a false premise.

107. Thirdly, the reliance which the Developer seeks to place on the judgment of the Supreme Court in *Ferris v. Dublin Corporation* is misplaced. On the facts of that case, the planning authority was seeking to rely on an extraneous document for the purposes of *modifying* the objectives of the development plan. The planning authority was not relying on the document as an aid to the interpretation of the development plan, but rather for the precise purpose of overriding and modifying the development plan. More importantly, however, the SEA statement is an integral part of the decision-making process as required under Article 9 of the SEA Directive.

WEIGHT TO BE ATTACHED TO MINISTER'S INTERPRETATION

108. There was some debate at the hearing before me as to the weight, if any, which should be attached to the Minister's interpretation of the guidelines. More specifically, the Minister, in response to Parliamentary Questions, has expressed the view that the building height guidelines do not apply immediately to planning zones. See, for example, response to PQ 8398/19 as follows (20 February 2019).

> "By way of background, however, it is important to note that the guidelines specifically address their application in the context of areas covered by Strategic Development Zone Planning Schemes (SDZs), in particular, through the insertion of Specific Planning Policy Requirements (SPPR) 3(B & C). SDZs may be reviewed at any stage by their respective development agencies to reflect changing implementation and policy circumstances and development agencies frequently employ these review mechanisms.
>
> The intention of the above policy requirement is to ensure that, on the one hand, planning authorities give practical effect to Government policy on building height in planning scheme areas, while at the same time allowing for effective public engagement in any significant policy shift in relation to heights to comply with Government policy and in view of the absence of third party appeal rights in relation to planning applications in SDZs.
>
> For this reason, it is not the intention that SPPR 3 would allow an immediate 'over-ride' facility for the alteration of approved planning schemes without the undertaking of a review process that is provided for in statute. Rather, the implementation of SPPR 3, and its components at A, B and C, as an integrated package is focused on securing strategic planning outcomes commensurate with proper public consultation."

109. On behalf of the City Council, Mr Connolly, SC submits that some weight should be given to the views of the Minister as author of the guidelines. Mr Connolly accepts that, ultimately, the correct interpretation of the guidelines is a matter for the court. (A contrary argument in the written legal submissions is not now being pursued.)

110. With respect, I do not think that it is appropriate to have regard to the Minister's views as stated in response to the Parliamentary Questions. The interpretation of the guidelines is a question of law for the court. The court is not required to show any deference to the views of the Minister. The position is analogous to the interpretation of a development plan. The interpretation of a development plan is capable of objective assessment, and the courts are not required to defer to the view of the planning authority notwithstanding that it is author of the plan. See case law cited at paragraph 30 above.

111. Moreover, the responses to the Parliamentary Questions fall into the category of extraneous material. In contrast to the SEA statement, which is an integral part of the SEA decision-making process, the responses to the Parliamentary Questions are separate from the decision-making process and are not something which should be imputed to the hypothetical intelligent and informed person.

CONCLUSIONS

112. SPPR 3 (A) does not apply to a planning scheme. The most that the guidelines do is to require a planning authority to review and amend a planning scheme. This is provided for under SPPR 3 (B). This process must be carried out in accordance with the statutory

procedure prescribed. In particular, it may be necessary to undertake an environmental assessment of the amendments for the purposes of the SEA Directive. In any event, it will be necessary to seek the approval of An Bord Pleanála to any proposed amendments to an existing planning scheme. Thus, the fact that the Minister has issued guidelines is not necessarily conclusive of the outcome of the statutory process of amendment.

113. In the event that a planning scheme is amended, then the policy under the guidelines is given effect through the medium of the amended planning scheme. The requirement to comply with SPPR 3 (B) is spent. Any planning applications will be determined in accordance with section 170(2). For the avoidance of doubt, SPPR (A) is still not applicable.

114. Pending the making of an amendment to a planning scheme, any planning application made in the interim falls to be determined under section 170 of the PDA 2000 by reference to the extant planning scheme. On their correct interpretation, therefore, the building height guidelines do not authorise a planning authority to disapply the criteria prescribed under a planning scheme for an SDZ.

115. In interpreting Ministerial guidelines, it is legitimate to have regard to the content of the SEA statement prepared pursuant to Article 9 of the SEA Directive and Regulation 16 of the 2004 Regulations.

THE PROPOSED ORDER

116. In light of the findings above, the Applicant for judicial review is not entitled to any of the declarations sought in the Statement of Grounds. Accordingly, the application for judicial review is dismissed in its entirety.

117. I will hear the parties in relation to costs and, in particular, as to whether these proceedings are governed by the special cost rules under section 50B of the PDA 2000.

APPENDIX

EXTRACTS FROM THE SEA STATEMENT

4.3.3 Application of SPPRs on extant SDZ schemes

Issues Raised
A significant number of submissions referred to the application of the SPPRs on extant SDZ schemes. In essence concern was raised that by applying SPPR3 (which gives effect to the Development management criteria set out in section 3), would adversely affect the operation of SDZ's and call into question the certainty that SDZ's offer developers, third parties and development agencies. The 'settled' nature of the scale and scope of development in SDZ's would be adversely affected. It was expressed that as there are no third party rights to appeal in an SDZ following the approval of a Planning Scheme any move away from the scheme without public consultation would undermine confidence in the SDZ process. A number of submissions however supported the draft Guidelines as drafted.
Influence on the Final Guidelines
The purpose of SPPR 3 is to allow planning authorities to consider, and where they approve, grant permission for taller buildings where they accord with the criteria set out and positively align with the objectives of the NPF, notwithstanding contrary objectives that may be in statutory plans. In relation to SDZ's, their planning schemes do have a particular status, by virtue of their particular adoption process and operation. In view of this, on balance, it is appropriate that the implications of SPPR3 be further considered. However, while they are approved through a particular process, it should not be the case that an approved SDZ made at a particular time remains 'immune' to the evolvement of Government policy in relation to spatial planning. The Planning and Development Act 2000 (as amended) does allow for the capacity to amend a planning scheme. The purpose of Section 3 including SPPR 3 is to clearly and unequivocally support the promotion of taller buildings in appropriate urban locations, subject to appropriate safeguards. In this regard, SDZ's should be required to undertake a review of the planning scheme to ensure that the criteria and general policy, as set out, in Section 3 of these guidelines is fully reflected. Policy SPPR3 has been amended so that SDZ's are required to be reviewed to ensure the planning scheme fully reflects the criteria and general policy as set out in Section 3 of the Guidelines. It has been clarified that SDZ's coming into force after these guidelines will not have to be reviewed, as account will have to be taken of the criteria and policy in their formulation. In respect of these recommendations it should be noted that any amendment to a planning scheme that is material will have to include appropriate consideration of its environmental effects (SEA/ AA).

Reference	**Text for Final Guidelines**	**Assessment for SEA**

SPPR 3	(A) It is a specific planning policy requirement that where; 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and 2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines; then the planning authority may approve such development, even where specific objectives of the relevant development plan, or local area plan [~~or planning scheme~~]* may indicate otherwise. (B) In the case of an adopted planning scheme the Development Agency in conjunction with the relevant planning authority (where different) shall [~~immediately~~],* upon the coming into force of these guidelines, undertake a review of the planning scheme, utilising the relevant mechanisms as set out in the Planning and Development Act 2000 (as amended) to ensure that the criteria above are fully reflected in the planning scheme. In particular the Government policy that building heights be generally increased in appropriate urban locations shall be articulated in any amendment(s) to the planning scheme (C) In respect of planning schemes approved after the coming into force of these guidelines these are not required to be reviewed.	The policy has been amended to include an additional Part B which requires that the various planning schemes are reviewed and updated to reflect the Development Management Criteria and Specific Assessments. This will be directly positive across environmental objectives, as it will ensure that the specific considerations outlined for the protection of environmental receptors (namely BFF, CH, LT and PHH) will be integrated into the planning process. It is noted that any modifications proposed to a planning scheme must be considered in the context of SEA, EIA and AA screening as appropriate prior to adoption of the changes. No impacts from Part C as new schemes will be subject to SEA and AA.

*These words are struck through.