

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 733

[2020 No. 830 JR]

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

**BETWEEN**

**SINEAD KERINS AND MARK STEDMAN**

**APPLICANTS**

**AND**

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

**RESPONDENTS**

**AND**

**DBTR-SCRI FUND, A SUB FUND OF CWTC MULTI-FAMILY ICAV**

**NOTICE PARTY**

**(No. 3)**

**JUDGMENT of Humphreys J. delivered on Tuesday the 30th day of November, 2021**

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 applicant's case on domestic law points and indicated an intention to refer certain EU law questions to the CJEU.
2. In *Kerins v. An Bord Pleanála (No. 2)* [2021] IEHC 612, (Unreported, High Court, 4th October, 2021), I issued certain clarifications of the No. 1 judgment at the request of the parties.
3. I now make the formal order for reference, and have somewhat amended the questions from what was provisionally proposed in the No. 1 judgment.

**Subject matter of the dispute**

4. The applicant seeks an order quashing a decision of An Bord Pleanála (the board), as competent authority for development consent here, to grant planning permission for a housing development. The applicants also seek a declaration that s. 28 of the Planning and Development Act 2000 (the 2000 Act) is invalid as contrary to EU law, specifically the habitats directive 92/43/EEC and the environmental impact assessment (EIA) directive 2011/92/EU as amended by directive 2014/52/EU on the grounds that mandatory guidelines under that section interfere with the process of appropriate assessment (AA) or EIA.

**Facts**

5. The site to which this application relates is situated in Dublin's south inner city, with the South Circular Road to the south, Rehoboth Place to the southwest, the Coombe Hospital to the west, and St. Teresa's Gardens and Donore Avenue to the east.
6. The Dublin Development Plan 2016 - 2022 was adopted by Dublin City Council (the council), as the planning authority, on 23rd September, 2016 and came into force on 21st October, 2016.
7. The making of a development plan is a statutory obligation (s. 9(1) of the 2000 Act).

8. The area is designated in the Development Plan as a Strategic Development and Regeneration Area (SDRA), with the title "St. Teresa's Gardens and Environs SDRA 12". The overall SDRA includes two former industrial sites previously operated by Player Wills and Bailey Gibson.
9. A non-statutory development framework plan was prepared by the council in July 2017 to implement SDRA 12. This included a proposed park measuring 0.2 hectares within the Bailey Gibson site.

**The ministerial guidelines**

10. Ministerial guidelines entitled Urban Development and Building Height Guidelines, were adopted in 2018 under s. 28 of the 2000 Act. The guidelines were themselves subjected to strategic environmental assessment (SEA).
11. The guidelines do not mandate grant of permission, but allow for such permission. However the designation "permissive" (argued for by the board) is not totally accurate in the sense that the guidelines require the grant of permission to be an available option, even where specific objectives of the city or county plan, or local area plans, or related environmental considerations, would dictate otherwise. Hence a conclusion that permission cannot be granted by reference to such factors is precluded by the guidelines.
12. Paragraph 3.1 of the 2018 guidelines baldly states that "it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility."
13. It is clear that that approach, which in turn animates the binding SPPRs later in the document, is based on government housing policies and not on purely environmental considerations. Thus the case specifically raises the issue of the lawfulness of mandatory guidelines that have their origin in policies motivated primarily, albeit not exclusively, by non-environmental considerations.
14. Specific Planning Policy Requirement 3 (SPPR 3) states as follows:  
  
"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."
15. I reject the board's submission that compliance with the guidelines does not preclude any particular outcome. It precludes a decision by the board that the grant of permission is

itself ruled out by the development plan. Admittedly, the board might go on to refuse permission in any event on other grounds, but the one thing that is absolutely clear is that, if the foregoing applies, then the board is not entitled to refuse permission because “specific objectives of the relevant development plan or local area plan may indicate otherwise”.

16. The fact that there are some permissive-type terms used in the phraseology of SPPR 3(A) is a matter of wording rather than substance because under the statutory provision in s. 28, compliance is mandatory. The board submits that the “criteria above” referred to in SPPR 3(A) includes the criterion that “[r]elevant environmental assessment requirements, including SEA, EIA, AA and Ecological Impact Assessment, as appropriate” are satisfied. However, that doesn’t answer the question as to *how* the SPPR impacts on that process.
17. Section 28(1C) of the 2000 Act provides that where ministerial guidelines under the section contains specific planning policy requirements, the board *shall* comply with those requirements. That is mandatory.
18. The guidelines here, the wording of which is referred to above, indicate that the planning authority “may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise”, in respect of developments meeting the stated criteria. While phrased in permissive terms, that has the effect of precluding a decision by the planning authority that the grant of permission would be ruled out by the wording of the development plan or local area plan. That has a mandatory effect that can’t be simply dressed up by pretending that the legislation leaves everything to the discretion of the decision-maker.
19. The board is obliged to comply with those guidelines and, therefore, is precluded from holding that the development plan or local area plan rules out the grant of permission.

#### **The Masterplan**

20. A masterplan is expressly envisaged in the development plan, para. 2.2.8.1 of which states that “Dublin City Council will prepare area-specific guidance for the strategic development and regeneration areas (SDRAs) and key district centres, using the appropriate mechanisms of local area plans (LAPs) and schematic masterplans and local environmental improvement plans (LEIPs).” The development plan was subject to a SEA, but the masterplan was not.
21. A masterplan for the area was prepared jointly by the notice party’s advisers, Hines, and the council dated January 2020. That was screened for AA by the developer’s planning consultants on 15th January, 2020. It was not subjected to SEA. The masterplan includes the removal of the public open space from the Bailey Gibson site to be provided elsewhere at a later stage of development with a financial contribution from the developer.

#### **Capacity in which masterplan was adopted**

22. I reject the board’s interpretation that the masterplan was adopted in the council’s capacity as “landowner”. That is a complete misunderstanding in this context. The adoption of the masterplan is clearly not limited to the council’s role as landowner because it also envisages works on land not owed by the council. But even if it related to the council’s land alone, it engages the council’s function as local authority.

23. It is true that in relation to particular developments, the council is sometimes the competent authority and sometimes the developer - a distinction reflected in for example art. 9(a) of the EIA directive 2011/92/EU, as amended by directive 2014/52/EU. Insofar as developments on lands owned by the notice party to these proceedings are concerned, the council is clearly not the developer. But as a matter of domestic law, even where the council is both the landowner and the developer, it still acts in its capacity as the council within the clear public law and statutory framework applicable to it.
24. While specific substantive rights might accrue to a council as landowner as opposed to a statutory body, there is no provision in Irish law for the council to carry out any act "as landowner" divorced from its statutory regulatory context and functions "as council". Any formal act like the agreement of a masterplan, is carried out within the statutory context of its capacity as local authority even if it is also in its capacity as landowner.
25. In addition, given that the development plan was adopted in the council's capacity as planning authority, and that it envisages a masterplan guiding future planning, any such masterplan (such as this plan) must also be taken to be in law an act of the council in its capacity as planning authority. The notice party argued that there was "no evidence" that it was adopted by the council as planning authority, but it isn't a matter of evidence. It's a matter of logic and law. It would make no sense to say that the planning and development of an area, as envisaged by the council as planning authority, would be guided by a document that was adopted by the council but that somehow such a document can't be an act of the planning authority because that doesn't suit an argument now sought to be made by other parties.
26. In the present case, the inevitable conclusion is that the masterplan was agreed to by the council both in its capacity as local authority and in its capacity as planning authority, as well as being a landowner.

**Relationship of masterplan to development plan**

27. The masterplan is not made under any specific statutory provision and nor does it formally form part of the development plan. However, the masterplan is expressly envisaged by the development plan and is to that extent and in that sense made "under" the statutory development plan, *i.e.*, it is a specific measure taken further to the development plan that is envisaged by the development plan.
28. The masterplan does not formally modify the development plan, but it envisages developments being allowed that would not be consistent with the development plan as originally adopted.
29. The Chief Executive of the city council has authority to act in relation to a wide range of matters on behalf of the council without the positive approval of elected members. Such acts are acts of the council. Those actions include agreement to a masterplan. Under s. 149 of the Local Government Act 2001, sub-s. (4) provides that "[e]very function of a local authority which is not a reserved function is, for the purposes of this Act, an executive function of such local authority." Subsection (3)(a) provides that the Chief Executive shall

“exercise and perform in respect of each local authority for which he or she is the chief executive”. Hence, all functions of a local authority are matters for the Chief Executive except those that are specifically provided by statute to be “reserved functions” for the elected members. Hence, it is irrelevant that the elected members did not approve the masterplan.

30. The masterplan would in effect amount to a deviation from the development plan in the sense that it expressly envisages a different set of developments, particularly in terms of heights.

#### **The application**

31. The developer engaged in pre-planning consultation on 21st January, 2020 and formally applied for permission on 25th May, 2020 under s. 4(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016. That was the first of four planning applications envisaged in relation to the site and environs within the masterplan.
32. The senior planning inspector of An Bord Pleanála recommended refusal of the application on 20th August, 2020. The board, however, disagreed, and granted permission on 14th September, 2020. The permission authorised a “Build to Rent” development allowing for the demolition of all existing structures on site and the construction of 416 dwellings in five blocks ranging from 2 storeys to 16 storeys, as well as tenant amenities, communal open space, childcare facilities, commercial floor space, an ESB substation and associated works such as parking places.
33. There are multiple references to the masterplan in the decision. It is referred to 68 times in the inspector’s report, and compliance with a financial development contribution to give effect to the masterplan is made into a binding condition at condition number 24.

#### **Condition 24**

34. Condition 24 states that the developer shall pay €4,000 per unit (as updated) to the planning authority as a special contribution in lieu of public open space provision under s. 48(2)(c) of the 2000 Act. The reason given is “[i]t 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”.
35. Condition number 24 obviously gives effect to the masterplan. The purpose of the payment is to give effect to the masterplan to the extent of providing funding for public open space in the masterplan area. While that doesn’t create a binding obligation to give effect to the masterplan in full, it clearly earmarks the specific funds to be used for open space within the masterplan area. If those works are not carried out, the council is obliged to give the money back (see s. 48(12) of the 2000 Act and David Browne, *Simons on Planning Law*, 3rd ed. (Dublin, Round Hall, 2021), p. 368).
36. The masterplan didn’t specifically require the imposition of condition 24, but the imposition of conditions of this nature is reflected in the development plan which provides (at para. 16.10.3) 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". So in effect, the imposition of condition 24 arises from the combination of the statutory framework, the development plan and the masterplan. Without the masterplan there would be no specific public open space provision for which the special contribution would be required. The imposition of condition 24 doesn't change the formal legal status of the masterplan, but it does amount to legally enforceable implementation of a measure envisaged by the masterplan.

**Reliance on the ministerial guidelines in the development consent here**

37. The fact that the board under the heading of the EIA in its decision didn't expressly mention SPPR 3 or the building heights guidelines is irrelevant, both in fact and in law. Lack of express mention is not equivalent to lack of consideration.
38. The board referred to the building heights guidelines at para. (f) of the "Reasons and Considerations" section at the outset of the board's decision. In accordance with established law, therefore, the board in carrying out the EIA *did* rely on the building heights guidelines among a range of other materials. Indeed, it is a point made by the board regularly in judicial reviews (and upheld regularly by the court) that the fact that a matter isn't specifically referred to under any given heading doesn't mean it wasn't taken into consideration. So the fact that the building heights guidelines weren't referred to under the EIA heading is irrelevant.
39. It is true that EIA is first and foremost a matter of process rather than outcome, but at the end of the assessment process is a judgment as to whether the impacts identified are acceptable or not in environmental terms; and that aspect is clearly tied into the ministerial guidelines.
40. As a matter of fact and law the board clearly had regard to the mandatory guidelines in all of the aspects of the decision. That follows from:
  - (i). the specific mention of regard having been had to the mandatory guidelines in the "Reasons and Considerations" section;
  - (ii). the absence of any wording in the decision disapplying that regard in respect of the EIA section of the decision and
  - (iii). established domestic caselaw that if the decision-maker states that a matter has been considered then it should be taken as having been considered in the absence of proof to the contrary.
41. Accordingly, the consideration of the guidelines must include the EIA process.
42. The practical effect of the mandatory nature of ministerial guidelines may vary from case to case because it is always conceivable that a permission could be refused on other grounds. But in practical terms the impact of the statutory provision can be demonstrated in the present case by comparing the board's decision with the inspector's report. In the inspector's report of 20th August, 2020, there was considerably more emphasis on

environmental issues, which gave rise to a recommendation for refusal of the application. The board, however, gave far more weight to the impact of SPPR 3 in deciding to grant permission on 14th September, 2020. Thus, while compliance with the guidelines doesn't entirely pre-determine the outcome, because of the possibility that a permission might be refused on some other basis, it does skew the analysis strongly in favour of granting permission, and that is what happened here.

#### **Relevant legal materials**

43. A list of the relevant EU, international and domestic legal material is summarised is set out in the appendix to the judgment together with web links.

#### **The relevant grounds of challenge**

44. Following the No. 1 judgment which rejected a number of grounds of challenge there are two live grounds.

45. The first complaint is that the decision relied on a masterplan which had not been subjected to SEA.

46. The second complaint is that the statutory requirement to comply with ministerial guidelines gives rise to a breach of the EIA directive 2011/92. The applicants take objection to s. 28(1C) of the 2000 Act which provides that where the guidelines contain specific planning policy requirements, the board shall comply with those requirements. The core issue is one of interpretation and of whether the EIA directive 2011/92 precludes regard being had to national mandatory policies. A particular kind of policy comes into focus here, because para. 3.1 of the 2018 guidelines, which in turn animates the binding SPPRs later in the document, is based on government housing policies and not on purely environmental considerations. That seems to me to be the most acute practical aspect of the grounds pleaded. The applicants maintained their objection to mandatory guidelines on any issues, environmental or otherwise, but it seems to me that the facts here more particularly raise the issue of the lawfulness of mandatory guidelines that have their origin in policies motivated primarily, albeit not exclusively, by non-environmental considerations.

47. The applicants contend that the outcome was "pre-determined" by the guidelines, but even if that's a slight overstatement, certainly the outcome was strongly suggested by the guidelines. As noted above, one can certainly see that by comparing it with the inspector's report which placed more emphasis on environmental considerations.

#### **Questions of European law arising**

48. It seems to me that a number of questions of European law arise from the substantive grounds identified above, and I consider it appropriate in all circumstances to make a reference to the Court of Justice under art. 267 of the TFEU.

#### **The first question**

49. The first question is:

**does art. 2(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... as well as any modifications to them ... which are subject to preparation and/or adoption by an authority at national, regional or local level..."**

**include a plan or programme that is jointly prepared and/or adopted by an authority at local level and a private sector developer as owner of adjacent lands to those owned by a local authority.**

50. The applicants' position is that a plan or programme as defined by Art. 2(a) that is prepared by a local authority is subject to the obligations under the SEA Directive 2001/42. It does not matter whether the plan is exclusively prepared by the authority or if it is prepared in collaboration with or with the assistance of a developer. The obligations and effect of the Directive are the same. It would entirely undermine the purpose of the Directive if the requirement to comply with its obligations was capable of being avoided or circumvented by the device of preparation in collaboration as a joint plan or programme.
51. The board's position is in the negative.
52. However the answer supplied by the board doesn't directly answer the question and conflates it with the second question, so it would only confuse matters to repeat that answer here.
53. The State respondents' position is that in circumstances where the Court has found that the masterplan was subject to preparation and/or adoption by Dublin City Council, qua local authority and planning authority, and that it was envisaged by the development plan, the State Respondents consider that the first indent of the definition of 'plans and programmes' in Article 2(a) of the SEA Directive is satisfied.
54. The State's answer seems to imply that the first question should be answered "yes". However the wording provided by the State in respect of the first question went on some reason tried to answer the second question. Also the proposed answer to the second question that was so provided seems to me to contradict the State's formal answer to the second question which is set out below.
55. The notice party's proposed answer was negative but also seems to be an attempt to answer the second question and not the first question, so again it would only confuse matters to state that answer here.
56. My proposed answer to the question is "Yes". A purposive interpretation of the directive leads to the conclusion that a plan prepared by a local authority jointly with some other entity should be treated in similar manner to one prepared by a local authority alone.
57. The reason for the reference of this question is that it was argued at the hearing that a jointly prepared plan did not come under the first indent of the definition of "plans and programmes" in art. 2(a), and if the answer is "No" then the applicants' argument based on the SEA directive would fail.

**The second question**

58. The second question is:



**does art. 2(a) of directive 2001/42/EC have the effect that the concept of “plans and programmes ... as well as any modifications to them ... which are required by legislative, regulatory or administrative provisions” includes a plan or programme that is expressly envisaged by a local authority’s statutory development plan (that development plan having been made under a legislative provision) either in general or where the development plan states that the local authority “will prepare area-specific guidance for the strategic development and regeneration areas ... using the appropriate mechanisms of local area plans ... schematic masterplans and local environmental improvement plans”.**

59. The applicants’ position is that the preparation of the masterplan is a mandatory obligation that is binding on the planning authority under the provisions of the Planning and Development Act, 2000 as amended. The masterplan is required to set out the framework for the development in the area to which it relates, and as a matter of fact the masterplan has satisfied this requirement.
60. The board’s position is in the negative, that the concept of “plans and programmes” as defined at Article 2(a) of the SEA Directive does not include a plan or programme envisaged by a statutory development plan where the preparation of such a plan or programme is not itself an enforceable legal requirement and where any such plan or programme is non-binding and does not contain conditions or criteria with which future development consents must conform and does not produce binding legal effects.
61. The State respondents’ position is that in accordance with the well-established case law of the CJEU, plans or programmes whose adoption are regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, are regarded as “required” within the meaning of Article 2(a) the Directive. Therefore, hypothetically, the State Respondents consider that a plan or programme adopted by a local authority in circumstances where the adoption of same is expressly provided for or contemplated by that local authority’s Development Plan would come within the definition of a plan or programme within the meaning of Article 2(a).
62. The word “hypothetically” in this answer seems to be an attempt to dispute the No. 1 judgment, but as noted above it is clear and express in the wording of the development plan that the masterplan “is expressly provided for or contemplated by [the] local authority’s Development Plan”, so I don’t think there is anything hypothetical about that premise.
63. The notice party’s position is that the concept of “plans or programmes” within the meaning of Article 2(a) of Directive 2001/42/EC does not include a plan or programme envisaged by a statutory development plan where the preparation of such a plan or programme is not itself an enforceable legal requirement and where any such plan or programme is not capable of producing binding legal effects.
64. My proposed answer to the question is “Yes”. Even though the masterplan is not itself a binding legal instrument, it is expressly envisaged by the statutory development plan which

has legal force and is made under a provision of primary legislation. That creates a sufficient link to the legislative, regulatory or administrative provisions to draw the conclusion that the masterplan is required by those provisions.

65. The reason for the reference of this question is that if the answer is “No” then the applicants’ argument based on the SEA directive would fail.

**The third question**

66. The third question is:

**does art. 3(2)(a) of directive 2001/42/EC have the effect that the concept of “plans and programmes ... which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in annexes I and II to directive 85/337/EEC...” includes a plan or programme that is not in itself binding but which is expressly envisaged in a statutory development plan which is binding, or which proposes or envisages in effect a modification of a plan that was itself subject to strategic environmental assessment.**

67. The applicants’ position in effect is that the answer is “Yes”, in that the masterplan is a plan which falls within art. 3(2) of 2001/42/EU as a plan prepared for town and county planning and/or land use and which sets the framework for future development consists listed in annex II of council directive 85/337/EEC.
68. The board’s position is that the concept of “plans and programmes” for the purposes of Article 3(2)(a) of the SEA Directive does not include a plan or programme, such as the Masterplan, which (a) is non-binding, (b) does not set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive and does not operate as a constraint on the discretion of the competent authority charged with making the decision about development consent for such projects, and (c) where that plan does not itself modify a Plan that was itself subject to an environmental assessment under the SEA Directive.
69. The State respondents’ position is that in circumstances where the Court has found that the masterplan “is not itself directly legally binding”, and that it “does not formally modify the development plan”, the masterplan does not effect a modification of a plan that was itself subject to SEA (*i.e.*, the development plan). Neither can the masterplan be regarded as setting the framework for future development consent of projects within the meaning of the principles enunciated in case-law of the CJEU interpreting Article 3(2)(a) of the SEA Directive.
70. The notice party’s position is that insofar as the Masterplan contains an indicative plan which demonstrates how development on connected sites may occur and, in particular, demonstrates the heights of proposed buildings on those sites, it is consistent with the Urban Development and Building Height Guidelines published by the Minister for Housing,

Planning and Local Government (which were subject to SEA). The Masterplan does not limit the discretion of the competent authority in the assessment of an application for development consent.

71. My proposed answer to the question is "Yes". The whole purpose of the masterplan is to set the framework for future development consents. Given that the masterplan is both envisaged by the statutory development plan, and is referenced so clearly in the inspector's report and thus the process of the actual grant of the development consent at issue here, there is a sufficient relationship between the masterplan and the setting of a framework for future development consent as have the result that it falls within art. 3(2)(a). This is reinforced by the fact that the masterplan envisages modified outcomes in terms of development than the statutory development plan did, and that the development consent actually granted reflects those modified outcomes to some extent, rather than the formal statutory development plan.
72. The reason for the reference of this question is that if the answer is "No" then the applicants' argument based on the SEA directive would fail.

**The fourth question**

73. The fourth question is:

**whether art. 2(1) of directive 2011/92/EU has the effect of precluding regard being had by the competent authority in the process of environmental impact assessment to mandatory government policies, in particular those which are not based exclusively on environmental criteria, being policies that define in certain circumstances situations where a grant of permission is not to be ruled out.**

74. The applicants' position is in effect that the answer is "Yes", and in particular that art. 2(1) of council directive 2011/92/EU has the effect of preceding a competent authority in the process of EIA to mandatory government policies which are not based exclusively on environmental criteria.
75. The board's position is that the EIA Directive does not preclude the competent authority having regard, in the process of EIA, to government policy regarding building heights which has itself been subject to environmental assessment under the SEA Directive. No such preclusion is contained in the text of Article 2(1) or elsewhere in the EIA Directive. The assessment of significant effects on the environment by the competent authority relies on value-dependent and context-dependent judgments as to what is important, desirable, or acceptable with regard to changes triggered by the project in question in light of the project's specific circumstances.
76. The State respondents' position is that the EIA Directive does not preclude regard being had by the competent authority, in an integrated EIA procedure carried out in parallel with other assessments to determine an application for development consent, to national planning policy in respect of building heights (which has itself been subject to SEA under directive 2001/42). The SPPRs contained in guidelines issued under Section 28C of the

Planning and Development Act 2000 (as amended) are policy requirements; they are not determinative of the outcome of an application for development consent and do not have any impact on the requirement to carry out an EIA in accordance with Part X of the Planning and Development Act 2000 (as amended). Moreover, the guidelines at issue in this case (the Urban Development and Building Height Guidelines for Planning Authorities, December 2018) expressly provide that SPPR 3 thereof is subject to such environmental assessment requirements as may be required by EU law, including EIA, and SPPR 3 is not in any event mandatory in its terms.

77. The notice party's position is that a competent authority is entitled to have regard to guidelines published by a Member State which contain development management criteria in respect of building heights of residential developments, which of themselves are not mandatory or determinative of the outcome of the EIA, where those guidelines have been subject to an SEA for the purpose of Directive 2001/42/EC.
78. My proposed answer to the question is "Yes". The whole object and purpose of the EIA directive is to identify impacts on the environment, broadly defined, to enable an objective, environmentally-based judgement to be formed as to whether those impacts are acceptable. A provision of domestic law that requires the planning process overall including the EIA process to comply with a policy instrument (called a "guideline" but in fact mandatory) from central government that is based significantly on social and economic considerations rather than purely environmental considerations cuts across that purpose. It is irrelevant that the ministerial instrument does not mandate the grant of permission because it impacts on the process in such a way as to be likely to create that outcome in many cases such as this one.
79. The reason for the reference of this question is that if the answer is "Yes", then the relevant domestic legislation is not in conformity with EU law, and the decision made in accordance with that legislation is invalid.

**Order**

80. Accordingly, the order will be:

- (i). I will direct the applicant to lodge hard copy books of all pleadings by making direct contact with the Principal Registrar within 28 days for transmission to the CJEU and will adjourn the balance of the matter pending the decision of the CJEU.
- (ii). I will refer the following questions to the CJEU pursuant to art. 267 of the TFEU:

(a). The first question is:

**does art. 2(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... as well as any modifications to them ... which are subject to preparation and/or adoption by an authority at national, regional or local level..." includes a plan or programme that is jointly prepared and/or adopted by an authority at local level and a**

**private sector developer as owner of adjacent lands to those owned by a local authority.**

(b). The second question is:

**does art. 2(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... as well as any modifications to them ... which are required by legislative, regulatory or administrative provisions" includes a plan or programme that is expressly envisaged by a local authority's statutory development plan (that development plan having been made under a legislative provision) either in general or where the development plan states that the local authority "will prepare area-specific guidance for the strategic development and regeneration areas ... using the appropriate mechanisms of local area plans ... schematic masterplans and local environmental improvement plans".**

(c). The third question is:

**does art. 3(2)(a) of directive 2001/42/EC have the effect that the concept of "plans and programmes ... which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in annexes I and II to directive 85/337/EEC..." includes a plan or programme that is not in itself binding but which is expressly envisaged in a statutory development plan which is binding, or which proposes or envisages in effect a modification of a plan that was itself subject to strategic environmental assessment.**

(d). The fourth question is:

**whether art. 2(1) of directive 2011/92/EU has the effect of precluding regard being had by the competent authority in the process of environmental impact assessment to mandatory government policies, in particular those which are not based exclusively on environmental criteria, being policies that define in certain circumstances situations where a grant of permission is not to be ruled out.**

## APPENDIX – WEB LINKS

### European law

- (i). Article 191 of the Treaty on the Functioning of the European Union (Part Three - Union Policies and Internal Actions, Title XX – Environment, Article 191 (ex Article 174 TEC), OJ C 115, 9.5.2008, p. 132–133).

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN>

- (ii). Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0337>

- (iii). Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora.

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