THE HIGH COURT

JUDICIAL REVIEW

In the matter of Section 50, 50A and 50B of the Planning and Development Act 2000 and in the matter of the Planning and Development (Housing) and Residential Tenancies Act 2016

Record No. 2020/248 JR

Between

Dublin Cycling Campaign CLG

Applicant

and

An Bord Pleanála

Respondent

And

Dublin City Council

First Notice Party

And

Oxley Holdings Limited

Second Notice Party

THE HIGH COURT FILED 27 MAR 2020 CENTRAL OFFICE

STATEMENT REQUIRED TO GROUND AN APPLICATION FOR JUDICIAL REVIEW

A. Applicant's Name

Dublin Cycling Campaign CLG

B. Applicant's Address

Tailors' Hall, Back Lane, Dublin 8

C. Applicant's Description

The Applicant is a company (No 348143) and registered charity (s20102029) which has the purpose *inter alia* of lobbying to make Dublin a safer and better city for cycling in.

D. Reliefs

1. An order of Certiorari by way of application for judicial review quashing the decision of the Respondent to grant planning permission pursuant to section 9(4) of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the "2016 Act") for the Demolition of 4 no. structures, construction of 741 build-to-rent apartments, retail space and associated site works on lands to the rear of Connolly Station, Connolly Station car park, Sheriff Street Lower, Dublin 1 (the "Contested Decision").

2. A Declaration that the Respondent did not have jurisdiction pursuant to the 2016 Act to make the Contested Decision as the proposed development does not constitute "strategic housing development" for the purposes of section 3 of the 2016 Act.

3. A Declaration that the Respondent erred in law in not taking into account the proposed works to construct a third-floor level car parking deck with 135 car parking spaces and ancillary access ramp.

4. A Declaration in the alternative that the Respondent did not have jurisdiction under the 2016 Act to make the Contested Decision since the planning application was invalid because:

   (a) The newspaper notice did not comply with section 8(1)(a)(i) of the 2016 Act, Regulation 294 of the Planning and Development Regulations 2001 (the "2001 Regulations") and Form No 13 of Schedule 3 of those Regulations.

   (b) The site notice did not comply with Regulation 292(2)(a) and Form No 12 of Schedule 3 of the 2001 Regulations.

   (c) The application form was incomplete at least in sections 9, 15 and 18 and therefore did not comply with Regulation 297(1) and Form No 14 of Schedule 3 of the 2001 Regulations.

5. A Declaration in the alternative that the that the Respondent did not have jurisdiction under the 2016 Act to make the Contested Decision since the planning application was invalid because the plans and particulars submitted by the Developer showed an area labelled "SHD Car Park Deck" within the "red line" delimiting the boundaries of the development and therefore did not comply with the requirements of Regulation 297(2) of the 2001 Regulations.

6. A Declaration that the Respondent erred in law in concluding that a Stage 2 Appropriate Assessment was not required under Article 6(3) and section Directive 92/43/EEC.

7. An Order that Section 50B of the Planning and Development Act 2000 as amended (the "2000 Act"), and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and / or Article 9 of the Aarhus Convention apply to the present proceedings.

8. Costs.

E. Grounds

Facts

1. The Applicant is a company (No 348143) and registered charity (20102029) which has the purpose of lobbying to make Dublin a safer and better city for cycling in. It carries out its activities using the "Cyclist.ie" registered business name (RBN No 534076).

2. The Second Notice Party Oxley Holdings Limited (the "Developer"), is a private company registered in Singapore which engages in development for profit and proposes to build a development of 741 build-to-rent dwelling units, commercial units and other development on publicly owned land to the rear of Connolly Station.

3. The Respondent, An Bord Pleanála (the "Board") is a statutory body tasked with handling applications for planning permission for strategic housing development under the 2016 Act. It granted permission to the Developer on 5th February 2020 under Case Reference ABP-305676-19.

4. The First Named Notice Party is Dublin City Council ("DCC"), the planning authority in whose functional area the proposed development is located.

5. During the pre-application procedure the Developer held consultations with the Board on 29th May 2019. On foot of those consultations the Board determined that the proposed development would be a Strategic Housing Development (SHD) under section 5 of the 2016 Act and gave an opinion as to further considerations and amendments that should be included in the application. The Developer also had meetings with DCC on nine occasions between 30th August 2018 and 28th March 2019.

6. The Developer made an application to the Board pursuant to section 4 of the 2016 Act on 16th October 2019.

7. The Applicant and other parties filed submissions during the public consultation period. The Applicant expressed concern about the proposed CIÉ parking and recommended that the Board seek further information because no clarity had been provided on the justification and future use of these newly constructed car parking spaces.

8. The CIÉ car-parking is fully integrated into Block B of the development where it is proposed to be provided underneath Blocks B1, B2 and B3 (9/10 story buildings with heights of 51.787m and 54.917m) which are proposed to be built over railway sidings in Connolly Station.

9. The chief executive of DCC provided an undated report pursuant to section 8(5)(a) of the 2016 Act which recommended that Further Information be sought in respect of a number of elements of the application. This report expressed concern that although the development description did not include reference to the 135 CIÉ car parking spaces they were included on drawing #107. The report expressed the opinion of the planning authority that the development of these car parking spaces was development and that there were serious concerns with the approach advocated by the Developer whereby a third-party agreement could take precedence over the requirement for planning permission. DCC recommended that this parking should be omitted and proposed a condition in this regard. In an appendix to this report, the DCC Senior Executive Parks Superintendent expressed concerns

regarding the conclusions of the Developer's Appropriate Assessment screening report in relation to the effect of increased sewage effluent loading in Dublin bay pending the completion of the upgrade to the Ringsend Wastewater Treatment Plant.

10. The Board appointed an Inspector, Ms. Karen Kenny, to prepare a report. She reported on 22nd January 2020 and recommended that permission be granted subject to conditions. The Board then decided to grant conditional permission with 29 conditions and signed the decision on 5th February 2020. As is normal practice, the Board published the Inspector's report, Direction and Order (with amendment) on its website shortly after the decision was made.

11. The Applicant challenges the decision of the Board on two broad legal grounds:

a) The Board erred in making the Contested Decision because:

    i) the proposed development was not strategic housing development and therefore the Contested Decision was *ultra vires* the powers of the Board under section 9(4) of the 2016 Act; and/or,
    ii) the application was invalid because the newspaper notice, site notice and application form did not comply with the mandatory requirements of the 2016 Act and/or the 2001 Regulations and/or were inaccurate and incomplete; and/or,
    iii) it erred in excluding the proposed 135-space car park from its consideration; but nonetheless granted planning permission for development which did not form part of the planning application.

b) The Board incorrectly concluded that a Stage 2 Appropriate Assessment was not required.

Grounds of Challenge

Reliefs 1-5

12. The proposed development is on land which is owned or controlled by CIÉ – a statutory corporation responsible or most of the public transport in Ireland. The site is currently used,

inter alia, as a car park with 390 spaces. 161 of these spaces are reserved for CIÉ staff and 229 are available for rail passengers to use on a pay and display basis. The proposed development will have 58 car parking spaces at basement level for use by residents of the proposed development on a car-club basis. It will also have 135 car parking spaces on a third-floor deck situated under Blocks B1, B2 and B3 that will sit over the railway sidings. It is purported that these latter car parking spaces will continue to be reserved for the use of CIÉ staff.

13. The way these car parking spaces have been treated in the application submitted by the Developer is entirely confused and contradictory:

14. There is no reference to the car parking deck in the Non-Technical Summary or in the "*key aspects with respect to transportation*" (p.28). Nor is there any mention of the car parking deck in the comparison provided between the proposed development and an extant permission for the site (EIAR 3-7) which identifies the car parking available for the "*public/CIÉ/residential*" as 58 spaces but then goes on to state that the CIÉ spaces will be rationalised from 390 to 180 spaces. There is no mention of the car parking deck in the section 6.8.2.1 of the EIAR entitled "*Car Parking*".

15. The Traffic Impact Assessment submitted identified (p.10) that there are currently 390 Irish Rail car parking spaces on the site, split between staff and train users and that these would be rationalised to 180 spaces in total. Apart from that reference there is no mention of the car parking deck and it is not included in Figure "*Indicative Site Layout*". Nor is there any discussion of it in relation to "*Car Parking Standards*" (p. 20) or "*Car Parking Provision*" (p. 25) or "*Parking Management*" (p. 28).

16. A Notice of Pre-Application Consultation was issued by the Board on 18th June 2018. This was responded to by the Developer in October 2019. In relevant part it noted that the site was currently used to provide for 390 carparking spaces to meet the operational needs of Connolly Station and "*This is an established and existing use*". They response then made reference to an opinion of Michael O'Donnell BL and stated that (p. 6) "*the existing established use is not included in this application proposal, nor is it necessary, as the authorisation to allow this existing use is already in place*". The response then went on to

immediately contradict itself by noting that an agreement between the Developer and CIÉ required it to maintain 180 carparking spaces and: *"The masterplan which accompanies this SHD application demonstrates how this will be achieved, with 135 spaces within the SHD component and 45 spaces within the proposed subsequent Section 34 non-SHD application".*

17. The response also stated that the carparking arrangement is: *"in effect, a rationalisation that will result in a significant decrease in the level of existing onsite carparking. While the proposed SHD application does not propose these 135 CIÉ carparking spaces for reasons outlined in the legal Opinion attached, the plans submitted do indicate where these spaces will be located. The area identified to maintain the existing carparking provision i.e. 135 spaces, is the void above the deck which must be constructed to accommodate the proposed residential blocks B1, B2, B3 which over sail the rail sidings. Rather than leave the void empty it is proposed to provide for the continuation of existing carparking use within the space as required by the legal agreement"* In other-words the Developer states that the construction of a car parking deck is both within the SHD application, yet at the same time that it is not, on the apparent basis that as carparking is occurring elsewhere on the site there is no necessity to seek permission for car parking on the third story of a newly constructed and dedicated car parking deck.

18. The response also referred to an allegedly "*similar*" proposal in relation to campus accommodation in UCD which was granted permission by the Board (Ref PL06DTA0001). The response noted that Board's Inspector had identified that the campus accommodation proposal involved in an effective "rationalisation and consolidation" of car parking provision. The readily apparent difference, however, between that example and the proposed development is that the car-parking provision elements of the campus accommodation application were squarely included in the application and on the site notices – i.e. UCD sought and was refused permission for the rationalisation of its car-parking. In this case, paradoxically, the Developer has not sought, but has been granted, permission for the construction a car park and associated ramps.

19. Reference was also made in the response to a Masterplan Framework which is a document prepared for the entirety of the site, including hotels and office accommodation which do

not form part of the SHD application. This state (p. 5) *"Block B extends over the existing Irish Rail sidings and is supported by a steel truss support arrangement. This support deck creates the opportunity to accommodate 174 CIÉ car parking spaces on full buildout (135 spaces as part of the SHD application) within the structural depth with this deck being accessed via a series of ramps/roadways from Oriel St."*. The Car Parking Deck, which both does and does not form part of the planning application, is shown at pages 78, 97 and 98 of the Masterplan.

20. The opinion of Michael O'Donnell BL was appended to the response. It notes (para 10) that there is an agreement to maintain existing car-parking arrangements between the Developer and CIÉ and *"that these existing arrangements do not form part of application proposal to be made. The existing car parking is the subject of the agreement, is a valid and subsisting operation, and there is no requirement that, and indeed it would be inappropriate that these arrangements be included within the application...the necessary authorisation to allow this activity is already in place"*.

21. The opinion went on to note that Section 3 of the 2016 Act made an allowance for other uses in an SHD development. The opinion stated (para 11) that this allowance was not engaged in relation to uses *"which are existing, and which are not intended to be altered and the continuance of which does not require approval as part of the application procedure"*. Finally, the opinion noted (para 13) *"The existing commercial car parking is a valid and subsisting use and will not and should not and does not form part of the application"*.

22. The presence of the 180 car-parking spaces is identified in the Planning Statement & Statement of Consistency with Dublin City Development Plan submitted by the Developer with its application. It states (p. 16) *"The development of this site is subject to an agreement that 180. no of these spaces (a reduction of 210 spaces) must be maintained exclusively for the use of CIÉ...The SHD proposal complies with this obligation."*

23. The Statement of Consistency with National, Regional and s.28 Ministerial Guidelines notes (p33) that there is *"A very low level of car parking (58 no. spaces) is proposed"* and (p39) *"Car parking will be at basement level"*.

24. The Report of DCC extensively criticised this approach. It noted the submission made by the Applicant that the 180 car parking spaces "*should be considered as part of the proposed development rather than as an existing use as the spaces do not currently exist*"

25. The Report echoed those concerns. It noted that the 135 car parking spaces on the car parking deck were not included in the application "*and the plans submitted do not indicate the location of the parking spaces...This parking is not included within the development description*". It stated that the Planning authority had serious concerns in relation to this approach "*The existing use of the site to accommodate CIÉ parking is noted however such parking is not currently provided at 3rd floor level overhanging the CIÉ railway sidings. The provision of car parking at this location constitutes development in the opinion of the planning authority...Furthermore the planning authority would have serious concerns in relation to the undesirable precedent that such a decision would set in terms of the suggestion that compliance with a legal covenant would take precedence over the requirement for planning permission*". It recommended that if planning was granted this parking should be omitted.

26. The DCC Roads and Traffic Planning Division noted that the proposed car parking deck had not provided a detailed route of ramp into the car park and that the fire tender was shown as turning within the third floor car park "*in order to facilitate a proper assessment of the overall access arrangements including those for [a] fire tender, the third floor car park should have been included in the development*". This division noted that no reference to the CIÉ car-parking had been included in the Car Parking Strategy and "*the failure to provide details on the operation of the existing car park or its inclusion in the proposed car parking strategy seriously undermines the principle of sustainable integrated land use and transportation development in the City.*" The report also raised concerns about queueing caused by a traffic-light shuttle system for access to the car park and noted that the operation of the ramp access and basement car park had not been taken into account in the Road Safety Audit.

27. This issue was addressed by the Board's Inspector at 11.7.2 of the Report. The Inspector noted the argument made by the Developer that 180 spaces had to be maintained on the site for the use of CIÉ by virtue of a restrictive covenant and that the proposal represented a

rationalisation of the car parking on site. The Inspector noted the argument made by DCC that the Developer had not provided details of the operation of the existing CIÉ car park and "*that its continuance as a commercial commuter car park would be contrary to Development Plan policy*". The Inspector then stated that "*I would accept the argument presented by the applicant. The relocation and rationalisation of the existing spaces facilitates the redevelopment and regeneration of the site for urban land uses*".

28. The Board granted permission without comment on this issue. Insofar as it addressed it, the Board noted that the development (p.3) included "*A service and emergency vehicle only access ramp from the Oriel Street Upper site entrance to serve Córas Iompair Éireann's transport needs at Connolly Station*".

29. It is the Applicant's case that the Board erred in law in granting planning permission in circumstances where this car-parking deck and access ramp were not referenced in the public notices and application form and/or was erroneously regarded as a pre-existing use for the purposes of planning permission and was not counted for the purposes of the alternative use calculation required by section 3 of the 2016 Act.

30. It is apparent from the application documentation that the Developer is obliged under its agreement with CIÉ, through which it obtained control of the site, to provide for these 135 car parking spaces. However, the inclusion of these spaces and the associated access ramp brings the gross floor space of "Other Uses" above the maximum 4,500 square meters allowed under section 3 of the 2016 Act. That would preclude the Developer from accessing the possibility of using the fast-track SHD planning procedures and therefore necessitating an ordinary planning application to DCC under section 34 of the 2000 Act.

31. It is apparent that in order to navigate between the car-parking obligations to the CIÉ agreement on the one hand and the possibility of having to use the standard planning procedure on the other, the Developer commissioned a legal opinion which suggested that since car parking is an existing use on the site it therefore is not an "other use" for the purpose of section 3 of the 2016 Act. Therefore, the Developer advanced the argument that the gross floor space of this use did not have to be taken into account when calculating the qualifying factors set out in section 3.

32. It is the Applicant's case that the Developer, in navigating these obstacles, has in fact submitted an invalid application which (a) is not strategic housing development and (b) does not identify the construction of a new car parking deck and access ramp in the public notices and application form. In the event that the Applicant is wrong in those contentions it necessarily follows, in the alternative, that the Board granted permission in error for development which did not in fact form part of the application made to it. On either possible construction of the facts the decision is invalid.

33. Neither the site notice, newspaper notice nor the application form submitted on 16th October 2019 make reference to the proposed third floor car parking deck with 135 car parking spaces. Reference is made to the 58 spaces provided for residents. The only reference to "other uses" is to 10 units for retail, commercial and community use with a combined gross floor space of 3,142 sqm. The notices and application form make reference to *"A service and emergency vehicle only access ramp from the Oriel Street Upper site entrance to serve CIÉ's transport need at Connolly Station"* but do not refer to access to a CIÉ car park at or from this location.

34. The application form at section 15 requires the applicant to set out details of the gross floor space of "other uses" on the land, the zoning of which facilitates such use. The purpose of this section is so that the Board can check that the conditions limiting other uses on the land are met and that the application is for strategic housing development. Section 18 of the application form requires the applicant to give details of material change of use of the land or structure.

35. The form and content of these notices and application form are mandated by Regulations 292(2)(a), 294 and 297(1) of the 2001 Regulations respectively. Regulation 297(2)(i) requires the applicant to provide a location map with indication in red of land or structure to which the application relates and the boundaries thereof. Drawing No 18135-RKD-00-00-DR-A-1000) indicates that the North Western portion of the site includes an area containing 6 railway sidings presumably within Connolly Station. The site layout plan for level 3 (Drawing No 18135-RKD-00-03-DR-A-1007) shows that a "SHD Car Park Deck" is intended to be constructed over these railway sidings within the red-line boundary. This

car park is shown in more detail on Drawing No 8135-RKD-B-03-DR-A-1103 which shows 135 numbered car parking spaces. The access to this car park (described as "Car Park and Fire Tender Access") is shown on other drawings. The access ramp also includes a fire tender access to Connolly station (see Drawing No O635 OCSC XX XX DR C 0107). It is clear from the drawings that this car park and access ramp is a new-build and is within the boundary of the development site. Drawing No 8135-RKD-B-ZZ-DR-A-1200 shows how the proposed CIÉ car park is fully integrated with Blocks B1, 2 and 3 inside the red line and that these blocks cannot be built according to the plans submitted without this car park.

36. It is estimated from these drawings that the gross floor space of the car park is conservatively estimated as approximately 4,000 square meters (not counting the access ramp). When this is combined with the 10 units of gross floor space of 3,142 square meters which the Developer acknowledges are "other uses" the total area of other uses far exceeds the 4,500 square metre limit imposed by the 2016 Act.

37. There are a couple of ways of looking at this each of which leads to the same conclusion – that the Contested Decision was unlawful.

38. In the first instance it is the Applicant's case that the car park and access ramp are "other uses" of the land, falling as they do within the redline boundary of the development site and therefore the gross floor space of the "other uses" exceeds 4,500 square meters and therefore the proposed development cannot be validly made or considered under the 2016 Act.

39. "Gross floor space" is defined in section 3 of the 2016 Act as "*the area ascertained by the internal measurement of the floor space on each floor of a building (including internal walls and partitions), disregarding any floor space provided for the parking of vehicles by persons occupying or using the building or buildings where such floor space is incidental to the primary purpose of the building.*".

40. The concept of "other uses" does not require such uses to be new uses in the development. It is also clear that the CIÉ car park entails works since car parking will be provided on a third-floor deck level proposed to be built above railway sidings in Connolly Station. The car park is clearly development within the meaning of section 3 of the 2000 Act and requires planning permission. It is equally clear that planning permission is still required whenever non-exempt works are proposed without a change of use. Therefore the CIÉ car park and access ramp must be considered part of the development, require planning permission and must be counted for the purposes of calculating the extent of "other uses" of the land for the purposes of section 3 of the 2016 Act.

41. Insofar as the Applicant has been able to establish the cumulative gross floor space of the houses comprises less than 85% of the gross floor space of the proposed development and therefore the application is also excluded under paragraph (i) of the section 3 of the 2016 Act. The Application form states that the gross floor space of the apartments is 44,323.4 square meters and the gross floor space of non-residential development (i.e. 10 units) is 3,142 square meters (i.e. 6.62% of the total gross floor area). On this basis the application meets both the 85% threshold and the 4,500 square meter limit.

42. However, if the CIÉ car park (conservatively estimated as approximately 4000 square meters not including the ramp) is included the non-residential element rises to 13.88% of the cumulative gross floor space of the development. If the non-residential gross floor space exceeded 4,700 square meters then the housing element would be less than 85% of the gross floor area and would not be strategic housing development.

43. Second the form of notices and application form are prescribed under the 2016 Act and the 2001 Regulations and adherence to these specifications is strict. The notices are an important aspect of guaranteeing effective public participation and in this case it is clear that a member of the public would not have been made aware by the newspaper and site notices of the proposed car parking deck and associated access ramp.

44. Compliance with the requirements to supply all of the information on the application form is also strict. In this case the omission of any mention of the car parking deck and/or the

gross floor space of the car parking deck gave a misleading indication that the gross floor space of "other uses" was below the threshold set out in section 3 of the 2016 Act.

45. Third and finally, in the alternative, if the Applicant is incorrect in relation to this argument, it must follow that the car park has been excluded for the purposes of the application for planning permission. If that is the case, then the Board has unlawfully granted planning permission for a car park that did not in fact form part of the development which is clearly unlawful and *ultra vires* the Board's powers under section 9(4) of the 2016 Act

In summary the legal position is that the car parking deck and the 135 spaces were regarded by the Developer as an existing use and therefore not reckonable as "other uses" for the purposes of section 3. It was not referred to on the public notices and application form but which were included as proposed works in the planning application and drawings. The Developer has therefore received planning permission for a third-floor parking deck and associated ramp structure for 135 cars which do not currently exist and which appear not to form part of its application for planning permission.

46. Secondly, in circumstances where the Developer stated that the parking deck both did and did not form part of the application and where the Applicant and DCC had expressed strong views, the Board was under an obligation to give reasons as to why it preferred the Developer's submission. Instead, and contrary to that requirement, the Board's Inspector stated her preference for the Developer's submission on the sole apparent basis that "*The relocation and rationalisation of the existing spaces facilitates the redevelopment and regeneration of the site for urban land uses*". The legislative intent of the 2016 Act is to ensure fast-track delivery of development that is predominantly residential in nature, the idea expressed by the Inspector in relation to the treatment of the car park is in clear conflict with this intention which provided an expedited procedure based on floor space thresholds. Neither the Board nor the Inspector was entitled to take into account the alleged facilitation of the development of the site through the exclusion of the CIÉ car park.

47. Furthermore, this is not a reason which engages at all with the submissions made by DCC or the Applicant. Both of them had submitted that the Developer was legally obliged to seek planning permission for a car parking deck for 135 spaces in a physical location where it does not currently take place (judged on both the horizontal and the vertical plane) and

which did not form part of the application for permission. As noted by DCC "*The provision of car parking at this location constitutes development in the opinion of the planning authority...*". It is the Applicant's case that the only reason advanced by the Inspector is not in fact a reason that engages with these submissions at all. The relocation of car-parking may well facilitate development but that was not the issue raised by DCC or the Applicant. It is the Applicant's case that the Board was under an obligation, but failed, to provide reasons as to why the Board had concluded it was entitled to grant permission for a car parking deck which did not form part of the planning application. In this regard the Applicant relies, *inter alia,* on *Balz v An Bord Pleanala* [2019] IESC 90.

Reliefs 1 & 6

48. The Developer submitted a Screening Report for Appropriate Assessment completed by Openfield Ecological Services. This identified a number of Natura 2000 sites within the Zone of Influence of the proposed development including the South Dublin Bay and River Tolka SPA, the South Dublin Bay SAC, the North Dublin SAC and the North Bull Island SPA. The Report listed the Conservation Objectives for each of these Natura 2000 sites.

49. It then assessed the potential impacts from the proposed development on those sites. In doing so it noted that the development would generate 340 cubic metres of wastewater daily. It noted (p.17) that *"While the issues at Ringsend wastewater treatment plant are being dealt with in the medium-term evidence suggests that some nutrient enrichment is benefiting wintering birds for which SPAs have been designated in Dublin Bay (Nairn & O'Hallaran eds 2012). Additional loading to this plant arising from the operation of this project are not considered to be significant based on two points:*

1. *There is no evidence that pollution through nutrient output is affecting the conservation objectives of the South Dublin Bay and River Tolka Estuary SPA*

2. *Accepting that pollution is undesirable, regardless of the conservation objectives of the SPA and would be contrary to the aims of the Water Framework Directive, then the upgrading works at Ringsend wastewater treatment plant will address future capacity demand"*

50. Neither of these statements is correct. There is ample evidence that pumping significant amounts of sewage into Dublin Bay is having significant impacts on the Natura 2000 sites. Secondly, even if a relevant consideration, the upgrading works at Ringsend Wastewater Treatment Plant will still not have adequate capacity upon completion which is not due until 2025.

51. The Parks Section made a submission in the course of the Chief Executive's Report. It noted that contrary to the evidence advanced by the Developer "*...there are reasons to believe that the sewage effluent is contributing to further exceedances of the Nitrates Directive for the Lower Liffey Estuary, to declining ecological status of the Bay under the Water Framework Directive and the Habitats Directive in terms of impacts to protected seagrass habitats of the Special Area of Conservation of the Bay"*. Reference was then made to an EPA report that identified that eelgrass as sensitive to nutrient enrichment.

52. The submission continued that ongoing research funded by the EPA and the City Council "*suggest that nutrient enrichment is contributing to the alteration of the plant communities of the Natura 2000 sites and increased growth of algae at the expense of protected seagrass habitats"* and that this loss was forcing bird species such as the Light Bellied Brent Goose to feed inland rather than on the eelgrass beds "*the Precautionary Principle requires that the control of nutrient enrichment is essential for maintaining the Conservation interests of the Special Protection Areas and Special Areas of Conservation for Dublin Bay. Sewage effluents outputs are clearly contrary to the legally binding Conservation Management Plans for the Natura 2000 sites"*

53. This issue was dealt with by the Inspector. She noted (13.1.2) that foul effluent would drain via the public network to the Ringsend WWTP and will ultimately be discharged to Dublin Bay. The Inspector then concluded that effects on Natura 2000 sites could be excluded on the basis (13.1.17) that "Foul and surface waters will discharge to the combined foul and surface water network and will travel to Ringsend WWTP for treatment prior to discharge to Dublin Bay; the Ringsend WWTP is required to operate under EPA licence and meet environmental standards, further upgrade is planned and the foul discharge from the proposed development would equate to a very small percentage of the overall licenced

discharge at Ringsend WWTP, and this would not impact on the overall water quality within Dublin Bay". The Inspector then noted (13.1.18) that the Ringsend WWTP upgrade was due to completed in the short-medium term and that at the time of writing there was no proven link between WWTP discharges and nutrient enrichment of sediments in Dublin Bay based on previous analyses of dissolved and particulate Nitrogen signatures and enriched water entering Dublin Bay was shown to *"rapidly mix"* and become diluted such that the plume is *"often indistinguishable from the rest of the bay water"*. On the basis of that conclusion the Inspector screened out the possibility of any impact at Stage 1. The Board adopted the Inspector's conclusions in this regard without further comment.

54. This approach gives rise to two legal grounds:

55. Firstly, it is the Applicant's case that the Inspector was required to assess, analyse and conclude whether the possibility of adverse effects on European Sites from the foul water generated by the proposed development, which would be treated by a plant operating in excess of capacity could be excluded. It is the Applicant's case that the Inspector (and the Board) were obliged to analyse whether there is a proven link between WWTP and nutrient level or whether marine modelling did in fact show that discharged effluent was rapidly mixed within a short distance of the outfall from the WWTP and to exclude that possibility.

56. The Screening Report accurately states that Ringsend WWTP is operating beyond its capacity to treat effluent. However, the Screening Report does not establish beyond a reasonable scientific doubt by reference to the basis of the best scientific evidence available that effluent discharged from the Ringsend WWTP will be rapidly mixed and dispersed to low levels via tidal mixing within a short distance of the outfall pipe. Instead it seems to be premised on the conclusion that pollution is in fact having a positive effect on Dublin Bay. In particular, the Screening Report's conclusion does not take account of the scientific evidence obtained on foot of modelling carried out in 2012 or 2018 in relation to proposed alterations to the WWTP.

57. In 2012 DCC sought planning permission for the expansion of the facility with a proposed off-shore pipeline 9km out from the Poolbeg Peninsula. This was granted permission by the Respondent on 16th November 2012 (Planning Reference PL29C.YA0010). This

concluded that there were significant impacts on north Dublin Bay from sewage discharges from Ringsend. The modelling results from the proposed upgrade works by Irish Water in its application for upgrade works did not form part of the Appropriate Assessment Screening determination (submitted 6th June 2018 and approved as identified by the Inspector on 24th April 2019) This, later and more comprehensive information and modelling was not relied upon by the Developer or (ultimately) the Board and shows significant concentrations of (for example) ammonia, DIN and suspended solids in the vicinity of, in particular, South Dublin Bay and River Tolka Estuary SPA and North Bull Island SPA. The information available from that modelling demonstrates as a matter of fact that the Inspector was wrong to state that enriched water rapidly mixes and *"is often indistinguishable from the rest of the bay water"*. In fact the opposite is the case.

58. The Board was on notice (by virtue, at least, of its earlier decisions referred to above) that the information supplied by the Developer was inaccurate, incomplete and out-of-date and was not entitled to rely upon it in order to exclude the possibility of those effects at the screening stage. In order for the possibility of significant effects to be excluded the scientific information relied upon cannot, as a matter of law, have *lacunae* and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. The exclusion of significant effects from the impacts of the foul effluent that would be generated by the proposed residential development was clearly not based on the best scientific evidence available and was not therefore capable of removing all reasonable scientific doubt as to the effects of the works proposed on the European Sites considered in the Screening Report.

59. Furthermore, it is also not accurate to state that the Ringsend WWTP will have capacity once the upgrade is completed. As a matter of fact it will not and, insofar as this future alleged capacity was relied upon by the Inspector, it is the Applicant's case that this constitutes a further error of law.

60. Finally, in this regard, the fact that the contribution made to the over-capacity problem in Ringsend WWTP is allegedly insignificant in the context of that plant's capacity issues is not a reason upon which the Inspector could possibly exclude at Stage 1 the possibility of

significant effects. Where, as here, the evidence submitted by the Planning Authority demonstrates that the capacity issues (and consequent outflows of raw sewage into the bay) are having significant effects on eelgrass beds and the Qualifying Interest avifauna feeding on them, the Board cannot (even if it had evidence to that effect) exclude the possibility of a significant additional effect at Stage 1 (or at all) because this particular development will make only an alleged modest contribution to those impacts. Insofar as this was relied upon by the Inspector, it is the Applicant's case that this constitutes a further error of law.

61. Secondly, the Planning Authority placed cogent evidence before the Board that the over-capacity Ringsend WWTP was having a significant effect on eelgrass beds (which are a Conservation Objective for the SACs) and some Qualifying Interest avi-fauna for the SPAs. It provided a link to contemporaneous research carried out by it and the EPA which demonstrated this significant effect. The Inspector did not identify this as an issue or refer to it in any way in the Report.

62. It is the Applicant's case that where the Inspector was faced with a choice between brief and inaccurate information supplied by the Developer premised on a belief that pumping raw sewage into Dublin Bay is an environmental positive for Natura 2000 sites and contemporaneous and careful research demonstrating the obvious point that it is the exact opposite, the Inspector was obliged to give a reason as to why it preferred the former over the latter. In default of that obligation the Inspector gave no reasons whatsoever for preferring the Developer's evidence over DCC's. In this regard the Applicant relies, *inter alia,* on *Balz v An Bord Pleanala* [2019] IESC 90.

John Kenny BL

F. Name and address of solicitor for the Applicant

FP Logue Solicitors, 8/10 Coke Lane, Smithfield, Dublin 7

Dated 27th March 2020

(signed)

FP Logue Solicitors for the Applicant

THE HIGH COURT

JUDICIAL REVIEW

In the matter of Section 50, 50A and 50B of the Planning and Development Act 2000 and in the matter of the Planning and Development (Housing) and Residential Tenancies Act 2016

Record No.

Between

Dublin Cycling Campaign CLG

Applicant

and

An Bord Pleanála

Respondent

And

Dublin City Council

First Notice Party

And

Oxley Holdings Limited

Second Notice Party

STATEMENT REQUIRED TO GROUND AN APPLICATION FOR JUDICIAL REVIEW