THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 268

Court of Appeal Record No. 2019/309

Costello J.
Donnelly J.
Collins J.

BETWEEN/

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

APPLICANT/APPELLANT

- AND -

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 2nd day of October 2020

1. This is an appeal against the judgment and order of the High Court (Simons J.) of 30 May 2019 refusing an application for judicial review. Collins J. has delivered a judgment, with which I agree, on the substantive issues raised in this appeal. This judgment discusses whether the proceedings are premature and whether the briefing note, the subject of these proceedings, is justiciable.

2. The central issue in the case is whether Building Height Guidelines adopted by the Minister in 2018, pursuant to s.28 of the Planning and Development Act 2000 (as amended), applied from the date of their adoption to approved planning schemes, and, in particular, to the North Lotts and Grand Canal Planning Scheme. A briefing note prepared by the Chief Planner of Dublin City Council on 31 January 2019 for the elected members of the Council, said that the requirements of the guidelines did not apply to an approved Strategic Development Zone ("SDZ") planning scheme, but that the planning authority must conduct a review to ensure that the guidelines are reflected in the planning scheme. The applicant contends that this briefing note is erroneous, and seeks a declaration to that effect, and that the guidelines apply to the approved planning scheme. Collins J. analyses the planning code and, in particular, the differences between development plans and planning schemes and applications for planning permission under the different regimes in great detail in his judgment. He sets out the requirements for a planning scheme, the means by which it is adopted, how applications for planning permission for development within the SDZ are dealt with and the absence of an appeal to An Bord Pleanála. He analyses the relevant Building Height Guidelines and applies that analysis to planning schemes. In the interests of brevity and clarity, I do not propose to repeat this

exercise. This judgment should be read in conjunction with his judgment and proceeds on the basis of his analysis of the nature of planning schemes and ministerial guidelines.

Background

3. Spencer Place Development Company Limited ("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 (SDZ). A statutory planning scheme was adopted in respect of the SDZ in 2014, known as the North Lotts and Grand Canal Planning Scheme 2014. The North Lotts Planning Scheme prescribes detailed parameters for development within the SDZ, including maximum building heights of five to eight storeys (commercial) and six to ten storeys (residential), with one possible set back floor.

4. The developer applied for and obtained two planning permissions on its lands. The first is DSDZ2661/17, as amended by DSDZ4181/18; and the second is permission DSDZ2896/18, as amended by DSDZ 4279/18. Building pursuant to these permissions commenced approximately 18 months prior to the hearing of the application for judicial review.

5. In the meantime, the Minister for Housing, Planning and Local Government engaged in public consultation in 2018, concerning building height guidelines which he proposed to issue pursuant to s.28 of the Local Government Planning and Development Act 2000. Draft guidelines were issued and interested parties, including Dublin City Council, made submissions, inter alia, whether and how they should apply to planning schemes. As is set out in the judgments of the High Court and Collins J., the Minister amended the draft guidelines. The effect of the amendments is an issue in the proceedings.

6. In December 2018, the Minister issued the Building Height Guidelines under s.28 of the Act of 2000.

7. The developer and its advisors were of the view that the Building Height Guidelines applied to the North Lotts Planning Scheme and that the height limitations expressly prescribed in the North Lotts Planning Scheme, accordingly, no longer applied. It, therefore, proposed to apply for planning permission to amend the two existing planning permissions currently under construction within the North Lotts Planning Scheme to increase the height of the two developments, on the basis that the additional height sought would no longer be prohibited.

8. Representatives of the developer were in discussion with Dublin City Council in relation to the Building Height Guidelines. It would be a significant benefit to the developer if it could take advantage of the guidelines and enlarge the development then under construction. The window of opportunity to do so was limited due to the fact that construction was underway.

9. On 2 January 2019, Mr. John Ronan, on behalf of the developer, wrote to Mr. Richard Shakespeare, the Assistant Chief Executive of Dublin City Council, in relation to the matter. It is relevant to quote the following extracts from the letter:-

> *"We will be submitting a planning application in the next week, 8th January, for two additional floors to the office scheme at Spencer Place on North Wall Quay, to provide for the new Salesforce Headquarters. These additional floors are essential to ensure the needs of Salesforce can be accommodated on this key city centre site.*
>
> *…*
>
> *As I say we are advised DCC can grant planning for the two additional floors and I write in advance of our meeting on 7th January in respect of [the two sites] and in particular in relation to our proposals for additional height in response to [the Building Height Guidelines].*
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> *We understand from discussions with the City Council that the City Council takes the view that it is not in a position to implement the Guidelines to grant additional height and in particular implement Specific Planning Policy Requirement 3(A), as it relates to sites within the planning scheme area, until such time as a review of the planning scheme has been undertaken in the light of the Building Height Guidelines as required under SPPR3(B).*
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> *Our team and advisors have examined [the Building Height Guidelines] carefully and have concluded clearly and unambiguously that SPPR3 is applicable immediately to all areas of Dublin City including Docklands and in respect of sites subject to of (sic) all relevant plans, including Development Plans, Local Area Plans and Planning Schemes.*
>
> *… the Planning Acts require the City Council to apply the guidelines and the SPPRs immediately.*
>
> *…*
>
> *So clearly Dublin Corporation (sic) can grant the permission.*
>
> *We would be most grateful for any support you can provide in this regard so that we may proceed in a way which meets the needs of Salesforce and also fully complies with government policy and the principles of proper planning and sustainable development.*
>
> *…*
>
> *I trust that this will be of assistance to City Council in interpreting the Guidelines."*

10. The opinions of two Senior Counsel were enclosed. The issues in dispute in these proceedings were clearly set out as of 2 January 2019. At all times, the developer, as it was perfectly entitled to do, sought to persuade Dublin City Council of the correctness of its interpretation of the legal landscape and to apply its view of the law to the two planning applications it was then proposing, and subsequently made.

11. Mr. Shakespeare replied to Mr. Ronan by letter dated February 2019, apparently sent on 6 February 2019. He said:-

> *"I must disagree with your argument regarding the application of SPPR3 of the* [Building Height Guidelines]*. Our advice on same is that consideration of any additional building height can only be considered following a review of the strategic development scheme."*

12. He enclosed the opinion of Junior Counsel with his letter and informed Mr. Ronan that a review of the Scheme was underway and it was envisaged to take approximately three months, that is until May 2019.

13. On 21 January 2019, before Mr. Shakespeare had replied to Mr. Ronan's letter, the developer applied for planning permission DSDZ2088/19 seeking, *inter alia*, amendments to Buildings 1B, 2, 3 and 4 to provide two additional storeys on Buildings 2, 3 and 4, and three additional storeys, including one set back floor, on Building 1B. The additional height proposed was in excess of the maximum building heights set out under the North Lotts Planning Scheme. Shortly after receipt of Mr. Shakespeare's reply, on 11 February 2019, the developer applied for a second planning application DSDZ2241/19 seeking, *inter alia*, amendments to increase the maximum height of Block 1 of the permitted development from seven storeys to thirteen storeys, and to increase the maximum height of Block 2 to eleven storeys. This also was in excess of the maximum building heights as set out in the Scheme.

14. Under the provisions of s.34(9) of the Act of 2000, Dublin City Council was required to make a decision on these applications for planning permission within eight weeks, that is 19 March and 9 April 2019 respectively.

15. The elected Council of Dublin City Council is empowered, pursuant to s.133 of the Local Government Act 2001 (as amended), to establish, *inter alia*, a Corporate Policy Group. The Corporate Policy Group is a Committee comprising the Cathaoirleach and Chairpersons of Strategic Committees established under s.48 of the Act of 2001. Section 133(2)(a) of the Act of 2001 provides that the Corporate Policy Group "*may advise and assist the elected council in the formulation, development, monitoring and review of policy for the local authority and for that purpose propose arrangements for the consideration of policy matters and the organisation of related business by the elected council.*" Subsection (5) permits the Policy Group to request the Chief Executive to provide a report to them on any matter or thing related to a function of the Local Authority and specified by the Policy Group, and the Chief Executive "*shall*" provide that report.

16. The Corporate Policy Group, at its meeting on 27 January 2019, requested that a briefing note be prepared on the City Development Plan and Height Guidelines, and that the matter be placed on the agenda for the February meeting of the City Council. The City Planner prepared a briefing note addressed to the Lord Mayor and Members of Dublin City Council, Report No. 71/2019 dated 31 January 2019 ("the Briefing Note"). As the Briefing Note is at the heart of these proceedings, I set out its contents in some detail.

17. Mr. O'Hara, the City Planner and author of the Briefing Note, explained that development plans are made by the elected members of a local authority under ss. 9-17 of the Planning and Development Act 2000 (as amended) every six years. He outlined the requirement, insofar as is practical, that they be consistent with national plans, policies or strategies, and referred to the Building Height Guidelines 2018. He stated that the guidelines required the Planning Authority to consider building heights of at least six storeys within the canal ring, three to four storeys in suburban locations and to actively seek and bring forward proposals which significantly increase building height and overall density of development. He indicated that the Minister had powers to state specific planning policy requirements which must be mandatorily applied by Planning Authorities and An Bord Pleanála. He said:-

> *"Subsequently both the Apartment Guidelines (March 2018) and the Building Height Guidelines (2018) contain SPPR's which take precedence over any conflicting policies and objectives contained in development plans or local area plans.*
>
> *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'**.*
>
> *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/street scape, 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.**'*
>
> ***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 DCCSDZ 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."* (emphasis in bold type added)

18. The Briefing Note was not reached at the February meeting of the elected members of the Council.

19. A copy of the Briefing Note of 31 January 2019 was received by the developer at a date not apparent from the evidence. In early February 2019 (possibly the 7th), Mr. Ronan received Mr. Shakespeare's letter stating that he disagreed with the developer's argument that SPPR 3 of the Building Height Guidelines applied to the North Lotts Planning Scheme. The solicitors for the developer wrote on 20 February 2019, after receipt of the letter from Mr. Shakespeare, to the Chief Executive of Dublin City Council, Mr. Keegan, expressing concern in relation to the Briefing Note, stating that it appears from the report that the Council has already decided not to apply the guidelines to SDZ planning schemes. The letter took issue with the Council's interpretation of the guidelines and enclosed two further opinions of Senior Counsel, responding to the opinion of Junior Counsel furnished under cover of Mr. Shakespeare's letter. The solicitors clearly disagreed with the legal opinion expressed by Junior Counsel and with the Briefing Note and said:-

> *"The Council's interpretation of the Guidelines flies in the face of the clear meaning of these Guidelines issued by the Minister. Dublin City Council is encroaching on the powers of the Minister and is committing a serious breach of its statutory duty under section 28(1)(C) which provides that:*
>
> > *'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**.'*
>
> *Our client is gravely concerned that Dublin City Council is fettering the discretion afforded to it by the Guidelines in forming the view that SPPR3 does not apply to the Strategic Development Zone at this time. Of further concern, resulting from the position the Council has taken in interpreting the Guidelines, as expressed in the Briefing Note of the City Planner, is that the Council will inevitably refuse the Application."*

20. The letter formally called upon the Chief Executive to confirm that Dublin City Council will apply SPPR 3 to the developer's planning application and that it will "*formally revoke and/or withdraw the City Planner's Briefing Note*".

21. Dublin City Council replied on 1 March 2019. While the letter was not exhibited, at para. 18 of his affidavit, Mr. Ronan summarises the letter and no issue was taken with his synopsis. He stated that it confirmed that the Briefing Note had been prepared at the request of the elected members; that the Briefing Note had not been prepared in the context of the developer's planning application; that Dublin City Council had not fettered its discretion and that the developer's application would be given full and proper consideration; and that the opinions of Senior Counsel would be considered by Dublin City Council. The letter stated that the Briefing Note "*shall now go before the meeting of 4 March next*".

22. At the next meeting of Dublin City Council on 4 March, the Minutes record that the Briefing Note from the City Planner was "*noted*".

23. On 8 March 2019, the developer's solicitors again wrote to the Chief Executive indicating *"[o]ur client hopes that DCC will pay genuine regard to the two Senior Counsel opinions (which are unequivocal in their conclusion) regarding the application of … SPPR3, to development proposals within the area of SDZ Planning Schemes*." The letter concluded that the developer was simply looking for the application to be "*considered to the correct legal background as set out in the two Opinions furnished."*

24. On 14 March 2019, the developer's solicitors again wrote urging Dublin City Council to adopt the view of the law expressed by two Senior Counsel instructed on behalf of the developer. The letter stated:-

> *"Our Client and their representatives are more than happy to meet and discuss any reservations you might have in advance of reaching a decision on the Planning Application. This would certainly be a preferable option than having a Court ultimately decide on matters should that prove necessary."*

25. The following day, 15 March 2019, the developer wrote consenting to an extension of time for the decision on the first planning application until 31 May 2019. A similar letter was written on 3 April 2019, in respect of the second planning application, consenting to an extension of time for a decision in respect of that application until 31 May 2019. Each letter was acknowledged by Dublin City Council.

26. The decisions in respect of the two planning applications were thus postponed until 31 May 2019 at the sole instigation of the developer.

27. On 24 April 2019, the developer commenced these judicial review proceedings, grounded on affidavits sworn on 23 April 2019. Had there been no letters consenting to the extension of time, in the normal way, decisions in respect of each of the two planning applications would have issued prior to the commencement of these proceedings.

28. The grounding affidavit was sworn by Mr. James Ronan. Mr. Ronan's affidavit does not address the requests by the developer to extend the time for the decisions on the two planning applications until 31 May 2019. Mr. John Spain, Chartered Town Planner and Chartered Surveyor of John Spain Associates, swore two affidavits on behalf of the developer. In his first affidavit, sworn on 23 April 2019, he simply refers to the letters of 15 March 2019 and 3 April 2019, and to the acknowledgements by Dublin City Council of each of the letters. He does not explain why the developer sought the extension of time.

29. In his second affidavit, sworn on 17 May 2019, he addressed the consent to the extension of time in paras. 4-7. He agreed that the consent to an extension of time did not follow any discussions with the Council on the application itself and was made unilaterally by the developer. The explanation offered was:-

"The [developer's] position at all times was, and remains, that there is no requirement to review the North Lotts and Grand Canal Planning Scheme to give effect to SPPR 3(A). However, an applicant for planning permission also has to be pragmatic and in circumstances where the Council had indicated that it was going to review the North Lotts and Grand Canal Planning Scheme it was considered that such a review should be facilitated to the limited extent possible having regard to the construction programme.

The extension of time was the appropriate route for the [developer] 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.****"* (emphasis added)

I understand this to mean that the developer hoped that the review of the North Lotts Planning Scheme pursuant to SPPR 3(B) might be completed and the Scheme amended in sufficient time for the decisions on the two applications for planning permission to be taken under the revised Scheme or, if this could not be completed by May 2019, that Dublin City Council would be persuaded during the further time available of the correctness of the developer's view of the application of the Building Height Guidelines, and in particular the applicability of SPPR 3(A), to the planning applications.

The issues for decision

30. Two issues arise for consideration in this judgment:

(i) Is the Briefing Note justiciable?

(ii) Were the proceedings brought prematurely, prior to the determination of the planning application(s)?

The decision of the trial judge on the procedural objections

31. The trial judge summarised Dublin City Council's procedural objection succinctly:-

"… 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."

32. He regarded the argument that Mr. O'Hara was not the person ultimately responsible for making the decisions on the two planning applications as having been overtaken by reason of the pleading of Dublin City Council in its Statement of Opposition that SPPR 3(A) does not apply to planning schemes. It follows, therefore, that any argument that the views expressed in the Briefing Note were personal as opposed to corporate, falls away. The trial judge set out the issues in paras. 30 and 31 of his judgment as follows:-

> *"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."*

33. The trial judge was 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. A decision on the applications necessarily would involve a decision on the application of the Building Height Guidelines. If Dublin City Council erred in its interpretation of the Building Height Guidelines, the legal argument which the developer makes in these proceedings could equally well be made in proceedings challenging a decision to refuse planning permission.

34. On the facts of the present case, two planning applications had been submitted before the judicial review proceedings were instituted and, therefore, the costs of preparing the planning applications had already been incurred. But for the fact that the developer took what the trial judge described as "*the highly unusual step*" of unilaterally consenting to an extension of time, the two applications would have been determined prior to the date when the judicial review proceedings were instituted. He concluded on this point at para. 36 as follows:-

> *"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."*

The submissions of the developer

35. The developer submitted that the trial judge's conclusions failed to acknowledge that an applicant for judicial review does not have to wait until his rights have actually been affected before he can commence proceedings. It argued that the position adopted by Dublin City Council in the Briefing Note effectively meant that the Council would refuse both of the developer's planning applications pending before it as the planning applications were in contravention of the maximum height standards contained in the North Lotts Planning Scheme. In its written submissions, it continued:-

> *"The Briefing Note also affects the rights and interests of the Appellant and in particular its right to have the planning applications determined in accordance with the correct interpretation of the Building Height Guidelines. Accordingly,… the Appellant was entitled to challenge the Briefing Note and did not have to wait until the Council decided the planning applications."*

36. The developer relied upon *East Donegal Co-Operative Livestock Mart Limited v. The Attorney General* [1970] I.R. 317; *State (Lynch) v. Cooney* [1982] I.R. 337; *Christian & Ors. v. Dublin City Council* [2012] 2 I.R. 506 and *North East Pylon Pressure Campaign v. An Bord Pleanála (No. 2)* [2016] IEHC 490 in support of this submission. I shall refer to these authorities below.

Discussion

(1) Is the Briefing Note justiciable?

37. Two authorities relevant to this question were cited by the parties. The first was *Ryanair Limited v. Flynn* [2000] 3 I.R. 240. In that case, the Minister for Enterprise, Trade and Employment ordered an inquiry under s.38(2) of the Industrial Relations Act 1990, in relation to a dispute between the applicant and a trade union. The Minister appointed the respondents to conduct the inquiry. Kearns J. held that the inquiry team had an extremely limited function. It could not attempt mediation or dispute resolution. It could not impose duties, penalties, liabilities or consequences of any sort. On that basis, he held that the matter raised before the court was not justiciable because there was no decision susceptible to being quashed in the case; that no legal rights of the appellant were affected by what was a mere fact finding report. He held at p. 264 of the report:-

> *"… quite apart from the public law dimension … two other requirements which must be fulfilled before the court can intervene by way of judicial review, namely, there must be a decision, act or determination and* ***it must affect some legally***

***enforceable right of the applicant. If the right is not a "legally enforceable right", it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed.*”** (emphasis added)

38. The second relevant authority was *Cintra Infraestructuras Internacional S.L.U. v. The Revenue Commissioners* [2016] 2 I.R. 314. The issue for Twomey J. was whether two letters issued by the Revenue Commissioners were justiciable. The letters refused to confirm to Cintra that shares in a company, which it proposed to sell, did not derive the greater part of their value from land. This, in turn, impacted the issue whether the proceeds of sale of the shares were chargeable to capital gains tax. The net question which the court had to consider was whether the refusal by the Revenue Commissioners to give the confirmation sought, which was sought by Cintra on the basis of Cintra's interpretation of "land", and with which the Revenue Commissioners disagreed, amounted to a decision or determination which was subject to judicial review by the court. Cintra argued, based on *Ryanair v. Flynn*, that even though the letters did not affect some legally enforceable right, they were nonetheless subject to judicial review since a probable, if not inevitable, consequence of these letters was that a decision would be taken by the Revenue Commissioners to assess Cintra for capital gains tax on the sale of their shares in this case.

39. Having quoted the passage from the judgment of Kearns J. at p. 264, Twomey J. said that, as part of his consideration of whether the probable next step after the letters issued is that a legally enforceable right will be infringed, it is relevant to consider the actual effect of the letters themselves, the legal position of Cintra after the letters had issued and the likely next steps if the judicial review had not been instituted. In that case, the trial judge held that there was nothing in the letters that changed the legal position of Cintra. He held that, at the time the judicial review proceedings were instituted there was no guarantee that the shares in question would be sold and, therefore, it was impossible for the letters to impose legal consequences at the stage when the judicial review was sought. He emphasised that it was only certain that there would be a decision made by the Revenue Commissioners that capital gains tax was or was not payable by Cintra once it was clear that the sale of the shares had completed. Prior to that date, there could have been no liability to tax and thus, no decision by the Revenue Commissioners which had legal consequences. At para. 32, he held:-

> *"… if the judicial review had not been instituted, the likely next step where there was a difference of interpretation between the respondents and the taxpayer would have been a request by Cintra for a refund of the tax. If the respondents had refused to refund the withholding tax, then this refusal would have resulted in the non-binding interpretation (as set out in the two letters) of the respondents crystallising into a binding determination by the respondents on the liability of Cintra to capital gains tax."*

40. He held that if the Revenue Commissioners refused to refund the withholding tax then Cintra would have had a justiciable dispute and would have been entitled to appeal the

decision of the Revenue Commissioners under s.949 of the Taxes Consolidation Act 1997 (as amended).

41. He then considered whether Cintra's legally enforceable rights were about to be infringed as a result of the issue of the letters, so as to justify an order of *certiorari* quashing the letters. He emphasised that no legal consequences flowed from the letters themselves as they were non-binding and that the legal position of Cintra, both before and after the issuing of the letters, was the same and was governed by the Act of 1997. He held it was not the letters which visited legal consequences upon Cintra, but rather the provisions of the Act of 1997. While he accepted that the next probable step after the issue of the letters would be a refusal by the Revenue Commissioners to refund the tax on the grounds that Cintra was liable to capital gains tax, and this was a decision with which Cintra will disagree, this did not amount to there being a probable next step that Cintra's rights will be infringed. At para. 40 of his judgment he held:-

> *"This is because the likelihood (as revealed to Cintra by these letters) of the respondents refusing to refund the withholding tax based on its interpretation of the tax legislation is not an infringement of a right, it is simply an interpretation with which Cintra will disagree – it may well be that this difference of interpretation goes the whole way to the Supreme Court, but that is what it is: a difference of interpretation between the respondents and a taxpayer. When the letters issued, this did not amount to an infringement of a right. It will only become an infringement of a right if, after the respondents refuse to refund the capital gains tax, first the issue is appealed by the taxpayer and second the final appellate body to hear the matter, whether that be the Revenue Appeal Commissioners or the Supreme Court or an appellate court in between, agrees with Cintra's interpretation. If after the appeal process has been so exhausted, the interpretation of the respondents is found to be incorrect then one can say at that stage that a taxpayer's right was infringed. On the other hand, if after the appeal process has been exhausted, the interpretation of the respondents is found to be correct, then the taxpayer's rights will not have been infringed. The final appellate body may or may not agree with Cintra, but the fact that there are two possible interpretations of a tax statute, does not amount, in this court's view, to an infringement of a taxpayer's right."*

42. He, accordingly, held that the relief should be refused as the letters did not amount to a decision or determination of a public body which imposed legal consequences so as to be justiciable.

43. Further assistance on this point may be found in the decision of Clarke J. in *Ballyedmond v. Commission for Energy and Regulations & Ors.* [2006] IEHC 206. The applicant for judicial review challenged a statutory report of the respondents' inspector made under the provisions of the Gas Act 1976. Clarke J., in the High Court, stated as follows:-

> *"5.7 The Inspector's report is not, therefore, a stand alone report which is an end in itself. It is merely a step in a process. Either that process, taken as a whole, is*

sustainable, or it is not. It should also be added that it is a step in the process where the conclusions of the Inspector conducting that step have no formal effect on the process at all. It can thus be distinguished from schemes where, in order that someone might be adversely affected by the process, two separate decisions require to be made. For example certain disciplinary processes require that a prima facie case be established before one body with a full hearing, in the event that the first body is satisfied that a prima facie [case] (sic) exists, being conducted by a second body. In such a case there are formal consequences of the decision of the first body in that without it making a decision against the interest of a person against whom accusations are made, the matter can go no further.

…

5.9 I have therefore come to the view that the report of an Inspector appointed to conduct a hearing for the purposes of enabling the assembly of materials which are required to be considered by a statutory body fulfilling a role such as the Commission in this case, is not open to judicial review, notwithstanding the fact that such a report may contain recommendations where those recommendations are neither binding nor give rise to any formal consequences of the process as a whole."

44. In this case, the Briefing Note was prepared by the City Planner in response to general questions from the elected members (the Corporate Policy Group) pursuant to s. 133 of the Local Government Act 2001 (as amended), and not in the context of the two planning applications of the developer. It is addressed to the concerns of the Corporate Policy Group about the effect of the guidelines on the Development Plan. It was produced for the purpose of advising the elected members of the Council under the Act of 2001. It was not provided pursuant to the provisions of the Act of 2000. Neither the author of the Briefing Note, nor the recipient of the Briefing Note is the decision maker who determines the planning applications. The advices given by Mr. O'Hara were not prepared, nor given, in the context of the planning applications. The advices are not part of the formal planning process and are entirely separate from the consideration of the planning applications.

45. The developer contended that it was legitimate to challenge "*the interpretation of the Building Height Guidelines*" as contained in the Briefing Note prior to the determination of the applications "*so as to ensure that the Council properly applied SPPR 3(A) to those planning applications.*" It argued that the Briefing Note affected its rights and, in particular, its right to have the planning applications determined in accordance with the correct interpretation of the Building Height Guidelines. But, it did not explain how the *Briefing Note* had this alleged effect. It could not identify the legal status or import of the Briefing Note which made it amenable to review by the High Court. The fact that the elected members of Dublin City Council "*noted*" the report on 4 March 2019 confers no additional status on it.

46. At its height, it amounts to advices to the elected members of the City Council as to the planning officials' view that the Building Height Guidelines, and in particular SPPR 3, did not apply immediately to planning schemes which continued to be governed by the existing provisions, and that it was necessary to review those planning schemes in light of the guidelines. In my view, it is no different to any other statement of a legal opinion as to the law on any particular topic. The developer pointed to no legal effect of the Briefing Note which could not with equal force apply to the correspondence of Mr. Shakespeare.

47. Mr. Shakespeare, the Assistant Chief Executive, gave his opinion of the legal position when he stated in his letter of February 2019 that *"[o]ur advice on [the application of SPPR 3] is that consideration of any additional building height can only be considered following a review of the strategic development scheme."* The opinion of Junior Counsel was likewise an expression of a point of view. Whether the opinion of Junior Counsel obtained by Dublin City Council considered the Briefing Note, or whether the Briefing Note was prepared in light of the opinion of Junior Counsel, is irrelevant, in my opinion, to the issue whether the Briefing Note is justiciable. In my judgment, the Briefing Note has the same status in law as both the opinion of Junior Counsel and the letter of Mr. Shakespeare: it expresses a point of view on a legal issue. That legal opinion was expressed in the abstract and had yet to be applied to an application for planning permission. The fact that the opinion so expressed would, if applied to an application for planning permission, almost inevitably result in the refusal of any such application, and in particular the developer's applications for planning permission, does not alter the status of the Briefing Note, in my opinion.

48. The Briefing Note was in no way analogous to the report of an inspector on a planning application. It was generated outside of the statutory process and was not a necessary step within the process. As such, it had no impact on the process. In my judgment, the Briefing Note is even less amenable to review than was the report of the inspector in *Ballyedmond*.

49. This analysis follows the decisions in *Ryanair v. Flynn* and *Cintra v. Revenue Commissioners.* The Briefing Note had no legal consequences for the developer, either on the date it issued (31 January 2019), or the date it was noted by the elected members of Dublin City Council (4 March 2019). It did not affect a legally enforceable right of the developer. The probable next step of Dublin City Council would have been to determine the two applications for planning permission had the developer not intervened by firstly, consenting unilaterally to the extension of time and secondly, by commencing these proceedings. The developer had a legal right to have the applications determined in accordance with law. It is probable that, as occurred, the planning permission would be refused on the basis that the Building Height Guidelines SPPR 3(A) did not apply to the North Lotts Planning Scheme. However, this is based upon Dublin City Council's interpretation of the Planning and Development Act 2000 (as amended) and the Building Heights Guidelines. It is an interpretation with which the developer disagreed but, as was pointed out by Twomey J. in *Cintra*, this does not amount to an infringement of its rights, nor an inevitable infringements of its rights. The fact that there are two possible

interpretations of a statute or other legal instrument, and one is adopted by a decision maker with possible adverse outcomes for another party, does not amount to an infringement of the rights of a litigant, provided that the impugned interpretation is *bona fide* and reasonably held. There was no inevitable infringement of the rights of the developer when it commenced these proceedings. Its rights could only be said to have been infringed if a decision was taken which was subsequently found by a court to have been based on an error of law. This is relevant to the issue of prematurity but does not render justiciable that which is otherwise not susceptible to judicial review.

50. It follows, inexorably, that what was sought was judicial review of an opinion and, in my view, Dublin City Council was correct in submitting that it was not open to review. In my judgment, the appeal should be refused on the basis that, in the circumstances of this case, the Briefing Note was not amenable to judicial review.

(2) Were the proceedings commenced prematurely?

51. If the developer had not unilaterally consented to the extension of time for a decision on the two applications for planning permission to 31 May 2019 then, in the normal course of events, Dublin City Council would have made decisions on the two application on 19 March 2019 and 9 April 2019, respectively. The judicial review proceedings were commenced on 24 April 2019, grounded upon two affidavits sworn on 23 April 2019. It would have been possible to allow the applications to be decided in the normal course, and for the developer to apply for judicial review (assuming permission was refused) in the normal way, without any extra expense or loss of time.

52. I am satisfied that the trial judge was correct in concluding that there was no prejudice to the developer in allowing the planning applications to take their normal course and thereafter, seeking judicial review of any decisions to refuse the planning permissions sought, if the developer so wished. The arguments to the contrary do not bear scrutiny. If the developer had not applied unilaterally to extend the time for the consideration of the planning applications, both applications would have been decided before these judicial review proceedings were commenced. Thus, it would have been possible to have judicially reviewed actual decisions, and the actual reasons for those decisions, as opposed to the Briefing Note which is not specifically directed towards the planning applications, and is not addressed to, or written by, the decision maker. The developer advanced no explanation why it was preferable to judicially review the Briefing Note rather than actual decisions, or what prejudice it thereby suffered. A successful judicial review of the decisions on the planning applications would, from the perspective of the developer, negate the claimed effect of the Briefing Note.

53. It follows that it was not necessary for the developer to adopt the course of action it did, and it does not so contend. Its case is that an applicant for judicial review does not have to wait until his rights have actually been affected before he can commence proceedings. The issue is whether, in the circumstances of this case, this is correct.

54. The statutory scheme for the review of acts or decisions of a planning authority or An Bord Pleanála ("the Board") is set out in ss.50 and 50A of the Act of 2000. As the trial

judge held, the legislative intent is that where a matter is within the jurisdiction of a planning authority or the Board then recourse to the courts generally should be a matter of last resort. However, express provision is made under ss.50(4) and (5) of the Act of 2000 for the court to stay judicial review proceedings which relate to a matter for the time being before the planning authority or the Board. Such provisions would be otiose if proceedings could never be instituted prior to the conclusion of the decision-making process by respectively the planning authority or the Board. It follows that such proceedings are not prohibited and are therefore permissible. It also follows that the legislative intent is that where matters are properly before the planning authority or the Board, the preference is that the process should conclude before the planning authority or the Board before resort is had to the courts. The legislation, therefore, is not decisive on the question of prematurity in these proceedings.

55. In *North East Pylon Pressure Campaign Limited v. An Bord Pleanála (No. 1)* [2016] IEHC 300, Humphreys J. in the High Court, in a comprehensive judgment, considered at length the issue when is the appropriate time to institute judicial review proceedings. He examined whether steps taken by the Board (or indeed a planning authority) in the course of determining an application for development consent themselves amounted to acts or decisions by the Board or planning authorities so as to engage the machinery of s.50 of the Act of 2000. He held that there must be a clear route for access to the court for an applicant with a grievance as to a statutory or administrative procedure in general, and a development consent objection in particular. He held:-

> *"69. Order 84, s. 50 and similar provisions must be construed in such a way as to vindicate this crucial right of access to the court and to provide a clearly identifiable and practicable pathway to enable an aggrieved applicant to present his or her complaint to the court. Such an interpretation militates overwhelmingly in favour of the view that the sort of decisions or acts to which s. 50(2) refers are those amounting* ***to ultimate substantive determinations, such as the grant or refusal of development consent, or some other similar definitive and non-reversible decision as to rights and liabilities****, and not the subsidiary and intermediate steps, acts or secondary decisions that may take place on the way to that ultimate substantive determination.*
>
> *…*
>
> *74. From a public policy point of view, it seems to me that the need to avoid disruption to the processes of public administration is not only just as important as legal certainty in the abstract, but indeed significantly more important. …*
>
> *75. … If what I am terming intermediate steps constitute acts which must be challenged under s. 50(2), then the stage will have been set for enormous disruption to the development consent process. It will require applicants to seek judicial review at every stage of the process, such as a refusal to reject an application as invalid as a preliminary matter, a decision to hold an oral hearing, a*

refusal to adjourn an oral hearing, and so on, with all the potential for procedural chaos that would be unleashed by such an approach.

76. … No benefit to the public interest can be served by unnecessary multiplication of judicial reviews. …

77. … Judicial resources are limited, and as far as judicial review is concerned, those resources should be prioritised for applicants who do not in fact have the alternative remedy of a process to which they can submit. …". (emphasis added)

56. He held that the general proposition is that a person aggrieved in the course of an administrative process should complete that process before seeking judicial review; and, indeed a person with a right of appeal against a decision complained of should exhaust that remedy before seeking judicial review (para. 129). At para. 131, he held that there are several *significant* factors which strongly favour the need to submit to an administrative or judicial process prior to seeking relief by way of judicial review and enumerated them:-

"(a) Firstly, such a requirement prevents the severe disruption to the administrative or judicial process concerned that would be occasioned by mid-stream applications.

(b) Secondly, it prevents premature and unnecessary consumption of the very limited resources of the court. …

(c) Thirdly, the underlying process may resolve a number of factual and possibly legal questions which will simplify, assist or possibly obviate the necessity for judicial review proceedings at the end of the process. For example, an issue which appears potentially relevant in advance may in the event turn out not to be decisive. An applicant's standing to raise particular issues might turn out to be either confirmed or lacking depending on certain findings of fact in the course of the process.

(d) Fourthly, by simplifying the process for challenge, such an approach assists applicants overall by providing a clear pathway to an effective remedy and by removing uncertainty as to whether they should intervene in the course of a process or await its outcome, as a matter of generality.

(e) Relatedly, it also assists applicants who do not have an alternative remedy by freeing up court resources for their benefit rather than allowing such resources to be spent on applicants who have, but do not wish to use, the alternative remedy of a process to submit to."

57. At para. 140, he agreed with the observation in *Treacy v. An Bord Pleanála* [2010] IEHC 13, at para. 29, where MacMenamin J. noted that planning issues were more appropriate for determination by planning authorities "*even if a question or questions of law may arise*".

58. At para. 208, he noted that it was well-established that where an applicant seeks, by way of judicial review, to pre-empt a decision to be made by the decision maker being challenged, such an application may be dismissed as premature. While acknowledging that there was no absolute rule, he said there was a general preference for allowing the process to proceed "*particularly if it is a judicial or quasi-judicial process*" and then permitting review of the results.

59. In his second decision in those proceedings, ([2016] IEHC 490), at para. 13, in a passage cited by the developer in its written submissions, he said:-

> *"… there are strong grounds in public policy for viewing as premature a challenge to an intermediate administrative decision until such time as it crystallises in a legally binding and normally final outcome. However, it is clear that this is not an absolute rule, because there are counter-instances where the courts have intervened (on my analysis, exceptionally) prior to the making of a definitive decision."*

60. I accept these statements as correct statements of the law on this point. Applying these principles, the issue is whether the Briefing Note constitutes an intermediate administrative decision and, if so, whether it is one of the exceptional instances where it is permissible to challenging an intermediate decision, or whether the developer was required to await a final decision on the planning application(s) before bringing a challenge to court.

61. For the reasons expressed earlier in this judgment, I do not consider that the Briefing Note is an intermediate administrative decision at all; but for the purposes of considering this aspect of the appeal, I shall presume that it is amenable to judicial review and consider the issue solely from the perspective of timing.

62. In support of its argument that its case came within the exceptions referred to in *North East Pylon*, the developer relied upon three authorities. The first was *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317. At p. 338 of the report, Walsh J. stated as follows:-

> *"With regard to the locus standi of the plaintiffs the question raised has been determined in different ways in countries which have constitutional provisions similar to our own. It is unnecessary here to go into this matter in detail beyond stating that at one end of the spectrum of opinions on this topic one finds the contention that there exists a right of action akin to an actio popularis which will entitle any person, whether he is directly affected by the Act or not, to maintain proceedings and challenge the validity of any Act passed by the parliament of the country of which he is a citizen or to whose laws he is subject by residing in that country. At the other end of the spectrum is the contention that no one can maintain such an action unless he can show that not merely do the provisions of the Act in question apply to activities in which he is currently engaged but that their application has actually affected his activities adversely. The Court rejects the latter contention and does not find it necessary in the circumstances of this case to*

express any view upon the former. Rights which are guaranteed by the Constitution are intended to be protected by the provisions of the Constitution. To afford proper protection, the provisions must enable the person invoking them not merely to redress a wrong resulting from an infringement of the guarantees but also to prevent the threatened or impending infringement of the guarantees and to put to the test an apprehended infringement of these guarantees."

63. Walsh J. later explained the rationale for the decision in *State (Lynch) v. Cooney* [1982] I.R. 337, at p. 371, as follows:-

> *"In the judgment of the Court in East Donegal Co-Operative v. The Attorney General … , this Court expressly rejected (at p. 338 of the report) the contention that it was necessary for a plaintiff to show that the provisions of the legislation impugned applied not only to the activities in which he was currently engaged but that their application has "affected his activities adversely." This decided that a person does not have to wait to be injured. Once again, the question of sufficiency of interest will depend upon the circumstances of the case and upon what appears to be the extent or nature of the impact of the impugned law on the plaintiff's position."*

64. The developer also referred to the decision of Clarke J. in the High Court in *Christian & Ors. v. Dublin City Council* [2012] 2 I.R. 506, which concerned a challenge to the decision of the Council to zone lands in a particular manner which impacted upon the lands of the applicants. The issue was whether the proceedings were premature because any effect on the applicants' property as a result of the zoning could only crystallise when an application for planning permission had been refused on the basis of the content of the plan. Clarke J. concluded, in reliance on the judgment in *East Donegal*, that even though the applicants could only point to a threatened or impending infringement of constitutional rights, they had standing to take the proceedings. He also held that the claim was not premature. At p. 556 of the report (paras. 11.9-11.10) he held:-

> *"… Development plans have a significant effect on the rights and obligations of individuals. They form an important part of the planning permission infrastructure. While it is true that permissions can be granted under the material contravention route and that development plans can be amended and are periodically revised, there is no doubt but that the possibility of a party obtaining beneficial planning permission can be significantly affected by the contents of a current development plan.*
>
> *11.10 … It is true, for the reasons already analysed, that local authorities enjoy a very wide discretion as to how to formulate development plans. The circumstances in which such development plans can be challenged are, therefore, limited. However, the right to challenge, notwithstanding that the circumstances in which such a challenge can be mounted are limited, is, in my view, available to anyone whose rights are affected by the development plan. For those reasons it seems to me that the applicants have the necessary standing to maintain these proceedings."*

65. The developer also cited Morgan & Hogan Administrative *Law in Ireland* (4th ed., Round Hall, 2010) at para. 16-246, on the issue of prematurity. The authors refer to the judgment of Costello J. in *Donegal Fuel and Supply Company Limited v. Londonderry Harbour Commissioners* [1994] 1 I.R. 24. In that case, the applicants had sought judicial review to prevent the Minister for the Marine from approving certain byelaws which they claimed were *ultra vires*. The authors stated:-

> *"Costello J. dismissed the application, saying that even if it were shown that the draft bye laws were ultra vires the Minister's powers or unreasonable, "the court cannot assume that they would be adopted by the Minister" and that such an objector is required to exhaust his statutory remedies before seeking judicial review. This may be too narrow a view. After all, and notwithstanding any question of the operation on the presumption of validity or constitutionality, the question of vires is a matter for the Courts and not for the Minister.* ***If an applicant can clearly demonstrate that the proposed course of action would be ultra vires****, should not the courts be prepared to interfere in advance, at least in clear cases?"* (emphasis added).

66. I have come to the conclusion that I agree with the decision of Costello J. and respectfully disagree with the authors of the learned textbook. Costello J. stated at pp. 39-40 of the report:-

> *"Under s.48 of the Act of 1882, the Minister* ***is required to consider representations made to him before approving draft bye-laws*** *submitted by the harbour commissioners and* ***he may approve, amend or disallow them****. Even if was shown that the draft bye-laws were ultra vires the Minister's powers or unreasonable, the court cannot assume that they would be adopted by the Minister. I think that an objector to draft bye-laws is required to exhaust his statutory remedies before seeking the aid of the court in relation to them.* ***If notwithstanding his objections the Minister approved bye-laws which legally he could not approve then the courts would quash the byelaws****."* (emphasis added)

67. It seems to me that the issue of prematurity is correctly analysed in this case. The Act of 1882 required that draft byelaws be prepared. The Act required that the Minister consider representations made in relation to the draft byelaws. It was open to the Minister to amend the draft byelaws, or to disallow them in the light of those representations. It would be open to an objector to submit to the Minister that the draft byelaws *were ultra vires* the Minister's powers or unreasonable, and it was not a foregone conclusion that the Minister would proceed to adopt *ultra vires* byelaws. In those circumstances, Costello J. held that it was appropriate for an objector to the draft byelaws to exhaust his statutory remedies, i.e. to make his submissions under the Act, prior to instituting proceedings. It was not for the court to assume that, in those circumstances, the Minister would adopt ultra vires or unreasonable draft byelaws. It seems to me, in those circumstances, that the applicant could not "clearly demonstrate" that the proposed course of action would be

ultra vires precisely because it had acted precipitously: on the facts of the case, there was no basis for concluding, at the time the proceedings were instituted, that the Minister would exceed his powers. It is, as Simons J. in these proceedings indicated, a question of timing.

68. The **general** rule is that the statutory procedure as laid down by the Oireachtas should be followed and the statutory process concluded unless there were exceptional circumstances, as is clear from the analysis of Humphreys J. in *North East Pylon Pressure Campaign*. The question is whether on the facts of this case, where the developer has invoked the statutory procedures, the developer can demonstrate exceptional circumstances. And, whether the three authorities cited are of assistance in this regard.

69. The developer does not claim that its rights have been adversely affected by the adoption of the Building Heights Guidelines and it does not seek to challenge those guidelines. Nor does it anticipate being negatively impacted by an application of those guidelines to its lands. On the contrary, it wishes to benefit from them. Its position is not analogous to the plaintiffs in *East Donegal Co-Operative*. In that case, legislation had been enacted and the plaintiffs sought declarations that the Act or certain sections were repugnant to the Constitution. This was the context in which the issue of *locus standi* and, by implication, prematurity, was considered. There was no pending decision of a decision maker applying the provisions of the Act awaited. Thus, it is not comparable to the circumstances of this case and I do not find it of assistance in resolving the question of prematurity on the facts before this court.

70. Neither is the position of the developer analogous to the prosecutor in *The State (Lynch) v. Cooney*. The relief sought was an order of *certiorari* quashing an order made by the Minister under s. 31(1) of the Broadcasting Authority Act 1961, which prohibited RTÉ (to whom the order was addressed) from following through on its invitation to the prosecutor to present a party political broadcast on behalf of Sinn Féin during the general election campaign. The issue was whether, in those circumstances, Mr. Lynch had demonstrated sufficient interest to establish his *locus standi* to seek the order of *certiorari*. The case was not concerned with prematurity, and so does not assist in this appeal.

71. The developer does not make the case that its lands have been adversely affected by the adoption of the guidelines, as occurred in *Christian*, in relation to the adoption of the Development Plan. Its issue is not with the guidelines, but with the opinion as to the applicability of the guidelines. The Briefing Note amounts to no more than a statement of legal opinion and the complaint relates to the validity of that legal opinion, and its anticipated application to the two planning applications, not to a decision which actually impacts the rights of the developer, as was the case in *Christian*. Thus, it is not directly on point either and does not assist in answering the question at issue here.

72. None of the authorities cited by the developer in fact support its alleged entitlement to seek judicial review of the Briefing Note prior to the decisions on the two applications for planning permission. Or, to put it another way, they do not support the argument that

exceptional circumstances existed which justified a departure from the general rule as recently restated in *North East Pylon*.

73. In my judgment, in this case the developer has not identified any exceptional ground which warranted the institution of these judicial review proceedings prior to a decision on the first application for planning permission. On the contrary, it would have suffered no prejudice had it permitted the normal processes to run their course. That alone, in my view, is sufficient to indicate that there were no exceptional circumstances in this case. For the reasons identified by Humphreys J., it is important that proceedings are not instituted prematurely. The developer has pointed to no credible prejudice it would have suffered had it allowed Dublin City Council to reach a decision on at least the first of the planning applications, prior to the institution of judicial review proceedings.

74. This decision is reached on the particular facts of this case, where the developer actually applied for two planning permissions and then delayed the determination of those applications by the very unusual, unilateral decision to seek an extension of the time for the consideration of the decisions. Having applied for planning permissions, there was no good reason not to await the outcome of the applications and there was further no good reason to bring judicial review proceedings prior to those decisions issuing.

75. For these reasons, I would refuse the appeal on the grounds that the proceedings were commenced prematurely and that the developer ought to have awaited the determination of its first planning application prior to the commencement of judicial review proceedings.

Are the proceedings moot?

76. Dublin City Council argued that the proceedings had become moot as each of the applications for planning permission were refused by it on 31 May 2019, following the delivery of the judgment of the High Court. The developer did not challenge the decisions and it was not out of time for any challenge. Accordingly, the decisions were final and no longer open to challenge. I do not propose to consider this argument as it is not necessary to resolve this appeal and consideration of the point should await another case.

Conclusions

77. The Briefing Note of 31 January 2019 of the City Planner, issued pursuant to s. 133 of the Local Government Act 2001(as amended), is not amenable to judicial review.

78. The proceedings were instituted prior to any decision on the applications for planning permission. The general rule is that parties should not challenge intermediate administrative decisions until there is a legally binding, normally final, decision, save in exceptional circumstances. No such exceptional circumstances applied in this case.

79. For these reasons, in addition to those set out in the judgment of Collins J., I would dismiss the appeal.

80. Donnelly and Collins JJ. have indicated their agreement with this judgment which is to be delivered electronically.