

## Irish Supreme Court to decide if quashed planning permissions can be remitted

Insights - 14/03/2024

The appeal of Crofton Buildings Management CLG & Anor v An Bord Pleanála and Fitzwilliam DL Limited, **High Court [2022] IEHC 704** to the Irish Supreme Court is of public importance because it will mark a precedent as to whether Strategic Housing Development (SHD) permissions can be calibrated with new development plans and the new Large-scale Residential Development (LRD) planning regime which specifically prohibit Build-to-Rent (BTR) residential units.

The decision will have implications for various other SHD permissions currently pending before the Irish High Court which have been challenged by way of judicial review.

### Background to the case

The Applicants in this case brought judicial review proceedings in the High Court challenging a decision of An Bord Pleanála ('the Board') dated 21 April 2021 which granted permission for a Strategic Housing Development ('SHD') which involved the construction of 102 build-to-rent apartments up to 13 storeys high, on the grounds of St Michael's Hospital, Crofton Road, Dún Laoghaire.

The Board conceded that its decision ought to be quashed because it said it had failed to apply a provision under Section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016. Specifically, that its decision materially contravened provisions of the 2016 Dún Laoghaire-Rathdown development plan in relation to building height.

In light of this concession, the issue before Mr Justice Holland was that where the planning permission had been quashed, whether the SHD decision should be remitted back to the Board for reconsideration. Secondly, if remitted, whether the now-expired 2016 Development Plan provisions or the current 2022 Development Plan provisions would apply.

The Applicants submitted to the High Court that the 2022 Development Plan should apply. They argued that the decision maker is required by statute to make planning decisions based on the development plan extant at the date of the decision. The Applicants submitted that as the 2016 Development Plan had expired, the 2022 Development Plan is the only applicable plan. Therefore in order to remit the decision on the basis of the 2022 Development Plan, this would require the rewriting of the entire planning application. The Applicants submitted that the planning application is now flawed and would have to be completely rewritten to reflect the currency of the 2022 Development Plan, and as such was unsuitable for remittal.

The Notice Party developer submitted that the provisions of the 2016 Development Plan, under which it had applied for and obtained its planning permission, should apply. The developer argued that it has a constitutional right to fair procedures, and that it was entitled to a lawful decision as of the date of the quashed unlawful decision.

The Board was neutral as to remittal, but submitted that it generally favoured it as an option. The Board suggested that the remitted decision would be made having regard to the 2022 Development Plan and remittal on that basis was not legally impermissible and that the Board could determine a means of ensuring fair procedures within the statutory framework.

## Decision of the High Court

In the decision of the High Court: *Crofton Buildings Management CLG & Anor v An Bord Pleanála and Fitzwilliam DL Limited* **High Court [2022] IEHC 704** Mr Justice Holland decided in favour of remittal. In considering the question of remittal, the Judge set out that in judicial review, remittal implies a resumption and repetition of an existing planning process as opposed to the start of a new one.

He directed the that Board, when reconsidering the application, must have regard to the 2022 Development Plan and that the Board must hold a public oral hearing in order to comply with fair procedure requirements.

Mr Justice Holland subsequently certified issues to be decided on appeal to the Court of Appeal. The Applicants applied to the Supreme Court for a 'leapfrog' appeal, directly from the High Court.

## Supreme Court Appeal

In July 2023, the Supreme Court confirmed that it would hear the appeal, with the effect that all point of appeal will now be decided by the Supreme Court rather than the Court of Appeal.

The panel accepted the appeal on the basis that the case raises issues of public importance,

including a question as to the scope of the High Court's power to remit planning decisions to the Board and the High Court's discretion to give directions to the Board to hold oral hearings in respect of such planning decisions.

The court also highlighted that the appeal was in the interests of justice and one of public importance because the outcome of the appeal will directly impact upon at least ten other SHD judicial review cases pending before the High Court

This appeal was heard before the Supreme Court in December 2023. It is anticipated that it will deliver its judgment in this case in the coming weeks.

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