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ENVIRONMENTAL & PLANNING

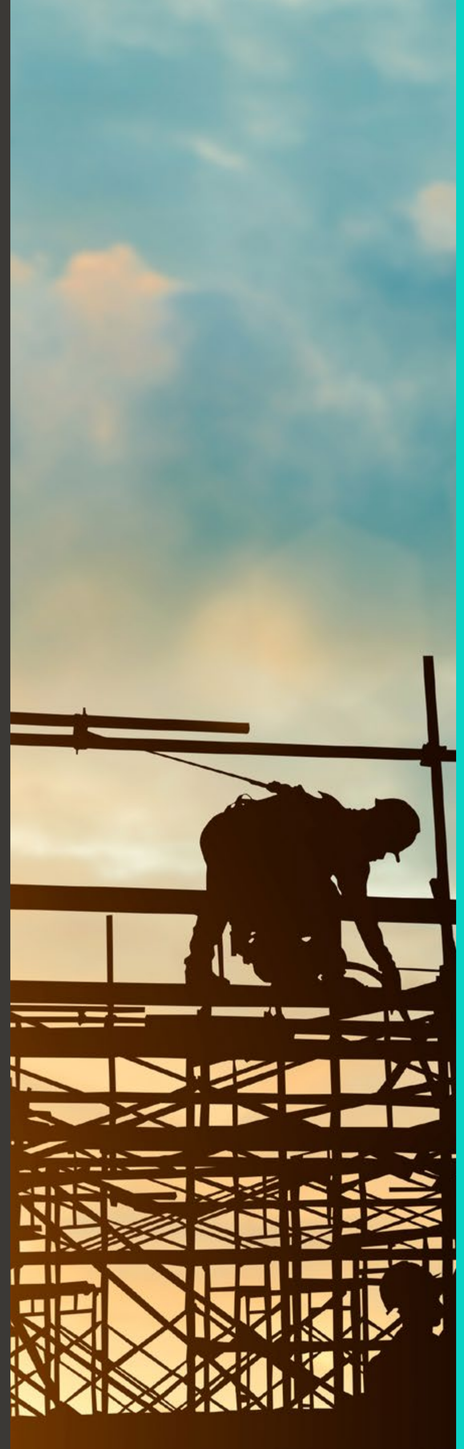
High Court calls “design envelope” into question, Court of Appeal to clarify scope

The High Court has issued an important decision regarding applications for planning permission for projects, which are based on a “design envelope” approach.

In *Sweetman* v *An Bord Pleanála* ([2021] IEHC 390) (the **Derryadd decision**) the Court ruled that the design envelope approach is contrary to the requirement under the Planning and Development Regulations 2001 (the **PDR**) to provide “plans and particulars” in relation to the relevant application.

7 MIN READ

In light of the potentially significant implications of its initial decision, the High Court has given leave to appeal to the Court of Appeal on a number of questions. In the associated leave decision ([2021] IEHC 662), the High Court has also provided some clarifications on the scope and intent of its initial decision. In the meantime, the Derryadd and *Balscadden* decisions ([2020] IEHC 586) may lead to challenges for all developers of projects, in determining how much detail they need to give in the planning application while still retaining the flexibility needed for tendering.



Background

An Bord Pleanála (the **Board**) granted planning permission to Bord na Móna for a windfarm in Derryadd, County Longford through the Strategic Infrastructure Development (**SID**) provisions in the Planning Acts. A judicial review challenge was taken raising a number of issues with the Board's decision.

There were some particular features of Bord na Móna's planning application that are worth noting. The application was for permission for an "envelope" of up to 185 metres blade tip height with no specific details given of the hub height or the rotor diameter being proposed. The High Court identified three core deficiencies with the planning application:

- "Typical" details of several aspects of the development were given rather than precise details of the structures which were being proposed.
- The application was for a "design envelope" rather than a structure of specified dimensions.
- There was some variation in the location of turbines/foundations and road layouts implied in the Environmental Impact Assessment Report (**EIAR**) submitted with the application.

What did the High Court decide?

According to the High Court's initial judgment:

- The PDR require developers to submit "plans and particulars" of their proposed development.
- "Plans and particulars" means something that is "*specifically measured and capable of being drawn on a planthat cannot include a widely variable design envelope*".
- It is not acceptable to assess the proposed development on a "worst case basis". It is not lawful for a developer to proceed on the basis that whatever is eventually constructed will have been properly assessed on the basis that the impacts of that development or indeed a development that is more impactful will have been assessed. The statutory obligation is to specify the particulars of the development for which permission is sought and "*not to seek permission for a project that is open-ended at one end of the scale and which could be anything up to a maximum specified*". Further, the Court stated that a "*worst case analysis is also hopelessly subjective. What is the worst case scenario for one person at one location may not be considered as such by another person at another location*".

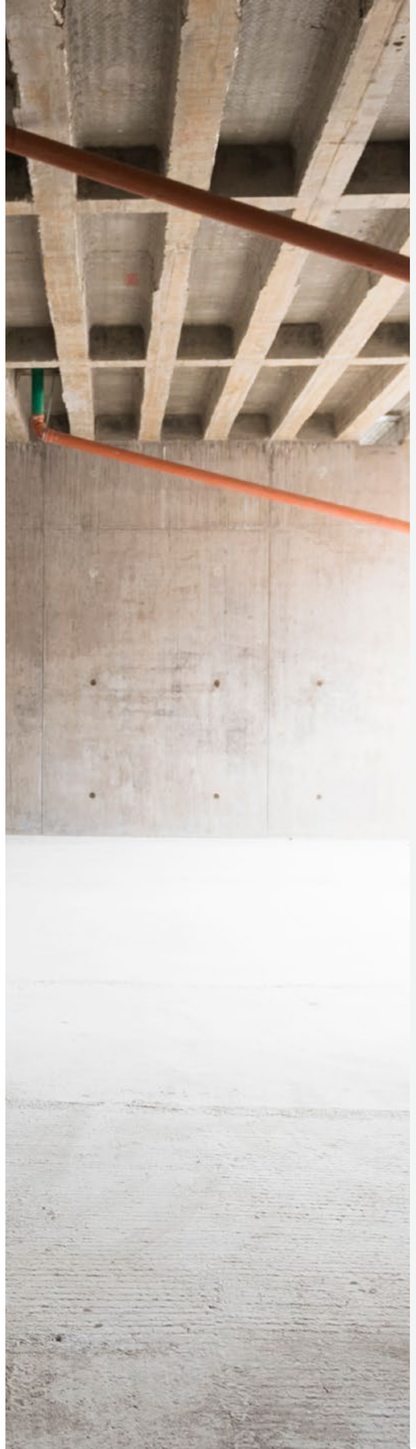
- There was much discussion of the so called "Rochdale envelope" (ie, basing the planning application and corresponding assessments on a range of potential designs and parameters). The Court made the following points:
  - The concept of the "design envelope" has, under English law, a written basis in national guidelines (NPS EN-1). There is no such written basis in Ireland, either in statute or in guidelines.
  - The concept has no application to the statutory framework/requirement under the PDR to provide "plans and particulars". It instead applies only to environmental assessment of that development;.
  - In the *Rochdale* case, the consent sought was an outline planning permission only and therefore it was more appropriate to talk of parameters in that context.
  - *Rochdale* was decided in 2001 and planning law has become much more complex in the intervening period.

The Court was also asked to find that the "design envelope" approach was contrary to the EIA Directive. The Court declined to rule on that question, but could do so in a future case. Under the EIA Directive, the obligation of a developer is to identify, describe and evaluate the impacts of its proposed development on the environment. The Court may decide in a future case that it is not possible to meet this obligation unless the developer is describing and evaluating the impacts of a certain and defined project, rather than a range of possibilities.

Subsequent clarifications and leave to appeal

The High Court granted leave to appeal its initial decision to the Court of Appeal. It accepted that the "practical operation" of the planning system would be assisted by clarification of certain questions raised in relation to the initial decision (set out below). In doing so, the High Court clarified a number of points from the initial decision. The Court noted that:

- The initial judgment did recognise the legitimacy of certain limited flexibility. What that flexibility could reasonably look like might vary from context to context.
- The concept of limited flexibility, applied reasonably in a context-specific way, would appropriately balance the interests of developers and others. In particular, it would allow developers a margin to refine the exact design post-consent, but would also allow other participants sufficient certainty as to what the proposal in fact is.
- There is no difficulty with the general concept of a design envelope provided it is within a certain limited flexibility, and no genuine planning issue is thereby created.
- What might be regarded as a reasonable zone of flexibility may vary from context to context.
- An affidavit on behalf of the developer had referred to the developer not being able to "finally determine … the particular turbine design". The Court clarified that such final determination was not required by the initial judgment. The developer's difficulty in determining the "*exact extent of turbine foundations, hard stands and other infrastructure*" could still be accommodated within a reasonable degree of flexibility because the initial judgment did not demand advance specification of the "exact extent" of those features.
- The content of an application in the SID context is not quite as exacting as that in the normal planning context.
- However, the SID framework only allows a reasonable albeit limited degree of flexibility (particularly in a changing context like wind turbines). However, a completely open-ended permission at one end of the scale goes far beyond what is necessary or appropriate.
- If the Board's decision or alternatively some instrument of general application were to say that the approval of plans and particulars based on a typical design had the effect that the developer could not depart substantially from such a design, then there would not be a problem. However, there was no such provision in relation to the Derryadd wind farm.



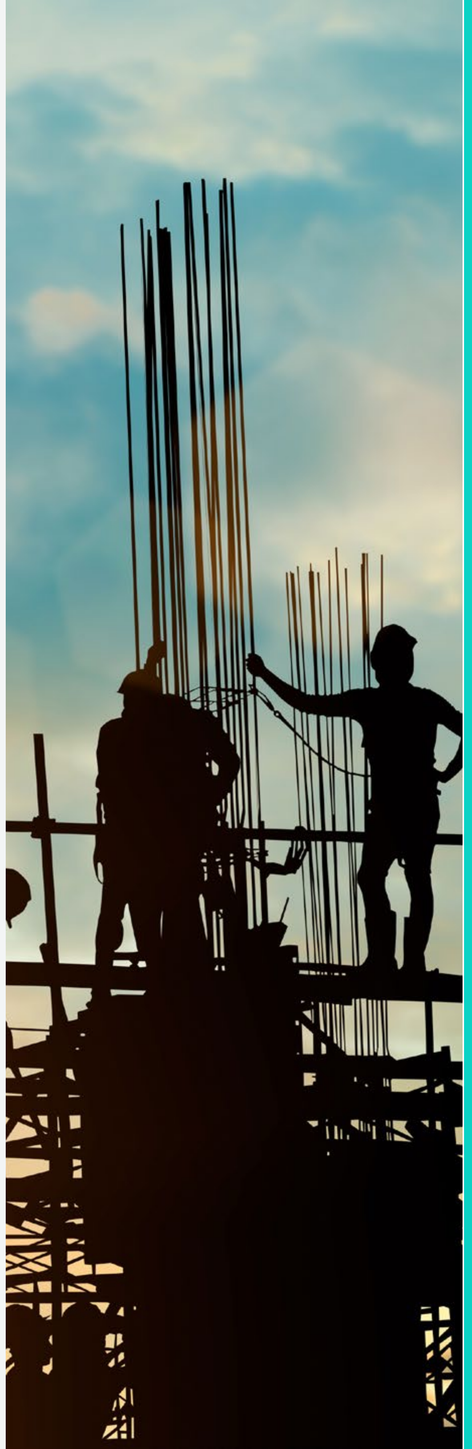
The High Court granted leave to appeal on the basis of the following questions (paraphrased):

1. Whether it is permissible to allow a variable design application that (i) goes beyond a reasonable limited degree of flexibility and/or (ii) could give rise to a genuine planning issue after the grant of development consent in the Strategic Infrastructure Development context.
2. Is it open to the Board in the present case to contend on appeal that approval of a "typical" design cannot be substantially deviated from, (a) not having clearly and/or effectively and/or at all made that point at the hearing; and/or (b) given that such a point contradicts the evidence before the court and the Board?
3. If the Board can make that argument, is that argument correct?
4. Insofar as a permission can lawfully allow a degree of flexibility, is the Board required to consider and assess the range of options within that flexibility as opposed to merely assessing the worst-case scenario?

The *Balscadden* decision

The High Court's decision in *Balscadden Road SAA Residents' Association* v *An Bord Pleanála* [2020] IEHC 586 involved similar issues to those raised in Derryadd. In that case, the High Court overturned the grant of planning permission for a Strategic Housing Development because the plans submitted with the application did not include details of the sheet piling structures to be used in the basement. The High Court made the following observations:

- Where any structure is of a significant size, its dimensions and location constitute necessary information.
- The PDR require the application material to show the distances of the relevant structure to the boundaries of the site, but the application had not done so.
- There were two fundamental problems with the lack of formal drawings showing the dimensions and locations of the sheet piling for subterranean structures. First, it breached the requirement to submit drawings in accordance with the PDR. Second, the actual grant of permission was "devoid of meaning" because the permission was to construct the development in accordance with the plans submitted, but those plans did not include adequate details as to the location and dimensions of the sheet piling.



Next steps

The Court of A ppeal's decision should bring some degree of clarity on the obligation under the PDR to provide "plans and particulars". It should also clarify the extent to which developers can build in flexibility within their planning applications and associated environmental assessments.

It will likely be 9-12 months before we know the decision of the Court of Appeal, and that decision in turn may be appealed to the Supreme Court. It is possible that legislative change will be made to deal with the issue in the meantime.

For more information, please contact Alison Fanagan, Consultant, Brendan Abley, Associate or any member of ALG's Environmental and Planning Group.

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