

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 281
[2021 No. 631 JR]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND

CORK CITY COUNCIL

NOTICE PARTY

(II) (No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 27th day of May, 2022

1. The history of this matter involves two related sets of proceedings which I shall refer to as Cork I [2021 No. 189 JR] relating to a direction under s. 31 of the Planning and Development Act 2000 and Cork II [2021 No. 631 JR] relating to a requirement under s. 9(7) of that Act.
2. In *Cork County Council v. Minister for Housing Local Government and Heritage (II) (No. 1)* [2021] IEHC 617, [2021] 9 JIC 0701 (Unreported, High Court, 7th September, 2021), which was the judgment first in time but in the second set of proceedings, Hyland J. discharged a stay on the Minister's requirement to Cork County Council ("the council" unless the context otherwise requires) under s. 9(7) of the 2000 Act to co-ordinate its development plan with Cork City Council. That requirement, the validity of which I am now assessing, was the first ever exercise of the statutory power to require co-ordination, or of the corresponding power under previous legislation.
3. In *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021), I quashed a direction by the Minister under s. 31 of the Planning and Development Act 2000 to remove Variation No. 2 to the Cork County Development Plan.
4. In *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 2)* [2021] IEHC 708, [2021] 11 JIC 1810 (Unreported, High Court, 18th November, 2021), I granted a limited stay on that order.
5. I am now dealing with the substantive challenge to the s. 9(7) requirement.

Facts

6. In April 2012, ministerial retail planning guidelines were issued envisaging that local authorities would prepare retail strategies and in certain instances (including in Cork) to adopt joint retail strategies. The guidelines were not in themselves binding, but councils were required to have regard to them.
7. In March 2013, a retail study for Cork was carried out by John Spain Consultants.

8. In December 2013, a draft joint retail strategy was prepared by the two Cork local authorities.
9. The Cork County Development Plan 2014 was adopted on 8th December, 2013. That came into effect on 15th January, 2014.
10. In March 2015, the Cork authorities adopted the joint retail strategy, although this did not address the question of retail outlet centres.
11. In February 2018, Variation No. 1 to the County Development Plan was adopted.
12. On 12th December, 2018, the city council withdrew from a joint study into the requirement for a retail outlet centre in the Cork metropolitan area on the basis of a policy reassessment that would have a different focus from outlet centres. It was understood that the county council would continue with the study and that the city council would be a consultee.
13. In May 2019, the city boundary was extended into what had been county council territory.
14. In October 2019, the retail study was issued in the form of a report prepared by MacCabe Durney Barnes Consultants which concluded that there was scope for a retail outlet centre in the Cork metropolitan area.
15. On 14th November, 2019, the county council proposed draft Variation No. 2 to the Development Plan which included provision for a retail outlet centre. The Office of the Planning Regulator (OPR) made a submission hostile to that variation on 21st November, 2019.
16. The Chief Executive of the county council reported on submissions on 20th December, 2019.
17. Variation No. 2 was adopted on 27th January, 2020.
18. Notice was given to the OPR on 30th January, 2020. A recommendation was made by the OPR to the Minister to issue a draft direction for the removal of the variation on 21st February, 2020.
19. The Minister issued a draft direction under s. 31 of the 2000 Act on 5th March, 2020, and under s. 31(6), Variation No. 2 ceased to have effect as a result.
20. In the meantime, on 12th March, 2020, the county council gave notice of intention to review the Development Plan and to prepare a new Development Plan.
21. Public consultation on the draft ministerial direction took place between 19th March and 27th May, 2020, and the Chief Executive reported thereon on 23rd June, 2020.
22. The OPR recommended under s. 31AN of the 2000 Act that a s. 31 direction be served on 14th July, 2020.

23. On 20th August, 2020, the Cork authorities jointly published a request for tenders for a joint retail study and strategy for inclusion in the respective development plans.
24. In October 2020 both councils agreed to terms of reference for an updated joint retail study. That did not include retail outlet centres, apparently at the request of the county council which was agreed to by the city council.
25. The Minister issued the s. 31 direction on 23rd December, 2020.
26. The council subsequently indicated an intention to challenge that direction and on 3rd March, 2021 the OPR wrote to the Minister asking whether anything could be done about the council's intention in that regard. The letter states as follows:

"Dear Minister

I trust you are keeping safe and well.

I refer to my letter to you on the 14th July 2020 wherein I gave notice pursuant to section 31AN(4) of the Planning and Development Act 2000 (as amended) in relation to Variation No.2 of the Cork County Development Plan 2014.

Such notice contained a recommendation to issue a Direction to Cork County Council to remove policy amendments in the above plan in support of retail outlet village type development.

After his own careful consideration of our recommendation as well as all the relevant matters, Minister Peter Burke issued the Direction in December 2020.

At a meeting on Monday 1st March last with both local authorities on the progression of a Joint Retail Strategy required for the impending 2022-2028 development plan reviews, I was informed by the Chief Executive of Cork County Council that his authority intends to bring forward Judicial Review proceedings in respect of said Direction in relation to the current and soon to expire county development plan, the nature of which application to the Court is unknown at this time.

As Chief Executive of the OPR, I am very concerned about the possibility of such proceedings being brought, at a sensitive time, by a public body against presumably you as Minister and the OPR as a body under your aegis.

We follow the Code of Practice for the Governance of State Bodies. This states that where the possibility of legal disputes involving another State body arise, unless otherwise required by statute, every effort should be made to mediate, arbitrate or otherwise resolve before expensive legal costs are incurred.

At our meeting with both local authorities in Cork on retail planning policy, we pointed out that the plan the subject of the Direction is about to expire and that the

forthcoming draft development plan processes are the most appropriate context for settling all the relevant retail planning policies flowing from the implementation of your guidelines, including retail outlet villages rather than a plan which is about to expire.

However, we understand the issue of such outlet centres has been excluded from the terms of reference of the joint retail strategy and we are unclear as to why.

You will be aware that every development plan in the country is being reviewed at present and while ours can be an unpopular task, in line with our Statement of Strategy and oversight arrangements by your Department, we always seek to engage proactively with the local government sector to avoid any difficulties and our meeting on 1st March with the Cork local authorities is a good example of that.

I am requesting an urgent meeting with you, Minister of State Peter Burke and the Secretary General of your Department Graham Doyle to assess what, if anything, can be done at this late stage in relation to this matter.

Moreover, even if such proceedings are brought, a meeting could also discuss the following:

1. Re-stating the advice of the Code of Practice referred to above and any other policy relevant to the local government sector to Chief Executives of local authorities in relation to the avoidance of legal disputes;
2. A general stock-take of the programme of reviews of development plans and identifying strategies to manage challenging issues that may arise in our independent assessment process.

I am available at short notice for such a meeting virtually or by attendance at the Department.

Yours etc

Niall Cussen

Planning Regulator"

27. While the OPR was not a party to the present proceedings, maybe it's worth clarifying that if the OPR's boast that they follow the code of practice for the governance of State bodies carries the implication in anyone's mind that the county council has not done so, I should dispel that. There is no basis of which I am aware to suggest that the council unreasonably failed to obviate the s. 31 proceedings either at all or at least in some way that does not apply equally to other protagonists. Indeed since the only specific act identified by the OPR as constituting compliance was attending a meeting with the Cork

local authorities, then the county council must also have complied because they were there. More fundamentally, as I in effect said in the *Cork (I) (No. 1)* judgment, in which the OPR was involved, there isn't really any necessity to be very concerned about public bodies suing other public bodies if agreement isn't possible. The OPR didn't draw attention to this letter in those proceedings – and I'm not saying they should have – but it wouldn't have done a whole lot to change the view on that issue. Indeed the Minister doesn't seem to have considered it necessary to reply to this correspondence.

28. On 15th March, 2021, the council obtained leave to challenge the s. 31 direction.
29. On 12th April, 2021, those proceedings were admitted into the commercial list despite that being opposed by the Minister for reasons that I wasn't told of.
30. On 19th April, 2021, the proceedings were listed in the Commercial Planning and Strategic Infrastructure Development List.
31. On 22nd April, 2021, the Draft County Development Plan went to public consultation.
32. Crucially for present purposes, on the same date the Minister issued two letters containing a requirement under s. 9(7) of the 2000 Act. The letters require the two authorities to "co-ordinate ongoing development plan review processes in respect of specified matters". In particular, the letter stated: "[t]he specific matters that require co-ordination are consideration of retail outlet centres, not addressed by the Terms of Reference for the joint retail strategy in respect of the Cork City and Cork County Development Plans for the period 2022-2028" and "[t]he manner in which the matters are to be addressed is that the two Cork local authorities will jointly determine whether there is capacity and scope for retail outlet centre development in Cork City and County, taking into account the work undertaken to date in respect of the joint retail strategy for the Cork City and Cork County Development Plans for the period 2022-2028 and having regard to the changing pattern of retail expenditure and related objectives in both emerging draft plans in respect of the city and town centres".
33. The letters stated that a "required outcome" would be "agreement in respect of the potential provision of retail outlet centre development, and if applicable, the general location, format and scale (i.e. floor space) of any retail outlet centre development that may be permissible in the Cork City and Cork County administrative areas during development plan period 2022-2028". Furthermore "[a]s part of the methodology and in the event that agreement cannot be reached, each authority shall be entitled to make submissions on the requirement and on the issues in respect of which agreement cannot be reached, in order to facilitate adjudication by me, as Minister". The letters indicated that should it be necessary to assist both planning authorities with the co-ordinated processes, the Minister may appoint an independent person to work with the two authorities.
34. The phrase "as part of the methodology" has some significance because the Minister sought to pass off the consequences of non-compliance as being hypothetical, abstract

and futuristic. However, it is clear that the Minister's letter envisages those consequences as being part of the methodology of the s. 9(7) requirement itself. The fact that the county council thinks that no dispute exists and the fact that the retail expert has not been appointed and the Minister has not adjudicated the matter does not mean that the letters cannot be challenged.

35. It is perhaps worth mentioning in passing that the letters are not phrased in the statutory language. The statute allows the Minister to require co-ordination of "development plans" whereas the letter requires the councils "to co-ordinate ongoing development plan review processes". That particular point does not seem to be a specific ground of challenge in these proceedings.
36. The Draft County Development Plan was published on 22nd April, 2021.
37. On 26th April, 2021, the s. 31 proceedings were listed again in the SID list. In effect the State submitted on that occasion that the s. 9(7) requirement reduced the urgency of and possibly overtook the s. 31 proceedings. On that occasion I granted the Cork (I) case priority, but did not accede to the council's request to fix a date.
38. On 17th May, 2021, the county council replied to the Minister stating that the s. 9(7) direction was premised on the validity of the s. 31 direction and was premature.
39. On 20th May, 2021, the city council replied indicating agreement to comply with the requirement and proposing that terms of reference of the joint retail study should be extended to cover retail outlet centres.
40. On 21st June, 2021, I gave the s. 31 proceedings a hearing date commencing on 19th October, 2021.
41. On 21st June, 2021, the Minister wrote to the county council indicating that as the two councils had not submitted joint proposals he intended to determine the matter in accordance with s. 9(7)(b) in the absence of agreement and intended to appoint an independent retail expert to assist that consideration and inviting submissions by 19th July, 2021.
42. On 1st July, 2021, the OPR made a submission on the Draft County Development Plan including a recommendation regarding the preparation of a joint retail strategy.
43. On 12th July, 2021, the county council obtained leave in the present proceedings as well as a stay on the s. 9(7) requirement.
44. On 19th July, 2021, the city council wrote in respect of the s. 9(7) requirement indicating preparedness to engage in a joint study.
45. On 25th August, 2021, the State issued a motion to lift the stay on the s. 9(7) requirement.

46. On 7th September, 2021, Hyland J. gave judgment in favour of the State on that issue: see *Cork County Council v. Minister for Housing Local Government and Heritage (II) (No. 1)* [2021] IEHC 617, [2021] 9 JIC 0701 (Unreported, High Court, 7th September, 2021). On foot of that judgment the Minister wrote on 14th September, 2021 giving both councils seven further days to make submissions.
47. On 21st September, 2021, the county council wrote indicating that without prejudice to the proceedings the council was willing to co-ordinate with the city council on the issue of retail outlet centres. The council also queried the proposed timelines.
48. On 8th October, 2021, the Department wrote to the city council seeking to clarify their position. The city council replied to that letter on 13th October, 2021.
49. The s. 31 proceedings were heard on 19th to 22nd October, 2021 and I gave judgment on 5th November, 2021 in favour of the county council: see *Cork County Council v. Minister for Housing Local Government and Heritage (I) (No. 1)* [2021] IEHC 683.
50. On 15th November, 2021, both councils agreed to put the process of the joint retail study on hold.
51. The order quashing the s. 31 direction was perfected on 18th November, 2021.
52. On 26th November, 2021, the OPR wrote to the Minister dealing with the implications of the s. 31 judgment:

“Dear Minister

I refer to the recent High Court Judicial Review between Cork County Council (Applicant) yourself as Minister (Respondent) and the OPR (Notice Party) [2021 No.189 JR] in relation to Variation No. 2 of the Cork County Development Plan 2014 concerning retail outlet centres.

I write to you to express the concern of the OPR that, in our view, the judgment of the Court may have consequences in terms of the wider goals of achieving plan led development, the observance by local authorities of your statutory guidelines, and our (OPR's) oversight of that process.

As you will be aware, much of Project Ireland 2040, Housing for All, the Climate Action Plan and many other important public policy initiatives depend on implementation of section 28 guidelines in respect of housing supply targets, flood risk management, education and childcare provision, and transport infrastructure investment and road safety.

There is a danger that development plans could diverge from the national policy courses Government has set in these and other vulnerable areas.

I feel, therefore, that it is important that the OPR highlights the potential consequences of this judgment for the implementation of such national policies by planning authorities in the discharge of their development plan making functions, in addition to the potential consequences for the OPR as a body with an oversight role tasked with ensuring that your policies are appropriately addressed in development plans.

You will be aware that almost all development plans are currently under review and as such this is a matter of considerable urgency. (For your and your officials' information, I have appended an indicative summary of on-hand development plan evaluations by the OPR.) In this context, the Departmental/ AGO process for a comprehensive review of the Planning and Development Act 2000 (as amended) may not come soon enough.

Conclusion

The recent litigation in this area would point to the need to support the function of section 28 ministerial guidelines as a means of implementing national policy and providing for plan-led development at a local level.

In this context, I would welcome engagement with your officials to discuss your possible responses to this situation, including the opportunity and timing for urgent legislative measures to bolster the operation of section 28 so as to make clear the obligations arising from your guidelines.

Is mise le meas,

Niall Cussen

Planning Regulator"

53. Without making any detailed comment on the letter, given that the OPR is not a party to the present proceedings, it is possibly worth emphasising the point I made in the proceedings in which the OPR was involved that both the clear wording of the legislation and the Cork (I) (No. 1) judgment itself makes clear that s. 28 of the 2000 Act and other legal provisions already allow for considerable scope to clarify or enhance the status of guidelines. Thus it is not necessary for there to be primary or indeed any legislation to require this to be done or to "make clear the obligations arising from ... guidelines". Insofar as the letter, which bills itself as a response to the judgment, implies that there is a need for "urgent legislative measures to bolster the operation of s. 28", a reading of the clear wording of the legislation or a reading of an express section about this issue in the judgment or both would suggest otherwise, a point not particularly addressed by the OPR. In those circumstances it is possibly not totally surprising that the Minister did not reply to this letter either.

54. On 17th December, 2021, the time period for material alterations to the draft development plan closed and an amendment along the lines of Variation No. 2 was proposed.
55. On 22nd December, 2021, the Minister appealed the judgment in the s. 31 proceedings.
56. Public consultation on material amendments to the Draft County Development Plan took place on 18th January, 2022.
57. Opposition papers in the present proceedings were filed on 24th January, 2022.
58. On 15th February, 2022, the OPR made a recommendation regarding the material relation to the Draft Development Plan corresponding to Variation No. 2 and in doing so made reference to the s. 9(7) requirement that is challenged in these proceedings.
59. Meanwhile the city council progressed its own Draft Development Plan and the time period for amendments closed on 14th March, 2022. Public notice of amendments was then given between 15th March and 2nd April, 2022.
60. On 25th April, 2022 the county council adopted its Development Plan.
61. Shortly before the hearing of the present matter, on 2nd May, 2022 the *Irish Times* published an article disclosing the first item of correspondence from the OPR as set out above which they obtained under the Freedom of Information Act 2014: see Simon Carswell, Public Affairs Editor, "Planning Regulator was 'rattled' by local authority's legal action: Watchdog sought meeting with Minister for Housing over Cork County Council challenge", *Irish Times*, 2nd May, 2022.
62. On 3rd May, 2022, the county council replied to the OPR's recommendation.
63. The present proceedings were heard on 5th and 6th May, 2022.
64. On 5th May, 2022, without objection I allowed an affidavit of Sinéad Finnegan sworn on 27th April, 2022 on behalf of the respondent exhibiting correspondence. I also allowed an affidavit of Julia Dineen of 5th May, 2022 exhibiting the letter from the OPR of March 2021, again without any objection being ultimately pressed.
65. Looking forward from the hearing, there are a number of forthcoming developments I should note.
66. The time period for the city council Chief Executive's report on amendments closes on 25th May, 2022.
67. The OPR has until 30th May, 2022 to issue a recommendation on foot of the county council's ostensible non-compliance with its earlier recommendation which could potentially trigger a further process of ministerial direction under s. 31 of the 2000 Act.

68. The county council's new development plan for the period 2022 to 2028 comes into force on 6th June, 2022.
69. The city council Chief Executive's report to the full council to consider and make the new City Development Plan with or without amendments will take place in the period 25th May to 27th June, 2022.
70. The Court of Appeal is due to hear the appeal in the s. 31 proceedings on 30th June and 1st July, 2022 albeit that the s. 31 matter will have already become moot at that stage because it relates to the previous development plan which will have expired a few weeks earlier.
71. The new city development plan will take effect by 8th August, 2022.

The legislation

72. Section 9(7) of the 2000 Act provides as follows:

"(a) The Minister may require 2 or more planning authorities to co-ordinate the development plans for their areas generally or in respect of specified matters and in a manner specified by the Minister.

(b) Any dispute between the planning authorities in question arising out of the requirement under paragraph (a) shall be determined by the Minister."

73. Any power that enables central government to cut across the work of local government must be seen as being of some significance in the overall constitutional architecture, particularly in view of the explicit recognition of the role of local authorities in Article 28A of the Constitution.
74. In *R. v. Secretary of State for the Environment, ex parte Norwich City Council* [1982] QB 808, [1982] 2 WLR 580 Lord Denning M.R. considered what he called "a most coercive power in a Minister of the Crown" (p. 824) to declare that a local authority was not performing its duty and was in default, and to take steps to ensure that the function was properly performed. He noted that during the passage of the legislation through parliament "assurances were given by Ministers that necessary administrative steps would be taken to warn a local authority where the Secretary of State was contemplating serving a notice of intention". He went on to say that the power "enables the central government to interfere with a high hand over local authorities. Local self-government is such an important part of our constitution that, to my mind, the courts should be vigilant to see that this power of the central government is not exceeded or misused. Wherever the wording of the statute permits, the courts should read into it a provision that the "default power" should not be exercised except in accordance with the rules of natural justice."
75. The particular context in which the power at issue here is being exercised is that of the preparation and content of the development plan, described as an "environmental contract" (*Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, *per*

MacCarthy J. at p. 113) and “a representation in solemn form” (*Byrne v. Fingal County Council* [2001] IEHC 141, [2001] 4 I.R. 565, per McKechnie J. at p. 580).

76. I now turn to the applicant’s headings of challenge beginning with points where pleading objection was taken.

Points subject to a pleading objection

77. Three points were advanced in legal submissions which were objected to on behalf of the respondent as falling outside the pleadings.

Whether the specification of timelines by the Minister under s. 9(7) was *ultra vires* in principle

78. The applicant sought to make the point that s. 9(7) as a matter of general principle does not authorise the specification of time-lines for the particular steps to be taken by way of co-ordination. Unfortunately I do not think that a claim that the timelines as such were *ultra vires* properly comes within the pleaded grounds which just don’t say this either expressly or by implication. Even if they did I would reject the claim, because specifying a time for something to be done is legitimately encompassed by specifying the “manner” of coordination as envisaged by s. 9(7). Virtually any requirement could be rendered meaningless by the absence of a timeline. Delay is the deadliest form of denial, as Professor C. Northcote Parkinson pointed out (*The Law* (Harmondsworth, 1981 ed.) p. 158).

Whether the requirement was invalid because it required joint action across both administrative areas rather than coordination of plans for each area

79. Section 9(7) requires coordination of planning authorities “for their areas” and an attempt was made in submissions to argue that the s. 9(7) direction went beyond this. Unfortunately, I do not find this complaint in the pleaded statement of grounds. Even if it had been pleaded I would have rejected it. The form of the outcome of each council’s coordination would be a plan for their own area, but the intellectual exercise leading to the two separate development plans would be an overall consideration of the greater Cork area. That in itself is not unlawful. In effect coordination of development plans does inherently require some process of joint consideration of the wider area covered by both. That may involve documentation covering the overall area including perhaps joint studies. Notwithstanding all that, the outcome would be individual development plans within each separate area.

Alleged failure to give reasons for the procedural aspects of the decision such as timelines

80. The obligation to give reasons for decision is not limited to the reasons for the core decision itself. It may also include a duty to give reasons for subsidiary aspects. An example is that in the criminal context there must be reasons from a professional court both for the conviction and the sentence (the need for reasons doesn’t apply to juries). By analogy one could make the argument that the Minister needed to give reasons for the subsidiary aspects of the decision such as the various time frames of one month to prepare proposals involving a highly complex process, especially where this was in respect of an alleged *lacuna* as to a lack of reference to retail outlet centres in the joint

studies which had existed since 2015. That was not a problem that only came into existence in April 2021 such that it required resolution within one month.

81. Unfortunately for the applicant I think the pleading objection is well-founded because the way the reasons argument is made in the statement of grounds relates to the decision itself, not the subsidiary aspects such as the timescale. If the point had been pleaded, the applicant would have also had the difficulty that the reasons obligation only applies to the main reasons for the main issues and it is not entirely clear that the time scale for submissions was a main issue, particularly where the council did not specifically complain about the adequacy of the time-limit for submission, as opposed to its later complaint about the time-limit for resolution of the process overall.
82. Thus, upholding all three pleading objections by the State I now turn to the pleaded arguments.

Pleaded domestic law points

83. I propose to deal first with the applicant's case in domestic law and to leave the EU law points aside for the time being unless they are necessary for the decision.

Does the power to require co-ordination extend to enable the Minister to require agreement (core ground 7)

84. The applicant contrasts a limited power to require co-ordination with more enhanced processes such as cooperation or harmonisation, referring *inter alia* to an academic paper by Duncan Snidal, "Coordination Versus Prisoners' Dilemma: Implications for international Cooperation and Regimes", 79 *American Political Science Review*, 923 (1985).
85. While dictionaries are not a forensic end in themselves, they do have a role from time to time. The Concise Oxford English Dictionary, 6th ed. (Oxford, Oxford University Press, 1976) defines "co-ordinate" (as an adjective and noun) as "1. a. Equal in rank ..." (p. 224). An example would be referring to a court of co-ordinate jurisdiction, which means an equally ranking judge or court. As a verb, however, to "co-ordinate" is defined in its first meaning as to "Make co-ordinate" (p. 224). This is a key concept here because if as the county council says there is room for only one retail outlet centre in the greater Cork area, then it would not be consistent with co-ordination for one of two equally ranked local authorities to make a unilateral decision as to which authority should host such a centre. Co-ordination in the specific context here means agreement. In other contexts, no doubt it would not have that meaning and would involve mere discussion and sharing of views and information, but in the very specific context here it can only mean that agreement of both authorities is necessary.

Did the Minister require a substantive policy outcome (core ground 7)?

86. I agree with the applicant that s. 9(7) does not give the Minister a power to impose a substantive policy outcome. It only confers a power to require local authorities to co-ordinate their development plans with each other. However, on the particular facts here, I do not accept that the actual requirement issued does impose a specific substantive outcome. It merely requires the councils to co-ordinate their consideration of retail outlet centres. It does not assume what the outcome of that should be, but merely states that

if the outcome is that there is capacity and scope for such a development, that the councils should specify the general location, format and scale of that development. That is a procedural and not a substantive outcome. Indeed, as Hyland J. pointed out at the stay stage (para. 23 of her judgment in *Cork (II) (No. 1)*), such procedural requirements are also already included in ministerial guidelines.

Alleged improper connection with invalid s. 31 direction (core grounds 1 and 2)

87. It is argued that the requirement is premised on the validity of the s. 31 direction. However, I do not accept that. These are two separate statutory processes. The consequential argument that the direction is therefore premature pending determination of the s. 31 issue thus fails. The section is not frozen merely because another decision under another section is challenged.

88. Nor do I accept the argument that this is an impermissible attempt to make guidelines mandatory by the back door. Rather, it is a separate and distinct statutory process. Non-mandatory guidelines remain non-mandatory, but if the Minister can achieve a similar result through the use of a mandatory power, that is not in itself impermissible at the level of broad principle. The fact that something is not binding in itself does not mean it cannot be made binding by a lawful separate requirement. Thus, arguing that the guidelines are not in themselves binding does not answer the question of whether the Minister can issue a direction under s. 9(7).

Alleged failure to give reasons for the decision itself (core grounds 4)

89. The applicant complains that no reasons for the decision were provided, particularly where the Minister invoked “moribund legislation of some antiquity” which had never been used before. However, that complaint needs a reality check, particularly in view of the reference in the letter to the lack of provision for retail outlet centres in the Cork local authorities’ joint studies. That involves the inferential view that there was a lack of adequate coordination on the issue of retail outlet centres. I think that reason is sufficiently apparent from the wording of the letter itself.

Failure to consider relevant considerations (core ground 3)

90. The council claims that the Minister failed to consider the 2019 study or Variation No. 2. The flaw in that argument is that these were not relevant considerations favouring the council’s position that changed the calculus in any meaningful way, given the Minister’s standpoint that co-ordination was desirable. Rather, they were aspects of what the Minister saw as the problem, being that the county council’s approach to retail outlet centres was not one that was agreed with the city council. In such circumstances, there was no unlawful failure to consider relevant matters. If there was some contradictory evidence that the two councils were co-ordinating such that no requirement was necessary, then that *would* have been a relevant consideration that would have had to be considered, but the matters now relied on by the council are reinforcing and not contrary considerations from the Minister’s point of view, so failure to consider them even assuming that there was such a failure does not render the decision unlawful.

Alleged lack of specification as to what the Minister took into account (core ground 5)

91. The claim that the Minister did not specify what he took into account has not been made out in any sense that is not dealt with more satisfactorily under some other heading of challenge.

Claim that the power was exercised for an improper purpose (core ground 6)

92. The applicant claimed that the Minister had issued a s. 9(7) requirement for an improper purpose or an ulterior motive, relying on *Stewart v. Perth and Kinross Council* [2004] UKHL 16, *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, *Hoey v. Minister for Justice* [1994] 3 I.R. 329, *The State (O'Mahony) v. South Cork Board of Public Health* [1941] Ir Jur Rep 79, and *McDonough v. Minister for Defence* [1991] 2 I.R. 33.
93. The applicant points in particular to the fact that the s. 9(7) requirement was positively relied on in the s. 31 proceedings as having in effect overtaken the proceedings, that the timing of it was such as to indicate that it was a response to the s. 31 proceedings, that the OPR demanded that something be done and this followed closely thereafter, and that there was inadequate rebutting evidence on behalf of the Minister, but merely bare assertion and denial.
94. The problem as I see it with drawing an inference from those elements to reach a conclusion that the Minister had some ulterior purpose in issuing the s. 9(7) requirement as a means of essentially derailing the council's s. 31 proceedings, is that the council has not sought any disclosure from the Minister beyond some very limited items which were given immediately, and nor has it sought any directions from the court. The council did not ask for an order that the State furnish an affidavit giving a full account of the decision-making process, let alone for cross-examination of the hypothetical deponent, did not ask for any submission document which could have accompanied the letters presented for the Minister's signature, and did not ask for details of whether the meeting sought by the OPR took place and if so whether any minutes exist of it.
95. It seems to me that where there is any suggestion (not by any means something that has to be proved, but where there is any legitimate basis for a reasonable suspicion to that effect) that a full account of the decision-making process has not been provided (for example by failure to respond in full to queries about the decision-making process), then a court should be quite sympathetic to any request for a direction requiring a respondent to furnish an affidavit, and indeed if unanswered questions remain on foot of the affidavit to permitting cross-examination of any such deponent.
96. As I pointed out in *Save Cork City Community Association CLG v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage* [2021] IEHC 700, [2021] 11 JIC 1602 at para. 26, if an applicant thinks that a decision-maker has given something less than a full account of the decision-making process, she can apply to the court for appropriate orders or directions, which may include a requirement to make disclosure or discovery, swear an affidavit or a further affidavit, or produce a deponent for cross-examination: see the principles of law discussed in *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 at 945, *Secretary of State for Foreign and Commonwealth Affairs v. Quark Fishing Ltd.* [2002] EWCA Civ. 1409, *Tweed v.*

Parades Commission for Northern Ireland [2006] UKHL 53, [2007] 1 A.C. 650, *Treasury Holdings v. National Asset Management Agency* [2012] IEHC 66, [2012] 3 JIC 2201 (Unreported, High Court, Finlay Geoghegan J., 22nd March, 2012) at paras. 126 and 127, *McEvoy v. Garda Síochána Ombudsman Commission* [2015] IEHC 203, [2015] 3 JIC 1602 (Unreported, High Court, McDermott J., 16th March, 2015), *R. (Citizens U.K.) v. Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123 at para. 106, *R. (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at para. 20.

97. Without being too definitive about a hypothetical, I think I would have been very much minded to make such an order had it been applied for. Indeed I am very far from being satisfied that the State *did* provide a full account of the decision-making process at issue in this case. However, that does not particularly matter, and nor do I hold it against the State, for the very simple reason that the applicant could have, but did not, seek any directions in that regard.
98. The only explanation I can think of for that is that the applicant's legitimate forensic judgement was that it is better off in arguing for an inference from the limited materials available than it might have been if all the cards had been played and in fact no mystery or skulduggery were to be disclosed. If that is the rationale, then that is a legitimate judgement with which some people may agree and others may not, but in the context of a primarily adversarial process I am not particularly inclined to get involved in either making any directions of my own motion where an applicant could easily have sought such directions and didn't, or drawing adverse inferences against a respondent in such a context without a bit more than what we have here. Of course there are circumstances where what is on the record raises sufficient doubt as to the probity of the process that the court has to view the decision as flawed unless the respondents dispel the inference of impropriety thereby raised. But we aren't quite at that point here. So ultimately the point remains that applicants have to be highly active participants in the process of assembly of evidential materials and normally cannot passively leave the matter to the court to draw inferences from materials when it would have been relatively easy for them to seek further information. If a respondent refused to fully co-operate with an applicant's reasonable requests for information, then that could send the adverse inferences rocketing into the stratosphere. But if the applicant doesn't even make the request, they shouldn't complain too loudly if a court doesn't draw an adverse inference from limited and tenuous materials.

Validity of the requirement to submit joint proposals or engage with an independent person (core ground 7)

99. The first real problem for the respondent here is that the Minister's requirements went beyond merely setting a timeline for the required co-ordination. The councils were to submit joint proposals to the Minister as to how compliance would be addressed including agreed terms of reference within one month. But the detail of what was required went outside the limited scope of s. 9(7). Leaving s. 31 aside for present purposes, s. 9(7) doesn't change the fundamental point the development plans are for councils. The section is about requiring councils to cooperate with each other, not breaking outside that

relationship to require co-ordination or co-operation with the Minister or with any third party. It is not a function of the Minister to expressly or impliedly require councils to co-ordinate with himself or to make "proposals" or "joint proposals" to himself as to how they intend to co-ordinate.

100. As far as the independent person is concerned, the same point applies. Section 9(7) is about councils coordinating with each other, not with some entity such as the "independent person". As the council validly put it in oral submissions, the Minister was "setting himself up as a micro-managing central authority ... there is absolutely no basis for this". It's one thing for the Minister to appoint a person to assist him in relation to his own strategy functions. It is quite another to impose such a person on councils through the purported mechanism of s. 9(7) and in effect require cooperation or coordination with such a person.
101. The Minister doubled-down on this erroneous position in the letter of 21st June, 2021 where he stated the intention to appoint an independent retail expert to review the submissions of each planning authority and to prepare a report for ministerial consideration prior to his final determination which was in essence to be in lieu of a joint decision by the councils.
102. Effectively the Minister has pre-emptively involved himself in the process. The Minister only comes into the picture if s. 9(7)(b) is triggered, which requires a dispute (which is our next point). In the absence of a dispute, the section envisages co-ordination between councils and only between councils. That is not a process into which the Minister can insert himself. The power to specify the *manner* of co-ordination can't logically take us beyond the *process* of co-ordination, which by its very nature is co-ordination only between the councils concerned.

Complaint that, insofar as the requirement involved the Minister making a decision in the absence of agreement, that was *ultra vires* (core ground 7)

103. A further problem with the requirement is that the Minister misunderstood s. 9(7) by equating lack of agreement with a "dispute" for the purposes of s. 9(7)(b). In the legal context, just as in social, political or other contexts, there is a wide gulf between a lack of total agreement on the one hand and a dispute on the other hand. Parties might not be fully agreed, but might agree to disagree, might agree on a process or might agree to park an issue and come back to it after a period of time or following specified developments.
104. The logic that a "dispute" requires a disagreement that is sufficiently active that one or both sides wants ministerial adjudication is consistent with the constitutional architecture here. Development plans are matters for local authorities. It would be a major encroachment on that core function if the meaning of "dispute" were to be equated with mere lack of agreement at any given point in time, so that central government could get involved in development plans when nobody has asked them to.
105. Insofar as s. 9(7)(b) requires a "dispute" before the Minister can intervene and make a decision, that does not set a very heavy bar. If the city council wanted to raise a dispute,

all they had to do was to drop a line to the Minister to that effect. They could have done that at any time after the requirement but in fact didn't. The fact that they (to some limited degree at least) acquiesced by inactivity in some of the county council's various steps contradicts the notion of a "dispute". The courts would break down due to overwhelm of business if they applied an analogous definition of what constituted a dispute needing independent resolution.

106. Section 9(7) is not a mechanism for the Minister to escalate into a dispute requiring his involvement any disagreement that the councils concerned aren't escalating. The fundamental problem again here is that the Minister inserted himself into the process by extending the meaning of "dispute" to cover mere lack of agreement, which it doesn't.

Lack of fair procedures in the absence of advance notice of the requirement (core ground 4)

107. David Browne B.L. in *Simons on Planning Law* 3rd ed. (Dublin, Round Hall, 2021) at para. 1-07 states: "[t]he Minister may also require two or more planning authorities to co-ordinate the development plans for their areas generally or in respect of specified matters and in a manner specified by the Minister. Any disputes between the planning authorities should also be determined by the Minister. This appears to confer a wide degree of discretion on the Minister but it is submitted that the power should be exercised judicially and take account of any submissions or representations made by the relevant planning authorities." I broadly agree with that approach, it being understood that "wide discretion" means discretion within the bounds of the section and not a discretion to go beyond it in any way.
108. The section does not limit the *aspects* of a development plan that the Minister can require councils to co-ordinate and nor is it particularly prescriptive as to the aspects of the *manner* of coordination, subject of course to compliance with the express and implied contours of the section; in particular that a substantive policy outcome is not dictated and that the requirement is within the bounds of coordination between the councils, rather than between the councils and some third party, such as the Minister himself.
109. However, for present purposes I would endorse the learned author's view that the power should be exercised judicially and take account of submissions or representations made by the relevant planning authorities (consistent also with *R. v. Secretary of State for the Environment, ex parte Norwich City Council* [1982] QB 808, [1982] 2 WLR 580). The fact that the Minister required submissions after the event does not address the fair procedures issue because by that point the Minister had already issued the requirement. That very act has the immediate and self-executing consequence that the councils concerned are no longer free to determine their own development plans through the exercise of their own judgement within the terms of the 2000 Act. It has the inherent effect that the councils are required to co-ordinate even if they consider that that is not appropriate.
110. In the particular circumstances here, the requirement is accompanied by a clear statement from the Minister that the councils would be expected to cooperate with an

independent person appointed by the Minister. In oral submissions, the Minister says that he has “built fair procedures into that process by allowing for coordination in the first instance and then submissions”, but unfortunately that is misconceived. Such submissions are after the event. It would not have been in any way problematic for the Minister to have given advance notice and indeed (for the benefit of those who may be concerned at the council’s temerity in going to court) such advance notice might have even facilitated non-judicial resolution of the matter.

111. The Minister asks what rights of the council are affected. It seems to me there are two elements to this. Firstly, the direction in and of itself trammels the statutory functions of the council. It does not help the Minister’s argument that the functions concerned are particularly important reserved functions to be exercised by the elected members and relating to the solemn process of making a development plan. Secondly, the letters embody a clear statement of consequences of failing to comply with the Minister’s requirements. The Minister in submissions predictably claims that the threat to decide the matter himself has not been activated so that any challenge to it is premature. But rights can be affected by a threat. The making of an unlawful threat gives rise to a cause of action whether for injunctive relief or otherwise, and the recipient of the illegality does not need to wait for such a threat to be carried out.
112. The Minister submits that the “mere” issuing of the letter does not attract fair procedures and that it is just a preliminary step. I do not accept that because it has immediate legal consequences for the council. The fallacy of the “preliminary step” argument is that the issue of the requirement is a legal outcome in itself. That legal effect is immediate whether the matter goes further or not. It is not merely a step in the process like an inspector’s report. The power has been exercised once the s. 9(7) letter has been issued. Despite the fact that the Minister has not activated all aspects of the correspondence, the letter has not been withdrawn.
113. The State also says that the 2000 Act does not require notice, which is absolutely correct but totally irrelevant because that does not determine the fair procedures issue arising from the Constitution and natural justice.
114. Even assuming hypothetically that the Minister had kept the decision within the bounds of the provision, which he didn’t, the decision to invoke s. 9(7) had an impact on the council’s statutory rights functions and procedures, such as to make it necessary in terms of fair procedures for the Minister to give advance notice to the council and to consider any submissions made. The invitation of submissions after the event is not a legally sufficient substitute.

EU law points

115. As I am deciding the case in favour of the council on domestic law grounds, the EU law points made under the SEA directive 2001/42/EC do not need to be decided.

Order

116. Before concluding, maybe I had better repeat that if agreed solutions can be achieved, then that’s all to the good and certainly better than litigating. Perhaps this whole issue

(along with such other issues if any as may exist between the councils in the background) is not beyond some form of mediation process, and if that's at all a possibility even at this late stage I would encourage that. But the county council is fully entitled to litigate if agreement cannot be reached. Public bodies exercising their legal and constitutional rights on reasonable grounds isn't a matter for shock and horror, even if that's against other public bodies. It's called the right to an effective remedy. It's also called the rule of law - if judges are to be prevented from deciding on disputes between state bodies, then transparent and objective legal supervision is withdrawn and, in some crucial cases, outcomes may just come down to which entity can exercise more raw power against the other.

117. For the reasons stated the order will be as follows:

- (i). to grant the order of *certiorari* sought in para. 1 of the statement of grounds removing for the purpose of being quashed the requirement under s. 9(7) of the 2000 Act, it being understood by agreement that para. 1 is to be read as seeking to quash both versions of the letter i.e., that to the county council (copied to the city council) and that to the city council (copied to the county council);
- (ii). to list the matter for mention on Monday the 20th day of June, 2022 for any consequential orders.