

THE HIGH COURT

[2021] IEHC 617

2021 No. 631JR

BETWEEN:

CORK COUNTY COUNCIL

APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND

CORK CITY COUNCIL

NOTICE PARTY

Ex Tempore Judgment of Ms. Justice Niamh Hyland of 7 September 2021

Introduction

1. This is an application for a stay by Cork County Council (the “applicant”) in relation to the Direction of the Minister for Housing, Local Government and Heritage (the “respondent”) made on 22 April 2021 under s.9(7) of the Planning and Development Act 2000 (as amended) (the “2000 Act”) . An interim stay was granted by Meenan J on 12 July 2021, being the same date leave was granted to bring judicial review proceedings, with liberty given to the Minister to seek to lift the stay on notice of one week to the applicant herein. A motion was brought by the respondent seeking to lift the stay on 24 August 2021 returnable for 31 August. It was decided to put the matter in for hearing on 2 September 2021. The applicant filed a replying affidavit on 31 August 2021. Although the respondent is seeking to lift the stay, relevant case law makes it clear that in such circumstances the burden of proof rests upon the party seeking a continuation of the stay. Accordingly, the applicant bears the burden of persuading me that a stay should be imposed.

Legal Test for Stay

2. All parties agreed that the relevant test is that as set out in *Okunade v. Minister for Justice Equality and Law Reform* [2012] 3 IR 152, and summarised therein at paragraph 104. The parties also agree that, where an argument based on EU law is raised in the proceedings, there is a “gloss” on the *Okunade* test, as identified in *Friends of the Irish Environment v. Minister for Communications, Climate Action and Environment & Ors.* [2019] IEHC 555, following the Supreme Court decision of *Dowling v. Minister for Finance* [2013] 4 I.R. 576. I will discuss the precise parameters of that test when I consider the argument in relation to Strategic Environmental Assessment below.

Summary of Facts

3. The parties are familiar with the facts. Because this is an *ex tempore* decision, I will not recite same in any detail. However, in summary the pertinent events are as follows.
4. In 2012 Retail Planning Guidelines were adopted under s.28 of the 2000 Act as amended. In the Minister’s foreword, it was identified that planning for the retail sector must focus, inter alia, on:
 - the creation of vibrant, quality places, accessible by sustainable transport;

- planning for retail catchments that invariably straddle and transcend administrative boundaries;
 - a general presumption against large retail centres located adjacent or close to existing, new or planned national roads / motorways.
5. Chapter 3 is entitled "Retailing and Spatial Planning". Section 3.3 is headed up "Development Plans and Retailing" and provides that the function of the development plan is to establish an overall strategy for the proper planning and sustainable development of its area.
 6. At Section 3.5 of the Guidelines, entitled Joint or Multi-Authority Retail Strategies, it is noted that while planning authorities will prepare development plans for their functional areas, the nature of the retail sector is such that the catchments for such activity frequently transcend local authority boundaries. Accordingly, certain development plans and local area plans must be informed by joint or multi-authority retail strategies which should assess retail activity and demand needs that transcend planning authority boundaries. Annex 3 gives guidance on the preparation of joint or multi-authority retail strategies. In order to give these strategies statutory backing, the policies and objectives of the strategy should be adopted into the development plan.
 7. Table 1 identifies authorities where joint or multi-authority retail strategies must be prepared. Cork City and County Councils are included in the list of same.
 8. The importance of these Retail Guidelines is hard to overstate in the context of this application. The Guidelines clearly state that Cork County Council and Cork City Council must prepare a joint retail strategy. This is identified at paragraph 3.5. The development plans of both local authorities must be informed by this strategy. This is because the catchments for retailing frequently transcend both local authority boundaries. The development plan must be evidence-based by way of supporting analysis and data to guide decision making and be consistent with the approach of these guidelines.
 9. Outlet stores are defined at Annex 1 as *"Outlet Centres Groups of retail units in particular focusing on fashion and accessories which are generally associated with designer groups. They specialise in selling surplus stock and end-of-line goods at discounted prices"*.

Relevant Legislative Provisions

10. Section 9 of the 2000 Act is entitled "Development Plans". Section 9(4) provides that in making a development plan in accordance with Chapter 1 of Part II of the 2000 Act, a planning authority shall have regard to the development plans of adjoining planning authorities and shall co-ordinate the objectives in the development plan with the objectives in the plans of those adjoining authorities except where the planning authority considers it to be inappropriate or not feasible to do so.
11. Sub section 7 of s.9 provides as follows:

(7)(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.

12. The Retail Guidelines were made by the Minister under s.28 and planning authorities shall have regard to those guidelines in the performance of their functions. Under s.28(1A), in so doing they must consider the policies and objectives of the Minister contained in the Guidelines when preparing and making the draft development plan and the development plan and append a statement to the draft development plan and the development plan which shows how the planning authority has implemented the policies and objectives of the Minister contained in the Guidelines. If a planning authority has formed the opinion it is not possible to implement certain policies and objectives of the Minister contained in the guidelines, when applying those policies to the development plan or draft, it must give reasons why the policies and objectives of the Minister have not been so implemented.

History of the dispute

13. Initially both local authorities appear to have recognised that the catchment for a retail outlet centre would indeed transcend their local authority boundaries, as the McCabe Durney Barnes report of 2019 records that the brief for a study to consider the need for a retail outlet centre in the Cork Metropolitan area was identified by both local authorities. This process was started, and six sites were identified in the Cork Metropolitan area. That area straddles both local authority areas. However, for unexplained reasons, at a certain point, that joint strategy was abandoned. This may be seen clearly at paragraph 8.1 of the report McCabe Durney Barnes where it identifies that only those three locations that were within the County Council area of Cork were brought forward for detailed assessment.
14. Following this report, a variation to the Cork County Development Plan 2014 was made, known as 'Variation 2', that identified a preferred location for a retail outlet centre to serve the Cork metropolitan area. That was the subject of a s.31 direction by the respondent which directed removal of Variation 2. The s.31 decision was challenged by way of a leave application on 15 March 2021 and is listed for hearing on 19 October 2021.
15. There are various grounds of challenge in those proceedings, including those relating to inadequacy of reasons, unlawful delegation, and unconstitutionality of the statutory provision. There are also grounds that challenge whether the respondent in that case was correct in identifying that a joint retail strategy was required under the Retail Planning Guidelines and that challenge the necessity for compliance with guidelines adopted under s.28 of the 2000 Act.
16. Both local authorities commenced working on their respective draft development plans over the course of 2020.

17. Terms of Reference had been agreed between the local authorities in relation to the joint retail strategy, thus observing the requirements under the 2012 Retail Guidelines but these did not include a strategy in relation to retail outlets. Work on the joint retail strategy is currently ongoing.

Section 9(7) Direction

18. The respondent became aware of this gap in the Terms of Reference and issued the s.9(7) Direction the subject of these proceedings. He indicated in the Direction that he was writing to require the local authorities to co-ordinate ongoing development plan review processes in respect of specified matters. Those matters were consideration of retail outlet centres not addressed by the Terms of Reference for the joint retail strategy in respect of the Cork City and County Development Plans for 2022-28. He stated that the two local authorities were to jointly determine whether there is capacity and scope for retail outlet centre development in Cork City and County. He indicated the work could be an addendum to the current joint retail strategy or a separate report. He noted the required outcome of the co-ordinated process is agreement in respect of the potential provision of retail outlet centre development and if applicable the general location, format and scale of any retail outlet development that may be permissible. He noted that should it not be possible to reach agreement, the legislation specifies that any dispute between the local authorities should be determined by the Minister. He sought joint proposals to include terms of reference. He noted that, in order to assist the authorities with the co-ordinated process, he might appoint an independent person to work with both authorities.
19. Correspondence ensued following the Direction, where the applicant made clear it wished to await the outcome of the s.31 proceedings before complying with the Direction and the respondent made it clear that this was not an option. In a letter from the respondent of 21 June 2021, he noted the absence of joint proposals from the local authorities and indicated he would determine the matter in accordance with s.9(7)(b) and he sought submissions from both authorities in the absence of agreement. He also identified that he intended to appoint an independent retail expert who would prepare a report for his consideration.
20. It is in those circumstances that the applicant comes before court seeking to stay the s.9(7) direction.

Prescriptive nature of the Direction

21. I should address at this point a criticism made of the Direction by counsel for the applicant, who asserts that it is very prescriptive in its terms, pointing in particular to the references to the location, format and scale of any retail outlet centre development. In fact, carefully read, the respondent is not directing that any particular outcome be achieved but rather that the two authorities should co-ordinate to see if agreement can be reached in respect of the provision of retail outlet centre development. It is certainly the case that the respondent suggests that if agreement cannot be reached, any dispute shall be determined as per the legislation. However, that does not prevent the local authorities from agreeing, for example, that there is not capacity and scope for retail outlet development.

22. The Direction could be described as prescriptive in that it identifies that if there is agreement, the prescribed outcome should include location, format and scale of same. However, the retail guidelines identify that City and County Development Plans must, *inter alia*;
- Define, by way of a map, the boundaries of the core shopping areas of city and town centres and also location of any district centres;
 - Include a broad assessment (square metres) of the requirement for additional retail floorspace for those plans in the areas covered by a joint or multi-authority retail strategy
 - Set out strategic guidance on the location and scale of retail development to support the settlement hierarchy, including identifying opportunity sites.
23. Thus, it is apparently standard that development plans would have location and scale identified and so the terms of the Direction do not appear particularly novel in this regard.
24. In any case, as pointed out by counsel for the respondent, any such criticism as to the nature of the Direction goes to the substance of the decision and not to the criteria for a stay.

Effect of s.31 ruling

25. The core basis advanced for the stay by the applicant is that, if the applicant is successful in the s.31 challenge, it will have knock on effects on the issues in this case and that therefore no effect should be given to the Direction until the s.31 proceedings are determined, in the hope that that judgment will demonstrate that the respondent was wrong in making the Direction.
26. A stay is also sought until the determination of these proceedings, but I think it is fair to say that the main focus of the application is for a stay on the basis that the applicant is entitled to await the judgment in the s.31 proceedings.
27. It is worth considering how in the applicant's view this is likely to play out. It has averred that should it be successful – and by this it can only mean successful in the grounds that relate to the joint approach – then it will be in a position to include the approach in Variation 2 in the draft development plan – an admittedly unilateral approach - and will not be obliged to adopt a co-ordinated approach. In the replying affidavit of Mr. Lynch on behalf of the applicant, sworn 31 August 2021, he avers at paragraph 9 that if the s.31 Directive was quashed, it would be possible to reintroduce such an objective in the course of the development review process.
28. In my view, there are a number of fallacies in this approach that undermine the application for a stay. First, this analysis does not take into account the fact that the applicant may not be successful at all and that accordingly the stay will have been for naught. Second, it ignores the very real possibility that it may be successful on grounds that have nothing to do with the issues in this case. Third, it ignores the fact that if it is

successful on unrelated grounds, a remittal of the matter back to the respondent may be directed. But the respondent may decide not to adopt a further decision given that the dispute is firmly rooted in the Variation made to a development plan that will shortly expire. Accordingly, the issue of the substantive validity of Variation 2 may never be decided. Fourth, the application is firmly premised on the notion that the s.31 proceedings will determine the issues in this case. But even if the applicant is successful on ground 5, which argues that a joint approach was not needed, it is difficult to see how a ruling in that case will necessarily determine the issues in this case.

29. Most obviously, this case is about s.9(7) and not about s.31. The two sections are seeking to achieve different objectives and are quite different procedurally. The first is a forward-looking power to be exercised in advance of a development plan being made and the second is a backward-looking power to be exercised after a development plan has been made. The s.9(7) Direction is in relation to the making of the draft Development Plan for 2022 – 2028. The s.31 decision was in relation to the making of a variation to the 2014 Development Plan. The question of whether the approach to retail outlets should be a joint one, involving both local authorities or whether it should be unilateral, involving just the applicant, certainly arises in both sets of circumstances but in the context of two different development plans. It cannot be assumed that a construction of the legality of a s.31 direction will answer proceedings concerning the legality of s.9(7) Direction, even if there are common issues in the proceedings.
30. For all those reasons, contrary to the submissions of the applicant, I cannot agree that the outcome of the s.31 is likely to determine these proceedings. Rather, I consider that the s.31 proceedings have a medium to low likelihood of determining these proceedings. That is a relevant factor in deciding whether a stay should be granted.
31. A somewhat separate argument is made in relation to the s.31 proceedings to the effect that the issues are linked in the proceedings, that both should be treated together, and the respondent should not have proceeded with the s.9(7) Direction until the outcome of the s.31 proceedings was known. As I find below, the respondent has a statutory power under s.9(7) that he was entitled to exercise provided he does so lawfully. That power is quite different to his powers under s.31. Therefore, it does not seem to me that the respondent ought to be treated as being inhibited in his statutory functions under s.9(7) simply because there was an ongoing dispute in relation to the exercise of s.31 powers in respect of a previous development plan.

Orderly implementation of measures that are *prima facie* valid

32. There is an important dispute between the parties in relation to the application of the *Okunade* criteria. As part of the test, I must consider the impact of staying legislative measures that are *prima facie* valid. Identifying the measures at issue is usually an uncontroversial task where a private party is seeking to stay the operation of a statutory measure. However here, counsel for the applicant argues that the relevant statutory measure that should be allowed to continue uninterrupted is the process in relation to the draft Development Plan 2022-2028 that the applicant is currently engaged upon and that

the s.9(7) Direction is, as it were, the interloper and ought not to be permitted to disturb the orderly implementation of the process for the draft Development Plan.

33. That argument ignores the fact that the Direction is made pursuant to a statutory provision and not just any statutory provision but one that arises in the context of the making of a Development Plan. Thus, it is highly artificial to seek to separate the process in respect of the draft Development Plan from the s.9(7) powers of the respondent. They are all part of the same process. It is certainly true that the section provides the respondent with a role that he or she does not normally have in the making of a development plan. Generally, the making of a development plan is a matter for local authorities and not Ministers. However, by adopting s.9(7), the legislature has already envisaged an interference with the normal process through that statutory mechanism.
34. Section 9(7) is itself related to s.9(4), that requires a planning authority to coordinate the objectives in the development plan with the objectives in the plans of adjoining planning authorities. Section 9(7) goes further and allows the respondent to become involved in the process by requiring planning authorities to coordinate the development plans for their areas.
35. Thus, what I must ensure is that I give weight to the orderly implementation of measures that are *prima facie* valid. The stay is in respect of the s.9(7) Direction. It is that Direction which the applicant seeks to suspend. Therefore, I must focus my attention on whether that is a measure that is *prima facie* valid. No factor has been identified that would suggest it is not apart from the argument identified above which I have found to be incorrect.
36. Moreover, that Direction is seeking to give effect to a policy measure adopted under s.28 of the 2000 Act i.e. by way of the Retail Planning Guidelines. If I were to stay the Direction, I would be undermining not only the respondent's entitlement under s.9(7) to make a direction but also the respondent's intention to do so to give effect to Guidelines adopted under a different provision of the 2000 act.
37. Separately, the applicant argues that the Direction is not a legislative measure but is only part of a statutory process, and that therefore the process is in some unspecified way deserving of less deference. No case law was cited to support an argument that the reference in *Okunade* to "measures" is limited to statutory provisions, either primary or secondary, although it is true much of the case law is concerned with such provisions. In the absence of any authority, nor indeed any submission by the applicant that the *Okunade* test does not apply, I therefore treat the Direction as requiring the same approach as statutory measures.
38. I therefore conclude that I should give considerable weight to the implementation of the s.9(7) direction. However, that conclusion cannot alone determine the outcome of this application. I must now turn to look at the additional factors that have been invoked by both parties.

Arguments of the Applicant

Nature of a s.9(7) Direction

39. Counsel says that planning authorities should be allowed to make their own strategy, that the respondent should not interfere and that there are real issues about the interference allowed by s.9(7). Reference was made to the autonomy of local authorities under Article 28A of the Constitution and to the role of the elected members being disrupted by the Direction.
40. But there is no challenge to the constitutionality of s.9(7). The legislature has decided it is appropriate that the Minister be conferred with a power to interfere in the autonomy of local authorities in making the development plan. The fact that the applicant may not appreciate the policy choice made by the legislature cannot be relevant to my decision upon a stay. The respondent is entitled to exercise his statutory power provided it is done lawfully.

Delay

41. It was initially argued that any inclusion of a joint retail outlet strategy would not be subject to consultation and screening for SEA and would be unlawful on that basis. That would only be the case if the mandatory statutory provisions in relation to consultation and screening were to be ignored and I cannot assume this would be the case.
42. In the alternative, the applicant argues that if the consultation and screening requirements are observed, it is now too late for the result of any joint approach to be incorporated into the draft Development Plan process. Even leaving aside the statutory requirements, the applicant says there was delay in issuing the Direction and this means that it cannot now be incorporated into the draft Development Plan. Accordingly, it is said there is no point in requiring co-ordination at this point.
43. It is also said that there is no detriment to a stay being imposed since, if a requirement to co-ordinate turns out to be legal, it can be imposed in the context of a variation.
44. On the other hand, the respondent argues that it may well be possible for the fruits of the co-ordinated process (if fruits there are) to be incorporated into the draft Development Plan process and ultimately into the 2022 plan, even allowing for the necessary compliance with statutory requirements, including consultation and screening requirements. The respondent accepts that a variation can be made at a later stage but argues that the process should start now so as to maximise the chances of incorporation into the Development Plan 2022-2028.
45. Having heard submissions on this issue, it seems that it is not possible for me to pronounce with certainty as to whether or not any policy outcome that might result from co-ordination can be incorporated into the draft Development Plan given the statutory timelines. Presumably the answer to this question will also depend on the way in which the co-ordination envisaged by the Direction is carried out and the outcome of same.
46. In relation to delay and the alleged fault of the respondent, it seems to me that given the history of these proceedings and the s.31 events, it would have been difficult for the

respondent to take action much before the date upon which he did. In those circumstances I find no culpable delay on his part that would disentitle him to the relief sought.

47. Therefore, I approach this issue on the basis that where the respondent has issued a *prima facie* valid Direction intended to influence the 2022 Development Plan then there should be no delay in implementing same, given that the process for a new development plan remains ongoing. What is certain is that, if I grant a stay and it turns out I was incorrect to do so, the requisite co-ordination will have been delayed by some months. Therefore, I accept the argument of the respondent that staying the Direction would result in a delay in its requirements therein becoming effective.
48. There is one other relevant factor. Co-ordination is taking place between the two local authorities in relation to a joint retail strategy for which Terms of Reference have been drawn up. The outcome of that co-ordination has not yet been part of the draft Development Plan to date of either local authority. It is intended to conclude the strategy shortly and then seek to incorporate it into the draft Plans, but it will also have to go through the same process of consultation and screening that I refer to above. It is clearly intended by the Direction that the joint outlet strategy would be part of the joint retail strategy. In those circumstances, any delay occasioned by a stay would undermine the possibility that an updated joint retail strategy including retail outlets could be incorporated into the ongoing development plan process.

Chaos will result

49. A separate argument made by the applicant is that chaos will result, including to the public and to the elected members, and that this will be disruptive to public administration. I understand this argument to refer not to the co-ordination process *per se* required by the Direction, but to the end result. In other words, the applicant is concerned that, following co-ordination, the applicant will include something in its draft Development plan, but it will later transpire that it was entitled to proceed unilaterally in relation to retail outlets. That might mean it will then either change the draft Development Plan itself (thus necessitating more consultation) or vary the Plan if it has been adopted.
50. But it is difficult to understand that argument. The local authorities are being asked to co-operate. That process of co-ordination may result in an agreed position. That may become part of the Development Plan. If it later turns out that there was no need to work on a joint basis because of the outcome of the s.31 proceedings, the applicant can adopt a variation that determines policy on a unilateral basis. Alternatively, the timing of the s.31 proceedings may be such as to allow them to change the draft Development Plan so as to reflect a unilateral course. Contrary to the submissions of counsel, refusing a stay will not therefore ultimately deny the applicant the chance of enjoying the benefits of a s.31 victory.

51. But much of this will be within their own hands. For example, having co-ordinated, the applicant may decide that is a preferable approach, irrespective of the legal obligations in that respect.
52. In any case, none of the above seems to me to be a recipe for chaos. The elected representatives clearly understand there is litigation in being, since I am told they authorised both sets of proceedings and so they presumably understand that this may result in a change of direction if the s.31 proceedings are successful. That does not constitute chaos but rather a change of direction that will have been flagged in advance. In deciding on the weight to give to this factor, I also bear in mind my previous finding that there is only a medium to low likelihood that the s.31 proceedings will determine these proceedings. For those reasons, I do not consider that this is a strong argument in favour of a stay.

SEA

53. One of the eight core grounds raised by the applicant in the within proceedings relates to an alleged breach of EU law, being that set out at Paragraph 19(viii) of the Statement of Grounds. It is pleaded that the s.9(7) requirement is invalid insofar as the respondent failed to screen the s.9(7) requirement for the purposes of SEA and if he did screen it, the respondent erred in failing to conduct a SEA in advance of the letter of 22 April being issued.
54. From the submissions made by both counsel on this point, I am satisfied that the law is as follows: if I am satisfied that lifting the stay would undermine the effectiveness of an EU law right by depriving an applicant of an effective remedy in respect of same, then that will strongly point against a lifting of the stay. In this context, I must consider the defence raised. Obviously, if I am satisfied that there is a substantial defence, then it will be considerably less likely that I will conclude that a stay is necessary to vindicate an EU law right.
55. In this case neither a statement of opposition nor an affidavit in support of same has yet been filed by the respondent. However, the nature of the defence that will be raised has been sketched out by counsel at hearing. In summary, it is that the Direction does not attract the requirement to screen as it is not a plan or program within the meaning of the SEA directive, as per the discussion in *Friends of the Irish Environment Ltd v Minister for Communications & Ors.* [2019] IEHC 646. Further, it is argued that even if it is a plan or program, there will be a requirement for an SEA screening if the outcome of the process is an amendment to the development plan.
56. In considering whether the Direction can be considered to be a plan or program such as to necessitate screening, I must apply the test set out in the decision of the CJEU in *Verdi Ambiente* (Case C-305/18) where the Court stated that “*the notion of plans and programmes relates to any measure which establishes by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment*”.

57. Here the Direction simply requires that the two local authorities co-ordinate existing ongoing development plan review processes in respect of a particular matter i.e. whether there is capacity and scope for retail outlet centre developments in the city and county of Cork. There is also reference to the appointment of an independent expert and the possibility of the matter being determined by the respondent in accordance with the section if agreement is not reached.
58. None of these considerations constitute a plan or program which can be measured for its environmental impact. No environmental issue is identified by the Direction which could be assessed in accordance with the type of strategic assessment envisaged under the SEA Directive by reference to the criteria set out in Annex 1 thereof. The outcome of the process, which may identify concrete proposals that may require a SEA, has not been reached. Rather, the respondent is identifying a process for potentially arriving at substantive proposals. The argument on SEA appears very weak to me and there is clearly a solid defence to it. Accordingly, refusing a stay on the Direction seems highly unlikely to impact upon any EU law rights of the applicant under the SEA Directive. In the circumstances I am not persuaded there is any requirement of EU law that would dictate a stay.

Applicant requires guidance in relation to s.9(7)

59. In oral argument, counsel for the applicant identified that another factor tending towards a stay was that the applicant should not be expected to comply with the respondent's letter until guidance is given as to the permissible approach to s.9(7). No case was raised in support of this novel proposition and I do not believe there is any basis for it. All persons, including local authorities, are expected to comply with statutory provisions including where that a court has not pronounced on the correct interpretation of same.
60. The challenge is made to the Determination. That is clear in its terms. If the respondent takes any further steps on foot of s.9(7) that the applicant believes are not in conformity with the section, for example in relation to the determination of a dispute between the local authorities, the applicant will be entitled to seek to amend its proceedings in that respect. No such step has yet been taken by the respondent, although he has indicated an intention to take such a step. The respondent's jurisdiction under s.9(7) is clear and he may only act within the scope of the section, as interpreted in the context of the 2000 Act consistent with the normal principles of statutory interpretation. I am not convinced that either the necessity for guidance on the application of the section, nor the applicant's concerns about the respondent's future actions under s.9(7), justify the grant of a stay on the Direction.

Respondent's arguments

Nature of the process

61. The respondent has stressed the nature of the Direction in arguing against a stay. It is noted that no substantive outcome is being imposed but rather there is a requirement for coordination. It is noted there are no commercial or planning detriments identified. The applicant argues that the Direction may result in a solution being imposed by the respondent and that this would have substantive consequences.

62. However, I can only make my decision on the Direction the subject of these proceedings. The nature of the Direction is a highly relevant factor in assessing the balance of justice relevant to this application. That Direction requires two local authorities to coordinate their development plans in respect of a certain topic in circumstances where detailed planning guidelines clearly envisage joint retail strategies where retail activity and needs transcend local authority planning guidelines. That is all. It is very difficult to see the detriment to the applicant in being required to co-ordinate its activities with Cork City Council.
63. If there is a dispute between the authorities arising out of the requirement, the Minister may determine the dispute. The applicant is concerned the Minister will act ultra vires in that respect. I have made some observations above as to the scope of the Minister's jurisdiction in that regard. In any case, in circumstances where the applicant chose to make the application for a stay before any such determination by the Minister, I can only adjudicate on a stay on the basis of the Direction before me. That Direction does not include any such determination by the Minister.

Office of the Planning Regulator

64. The respondent places considerable emphasis on the fact that the Office of the Planning Regulator ("OPR") has provided its recommendations on the draft Cork County Development Plan 2022 - 2028. The OPR is a statutory body introduced by the 2018 amendments. A key function of the office is the assessment of statutory plans including draft development plans to ensure consistency with policy and legislative provisions. Any recommendations issued by the OPR relate to clear breaches of the relevant legislative provisions, of the national or regional policy framework and/or of the policy of government as set out in guidelines under s.28 and as such, local authorities are required to implement or address recommendations made by the office in order to ensure consistency with the relevant policy and legislative provisions.
65. On 1 July 2021, by way of letter to the Minister, in the exercise of its statutory obligations, the OPR provided its response to the draft Development Plan of the applicant. In that letter, the OPR makes reference to the current Cork County Development Plan, which refers to the need to identify potential suitable locations for an outlet centre and says that, in those circumstances, the joint retail strategy should consider the locational aspects of any such retail development. It makes a number of recommendations. Recommendation 9 recommends that the applicant should prepare a joint retail strategy with Cork City Council to secure a plan led development for retail within the two neighbouring local authority areas and identifies that, in view of the Direction, the joint retail strategy should consider the implications of retail developments contemplated in the Draft Plan such as outlet centres.
66. Counsel for the respondent submits that were a stay to be granted, the role of the OPR and its function in ensuring consistency with planning requirements would be undermined in circumstances where it has made a recommendation that the joint retail strategy includes the implementation of retail developments including outlet centres. Counsel for

the applicant objects to the notion of the Minister being bound by the OPR or viewing it as a decision maker.

67. I note that the OPR has particular expertise in the area of legislative and policy requirements applicable to draft development plans and it has expressed an opinion that the current approach is not in accordance with the applicant's obligations, and that there ought to be a joint approach. It is undoubtedly the case that if I were to impose a stay, this expert and independent opinion which is specifically charged with ensuring consistency, would be undermined. That does not equate to treating it as a decision maker, contrary to the submission of the applicant.
68. That is in my view a relevant consideration to take into account in determining the balance of justice and, from the point of view of the test in *Okunade*, it seems to me that there is a public interest in the recommendations of the OPR being given significant weight, given the statutory function of the OPR and the importance of consistency of approach across local authorities in respect of compliance with statutory and policy requirements.
69. Considering paragraph 104 (iii) of *Okunade*, it seems to me that the prospect of the applicant continuing to adopt a unilateral approach towards the adoption of a new development plan (as it will do if the stay is granted), in circumstances where the development plan will last at least 6 years, without taking into account the recommendation of the OPR, would heighten the risks to the public interest. Accordingly, I agree that I ought to take into account as a relevant factor that a stay would result in the recommendation of the OPR being ignored.

Cork City Council

70. The role of Cork City Council is highly relevant. Its approach may be seen in letters exhibited in these proceedings. The first is a letter of 26 March 2020 in relation to Variation 2, where it identifies its concerns in relation to the Variation and indicates that it will work with Cork County Council to prepare a joint retail strategy, which strategy should include retail outlet centres and which will inform both the Cork City development plan and Cork County development plan.
71. By letter of 19 July 2021, it responds substantively to the respondent's invitation to make a submission in relation to his intention to determine an approach for the two local authorities. It refers to the work ongoing to prepare a joint retail strategy. It states that it has concerns in relation to the impact of a retail outlet centre in Metropolitan Cork but says that it is satisfied to include an objective assessment of the capacity for, and impact of, a retail outlet store in the Metropolitan area as identifiable matters that should be addressed therein.
72. This correspondence makes it clear that Cork City Council is willing to participate in a coordinated strategy and believes it appropriate that the same should be carried out in respect of retail outlets.

73. A coordinated approach cannot of course prevail unless both the local authorities participate in same. A stay would prevent Cork City Council participating in a coordinated approach, despite its willingness to do so. Therefore, the approach of the applicant does not simply impact upon its position, it also has the inevitable consequence that Cork City Council cannot comply with the Direction despite its stated intention to do so.
74. The applicant's answer to this is that a joint approach is impermissible and that it will be vindicated in this stance by the ultimate decision in the s.31 proceedings. That response ignores both the difficulties of the applicant in respect of the outcome of the s.31 proceedings, identified above, but more importantly fails to grapple in any way with the fact that a stay would prevent Cork City Council from participating in a strategy designed to ensure that their own draft Development Plan reflects a joint retail strategy and is therefore in accordance with the approach of the Retail Guidelines. This is highly undesirable and is another factor that leans against a stay being granted.

Current co-ordination

75. A factor of significant importance is the fact that, consistent with the Retail Planning Guidelines, the two local authorities are already co-ordinating in relation to the joint retail strategy. The Terms of Reference of same were provided to me and, at my request, a relevant timeline for the conclusion of that process was identified. Both the respondent and the OPR have identified that the issue of retail outlets is one that ought to be part of that joint retail strategy.
76. I am impressed by the approach of the local authorities in this regard. They clearly recognise the utility of co-ordination on a joint retail strategy. They have shown that they can work together in this respect. In those circumstances it is difficult to understand why this approach cannot be extended to a particular issue i.e. retail outlet centres and it has not been explained why there is such a resistance on the part of the applicant to so doing. Importantly, no practical impediments to co-ordination in respect of retail outlets have been identified. This is a relevant factor in relation to the lifting of the stay.

Stay would render Direction moot

77. Counsel for the Respondent submitted that issuing a stay until the hearing of these proceedings, as is sought by the applicant, could wholly undermine the whole purpose of the Direction and could effectively determine the case if the Development Plan was adopted before these proceedings were determined. That seems to me a strong argument. The terms of the Direction make it clear that the purpose of the co-ordination is to co-ordinate ongoing development plans and strongly suggest that it is aimed at co-ordination for the purposes of the finalisation of the respective Development Plans, rather than possible variations of same thereafter. This is not to say that s.9(7) could not be used in respect of a variation but in this case, the aim of the Direction is to permit the upcoming Development Plans to be coordinated. I have already found there is a possibility, though not a certainty, that the outcome of the co-ordinated approach may be incorporated into the applicant's ultimate development plan. This may in fact be easier in relation to the draft Development Plan of Cork City Council as I understand it is at a somewhat earlier stage.

78. If, on the other hand, the stay is granted, it becomes extremely likely that any outcome of co-ordination will not be reflected in either Development Plan. Thus, granting a stay carries the risk that the purpose of the Direction will become moot by virtue of the stay alone. That is highly undesirable. Refusing a stay will best hold the line.

Summary

79. Given my conclusion that pending the determination of these proceedings:

- the orderly implementation of the Direction would be undermined by a stay;
- the recommendation of the OPR would be undermined by a stay;
- the approach of the Retail Planning Guidelines in relation to a joint approach, where planning issues transcend local authority boundaries, would be undermined by a stay;
- a stay is very likely to prevent the outcome of the co-ordinated process being reflected in the Development Plan 2022-2028 of both authorities, whereas lifting the stay may permit the outcome of that process to be reflected in the Development Plans of one or both local authorities;
- a stay would prevent Cork City Council seeking to adopt a joint approach with the applicant on retail outlets where it is otherwise willing to do so;

and

- where the Direction requires the applicant to engage in a process rather than requiring it to implement an identified outcome;
- where the applicant has already engaged in a co-operative strategy with Cork City Council in relation to a retail strategy generally;
- where the detriment to the applicant in engaging in the process is, at its height a possibility that it might engage on a co-ordinated basis with Cork City Council under the Direction, but later be entitled to revert to a unilateral approach if the legality of the Direction is undermined or the Direction is quashed;
- where I consider the likelihood of the s.31 proceedings determining the outcome of these proceedings is a medium to low one:

I am compelled to conclude that the greatest risk of injustice would occur if I were to grant a stay.

Accordingly, I grant the relief sought by the respondent by way of motion of 25 August 2021 and lift the stay.

Final observations

80. It is most undesirable to see State bodies litigating, not just in these proceedings but in the related s.31 proceedings, generating significant costs and using up the precious time

of the staff of the local authorities in question, and that of their elected members, as well as those of the Minister. I fully accept the submission of counsel for the applicant to the effect that no personal motivation was involved in the decision to issue proceedings. Nonetheless, it is regrettable that litigation could not have been avoided. I am very struck by the tagline on the notepaper of both local authorities – “We are Cork”. That tagline reflects the reality – Cork is made up of both the city and county. It is all Cork. Indeed, the Cork Metropolitan area spans both. It is ultimately not in the interests of either local authority to take an isolationist approach. The question of a retail outlet undoubtedly raises difficult questions because of its impact on shopping in the city centre on the one hand, and the benefits that it may bring to the county (and possibly the city) on the other hand. Because it is a difficult issue, energy and commitment will be needed to achieve the optimum joint retail strategy. There is now no stay on the Direction. It is to be hoped that both local authorities will comply with both the letter and spirit of the Direction while it remains in place, to achieve a solution that will be in the overall interests of Cork.