O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		S:AP:IE:2015:000055

[Title and record number as per the High Court proceedings]

John Callaghan	V	An Bord Pleanala, Ireland and the Attorney General, Element Power Ireland, Element Power Ireland Limited and North Meath Windfarm Limited

Date of filing	8 October 2015
Name of respondent	An Bord Pleanala
Respondent's solicitors	Barry Doyle & Co, Marshalsea Court, Merchants Quay, Dublin 8.
Name of appellant	John Callaghan
Appellant's solicitors	O'Connell Clarke, Suite 142, Capel Building, Mary's Abbey, Capel Street, Dublin 7

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	**An Bord Pleanala**

The respondent was served with the application for leave to appeal and notice of appeal on date
29 September 2015

The respondent intends :	
	to oppose the application for an extension of time to apply for leave to appeal
	not to oppose the application for an extension of time to apply for leave to appeal
x	to oppose the application for leave to appeal
	not to oppose the application for leave to appeal
x	to ask the Supreme Court to dismiss the appeal
	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	✓

Respondent's Representation

Solicitor: Alan Doyle			
Name of firm	Barry Doyle and Company		
Email	info@doyleandco.com		
Address	23 Merchants Quay Dublin 8	Telephone no.	01 6706966
		Document Exchange no.	DX 1081, Four Courts
Postcode	D08 C6XP	Ref.	AD

How would you prefer us to communicate with you?

	Document Exchange	✓	E-mail
	Post		Other (please specify)

Counsel :			
Name	Emily Egan SC		
Email	EEgan@lawlibrary.ie		
Address	PO Box 5939, Distillery Building 145-151 Church Street Dublin 7	Telephone no.	01 817 2816
		Document Exchange no.	DX 81-6001
Postcode			

Counsel			
Name	Brian Foley		
Email	brian@brianfoley.ie		
Address	Suite 4.22, Distillery Building 145-151 Church Street Dublin 7	Telephone no.	01 817 7367
		Document Exchange no.	DX 81-8074
Postcode			

~~If the Respondent is not legally represented please complete the following~~

~~Current postal address~~
~~Telephone no.~~
~~e-mail address~~

~~How would you prefer us to communicate with you?~~

	~~Document Exchange~~		~~E-mail~~
	~~Post~~		~~Other (please specify)~~

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

As the facts set forth in Section 4 of the Notice of Appeal are transcribed from the Judgement of the learned Judge J the Board cannot dispute anything in same. The Board would simply observe that more facts than this were found by the learned Judge which is clear from the Judgment under appeal.

4. Respondent's reasons for opposing leave to appeal

1. The Appellant's case for a grant of leave appears to rely heavily on the fact that the learned judge has certified the point of law set out therein in accordance with s.50A(7) of the Planning and Development Act, 2000 (as amended) ("the PDA").

2. Every point so certified will attract the dual labels of being a point of law of exceptional public importance and that it is in the public interest that an appeal be brought.

3. However, the classification of a point of law as being within s.50A(7) does not equate with satisfaction of the constitutional threshold for a leap-frog appeal. Merely because, it is in the public interest that an appeal be brought *per se* does not mean that the appeal should be brought to the Supreme Court. If the fact of certification were to be sufficient, the Supreme Court would be the *de facto* appellate venue in all planning matters by virtue of the relevant holdings made by the High Court on the requisites to grant a certificate pursuant to s.50A(7).

4. It is respectfully suggested that it was not the intention behind the creation of the Court of Appeal that a whole range of cases (i.e. planning cases) would track an inexorable course to the Supreme Court. This is not the legislative intention behind s.75 of the Court of Appeal Act, 2014 which clearly indicates the intent of the Oireachtas that even appeals certified in accordance with s.50A(7) should be brought to the Court of Appeal.

5. Thus, and with respect to the Appellant there must be something identified which demonstrates a pressing reason as to why the Supreme Court must hear this appeal as opposed to the Court of Appeal. Pressing and weighty reasons should be provided, particularly given the clear import of s.75. The Appellant has not demonstrated these.

6. There is no obvious or clear reason why the Court of Appeal cannot deal effectively with points of law of exceptional public importance nor why the public interest fails to be served by a planning appeal proceeding in the Court of Appeal.

7. Further, the Court may note the Appellant's motion for discovery and for a "Protective Costs Order" under s.50B of the PDA which were refused by McGovern J. These refusals have been appealed to the Court of Appeal and the Appellant has indicated that he is fully desirous of prosecuting that appeal. Thus, on the Appellant's own terms there are already two live issues in the Court of Appeal. It is presumed that if the Appellant prosecutes this appeal in the Supreme Court then issues regarding the applicability of s.50B of the PDA and the special costs rules therein may well arise again. In short, by reason of how the Appellant has prosecuted the case, it is respectfully submitted that the logical and sensible venue for disposing of the matter is the Court of Appeal where, to put it simply, all matters can be heard together.

8. The only substantive reason to prefer the Supreme Court put forward by the Appellant is delay – i.e. he relies on the fact that the Notice Party has emphasized its commercial interest in expedition in these proceedings. In this respect, although the Court is a better judge of its own resources than the Respondent, it appears far more likely that an appeal could be brought on in the Court of Appeal considerably faster than in the Supreme Court. Thus, the Appellant's only real point in this respect resolves into one about *finality*. If, for example, there is to be a further appeal from the Court of Appeal to the Supreme Court then there is added time. That alone, however, cannot – it is submitted – be a ground on which leave to appeal to this Court can or should be granted.

9. The Constitution clearly states now that the constitutional right of appeal from the High Court is best met by allowing an appeal to the Court of Appeal. The legislature intends this to apply even in the context of certified appeals. Thus, the Irish legal system now presumes that appeals to the Supreme Court should ordinarily come from the Court of Appeal. The Board would rely on what this Court said in *Redic v DPP* [2015] IESCDET 22 where it was held that "*[t]he Court finds that the applicant has not demonstrated that it is in the interests of justice that this matter not be dealt with by the Court of Appeal.*" This reflects the orientation which is required – what exceptional circumstances are shown which do not simply describe the appeal, but which demonstrate that the Court of Appeal cannot adequately deal with the matter?

10. It is respectfully suggested that none have been shown. There is nothing exceptional to warrant a leap-frog

5. Respondent's reasons for opposing appeal if leave to appeal is granted

The reasons for opposing are concisely stated as required as follows.

General

1. In relation to the Grounds as a whole, in coming to the opinion required under Section 37A of the Planning and Development Act 2000 as amended, the Board did not reach any conclusion which would predetermine or prejudge the application before it, reach any fixed or binding conclusion affecting that application, or fetter its discretion in any way when subsequently determining the planning merits of the proposed development. In those circumstances, all matters remain res integra when the Board comes to consider the application for permission and the submissions made, and the Applicant is free to make submissions on all points. There is therefore no breach of the right to be heard, no breach of the rules of natural justice, and no breach of the right of public participation under the EIA Directive. Accordingly the Applicant's case and this appeal are without foundation and bad in law

The "Predetermination / Prejudgment" Grounds

2. In relation to Grounds 1-7, 9, 12-14, 16 and 17:-

    a. The Appellant was wrong to claim that the SID Designation process predetermines the outcome of the subsequent EIA or the substantive planning application. Nothing in the EIA is predetermined via the SID Designation process. Nothing in the

substantive planning application is similarly predetermined nor has the Board prejudged any of the issues arising therein in any unlawful manner. It is entirely open to the Board to revisit (if necessary) the matters that led it to form its opinion on the condition under s.37A(1) (with reference to the matters in s.37A(2)) if those matters are, in fact, re-opened during the substantive planning stage. There is no prohibition on the Board considering or taking into account, for example, submissions on the issues of strategic economic importance or social importance insofar as same may arise as relevant at the planning stage. The opinion on SID Designation has not foreclosed this. Thus, the learned Judge was correct in rejecting the Appellant's case in this respect and there is no legal error in the judgment and no conceivable error in fact as appears to be claimed.

b. Further, simply because the Board may consider issues at the planning stage which may overlap with some of the issues considered when reaching the opinion on the SID Designation process, this does not involve any illegality or unlawfulness. This does not involve a questioning of the validity of the opinion on SID Designation.

c. The Board would observe, however, that these grounds are not a complaint that can be levied against the Board Decision and are properly made *contra* the legislative scheme itself.

The "Fair Procedures" Grounds

3. In respect of Grounds 8, 10, 11 and 15:-

a. The Applicant contends that the right to fair procedures is "triggered" by the "fact" or "perception" of predetermination. There is no such predetermination or prejudgment and thus the right, on the Applicant's own terms does not arise. Without prejudice to this, the Applicant's underlying supposition that the nature of the legislative scheme itself "triggers" a right to be heard (which itself is not evident in the legislative scheme) is not correct in law.

b. There is no right vested in the Appellant to be heard at the SID Designation stage. The legislative scheme is entirely clear and no such right is given. This contrasts with other areas of the PDA where clear participatory rights are granted including in relation to the substantive planning application. There is no requirement in the legislation, at all, for the Appellant to be afforded a right to be heard at this point. Further, there is no requirement in the concept of fair procedures, of natural and/or constitutional justice, or in any provision of European law that the Appellant be afforded this right, nor is there any requirement that a right be implied into the clear legislative scheme.

c. The EIA Directive does not require the carrying out of EIA during the SID Designation process. Transposition arguments are properly matters for the State Respondents.

d. The EIA Directive and the public participation provisions thereof do not apply to the SID Designation process nor do they require any particular right of participation during the SID Designation process. They apply only to the development consent process which was not in being until a planning application was made. The Board acted in no way in violation of the EIA Directive or the public participation provisions thereof.

4. The above is applied to Grounds 18-19 as the contents of those grounds are generic.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Brian Foley BL
Emily Egan SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

N/a

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? ☐ Yes ☑ No

If Yes, please give details below:

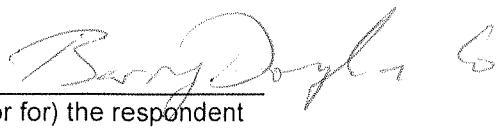
make a reference to the Court of Justice of the European Union? ☐ Yes ☑ No

If Yes, please give details below:

For the avoidance of any doubt, the Board opposed the Appellant / Applicant's request for a reference to the CJEU. Whereas certain matters arising at the High Court in this respect will not arise in the Supreme Court, the Board would re-state its position that no reference is necessary in these proceedings. Due to the absence of any requirement to state reasons for this the Board will reserve its position for submission should the need arise or will elaborate on such reasons as are possible to give at this point should the Court so require.

Will you request a priority hearing? ☐ Yes ☑ No

If Yes, please give reasons below:

Signed: 
(Solicitor for) the respondent
Barry Doyle and Company
Solicitors
23 Merchants Quay
Dublin, D08 C6XP

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.