AN CHÚIRT UACHTARACH
THE SUPREME COURT

S: AP: IE: 2025:000089

[2026] IESC 36

O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.

BETWEEN/

PAT O'DONNELL AND COMPANY

Applicant/Respondent

-and-

DUBLIN CITY COUNCIL

Respondent/Appellant

-and-

UNIPHAR GROUP PLC

Notice Party

JUDGMENT of Mr. Justice Hogan delivered on the 2nd day of July, 2026

1. I agree with the judgment which Woulfe J. has just delivered regarding the construction of s. 12(8)(b)(i) of the Planning and Development Act 2000 ("the 2000 Act"). As it happens, this sub-section has since been repealed with the commencement of the relevant provisions of the

Planning and Development Act 2024 with effect from 31st December 2025: see Planning and Development Act 2024 (Commencement) (No. 5) Order 2025 (SI No. 633 of 2025). The sub-section was nonetheless in force at the time when the rezoning motion (the validity of which is at issue in these proceedings) was adopted by Dublin City Council in November 2022. Nothing turns on this subsequent repeal of this sub-section so far as present appeal is concerned. I note this only for completeness.

2. This sub-section required the Chief Executive of the relevant planning authority (in this case, Dublin City Council) to list the persons who made submissions in respect of a proposal to effect a material change in the zoning of certain lands for the purposes of a draft development plan for the area. In a report concerning the Dublin City Development Plan 2022-2028, the Chief Executive did not list Pat O'Donnell and Company ("the applicant") as the entity which had made a submission in respect of the proposed material alteration to the zoning status of the lands. The statutory list instead listed the applicant's planning agent, "Doyle Kent Ltd.", who had prepared and made the submission on its behalf. In these judicial review proceedings the applicant has objected on that basis to the validity of the Council's subsequent decision to rezone the lands in question.

3. For all the reasons just given by Woulfe J., I think that the decision on the part of the Chief Executive to name the applicant's planning agent was an adequate compliance with the statutory listing requirement. Even, however, if it were not such an adequate compliance, any such error was so insubstantial or trivial such that it cannot be said that it has caused the applicant any material disadvantage or that the underlying purposes of s. 12(8)(b)(i) of the 2000 Act was not fully met. It was, after all, the applicant who had retained Doyle Kent Ltd. to act as its agent. For my part, I do not see how the applicant can be allowed to complain about a supposed non-compliance with what is essentially a notice requirement in respect of details of which it was fully aware. Nor, for all the reasons which Woulfe J. has just given, is there any prospect that any potential objectors might have been misled by reason of any such omission, even assuming that the applicant had the requisite *locus standi* to rely on the potential impact to hypothetical third parties as a ground for asserting the invalidity of the rezoning motion in the present case.

4. This, in any event, was simply an administrative notice requirement, designed simply to record for the purposes of good order the identity of those who had made submissions to the Council. It could not in any realistic sense be compared with the standard planning notices which have the different objective of informing the public about proposed planning applications and in respect of which stricter considerations may arise. In contrast to the latter type of notice requirement, it is hard to see how a supposed lack of compliance with the listing requirements of s. 12(8)(b)(i) could in itself have any direct bearing on the validity of the actual re-zoning motion which was subsequently adopted. In these circumstances I agree that the appeal against the High Court's decision to quash this re-zoning decision on this basis should be allowed.

<u>Non-compliance with statutory obligations</u>

5. The practical importance of this Court's case-law on the issue of non-compliance with statutory obligations cannot really be overstated. While this problem has been visible at least since the decision of the House of Lords in *Howard v. Boddington* (1877) 2 PD 203, the growth of the administrative state and the sheer complexity of modern legislation (especially in the area of planning and environmental protection) has meant that this issue has become an acute one. In a society such as ours where there are significant pressures on housing and infrastructure delivery, many view with some dismay the emergence of a trend whereby decisions of planning authorities (and sometimes other regulatory bodies) are set aside for non-compliance with prescriptive statutory requirements with apparently increasing frequency.

6. The roots of this problem lie deep in the history of legal systems. The ancients wrestled with a variation of this issue, most famously with Ulpian's discussion of the *de facto* judge in the first book of Justinian's Digests: see Dig.1.14.3. Here a runaway slave who was not a Roman citizen succeeded in having himself elected as a praetor. Was he nonetheless validly elected as a judge? And if not, in what circumstances should his verdicts be set aside? Ulpian appears to have thought that the better view was that these verdicts should be upheld in the public interest, as any other conclusion would affect the legitimate interests of third parties who had no reason to know of the supposed illegality. But he also noted that it would have been open to the Senate to confirm the appointment, even if they had been aware of the slave's status. This is perhaps the earliest example of where that which was prescribed by statute might have been held to be purely directory in the later *Howard v. Boddington* sense of that term. This remains a continuing problem for all modern legal systems, as highlighted by Professor Kevin Costello's illuminating article, "From Fawdry & Co. to Trump: the *de facto* officer doctrine in the twenty first century" [2025] *Public Law* 762.

7. This ancient dilemma finds its counterpart in modern administrative law systems where variants of this problem are everywhere to be seen. In what circumstances can an administrative decision be set aside where its underlying components do not fully (or, at least, adequately) comply with statutory requirements? If the prejudice to the public interest is insubstantial, can the invalidity be disregarded on some *de minimis* basis or perhaps because third parties had acted in good faith and changed their position in reliance on the assumed validity of that decision? But whereas Ulpian was addressing the problems caused by the fact that the straightforward requirement that the praetor had to be a Roman citizen had not been complied with, the modern administrative decision-maker faces a far more complex set of issues. As often as not, he or she has to contend with a forest of highly complex planning and environmental regulations, not all of which are perfectly consistent with each other: see, *e.g., Pembroke Road Association v. An Bord Pleanála* [2022] IESC 30, [2022] 2 ILRM 417.

8. Added to all of this is the generosity of modern *locus standi* and costs rules in the field of environmental litigation (often required or at least inspired by, the Aarhus Convention of 1998, i.e., the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters concluded at Aarhus on 25th June 1998). For Ulpian, Aarhus lay, so to speak, far north *in partibus infidelium* so that issues of this kind were obviously not confronted by him. Judged, however, from the range of contemporary case-law, it is nevertheless sometimes difficult to avoid the impression that while the Aarhus Convention has sought to pursue the noble objectives of access to justice and the protection of the environment, it has on occasion also incentivised environmental litigation where allegations of non-compliance with statutory requirements are often standard fare. This has, perhaps, sometimes led to environmental litigation of a kind that some may think has been prompted as much by opportunistic objectives as purely praiseworthy ones.

9. It must be recalled, however, that this problem is an inevitable by-product of the prescription by the Oireachtas of a set of rules which public bodies are required to obey prior to making administrative decisions. The obvious inference here is that compliance with these rules is, generally speaking, at least, a necessary pre-condition to the validity of that decision. The Oireachtas has been vested by Article 15.2.1º of the Constitution with exclusive power to make law. It is the body which is democratically elected by the people. By ensuring that administrative decisions comply with the requirements of that which has been prescribed by statute, the courts are doing no more than giving effect to that which the Oireachtas has (at least implicitly) proclaimed as essential to validity. In that respect, quashing for material non-compliance with that prescribed by statute may be seen as representing the enforcement of the rule of law and upholding the principles of legislative democracy reflected generally in Articles 5, 15 and 16 of the Constitution.

10. This is a problem which is perhaps systemic in the nature of legal rules. Even in micro or "closed" legal systems pertaining, for example, to the rules of sport, this problem is nonetheless evident. All of the great football codes (Gaelic football, Rugby Union and association football) have their own rules as to when a goal or a try has been scored, even though there are sometimes disputes as to the *application* of those rules. Yet it is clear that, for example, the referee has no discretion to award a goal where the ball has not actually crossed the line.

11. In those "closed" legal systems it is possible to prescribe strict and unbending rules as to formality and validity, precisely because the rule-maker does not have to have regard to matters extraneous to that legal system such as the rights of third parties or the wider public interest. The let rule in tennis was, for example, developed because it was recognised that where in the course of a serve the tennis ball clipped the net this could affect the spin, power and direction of the shot in an entirely random fashion, often to receiver's disadvantage. In the absence of the let rule a chance event could reward the random and the arbitrary at the expense of skill. Yet the let rule is mandatory in all circumstances, *irrespective* of whether the let was or was not to the receiver's disadvantage or whether it materially affected the flight of the tennis ball. Rule 22 of the International Tennis Federation's Rules of Tennis thus provides that "In the case of a service let, that particular service *shall not count*, and the server *shall serve again*." (emphasis supplied)

12. The position is otherwise in the case of "open" legal systems with rules governing the exercise of statutory powers. These rules form part of an attempt to regulate complex social and economic activity and to regulate public and private interests. If the courts were to insist on an unqualified and absolute rule of invalidity for want of formal non-compliance with statutory requirements in every case, this in turn would lead to the potentially arbitrary application of the law, often to the disadvantage of innocent third parties. The invalidity rules fashioned by the courts must accordingly reflect both the need to uphold the rule of law on the one hand and the importance of context in the application of statutory rules and powers on the other. Unlike "closed" legal systems they do not have the luxury of being able to prescribe simple and clear validity rules which are of universal application to all circumstances.

13. I think that the experience of the last 150 years of statutory interpretation since *Howard v. Boddington* has shown that there is no fully satisfactory solution to the problem of compliance with apparently prescriptive statutory standards which is presented in this and many other contemporary planning decisions. Admirable and influential though the judgment of Lord Penzance in *Howard v. Boddington* may well have been, judicial experience in the meantime has shown that the mandatory/directory distinction is an inadequate – or, at least, incomplete – formula for the resolution of this problem, at least so far as the typical modern regulatory statutory regime is concerned. In this respect I agree with all that Finnegan and O'Donnell JJ. said in respect of the mandatory/directory distinction in *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 IR 574.

14. Important as the judgments in *Gillen* undoubtedly are, I nonetheless consider that it is difficult to improve on the words of Henchy J. in *Monaghan UDC v. Alf-A-Bet Promotions Ltd.* [1980] ILRM 64. That was a case where a developer had sought planning permission such as would enable it to convert a clothing store into a betting office and an amusement arcade. The developer's statutory notice had merely stated, however, that "alterations and improvements" were in contemplation. This Court held that in view of the fact that planning permission could radically affect the rights and amenities of others, the non-compliance with the relevant planning regulations through the publication of a misleading notice of this kind was fatal to the grant of planning permission. Henchy J. stated ([1980] ILRM 64 at 69) that the courts should not countenance any deviation from that which had been deemed obligatory by the Oireachtas, save on an application of the *de minimis* principle:

> "What the legislature has prescribed…in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

15. He went on to observe ([1980] ILRM 64 at 69) that one of the primary purposes of the newspaper publication requirement would have been defeated in that case had the defective nature of the planning notice been excused:

> "[T]he notice does not, at least in fair and general terms, state the nature and extent of the proposed development. Whether the unilluminating words used in this case ('alterations and reconstruction') were chosen deliberately for their vagueness, or casually through inattention to the stated requirements of the regulations, they were so wanting in compliance with the spirit and purpose of the Act and the regulations that the published notice, and therefore the application, must be deemed to have been nullified."

16. I agree with Woulfe J. that this principle should continue to be the guiding one in cases of this kind. It is the one which best complies with the requirements of the rule of law and the objective of safeguarding democratic legitimacy to which I have already referred. In essence, therefore, non-compliance with the requirements of a statutory requirement may be excused if the underlying statutory objective is not compromised and where no material prejudice is thereby caused. In *Alf-A-Bet* the non-compliance was at odds with the statutory objectives and the potential for material prejudice to the rights of potential third party objectors was obvious.

17. Yet as Henchy J. recognised in *Alf-A-Bet*, any material non-compliance with that which the Oireachtas has prescribed should not lightly be excused. Any other conclusion would sit uneasily with the declared duty of each judge prescribed by Article 34.6.1º to "uphold the Constitution and the laws". As Woulfe J. himself said (at para. 47 of his judgment) in *Protect East Meath Ltd. v. Meath County Council* [2026] IESC 1:

> "If the position were otherwise, the capacity of the courts to ensure that statutory obligations imposed on public bodies such as local authorities were enforced would otherwise be significantly compromised. This would in turn compromise the rule of the law and the democratic identity of the State as reflected in constitutional provisions such as Article 5, Article 6, Article 15, Article 16 and Article 28A, since it would mean that which the Oireachtas had prescribed as mandatory in the public interest could not be enforced."

18. Of course, these statutory requirements do not, in general, at least, have to be adhered to with the same uncompromising and undeviating strictness as, for example, the "let" rule in tennis. As Henchy J. recognised in *Alf-A-Bet* and as Woulfe J. observes in his judgment, the principle of *de minimis* is also an important consideration. It cannot generally be supposed that the Oireachtas intended that administrative decisions should be invalidated on purely technical grounds which neither affect the integrity of the decision nor actually or potentially disadvantage third parties.

19. It must also be recalled that judicial review remains a discretionary remedy: as O'Donnell J. said in *Cullen v. Wicklow County Manager* [2010] IESC 49, [2011] 1 IR 152 at 161: "'…the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances' and, it might be added, at the right time" (quoting in part from Professor Wade in Lewis, *Judicial Remedies in Public Law* (London, 2004) at p. 187). Save possibly in the quite exceptional cases where the illegality is patent, an administrative decision remains valid unless and until it is set aside. In some respects, therefore, to describe such a decision as "void" is apt to mislead – even if the concept of a declaration of invalidity is a core part of classic administrative law thinking in common law countries. It would perhaps be more accurate to say that pronouncing such a decision to be void by reason of material non-compliance with prescriptive statutory requirements is a positive act taken by a court in order to invalidate the decision. It does this essentially in order to uphold the rule of law and the constitutionally prescribed democratic order.

20. In general, however, if the statutory requirements are considered to be too burdensome, then I agree with Woulfe J. that the solution lies in the repeal or amendment of the legislation in question. The Oireachtas should not look askance simply because the courts give effect to legislation which, after all, it has decided to enact in the public interest. As Collins J. observed in *Protect East Meath* (at para. 5 of his judgment): "Laws enacted by the Oireachtas must be given effect by the Executive (and by the courts) unless and until amended by the Oireachtas".

<u>Conclusions</u>

21. In summary, therefore, I agree with Woulfe J. regarding the construction of s. 12(8)(b)(i) of the 2000 Act and that the present appeal should be allowed for all the reasons he has just given. Even if (contrary to my own view), the listing of the applicant's planning agent was in some respects non-compliant with the requirements of this sub-section, the error was in the circumstances so technical or insubstantial that it may be excused on the standard *Alf-A-Bet* principles. It cannot be said that any such non-compliance could have prejudiced the applicant or that the purpose of this statutory rule has not been satisfied. This is quite different from *Alf-*

A-Bet itself where the non-compliance with the statutory requirements was plain and where such non-compliance could have significantly affected the rights of third parties.

22. In general, however, where there has been material non-compliance with a statutory provision which affects the integrity of that decision, then as the *Alf-A-Bet* principles show, it is the duty of the courts to give effect to those statutory provisions in order to uphold the rule of law and to give effect to the democratic principles which are at the heart of the constitutional order.