

[2023 IEHC 69]

**THE HIGH COURT
JUDICIAL REVIEW**

[2021 No. 958 JR]

BETWEEN

PROTECT EAST MEATH LIMITED

APPLICANT

AND

MEATH COUNTY COUNCIL

RESPONDENT

AND

**TRAILFORD LIMITED, SHANNON HOMES (DUNDALK) LIMITED, ROCKMILL LIMITED,
GLENVEAGH HOMES LIMITED, NEEMATS LIMITED and
J. MURPHY (DEVELOPMENTS) LIMITED**

NOTICE PARTIES

(II) (No. 2)

JUDGMENT of Humphreys J. delivered on the 17th day of February, 2023

“Reforms of planning legislation in 2010 introduced a new approach to justifying land use zoning objectives in local authority plans so that enough land is provided for future development but not so much that development becomes difficult to coordinate or undermines regeneration of existing, but under-occupied and run-down urban areas. These core strategy reforms have realised major benefits in a more evidence-based and strategic approach to planning.” [National Planning Framework, 2018, p. 137]

- 1.** This passage of official planning policy, while not in itself self-executing, nonetheless helpfully encapsulates one of the fundamental problems for the council here. By removing all of the phasings of residential zoning from relevant lands in the southern environs of Drogheda, the council has departed from a “strategic” (that is, a *plan-led*) approach to development, and has allowed the substitution in effect of a *developer-led* approach to development — in effect a building-site Darwinism whereby developers, not the council, will determine which of the zoned lands in the southern environs of Drogheda will actually absorb the provided allocation for housing.
- 2.** Indeed some of the developers concerned almost revel in the survival-of-the-fittest analogy, arguing that the over-zoning of lands to a greater level than that required for housing will promote

“competition” between developers. The race-to-the-finish-line outcome thereby envisaged under the current plan is that only the *first* 1,631 housing units that are consented will be provided, wherever those may be located, but not the *most appropriate* 1,631 units as viewed in objective planning terms.

3. This creates the very difficulty of coordination of development that the National Planning Framework warns against. Indeed it undermines such coordination because it eliminates any binding determination by the council of which among the zoned lands can be developed for housing during the life of the plan. The most that the council will be able to do under the plan is to propose priority areas, but that will only be a material consideration, not a legally effective requirement. The approach taken also undermines potential coordination as between Meath and Louth County Councils because it potentially creates a *fait accompli* prior to any potential agreement of a joint approach to the development of Drogheda overall – an issue in which Louth is the senior partner, viewing the matter in purely geographical terms.

Facts

4. Many of the relevant facts are outlined in Protect East Meath (II) (No. 1) [2022] IEHC 395, [2022] 7 JIC 0108 (Unreported, High Court, 1st July, 2022) but a few highlights may suffice here.

5. The previous County Development Plan was adopted in December 2012. On 19th May, 2014 Variation No. 2 was adopted. Section 3.3 noted that there was an excess of residential zoned lands in most of the towns and villages in Meath for which local area plans had been prepared. Table 5 set out in Variation No. 2 showed that 19.9 ha were required for residential use in the southern environs of Drogheda but 157.2 ha had been zoned for residential use, leading to an excess of 139.1 ha. Nine residential sites were given a rank within what was described as a Phase I zoning (including in three cases Phase I* zoning which applied to part of the site) meaning that such lands could benefit from A2 (new residential) zoning during the lifetime of the plan. The remainder of the lands were regarded as Phase II lands (that is, envisaged as having a new residential zoning after the lifetime of the plan, post-2019).

6. On 16th February, 2018 the government published the National Planning Framework, to which we have already referred.

7. On 28th June, 2019 the regional assembly adopted the Regional Spatial and Economic Strategy (RSES) 2019 to 2031. That envisaged a population for Drogheda of 50,000 by 2031. The RSES also included a regional policy objective RPO 4.11 which required the preparation of a joint urban area plan for Drogheda to be agreed between Meath and Louth County Councils.

8. The draft new Meath County Development Plan went on display in December, 2019. A number of submissions were made on the draft plan, including one by Louth County Council who stated that they “would have concerns with the quantum of lands zoned for residential use in this location, which appears to be significantly in excess of that required to meet the population in the plan period”. The Chief Executive reported on the submissions on 13th August, 2020. The material amendment process then took place and the applicant made a further submission *via* its solicitors on 28th June, 2021 seeking retention of the previous phasing. The Chief Executive’s report on the material amendments was issued on 12th August, 2021. The plan as amended was then adopted and came into effect on 3rd November, 2021.

Procedural history

9. The present proceedings challenging the development plan issued on 11th November, 2021. Leave was granted in the Judicial Review List on 15th November, 2021. On 24th January, 2022 the matter was entered in the Commercial List and then transferred to the Commercial Planning and Strategic Infrastructure Development List.

10. On 7th February, 2022, I fixed a hearing date of 20th May, 2022. On 14th February, 2022, the council applied to vacate that date and sought an alternative date in June 2022. On 21st June, 2022, when the matter was at hearing, I adjourned the *certiorari* challenge and allowed the applicant to notify relevant landowners of that challenge, which would become module II of the proceedings. Judgment was then reserved regarding a declaration regarding strategic environmental assessment, which had become module I of the proceedings. I gave judgment on that module in *Protect East Meath v. Meath County Council (II) (No. 1)* [2022] IEHC 395, [2022] 7 JIC 0108 (Unreported, High Court, 1st July, 2022), and dismissed the claim for relief in that regard.

11. To advance module II, notice was given to relevant landowners; in total, six such landowners were joined to the proceedings. They all filed written legal submissions and affidavits and I directed that the replying papers would be treated as statements of opposition so that they were not required to file such formal statements, as this would only delay matters further. Module II was then listed for hearing from 13th to 15th December, 2022. On Monday 19th December, 2022, I announced the order being made and indicated that I would give reasons later, which I now do.

Reliefs

12. The reliefs sought in the statement of grounds are as follows:

1. “An Order of Certiorari by way of application for judicial review quashing the decision of the Respondent, Meath County Council (the “Council”), on 22nd September 2021

to make and adopt the Meath County Development Plan 2022-2027 (the 'CDP') in relation to the zoning of lands for residential use in the Southern Environs of Drogheda.

2. A Declaration that the Council, in adopting the CDP failed to conduct a valid Strategic Environmental Assessment.
3. An Order that Section 50B of the Planning and Development Act 2000 as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and / or Article 9 of the Aarhus Convention apply to the present proceedings.
4. An Order for costs."

13. Various issues with the reliefs are noted in the No. 1 judgment. The present judgment is concerned with relief 1, *certiorari* of the development plan. While relief 1 is phrased in general terms, the applicant has clarified that it was only seeking relief in relation to the lands now zoned A2 in the southern environs of Drogheda. These fall into two categories. First of all, A2 lands that were previously A2 Phase II, and secondly, A2 lands that were previously A2 Phase I. The applicant also confirmed that its complaint in relation to lack of infrastructure assessment included an objection to economic uses (as opposed to purely residential uses) where such uses would be affected by that argument.

Materials before the court

14. Materials placed before the court by being uploaded to the ShareFile platform for this case included submissions, books of authorities and loose authorities, books of exhibits, books of pleadings, mapping material, original books for hearing and supplemental books for hearing, running to a combined record-breaking total in the list of 14,487 pages (exceeding the recent local record in *Concerned Residents of Treascon v. An Bord Pleanála* [2022] IEHC 700).

Issues

15. Essentially there were four issues to be addressed:

- (i) Whether the council acted unlawfully, either:
 - (a). by zoning significantly more land for housing in the southern environs of Drogheda than follows from an approach based on population, and/or
 - (b). by failing to comply with infrastructure assessment methodology.
- (ii) If so, whether relief should be used as a matter for discretion.
- (iii) An application to set aside the order made in module I.
- (iv) The form of the order in the event of unlawfulness being established.

Relevant core grounds

16. The basis of the claim for *certiorari* is summarised in core grounds 1 and 2, which are as follows:

1. "The Council erred in law in considering that removing the Residential Phase II designation for all A2 New Residential lands in the Southern Environs of Drogheda was not a change in zoning strategy and/or further misinterpreted the RSES for the Eastern and Midland Region and failed to act consistent with Section 4.3 of the RSES which requires either land prioritisation measure or de-zoning to address excess zoned lands during the life of the development plan and. It further failed to have regard to the Housing Supply Target Methodology for Development Planning Guidelines contrary to the Council's obligation pursuant section 28 of the Planning and Development Act 2000. The Council erred in law in failing to comply with its obligations pursuant to sections 10(1A), 12(11), 12(18) and 28 and/or contrary to the obligations contained in section 10(1) and 10(2)(a), 10(2)(b), 10(2)(d)(ii) of the Planning and Development Act 2000.
2. The decision to adopt the Meath County Development Plan 2021 to 2027 (the "CDP") ('the impugned decision') insofar as it relates to the zoning of lands in the Southern Environs of Drogheda is invalid as the Council failed to act consistent with NPO 72a, 72b, 72c of the National Planning Framework and the methodology contained in Appendix 3 thereof The Council thereby acted in breach of sections 10(1A), 12(11), 12(18) of the 2000 Act."

17. The law in relation to compliance with national and regional guidelines is set out in previous judgments, particularly *Killegland v. Meath County Council (No. 1)* [2022] IEHC 393, [2022] JIC 0106 (Unreported, High Court, 1st July, 2022). That discussion can be incorporated by reference here.

18. It might make more explanatory sense to start with core ground 2 and then return to core ground 1.

Core ground 2 – lack of infrastructure assessment and related issues

19. As outlined at para. 181 of *Killegland*, s. 10(1A) of the Planning and Development Act 2000 requires that the development plan includes a core strategy showing that the objectives of the plan are consistent as far as applicable with the NPF and the regional strategy. This is not a "have regard to" obligation – this is a "comply with" obligation. There is of course a qualifier, "as far as practicable", but that obviously is not a get-out-of-jail-free card to allow the national and regional strategy to be contravened where compliance is not in fact impracticable.

20. NPF national policy objective 72a requires that "Planning authorities will be required to apply a standardised, tiered approach to differentiate between i) zoned land that is serviced and ii) zoned land that is serviceable within the life of the plan."

21. In the present case it is clear from the Chief Executive's reports that both categories of land are involved, as it is expressly stated that "zoned" lands here are ones which either have access to infrastructure or are expected to have access to the necessary infrastructure during the lifetime of the draft plan.

22. As regards serviceable land, a report on the cost of delivery of the services is required (objective 72b): "When considering zoning lands for development purposes that require investment in service infrastructure, planning authorities will make a reasonable estimate of the full cost of delivery of the specified services and prepare a report, detailing the estimated cost at draft and final plan stages."

23. Non-serviceable land should not be zoned for development (objective 72c): "When considering zoning land for development purposes that cannot be serviced within the life of the relevant plan, such lands should not be zoned for development."

24. The standardised tiered approach referred to is set out in the NPF in appendix 3. That approach is not dependent on future guidelines and is therefore a currently operable obligation on planning authorities in the development plan context. This includes a requirement for an infrastructure assessment report. In relation to already serviced lands, Appendix 3 states: "Tier 1: Serviced Zoned Land This zoning comprises lands that are able to connect to existing development services, i.e. road and footpath access including public lighting, foul sewer drainage, surface water drainage and water supply, for which there is service capacity available, and can therefore accommodate new development. These lands will generally be positioned within the existing built-up footprint of a settlement or contiguous to existing developed lands. The location and geographical extent of such lands shall be determined by the planning authority at a settlement scale as an integral part of the plan-making process and shall include assessment of available development services. Inclusion in Tier 1 will generally require the lands to be within the footprint of or spatially sequential within the identified settlement."

25. Insofar as serviceable lands are concerned, Appendix 3 states: "Tier 2: Serviceable Zoned Land This zoning comprises lands that are not currently sufficiently serviced to support new development but have potential to become fully serviced within the life of the plan i.e. the lands are currently constrained due to the need to deliver some or all development services required to support

new development, i.e. road or footpath access including lighting, foul sewer drainage, surface water drainage, water supply and/or additional service capacity. These lands may be positioned within the existing built-up footprint of a settlement, or contiguous to existing developed lands or to tier 1 zoned lands, where required to fulfil the spatially sequential approach to the location of the new development within the identified settlement. The potential for delivery of the required services and/or capacity to support new development must be identified and specific details provided by the planning authority at the time of publication of both the draft and final development or area plan. This infrastructural assessment must be aligned with the approved infrastructural investment programme(s) of the relevant delivery agency(ies), for example, Irish Water, or be based on a written commitment by the relevant delivery agency to provide the identified infrastructure within a specified timescale (i.e. within the lifetime of the plan). The planning authority may also commit to the delivery of the required and identified infrastructure in its own infrastructural investment programme (i.e. Budgeted Capital Programme) in order to support certain lands for zoning. The written infrastructural assessment of the planning authority must: a) include a reasonable estimate of the full cost of delivery of the required infrastructure to the identified zoned lands; b) Set out (a) above at both the draft plan and final plan stages of the plan making process. Current development or area plans may include zoned lands that cannot be serviced during the life of a development or area plan by reference to the infrastructural assessment of the planning authority. This means that they cannot be categorised as either Tier 1 lands or Tier 2 lands per the above and therefore are not developable within the plan period. Such lands should not be zoned for development or included within a development plan core strategy for calculation purposes. Further guidance will be provided in updated Statutory Guidelines that will be issued under s.28 of the Planning & Development Act, 2000 (as amended)."

26. The Chief Executive's report of 13th August, 2020 states: "As noted in Section 3.5 of the Draft Plan, it is expected that the Updated Development Plan Guidelines being published by the Department will address the methodology for tiered zoning in more detail than that outlined as part of the National Planning Framework. Given the lack of guidance to date and the information that was available from infrastructure providers at the time of preparing the Draft Plan, it was not possible to outline a table such as that envisaged in the NPF. This approach is also consistent with the approach of other Local Authorities at this time. It should, however, be noted that c.319 hectares of land have been dezoned as part of the Draft Plan process and the decision on which lands to zone and dezone was influenced by the application of the principles of the tiered zoning approach. The

infrastructure provision and capacity of settlements is outlined in the accompanying SEA Report which provided the basis and structure for the settlement strategy. Meath County Council have only zoned lands which have either access to necessary infrastructure or are expected to have access to the necessary infrastructure during the lifetime of the Draft Plan. This was informed by consultations with infrastructure providers and it is considered that the table as required by NPO72a, NPO72b and NPO72c can be provided during the lifetime of this plan as part of any review that may be necessary once the Updated Development Plan Guidelines are issued by the Department of Planning, Housing and Local Government. The adoption of a tiered zoning approach will be further considered and incorporated into the drafting of the 15 Local Area Plans that are to be prepared as outlined in Section 3.4.5 of Vol. 1 of the Draft Plan. It should also be noted that a table in relation to infrastructure availability has been outlined as part of the SEA. In relation to prioritising of lands, Meath County Council has adopted the sequential approach to zoning, in combination with the zoning of extant permissions as well as the application of the principles of the tiered zoning approach as far as practicable. It should, however, be noted that as part of Rebuilding Ireland there is a strong expectancy of dwelling units being actually delivered and it is common for market pressures or land ownership issues to result in some sequentially preferable lands not coming forward for development ahead of other lands. In such a scenario the application of the sequential approach must be balanced consistently with the requirements of Rebuilding Ireland to deliver units, as well as the requirements of Section 95(1)(a) of Planning and Development Act 2000, as amended which notes that the Planning Authority is responsible for ensuring there is not a scarcity of land available for the delivery of housing. Also outlined in the submission is the Masterplan approach should not be used as a mechanism to address the sequential delivery of land across a settlement. Meath County Council agrees with this approach. The fundamental and beneficial value of masterplans is to ensure the coordinated delivery of strategic landbanks during the lifetime of the Development Plan. Finally, as noted above the quantum of lands zoned for new residential, existing residential as well as mixed use will be clearly outlined as part of the updated Table 2.11 and are consistent as far as practicable with the RSES and NPF.”

27. The excuses for not complying as far as practicable with the requirements of national policy are as follows:

- (i) "Given the lack of guidance to date" - however, as noted in the *Killegland No. 1* judgment, the appendix regarding methodology is not dependent on such guidance

and is immediately operable. The guidance will supplement, rather than commence, the provisions of Appendix 3

- (ii) "The information that was available from infrastructure providers at the time of preparing the draft loan" - the problem with that as an excuse is that the Chief Executive goes on to say that the council has only zoned lands which either have access to infrastructure or are expected to have access to the necessary infrastructure during the lifetime of the draft plan. That inherently involves a conclusion that the lands are serviced or serviceable, which completely contradicts the implied excuse that a conclusion in this regard could not be prepared because of information available from infrastructure providers. Clearly, sufficient information was available - otherwise the Chief Executive would not have been able to positively state that the lands would be serviced. However, appendix 3 of the NPF requires considerably more than just a bare conclusion. It requires a formal assessment report - which was not engaged in.
- (iii) The excuse is offered that the approach of not complying with infrastructure assessment methodology was consistent with the approach of other local authorities. But the cry of "everybody's doing it" is not a legal defence as such. Indeed such a proposition does not operate on the legal plane at all. For what it's worth, while some local authorities did indeed also fail to comply with the NPF, a number of local authorities did comply. Ultimately of course, the obligation, like any legal obligation, is an individual one, and the fact that other people might be in breach of legal requirements does not make the requirements any less applicable.
- (iv) It is said that the decision on which lands to zone and de-zone was influenced by the application of the principles of the tiered zoning approach. Again, that is all well and good but does not constitute compliance with the NPF. It is not up to the addressee of a legal obligation to extract some form of spirit of compliance which can be satisfied by acting in a way that is informed by the obligation. Compliance has an objective content.
- (v) The council states that the table required by the NPF can be provided during the lifetime of the plan as part of any review that may be necessary once the updated development plan guidelines are issued. I note in passing that it is not altogether clear that a review of the development plan is necessary following the updated

development plan guidelines (and indeed the council didn't suggest in submissions that this was actually going to happen), but even if it was, future good intentions do not answer the point that the methodology of adoption of the plan was not compliant as far as practicable with objectives set out in the national planning framework. Again the point is that the NPF procedures are there for a reason, namely to help shape the decision on zoning *before it is made*. That is self-evidently not satisfied by plunging ahead anyway and trying to address the state of infrastructure only after the zoning has been adopted. The decision has already been made at that point, and providing a "table" can't in itself change the zoning at that stage. Such an approach defeats the purpose of the national policy.

- (vi) The Chief Executive stated that the joint urban area plan would include a detailed infrastructure assessment consistent with Appendix 3 of the NPF. But the outcome of the infrastructure assessment report in the LAP context can only be a decision as to whether A2 lands will be regarded as strategic or non-strategic, for whatever that is worth – nothing mandatory in legal terms. But a *post hoc* assessment can't influence whether those lands are zoned A2 or something else, which is precisely what the NPF requires. The infrastructure assessment report is not a box-ticking exercise, it is a statutorily-required procedure *before adopting the zoning*. Not after the zoning is adopted, as part of a purely subsidiary procedure which cannot change that zoning. To do the assessment purely for LAP purposes after the zoning has been cemented in place in the development plan is obviously not what the NPF envisages. That really would be box-ticking in its most empty form.
- (vii) The report states that a table in relation to infrastructure availability has been outlined as part of the strategic environmental assessment. Again, that is all well and good but does not constitute compliance with the NPF.

28. The Chief Executive's report on the material amendments of August 2021 provides as follows: "MA Recommendation 1 – Tiered Approach to Zoning: In relation to the tiered zoning approach, Meath County Council addressed this matter in the Chief Executive Report response to the submission of the OPR (MHC5-816) on the Draft Plan. Meath County Council is fully committed to implementing national/regional planning policy, legislation and ministerial guidelines in local planning policy. As noted in the submission from the OPR, the Development Plan process and the legislative delays to the preparation of this plan have made it difficult to implement new policy or

guidelines that have been adopted during the plan preparation process. Meath County Council welcomes these comments. To demonstrate the commitment of the Local Authority to implementing the above planning policies and guidelines, it is recommended that modifications are made to Proposed Amendment Chapter 2.12 and Proposed Amendment Chapter 3.7 in line with the request of the OPR.”

29. In the second OPR submission, the OPR did not seem to be insisting on the infrastructure assessment report. That is as may be, but the OPR’s failure to enforce the legislation in this regard does not make the absence of an infrastructure assessment report lawful if it would not otherwise be so. Indeed, the OPR suggested that the infrastructure assessment report should inform the LAP process but that did not seem to acknowledge the problem that its use in such a context would be for a very different purpose and would come after, rather than before, the determination of the zoning. The fact that the OPR, having raised concerns, didn’t press the point doesn’t change the objective meaning of the legal obligation.

30. What we are left with then is a situation where no particularly valid reason has been offered for not complying with the policy objectives of the NPF, and we are certainly miles removed from a situation where such non-compliance has been shown to be justified by reference to the impracticability of doing so. Hence unfortunately the A2 zonings in the Southern environs of Drogheda were not adopted in compliance with s. 10(1A) of the 2000 Act. That does not automatically mean that all such zonings, even the pre-existing A2 Phase I zonings, must be quashed, having regard to the arguments raised under the discretionary heading to which I will turn later.

Core ground 1 – excess housing provision in the light of population projections

31. Section 10(2A)(f)(v) and (vi) require the inclusion of population projections for any given settlement within the core strategy. This implies that such population projections must inform the housing provision in respect of that settlement and implies that such provision should bear a reasonable relationship to the population provision for that settlement.

32. This principle is also reflected in regional objectives. The Eastern and Midland Regional Assembly RSES states as follows: “Settlement Strategy RPO 4.1: In preparing core strategies for development plans, local authorities shall determine the hierarchy of settlements in accordance with the hierarchy, guiding principles and typology of settlements in the RSES, within the population projections set out in the National Planning Framework to ensure that towns grow at a sustainable and appropriate level, by setting out a rationale for land proposed to be zoned for residential,

employment and mixed-use development across the Region. Core strategies shall also be developed having regard to the infill/brownfield targets set out in the National Planning Framework, National Policy Objectives 3a-3c.”

33. This implies that development plans must join up as part of a coherent whole with regional and national housing provision. The binding requirement that growth be sustainable and appropriate again implies that housing provision for any given settlement has to bear a reasonable relationship to the projected housing need for that settlement.

34. Regional objective RPO 4.11 provides: “A cross boundary statutory Joint Urban Area Plan (UAP) for the Regional Growth Centre of Drogheda shall be jointly prepared by Louth and Meath County Councils in collaboration with EMRA. The UAP will support, the development of Drogheda as an attractive, vibrant and highly accessible Regional Centre and economic driver. The Joint UAP will identify a functional urban area and plan boundary for the plan area and strategic housing and employment development areas and infrastructure investment requirements to promote greater coordination and sequential delivery of serviced lands for development.”

35. Page 64 of the RSES provides further detail: “Drogheda Joint Urban Area Plan (UAP): A cross boundary statutory Joint Urban Area Plan (UAP) for the Regional Growth Centre of Drogheda shall be jointly prepared by Louth and Meath County Councils in collaboration with EMRA. The UAP will support, the development of Drogheda as an attractive, vibrant and highly accessible Regional Centre and economic driver. The joint UAP will provide a coordinated planning framework to identify and deliver strategic sites and regeneration areas for the future physical, economic and social development of Drogheda to ensure it achieves targeted compact brownfield / infill growth of a minimum of 30% and ensure a coordinated approach is taken to the future growth and development of the town to ensure that it has the capacity to grow sustainably and secure investment as a Regional Growth Centre on the Dublin – Belfast Economic Corridor. The joint UAP will identify a functional urban area and plan boundary for the plan area and strategic housing and employment development areas and infrastructure investment requirements to promote greater coordination and sequential delivery of serviced lands for development. ... The joint UAP under agreement of both local authorities, is the appropriate mechanism to determine the functional urban area and plan boundary along with the distribution of population which should be generally in proportion to existing population levels in each local authority area. In tandem with the requirements outlined in the Implementation Roadmap for the National Planning Framework the joint UAP for the Regional Centre of Drogheda should endeavour to support and provide for the following:

- Provide for the sustainable, compact, sequential growth and urban regeneration in the town core by promoting the regeneration of underused, vacant or derelict town centre lands for residential development to facilitate population growth.
- Support the regeneration of the Westgate area of Drogheda's historic town centre to address vacancy and dereliction in the town core and as an alternative option to new development on greenfield sites.
- Facilitate the regeneration of lands at McBride Station to capitalise on existing and planned public transport infrastructure, including the DART Expansion Programme whilst avoiding development that detracts from the town centre.
- Provide for redevelopment or renewal of obsolete areas on lands at Mell / North Road.
- Support the sustainable development of existing zoned lands in the northern and southern environs of the town with a particular emphasis on the promotion of the IDA Business Park as a location for economic investment and the creation of compact, residential communities in key locations in proximity to established residential areas and transport hubs.
- Support the implementation of the Urban Design Framework Plan for the Heritage Quarter."

36. At p. 62 the RSES states: "Residential Development: Key to the success of Drogheda as a self-sustaining Regional Growth Centre is targeted compact growth through the renewal and regeneration of underused, vacant and/or derelict town centre lands for residential and commercial development facilitated through the joint UAP. The availability of vacant and derelict serviced sites for residential development within the town centre also allows for an opportunity to contribute towards place making. In this regard the regeneration of the Westgate Area, will attract more people to live in the town core. It is acknowledged that rapid phases of housing delivery in recent years requires the need to promote self-sustaining economic and employment-based development opportunities in the town to provide for employment growth for the existing population and to reverse commuting patterns. Job opportunities in the town will also help to combat social exclusion. The development of existing town centre brownfield and infill sites and the sustainable and co-ordinated development of zoned lands in the northern environs and southern environs of the town will be supported. The objective is to create compact mixed use employment and residential communities in key locations and in proximity to established residential areas and transport hubs while balancing growth north and south of the town centre."

37. It is envisaged that the proposed joint urban area plan between Meath and Louth County Councils will be a set of two local area plans prepared by co-operation under s. 18(2) of the 2000

Act. Of importance is the requirement that any local area plan be consistent with the objectives of the development plan (s.19(2)(a)). The parties in this case were agreed that this meant that the local area plan could not change the zoning set out in the development plan.

38. It is clear from the NPF p. 136 that joint urban area plans will be adopted “utilising current Local Area Plan (LAP) legislation”. There appears to be a suggestion that there is going to be legislative provision for such joint plans, but in the absence of such provision the LAP mechanism is going to be availed of. National policy objective NPO70 seems to envisage future legislation but this has yet to materialise. It reads as follows: “Provision will be made for urban area plans, based on current local area plan provisions, and joint urban area plans and local area plans will be prepared where a town and environs lie within the combined functional area of more than one local authority.”

39. Where the RSES refers to “existing zoned lands in the northern and southern environs of the town”, it seems to me that the natural meaning of that is “existing as of the time of the adoption of the RSES”. In that regard it must be emphasised (see the *Protect East Meath (No. 1)* judgment and *Highlands Residents v. An Bord Pleanála* [2020] IEHC 622 (Unreported, High Court, McDonald J., 2nd December, 2020)) that A2 Phase II lands were not existing “zoned” lands at that time.

40. One notable thing about the proposed agreement with Louth County Council is that the RSES is now over three-and-a-half years old and it is hard to see any very visible progress on agreeing an approach to the development of Drogheda in general, or its southern environs in particular. While an issues paper regarding the LAP is hotly anticipated later this year, the only visible developments (namely the rezoning of large tracts of land by Meath County Council) have a rather unilateral feel.

41. Nor is it particularly clear what the joint urban area plan is going to achieve in terms of binding outcomes. The intention seems to be to identify strategic housing development areas which can be lands where particular focus may be given to delivery of services and permitting residential developments. The meaning of the proposed strategic areas is quite nebulous. There is nothing stopping a housing application in a non-strategic area. The Council argued only that the nature of the area would be a “material consideration”. That does not seem to amount to a particularly mandatory requirement. And if that’s the extent of it, the council can be as focused as it likes, but none of that changes the zoning which is entrenched in the A2 objective: “A2 New Residential Objective: To provide for new residential communities with ancillary community facilities, neighbourhood facilities ... as considered appropriate.” On appeal to the board, material contravention of any envisaged strategic prioritisation would be very much on the table given that both the strategic and non-strategic lands would fall within the overall A2 zoning. When viewed

through the prism of the board's substantial powers to materially contravene plans (see *Heather Hill v. An Bord Pleanála* [2019] IEHC 450 (Unreported, High Court, Simons J., 21st June, 2019)), the excess zoning isn't quite as harmless as the council is suggesting here.

42. All of the above gives rise to a series of difficulties for the council. As correctly pleaded in sub-ground 6, the council erred by implication stating that any "amendments" to the land use zoning strategy for the southern environs of Drogheda would be "premature" pending the preparation of the joint plan. This implies that removal of A2 Phase II zoning and replacement with A2 *simpliciter* is not an amendment. But it *is* an amendment for the simple reason that A2 Phase II wasn't actually operative prior to the previous plan – as held in *Highland Residents v. An Bord Pleanála* and followed in the No. 1 judgment. In formal terms that could be viewed as an error of fact or law or both, or as the council misdirecting itself as to the meaning and effect of the 2000 Act.

43. More fundamentally, as pleaded in core ground 1, the basic problem for the council is the mandatory statutory requirement in s. 10(1A) of the 2000 Act which has the effect that the core strategy must be consistent as far as practicable with the objectives of the RSES, to which I have referred, and a disregard of the necessary relationship between housing provision and the population requirement that is implied by s. 10(2A). That non-compliance has been demonstrated notwithstanding that the effect will not necessarily be the immediate over-provision of housing in the southern environs of Drogheda (although that may well happen because the board will have been enabled to allow material contraventions to that effect, which it could not have done under the previous zoning), but rather a foot-race between developers to get applications consented. Ultimately the problem is that developer-led development has been substituted for plan-led development. And once the land is zoned A2, the board is free to authorise material contravention of the quantum of housing, so there is a potential for the council's limit to be exceeded.

44. As put by the applicant, "by recklessly removing the phasing from all land in the Southern Environs of Drogheda, the Council has facilitated a developer led rather than plan led approach. This is the very opposite of proper planning and sustainable development by creating a free for all for developers" (see *Dublin City Council v. An Bord Pleanála* [2020] IEHC 557, [2021] 1 JIC 2801 (Unreported, High Court, 28th January, 2021) at para. 38).

45. For good measure it seems to me the council's position in this case conflicts sharply with its strong, persuasive and successful submissions in *Killegland v. Meath County Council (No. 1)*, *McGarrell Reilly v. Meath County Council* [2022] IEHC 394 and *Killegland v. Meath County Council (No. 2)* [2022] IEHC 683, [2022] 12 JIC 0901 (Unreported, High Court, 9th December, 2022). In

those proceedings the council was keen to stress the joined-up hierarchical nature of housing allocation, and how each piece of land had to fit into an overall envelope of housing provision. Here such a logic has been to some extent side-lined if not disregarded, vastly more land rezoned for housing than is needed, developers left to fight it out amongst themselves to see who can get projects consented first, and the spectre of the board is left hovering in the background with the legal power to open the flood-gates even further than the council is prepared to do, now that the zoning has been changed. Consistency has to enter into the picture at some stage.

46. So far as the “as far as practicable” rider is concerned, it has not been demonstrated that compliance with regional policy objectives in this respect was even difficult let alone impracticable. Not only that, but since compliance could be achieved simply by a mathematic exercise and a prioritisation of lands along the lines expressly articulated in the previous development plan, it is evident on the facts that there is no impracticability involved at all.

47. More broadly, the departure from the necessary relationship with population provision could, if generalised, severely undermine the overall approach to plan-led development nationwide. Immanuel Kant’s categorical imperative applies here. If *this* council is entitled to rezone a multiple of the land that is required by a population projection, then generalising that approach across all local authorities and the State as a whole would be entirely destructive of the careful hierarchy of population assessment and provision that informs the national approach to planning and development.

48. Arguments about alleged pent-up demand, the need for provision of housing, alleged hoarding of zoned land, alleged land-banking, and the alleged need for competition between developers, are all well and good at the level of policy debate. But planning law is not something that is up for renegotiation in any given case on the basis of policy arguments. The careful system of population assessment and provision on a hierarchical basis was not invented by either the council or the court. It’s there in black and white in statute law and in regional policy, policy with the objectives of which the council is obliged, subject to practicability, by express provision of statute law to comply (not “have regard to” – *comply*).

49. That said, the need for a reasonable relationship with population projections doesn’t mean that there could not be any modest additional margin over and above the projection to allow for friction in implementation, but that has to be reasonably related to the projection and rationally considered by the statutory decision-maker rather than handed over to developers to sort out. The question of which sites are more appropriate, which sites are less likely to be developed, and which

ones should be prioritised during the life of the given land is all something capable of being rationally considered by a local authority having regard to the factual situation on the ground in any given area, considered on a plot-by-plot basis, so that an informed, strategic, planned assessment can be made as to what sites are the most appropriate to be included in currently operable residential zoning in order to deliver the required level of housing provision. All of that can be done while still maintaining a reasonable relationship between population requirements and the quantum of land zoned for housing. All of that was done by the council in the variation of the previous development plan, and similar exercises must have been undertaken elsewhere.

50. Thankfully I don't have to define here exactly how much of an excess margin would cease to bear a reasonable relationship to population. All I need say is that a multiple of the required provision, as here, falls outside that reasonable relationship. One of the distinct advantages of the common law system is that a court doesn't always have to decide exactly where a line should be drawn, but only on what side of the line the particular case at hand falls. For example, when a court says that something must be done within a reasonable time, it doesn't have to commit itself to defining exactly what constitutes a reasonable time in mathematical terms, to the nearest nanosecond. Any attempt to do so can lend itself to the spurious schoolboy objection that the court is engaging in judicial legislation, or fallacious counter-arguments which are essentially different versions of the "paradox of the heap". Since a heap of sand is still a heap if you remove one grain, it's relatively easy to reduce such a definition to absurdity if you remove enough grains, as long as you do it one at a time. Yet the equation remains stubbornly valid. Similarly, any attempt to quantify what is "reasonable" is open to plausible-sounding objections that surely a day added, in the case of a reasonable time, or a unit added, in the case of a requirement for a reasonable relationship between units of housing and population, couldn't make any difference. The basic point is that such objections are essentially bogus. One can postulate a line without necessarily deciding in advance where it is to be drawn in every case, as long as one can decide individual cases on a case-by-case basis – that is the common law method. To proceed in this manner is not judicial legislation – to assert that is to fall into a misunderstanding of the very concept of "legislation". The common law method is the application of a general concept to differing facts over time in such a way that a rule emerges organically, not legislatively. But a court doesn't have to lay down an absolutely rigid line in this respect, or indeed any line. All I need to do is to determine the present case; and it seems to me that there simply is no acceptable relationship here between the population projection and the quantum of land zoned. Again, one has to make the point that if multiples of the

required housing provision are acceptable for one local authority, they will be acceptable for all local authorities. That would be destructive of the principle which is contained in and sought to be upheld by the legislation and the relevant regional strategy here.

Defences and Discretion

51. The applicant's points of challenge as set out above are standard judicial review questions of legality and *vires*. It is a misunderstanding for opposing parties to characterise these as merits-based issues, still less as "transparently" merits-based, as submitted by one of the developers. Words simply lose all meaning if one goes down that route.

52. A range issues were raised by opposing parties which are probably most conveniently dealt with under the heading of discretion, but a number of those points could also be viewed as substantive defences. For the avoidance of doubt, I have also considered such points as defences. With the exception of the issue of the inconsistency of the relief sought with the applicant's actual submission to the council, I do not consider them as valid, either considered as defences or as grounds for the exercise of discretion. The below should, therefore, be read as having been incorporated by reference in the above discussion regarding core grounds 1 and 2, insofar as it relates to points that could be regarded as substantive defences.

53. The law on discretion has been clarified recently by Murray J. in *Independent Newspapers (Ireland) Ltd v. I.A.* [2020] IECA 19, [2021] 1 I.R. 384. The opposing parties here came forward with a record-breaking seventeen headings under which it is suggested that discretion should be exercised against the applicant and I will endeavour to deal with these below.

The court should be slow to allow a challenge to a development plan

54. The opposing parties have a fair point that a court should be slow to interfere with the democratic decision of local elected representatives when making a quasi-political collective decision such as the adoption of a development plan: see *Malahide Community Council Ltd v. Fingal County Council* [1997] 3 I.R. 383, 1998 WJSC-SC 10165 and *Killegland (No. 1)*. But I think it is important to distinguish between different kinds of decision in a development plan context. If members are presented with two possible land use objectives for a particular piece of land and make a decision that one set of uses is more appropriate than another, then it is reasonable for a court to regard that as a merits-based decision in relation to which members have a fair degree of discretion. However, that is not the type of situation at issue here, for two reasons. Firstly, the applicant is not trying to undermine the quantum of housing provision actually envisaged in the core strategy. It is seeking to establish consistency between the housing provision envisaged by the core strategy and

the actual zonings. Secondly, the applicant is not attacking the merits of the zoning as such but rather the compliance with the principles of assessment of infrastructure and of relationship to population which arise from the legislation, the NPF and the RSES taken together.

The alleged theoretical nature of the problem

55. It is submitted that the fact that there may be a possibility of the situation giving rise to problems does not mean that there will actually be more applications than the 1,631 limit. However, that is a misunderstanding of the legal situation. The problem is not theoretical – it is immediate. The effect of over-zoning lands is not just that there might be more applications than the 1,631 unit limit, but that the decision on sequencing is handed from the council to developers from the day the development plan came into operation. It doesn't take more than 1,631 unit applications for that problem to impact. That happens from the date of the first application, because at that point one can't be sure that the application would have been part of a tranche of 1,631 selected on the basis of an objective priority as opposed to a first-come-first-served approach.

The difficulty of quashing a document in part

56. The point is made that significant problems may be caused by quashing a given document in part. That can arise in certain situations, but a court has to have the flexibility and jurisdiction to fashion the appropriate remedy in order to uphold the statutory scheme. The power to quash a document in part is recognised in administrative law and, indeed, in the 2000 Act itself, so it is not insuperably problematic. Difficulties can be avoided by being specific as to what exactly is being quashed, and by ensuring that what remains is fully operable.

Prejudice to the opposing parties by reason of the mutating nature of the claim

57. The council contended that it had been prejudiced by the evolving and mutating nature of the points being made by the applicant, and suggested that pinning down the applicant's actual demands replicated the process of "trying to pick up mercury with a fork" (David Lloyd George on Éamon de Valera, as quoted in M.J. MacManus *Eamon de Valera* (Dublin, Talbot Press, 1944)). Having heard the case I do sympathise with the council on that. The applicant's pleadings are certainly sub-optimal in various respects. Ultimately, the council submitted that the applicant should be limited to the order of *certiorari* as sought in para. D1 of the statement of grounds and I tend to agree with that. I have, accordingly, framed the final order envisaged on the basis of the relief claimed. That does not preclude the court from cutting down that relief by specifying specific elements of the plan that should be made subject to *certiorari* and I propose to do that as set out later in the judgment.

Lack of particularity of relief sought

58. Similarly, considerable complaint is made that the applicant's pleadings lack specificity; but, similarly, I think that this can be addressed by the terms of the order sought. It seems to me that core grounds 1 and 2 are acceptably clear as to the point being made and the question of relief will simply be the appropriate subset of what is claimed in relief D1.

Consistency with *Killegland*

59. It is submitted that core ground 2 on infrastructure assessment overlaps with *Killegland* and, thus, consistency requires a rejection of this point. However, that is a misunderstanding of *Killegland*. The distinction with that case is that the lands there were not "zoned" lands. Therefore the infrastructure assessment obligations did not apply. The opposite is the case here. These lands are "zoned" lands so the obligation *does* apply. For this reason the present decision is consistent with *Killegland*. Reinforcing that, the Chief Executive expressly states here that the lands are serviceable within the lifetime of the plan, which implies that coming to such a conclusion is practicable (indeed it actually occurred).

Lack of notice to affected parties and delay in such notice

60. When the issue of notifying landowners came up in module I, I certainly gave consideration to dismissing the proceedings on the grounds of failure to notify the appropriate parties. However, the council did not take up that option and, indeed, for good measure, made a comment which I understood as being to the effect that such an approach might not achieve certainty in the event that an appellate court were to think that the applicant should have been given a lifeline by being permitted to give belated notice. That was a perfectly legitimate forensic judgment on the part of the council and probably the correct one. It is certainly not for me to demand that any given party press its advantage on any given issue. Given that the council balked at the possibility of dismissing the case at that point, it does not seem to make much sense to dismiss it at this point, now that the service of the notice parties has actually been carried out. As far as the belated nature of the notice is concerned, the assertions of prejudice are somewhat vague. While it is *possible* that some costs might have been avoided on behalf of the developers if they had earlier notice, it has not been averred to unequivocally that any *specific* costs would have been avoided. It is equally possible that developers who were preparing planning applications would have continued to prepare them. For good measure, the applicant's challenge was a matter of public record. Delay in giving formal notice, particularly to a potential notice party only, is not automatically fatal and is certainly not fatal here:

see *Cala Homes (South) Ltd v. Chichester District Council* [2000] CP Rep 28, (2000) 79 P & CR 430, [1999] 4 PLR 77.

Failure to make the point in the process

61. Insofar as concerns the lack of an infrastructure assessment report, the applicant is accused of “playing possum” by not making a submission to the council to the effect that an infrastructure assessment report was required. I would reject that objection here for similar reasons to my rejection of the same point in *McGarrell Reilly* at para. 14. The statutory obligations of the council are autonomous requirements which have to be applied whether anyone asks for that or not. Hence the applicant’s failure to make that point can’t be disqualifying.

Prejudice to developers

62. A range of submissions are made as to the prejudice being inflicted on developers by the quashing of A2 zoning. I think that here we need to draw a distinction between A2 zoning that was previously immediately effective (that is A2 Phase I) and A2 zoning that is only effective now (in other words, that was previously A2 Phase II, post-2019). If I were otherwise minded to quash the A2 zoning that was previously A2 Phase I, then questions of reliance interests might loom somewhat larger. However, for reasons that will become apparent, I am not proposing to grant relief in that respect, but only in respect of the newly de-phased A2 (former Phase II) lands. In relation to those lands, the change is new and has come with the current development plan. The applicant has challenged that new development plan within time, even acknowledging that it took a while for the developers to be formally put on notice. Under those circumstances, a claim of prejudice is hollow and boot-strapping.

63. In the absence of some unconscionable breach of a reliance interest, it is not legally cognisable prejudice to deprive someone of a benefit that was unlawfully conferred in the first place. To that extent the developers’ claim of prejudice literally begs the question. There is no unconscionable displacement of any reliance interest here, and no vested rights in the form of a final settled planning decision. Yes, of course the applicant’s claim cuts across developer-led proposals for particular developments - but that is the whole problem. That would be a totally circular basis for refusal of relief.

64. There is no evidence that lands were specifically purchased on foot of the change in zoning between the commencement of the new development plan and the initiation (or even notification) of the proceedings. As regards the planning applications in the pipeline or before the board, they can be dealt with by a stay pending the final determination of the proceedings.

65. Overall however, prejudice even if it had been established, would only be one dimension of the issue. The objective interest of environmental protection is paramount, and, subject to a breach of ECHR or other rights being clearly established, the mere “speculative risk” of purchasing ostensibly zoned land in the anticipation of a possible planning benefit doesn’t automatically give rise to a legal complaint (see *Pine Valley Developments Ltd. v. Minister for the Environment* [1987] I.R. 23, [1987] I.L.R.M. 747, *Mahon v. An Bord Pleanála* [2010] IEHC 495 (Unreported, High Court, Dunne J., 21st December, 2010)). Any given developer doesn’t have a right to a particular zoning or to maintenance of a particular zoning, and any anticipation of a benefit created by a new development plan can’t logically be a reason to defeat a challenge that is brought to that plan within time. Even if there was a legally cognisable legitimate expectation, that would have to be subject to the overriding public and community interest in proper planning and sustainable development and environmental protection generally.

66. Overall, the developers’ objections which ranged from severe prejudice up to “potentially catastrophic” implications, are over-cooked. All the council has to do in response to the present judgment is to lawfully decide on which new A2 lands should be developed in the lifetime of the plan, having regard to the population projection and in a manner that retains a reasonable relationship with that projection and that complies with the requirements of infrastructure assessment. That can be done by variation and presumably can be done within a manageable timescale. The variation process can consider the various parcels of land in the area individually to determine which should be earmarked for housing during the plan having regard to all relevant factors. Any prejudice to developers can be dealt with by a stay on their planning applications and any related appeals pending the final determination of the proceedings. If the variation route is taken, that might obviate much of the issue anyway, depending on how it is approached.

Prejudice to persons seeking housing in County Meath

67. It was suggested that the grant of relief would constitute prejudice to “the people of Drogheda and its hinterlands” given the need for residential accommodation. That unfortunately is an oversimplistic view of the public interest. The public interest in housing is one factor certainly, but it is not a public interest in housing at all costs. Rather it is a public interest in housing insofar as it constitutes proper planning and sustainable development. There is also a public interest in the implementation of statutory requirements, in the maintenance of a plan-led approach to development rather than a developer-led approach to development, and in the protection of the environment. The problem here can be remedied by the council in conducting a reasoned

identification of which sites should be added to the A2 pile to meet the target of 1,631 units in the core strategy, possibly plus a modest excess to allow for friction, bearing in mind the need for compliance as far as practicable with infrastructure assessment requirements. That is not an unduly difficult exercise to carry out by variation. The grant of relief creates nothing more than a temporary requirement for due process in this regard. It does not summon up a fundamental bar or permanent blockage to the provision of such housing. The issue is “temporary” for the simple reason that it disappears once a variation is adopted following compliance with the statutory requirements discussed above.

The effect on other proceedings

68. It is submitted that there are other proceedings in being, particularly *Protect East Meath v. An Bord Pleanála* [2022 No. 52 JR], which could be affected by an order in the present case and indeed possibly rendered futile. That again can be dealt with relatively easily in the first instance by listing those proceedings following this judgment and considering whether to pause them until the final determination of the present proceedings.

Lack of practical value of a remedy in the context of the proposed joint urban area plan

69. It is submitted that *certiorari* would not be of practical value because of the stated intention to make a joint urban area plan with Louth County Council. However, as the applicant correctly points out, incorporating infrastructure assessment in the joint urban area plan process would be a “pointless exercise”, because the purpose of the infrastructure assessment is not to tick a box but to inform the decision on zoning. Even if the joint plan could change the zoning, which it can’t, the best intentions of the council to advance the plan within the next year or less have to be weighed against the lack of any visible evidence of progress on the plan in the three-and-half years since the RSES. In such circumstances, no inference could reasonably be drawn that this plan is a top priority that has been proceeding at pace and that is going to be finalised, adopted, and come into effect any time soon; but even if it could be, that wouldn’t answer the problem. In addition, allowing the plan to stand pending the adoption of the plan will create a *fait accompli* based on developer-led decisions which, as the applicant submits, is the antithesis of plan-led development. *Certiorari* clearly has substantial practical value here by preventing the free-for-all from coming into operation and by allowing the decision on how to develop the southern environs of Drogheda to be made in a coherent plan-led manner by the council, rather than by the outcome of a struggle of all against all.

Failure of the applicant to seek a stay

70. The council essentially made the point that the applicants cannot have been that serious about the problem or the potential *fait accompli* because they never sought a stay on the plan. It is true that a court would have to be slow to stay a development plan, but a more realistic option would have been to stay the planning process insofar as that would be affected by the impugned zoning. That would certainly be a viable order that a court could consider (see *Killegland No. 1*) and the applicant could have asked for that type of stay. Its response to this objection was that this wasn't necessary because no planning permissions had been granted on foot of the amended zoning. Maybe that's a weighty excuse, or maybe it isn't, but either way the fact that the applicant did not seek a stay could not in and of itself disentitle it from relief to which it might otherwise be entitled.

***Certiorari* would cut across the SEA process**

71. It was submitted that *certiorari* of a plan that was subject to SEA could cause complications and possibly even give rise to a suggestion of breach of the SEA directive 2001/42/EC.

72. That is a far-fetched interpretation. Review of the legality of a plan is a very different matter in law from adopting a plan. Review of legality does not of itself require SEA as a matter of EU law. If, however, the review gives rise to a need for a variation or the adoption of some other measure by the council, then SEA can be addressed in that context.

***Certiorari* would create a vacuum whereby land would be unzoned**

73. It was submitted that the grant of *certiorari* would lead to a situation where certain lands were lacking in zoning thereby creating a "pall of uncertainty", if not "an absurd situation". That argument seemed to be premised on the false proposition that *certiorari* would quash the entire development plan. That was never going to be a runner. Even the SEA point was only pleaded as a basis for declaratory relief rather than *certiorari*. The order of *certiorari* will be narrowly focused to specifically identified land and, in relation to that land, only for specifically identified purposes. That logically does not affect zoning objectives that do not involve residential development or economic activity which would have required an infrastructure assessment report. All other objectives remain un-quashed.

***Certiorari* would preclude the completion of strategic housing development applications**

74. It is submitted that an order of *certiorari* would preclude the completion of the strategic housing development process on lands affected by that order. That may well be so, but unfortunately so be it. That is a necessary consequence of giving effect to the statutory requirements. There is no rule to the effect that the enforcement of law has to be nullified because it might result in the refusal of a planning permission.

Inconsistency with the applicant’s submission to the council at the material amendment stage

75. The applicant submitted the following to the council on 28th June, 2021 at the material amendment stage: “As identified in the attached expert report, there is no need to abandon the Phase II zoning qualification that is currently in place, given that there is more than adequate Phase I land available in the short to medium term while the UAP is being prepared. [The applicant] therefore urges the Planning Authority to maintain the Present Phase I and Phase II qualifications in the residential zoning until the UAP is adopted.”

76. This, in effect, is a request to the council to retain the existing A2 Phase I zonings. Under such circumstances it seems to me that it is simply not open to such an applicant to now seek an order quashing those very zonings. Admittedly part of the logic of quashing the former A2 Phase II zonings, namely the lack of infrastructure assessment, would otherwise have applied to the former A2 Phase I zonings. Nonetheless it cannot be appropriate to grant relief to *this applicant* in relation to such lands, because it argued to the decision-maker that such zoning should remain.

77. As noted in passing in *Clifford and O’Connor v. An Bord Pleanála*, [2022] IEHC 474, [2022] 8 JIC 1502 (Unreported, High Court, 15th August, 2022), an applicant who makes a particular proposal to a decision-maker owns that concept and cannot seek judicial review of an aspect of a decision that accepts that proposal. Whether one regards this as lack of standing, a preclusion from making the point, a substantive defence, a matter of discretion or some combination of these does not really matter.

Relief 2

78. As noted above, I have already dismissed relief 2, namely a declaration that there had been a lack of a valid SEA process, at the conclusion of module I. However, two problems with this subsequently emerged. Firstly, the applicant claimed to have been taken by surprise by the perfection of the order during the Long Vacation in August 2022, and wanted the order set aside and re-made so that it could appeal. Secondly, while I relied on the Court of Appeal judgment in *Friends of the Irish Environment v. Government of Ireland* [2021] IECA 317 (Unreported, Court of Appeal, Costello J. (Haughton and Murray JJ. concurring), 26th November, 2021), and while the applicant’s written submission did mention in passing that the Supreme Court had accepted an appeal, none of the parties sought modularisation or indeed referred in any way at the oral hearing to the qualified status of the Court of Appeal judgment. In hindsight, the more appropriate thing to do would have been to modularise that aspect so that matters currently before the Supreme Court

would not have been decided. Left to my own devices, once this problem came to my attention I would have vacated the order to that extent and adjourned the point pending the Supreme Court decision (which will come after a reference to the CJEU). But the parties in fact agreed that the order could be vacated *in toto* and then remade as was, essentially to allow the applicant to appeal insofar as that was an option that it wished to preserve. That unfortunately rather passes the problem along to the appellate courts unsolved, but I am going to reluctantly acquiesce to an approach that the parties have coalesced around as an acceptable compromise. The general principle is that consent of the parties in an adversarial system allows the court to make orders it might not otherwise be minded to make, and that such consent should only be disregarded for very compelling reasons (such as the consent being incomplete by reason of a failure to join a party to the proceedings whose participation would have been necessary or appropriate, to take a clear example). For future reference however it seems to me to be implicit in the Supreme Court determination in *Clifford v. An Bord Pleanála* [2022] IESCDET 13, at para. 14, that appeals in relation to a modular trial should be brought at the same time. The logic of that is that the substantive order for a particular module should not be perfected prior to the completion of the final module so that all matters can be appealed together, if appeal there be. That didn't happen here, but much like the way that the appeal in the *Friends of the Irish Environment* case was not factored in, that wasn't as a result of any particular grand design by anybody.

Form of the order

79. While the applicant was primarily focused on quashing the maps rather than the body of the development plan, it would be illogical, confusing, and inappropriate to only quash some of the problematic references and leave others *in situ*. Generally, I would approach the question on the basis that the extent of *certiorari* should be the minimum surgery necessary to remove the problem without also leaving a contradiction in the text that remains. If I were to merely quash the new A2 zoning in the maps, that would leave a contradiction in the body of the plan, so it seems to me the textual references also need to be addressed by the order. I don't think that a declaration would meet the needs of the situation because it would leave the problem unaddressed in practice, unless it was also accompanied by a stay pending any lawful variation. But there is no functional difference between a declaration plus a stay pending variation on the one hand, and *certiorari* plus confirmation that this does not prejudice a lawful variation on the other. Given that choice, *certiorari* is clearly preferable a remedy. Finally, since the final perfection of the order of *certiorari* will have to be postponed pending any discussion of possible consequential orders, in order to avoid what was

referred to at the hearing as an “interregnum” situation, it is appropriate and necessary to have a temporary stay pending that being finalised. In order to minimise prejudice to developers, this should also stay the planning process so that their existing efforts are preserved, pending finalisation of the proceedings depending on whether they go any further. The board will also have to be informed of such orders.

Order

80. Before concluding, it is worth emphasising that while the middle-distance observer of planning law might come to the table with an assumption that everything is a matter of planning judgement to be assessed in terms of reasonableness alone, that is not the case. We only get to planning judgement after we surmount any applicable legal requirements; and while such requirements may have been thin on the ground in the past, they have mounted up in recent years, primarily driven by EU law but also by domestic statutory provision, regulations, and other instruments with statutory backing.

81. Here there are hard-edged binding obligations. Section 10(1A) of the 2000 Act says that the development plan written statement “shall” include a core strategy which shows that the development objectives “are consistent, as far as practicable” with national and regional development objectives in the National Planning Framework and RSES. NPF national policy objective 72a states that planning authorities “will be required to apply a standardised, tiered approach”. That approach is in Appendix 3 which states that the determination of the location of serviced zoned lands “shall include” assessment of available services. Zoning is a development objective, and consistency would have been practicable on the facts. The language tells the story: “shall include ... are consistent ... will be required ... shall include ...”. If that isn’t mandatory, I don’t know what is.

82. For the court to soften or dilute the clear and binding nature of these principles into something fuzzy and aspirational would be to fail to uphold the Constitution and the laws. It is not the case that laws are requirements for everyone else but are only suggestions for planning decision-makers. Similarly, section 10(1A) requires consistency with objectives of the RSES. Those objectives clearly involve a relationship between zoning and population projection, which is absent here. Section 10(2A) requires inclusion of population projections in the plan which has the same objective.

83. The order announced on 15th December, 2022 by consent was that:

- (i). in principle there will be an order (i) that the order of 1st July, 2022, dismissing relief 2, would be vacated and

- (ii). a separate fresh order dismissing relief 2 would be made to be included in the final order on foot of module II when perfected.

84. The order announced on 19th December, 2022 was that:

- (i) there will be an order of *certiorari* in terms of relief 1 as pleaded but limited as follows:
 - (a) to sheet 35(a) southern environs of Drogheda sheet, 35(a) southern environs of Drogheda - combined, and sheet 35(b) heritage, but only insofar as relates to the references to A2 zoning of lands in the southern environs of Drogheda (not including any lands that were zoned A2 Phase I in the previous development plan), limited in extent insofar as such A2 zoning on such lands includes residential development or other land uses where zoning for such purposes would have required an infrastructure assessment report;
 - (b) the last three paragraphs of section 2.8.1.1; and
 - (c) the figure "178.70" in the table to section 2.10.4, column I, row 1;
- (ii) for the avoidance of doubt, the order will record that it is without prejudice to the right of the council to lawfully adopt an local area plan, joint urban area plan or variation of the development plan in a manner consistent with the judgment of the court;
- (iii) the foregoing order will not be perfected until the determination of any consequential issues; and
- (iv) an order would be perfected forthwith as follows:
 - (a) there will be an interlocutory stay on effect being given to the A2 zoning (other than land zoned A2 Phase I in the previous development plan) in the southern environs of Drogheda insofar as such zoning relates to residential development or the development the facilitation of which would have required an infrastructure assessment report, until the order of *certiorari* is perfected and becomes immediately effective;
 - (b) there will be an interlocutory stay on any current or future planning applications or appeals that are dependent on effect being given to zoning as so stayed, until the final determination of the proceedings;

- (c) the council is directed to notify An Bord Pleanála of the foregoing orders forthwith;
- (d) the matter will be listed for mention on a date to be notified by the List Registrar following delivery of the written judgment, in order to deal with any consequential issues; and
- (e) the proceedings in *Protect East Meath v. An Bord Pleanála* [2022 No. 0052 JR] will be listed on that date also to consider any implications for that case arising from the foregoing orders, and the applicant is directed to notify any other parties to that case of such listing.