

THE HIGH COURT  
COMMERCIAL

[2022 No. 7 COM]

[2021 No. 961 JR]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT  
ACT 2000 (AS AMENDED)

BETWEEN

HICKWELL LIMITED AND HICKCASTLE LIMITED

APPLICANTS

AND

MEATH COUNTY COUNCIL

RESPONDENT

**JUDGMENT of Humphreys J. delivered on Tuesday the 12th day of July, 2022**

1. The applicants challenge the validity of the adoption by Meath County Council of an indicative road route in the County Development Plan. The road is intended to run through various lands used for business activity in Dunboyne, County Meath, including the applicants' lands.
2. The road is referred to on the papers as a "distributor road", although no particularly satisfying definition of a distributor road was offered. The term isn't defined in the *Concise Oxford Dictionary of Current English*, 6<sup>th</sup> ed. (Oxford, Clarendon, 1976), or *The New Shorter Oxford English Dictionary* (Oxford, OUP, 1993), suggesting a more recent coinage perhaps.
3. Broadly, a distributor road appears to be a road connecting routes lower down the hierarchy of roadways to routes higher up the hierarchy, and in practice generally means a low to mid-ranking road in the hierarchy of roadways with low to moderate use connecting local streets with local or regional roads.
4. The Roads Act 1993 provides for classification of local, regional and national roads, a terminology referred to in Murdoch and Hunt's, *Dictionary of Irish Law*, 6<sup>th</sup> ed. (Dublin, Bloomsbury, 2016) at p. 1481.
5. In the urban design context, the Design Manual for Urban Roads and Streets (DMURS) manual refers to a hierarchy of streets as follows:
  - (i). local streets (corresponding to local roads), which "provide access within communities and to Arterial and Link streets",
  - (ii). link streets which are said to correspond to regional roads and also referred to as district distributor roads which "provide the links to Arterial streets, or between Centres, Neighbourhoods and/or Suburbs", and
  - (iii). arterial streets which are said to correspond to national roads and are also referred to as primary distributor roads. These are "the major routes via which major

centres/nodes are connected. They may also include orbital or cross metropolitan routes within cities or larger towns.”

6. These definitions, if one wants to call them that, are not exactly totally enlightening, and I don't find them particularly useful outside the urban context. Certainly it would make little sense to put the relatively modest distributor road the subject-matter of this case in the same category as a regional road, still less a national road. On the maps it seems less significant than the marked nearby local roads.
7. And the terminology of “streets” seems apt only in the urban setting which is not we are dealing with here. The term “road” is more apposite outside that context, although there are exceptions, Watling Street being a famous example - a Brittonic, and later Roman, highway that runs poignantly and evocatively through the heart of England.
8. The applicants are the owners of The Hub Logistics Park in Dunboyne, which offers warehouses with office facilities suitable for large scale logistics and distribution. It is to the north of Bracetown Business Park and of the data centre campuses of Facebook/Runways and EngineNode. The area hosts a limited number of ostensibly self-contained (certainly not obviously functionally related) business campuses, all with their own existing access, but the council thinks it is necessary and appropriate for there to be a road connecting all of these.
9. Development in The Hub commenced in 2006 under planning permission reference DA/50233, which permitted six logistics/light industrial units serviced by an internal distributor road accessed from the Kilbride Road.
10. The Dunboyne/Clonee/Pace Local Area Plan 2009-2015 contained CER OBJ 3 as an objective:
 

“To facilitate the development of lands between Portan[,], Clonee and Bracetown for E2 ‘General Industry & Employment’ and E3 ‘Warehousing & Distribution’ as provided for in Volume I of the County Development Plan. A Master Plan and a detailed Roads Needs Assessment of said lands shall accompany any planning application for the development of these lands. This Master Plan shall obtain the prior written agreement of the Executive of the Planning Authority. The Master Plan shall accompany any application for planning permission on these lands and shall address land use, transportation, connectivity, urban design, recreation, environmental impacts including flood risk, phasing and implementation issues to the satisfaction of the Executive of the Planning Authority. Development shall be contingent on the phased delivery of the distributor road.”
11. The effect of that was that where a developer wished to seek planning permission within the area, they had to provide a masterplan to be agreed with the council. “Masterplan” used in this sense is another relative neologism not defined for the purposes of the planning context in the usual sources. The World Bank website (worldbank.org) states that “[a] master plan is a dynamic long-term planning document that provides a conceptual layout to guide future growth and development.” However, for present purposes the definition offered by counsel

for the applicants here seems most apt, which is a document that treats of land use issues going over and above those involved in a particular planning application. It is a document that shows how the individual planning application will fit in to a wider suite of future developments on a larger piece of land.

12. The Meath County Development Plan 2013-2019 (incorporating the 2009 local area plan referred to above) reiterated objective CER OBJ 3.
13. On 23<sup>rd</sup> July, 2015, Facebook (*via* Runways Information Services Ltd.) obtained permission RA/150605 for a large data centre between local road L5028 Portan Road to the west and the county boundary with Fingal to the east.
14. The applicants obtained a further planning permission in December 2015, RA/150972 for three further units (A01, A02 and A03). Unit A02 has been completed and commencement notices have been issued for the construction of A01 and A03. Commencement of the latter has begun.
15. In 2016, Variation No. 3 was proposed showing the new road coming through the Hickcastle and Hickwell lands and terminating there where it linked up with the pre-existing internal roads in The Hub from which one could exit through to the L1010 at the main entrance to the Hickwell lands. That was the first of four recent attempts to identify a route for the road. The lands to which this refers by virtue of objective CER OBJ 3 are between Portan, Clonee and Bracetown. Those lands appear to relate to Masterplan Area 2 (MP2 in the draft of the current development plan, which is now MP23 in the current adopted development plan). The stated aim was facilitating the development of the lands and the preparation of a masterplan which involved development "contingent on the phased delivery of the distributor road."
16. On 21<sup>st</sup> June, 2018, Facebook (*via* Runways) applied for a further permission to extend the data centre (RA/180671). That was accompanied by an environmental impact assessment report and a masterplan as required under objective CER OBJ 3. That masterplan covered lands other than those owned by Facebook, but not the full extent of what is now the MP23 area and not any of the applicants' lands. The masterplan proposed a rerouting of the suggested new distributor road, so that instead of running through Facebook's lands it would run around the perimeter of the lands.
17. On 19<sup>th</sup> November, 2019, the council wrote to Clifton Scannell Emerson on behalf of Runways saying that the masterplan was being formally validated and approved.
18. I should note here that the non-statutory masterplan was not subjected to SEA or screening for SEA or AA.
19. Subsequently, a planning application RA/191593 by EngineNode Ltd for a development of four 2-storey data storage buildings, a single storey data storage centre as well as an operations building and two office buildings at lands at Bracetown and Gunnocks to the north of Clonee was submitted together with an EIA report and an AA screening report dated 20<sup>th</sup> November,

2019. That was also accompanied by a masterplan amending the masterplan previously approved by the council in connection with application RA/180671.

20. The Draft Meath County Development Plan 2020-2026 was published on 28<sup>th</sup> December, 2019. That involved the third iteration of the indicative route of the new road. Insofar as it concerned the applicants' lands, the previous route going through those lands remained, but there was an additional new route to the west of the lands to link up with rezoned lands beyond the applicants' property. The council now says that erroneously this failed to link up with the route that was set out in the previous development plan. Aside from the impact on the applicants, the route of the new road was amended, insofar as concerns the Facebook lands, to be consistent with what was set out in the masterplan.
21. On 3<sup>rd</sup> March, 2020, the applicants *via* their consultants, Declan Brassil & Co Ltd, stated that the proposed route was not deliverable for legal and planning reasons. An alternative route was proposed.
22. The council's Chief Executive responded to that in a report dated 13<sup>th</sup> August, 2020 which dealt with the applicant's submission reference MH-C5-247 and said as follows:
 

"The routes shown on the Draft Plan map are indicative purposes only in order to provide for a distributor road between the L1010-5 and the L5028-1 and to facilitate the development of the E2/E3 zoned lands within MP2 and MP3. Detailed designs for this roadway are currently being drafted in accordance with the grant of permissions RA/180671 and RA/191593. It is acknowledged and recognised that some of the indicative routes were incorrectly located on the Draft Map and this has now been corrected. The aforementioned detailed road design will not go through any existing buildings but will however connect to the local road L1010-5 at an appropriate location"
23. In the meantime, the EngineNode application for additional data storage was granted, but was appealed to the board.
24. The board's inspector's report dated 28<sup>th</sup> May, 2021 notes that the non-statutory masterplan "for the overall E2/E3 zoned lands" was approved by the planning authority under RA/180671 on behalf of Runways Information Services Ltd. (RISL) in compliance with CER OBJ 3". It should be noted here that this isn't correct - the masterplan did not cover the "overall E2/E3 zoned lands", but only a portion of those lands excluding the applicants' lands.
25. In July 2021, permission RA/191593 was granted to EngineNode Ltd. by the board, reference ABP-307546-20. That permission and a related permission are now the subject of two judicial reviews: *Coyne v. An Bord Pleanála* [2021 No. 780 JR] and *Coyne v. An Bord Pleanála* [2021 No. 781 JR]. The cases are potentially affected by the Supreme Court decision in *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESCDET 21 (Unreported, Supreme Court (O'Donnell C.J., O'Malley and Woulfe JJ.), 17<sup>th</sup> February, 2022).

26. Up to March 2021, the elected members made various decisions on material amendments. Those amendments then went on display on 31<sup>st</sup> May, 2021 with the label of MA05 being attached to the relevant material amendment effecting the applicants' lands.
27. What emerged at the material amendment stage, for the first time, was a new route cutting diagonally across the applicants' lands. Because this final iteration occurred at the last minute, it was offered on a basically take it or leave it basis – the legislation doesn't provide for major amendments to the material amendments at this point in the process.
28. An environmental report was published assessing the material amendments in terms of SEA directive 2001/42/EC. The applicants then made a submission *via* Mr. Brassil on the material amendments. That was dated 28<sup>th</sup> June, 2021 and enclosed a submission from TrafficWise dated 26<sup>th</sup> June, 2021 which raised the question of whether there was a need for the road at all.
29. The Chief Executive's reply in a report dated 12<sup>th</sup> August, 2021 addresses that submission and related submissions and states that the material amendment shows a corrected indicative route for the road in question. The purpose of the amendment was to "amend the land use zoning map to correctly show the indicative road routes through MP2 and MP3" that being a reference to masterplan areas 2 and 3 - since renamed in the Development Plan as MP23 and MP24: see Vol. 2 of the written statement, chapter relating to Dunboyne, Clonee and Pace, section 7.0.
30. The Chief Executive's response offers somewhat generic points about improving permeability, avoiding security issues associated with *cul-de-sacs*, reducing unauthorised parking and increasing network resilience. The report suggests that the route is indicative and, therefore, that the alignment can be changed subsequently. It asserts that the road is an objective of the Development Plan and already part authorised under RA/180671 and RA/191593.
31. The problem that new mutations of the proposal were coming into the picture at the last minute is also reflected in the fact that the Chief Executive's report on the submissions about material amendments was the first time that a council stated that the masterplans and previous permissions were relevant, so the applicants never had the opportunity to make a submission about that. Section 12 of the Planning and Development Act 2000 does not permit such a procedure, so the applicants cannot be criticised for not engaging with those points.
32. Following debate, the Development Plan was adopted on 22<sup>nd</sup> September, 2021. That includes Figure 13A in the maps relating to Dunboyne, Clonee and Pace, which places the applicants' lands in the MP23 masterplan area.
33. The previous maps of 2016, 2018 and 2020 all had a consistent indicative line for the road in the southern end of the Hickwell lands. The map which now applies at Figure 13A that was introduced at the material amendment stage has a diagonal line cutting through the applicants' lands.

34. The statement of grounds challenging the Development Plan insofar as it related to material amendment MA05 was filed on 11<sup>th</sup> November, 2021. Leave was granted on 24<sup>th</sup> November, 2021. The reliefs sought are as follows:

"1. An Order of certiorari quashing part of the Meath County Development Plan 2021-2027 (which Plan was adopted by the Respondent on 22nd September 2021), namely the "Proposed Dunboyne/Clonee/Pace Amendment No. 5", which was approved by the Respondent as part of the said County Development Plan as adopted, and which amended Land Use Zoning map (Sheet 13(a)) to "correctly show the indicative road routes through MP2 and MP3" to provide a road alignment route which goes directly through the Applicants' Lands at Bracetown and Gunnocks, Dunboyne, County Meath, and which cuts across a permitted development (under permission RA/150972) that is part implemented.

2. Such Order of certiorari as the Court deems fit quashing such part or all of the Meath County Development Plan 2021-2027 insofar as same appears appropriate to the Court having heard the case herein.

3. A Declaration that the indicative road route through MP2 and MP3, as delineated in Land Use Zoning map (Sheet 13(a)) in the said County Development Plan as adopted, is invalid and of no legal effect insofar as concerns the Applicants' Lands at Bracetown and Gunnocks, Dunboyne, County Meath.

4. A Declaration that the Respondent has acted in breach of its obligations under the Constitution of Ireland and the European Convention on Human Rights Act 2003 in failing to have regard, whether adequately or at all, to the Applicants' rights in respect of the property affected; to the Applicants' rights to fair procedures; and/or to the necessity, justice and proportionality of the proposed interference with the Applicants' rights.

5. A Declaration that the Respondent has acted in breach the Applicants' constitutional rights to property, including under Article 43 and Article 40.3.2°, in purporting to impose an effective restriction on the Applicants' rights to develop their Lands with the consequent impact on the value of their lands, without compensation.

6. An Order whether in the nature of Declaration or otherwise that section 50B of the Planning and Development Act, 2000 (as amended) and/or sections 3 and/or 4 of the Environment (Miscellaneous Provisions) Act, 2011 and/or Article 9 of the Aarhus Convention apply to the present proceedings.

7. Such Declaration(s) of the legal rights/legal position of the Applicants or legal duties/legal position of the Respondent as the Court considers appropriate.

8. A stay on the implementation of the part of the Meath County Development Plan 2021-2027 under challenge in these proceedings, namely the said "Proposed Dunboyne/Clonee/Pace Amendment No. 5", which was approved by the Respondent as part of the said County

Development Plan as adopted, pending the determination of these proceedings, with such stay limited to the Applicants' Lands at Bracetown and Gunnocks, Dunboyne, County Meath only.

9. Further or other others.

10. Costs."

35. Often a court might endeavour to examine domestic law issues first and if those prove to be decisive there might not need to be a requirement to consider EU law issues. The present case is a somewhat different situation because the applicants expressly seek both the quashing of the plan insofar as it affects their own lands, which is implicit in relief 2, but also the entire indicative road route as embodied in MA05 on the basis of an alleged breach of EU law among other things (the relief expressly sought in relief 1). The applicants rely on the special cost rules for environmental litigants (relief 6). Thus, even if a court were minded to grant limited *certiorari* of the Development Plan insofar as the indicative route affects the applicants' lands, that does not dispose of the case because the court is still being asked to address the wider route insofar as it affects other lands. Hence the EU law points need to be determined either way.

#### **Domestic law issues**

36. It is nonetheless convenient to begin with the domestic law issues including issues under the ECHR as applied by the European Convention on Human Rights Act 2003.

#### **Core grounds 5 and 7 – reasons/ failure to engage with submissions/ property rights**

37. Core grounds 5 and 7 provide as follows:

"5. In adopting the Meath County Development Plan 2021-2027, the Council failed to provide any and/or any adequate reasons for adopting proposed material amendment "Proposed Dunboyne/Clonee/Pace Amendment No. 5". The Council failed to provide any and/or any adequate reasons for rejecting the Applicants' submission and, in particular, their request that the road alignment route be modified so as not to go directly through and thereby sterilise the Applicants' Lands. ...

7. The material amendment referred to as "Proposed Dunboyne/Clonee/Pace Amendment No. 5", which was approved by the Council as part of the Meath County Development Plan 2021-2027, constitutes an unjust attack on the Applicants' constitutional property rights under Articles 43 and 40.3.2°, as it imposes an effective restriction on their right to develop their lands with the consequent impact on the value of their lands, without compensation. The Council has thereby acted in breach the Applicants' constitutional rights to property, including under Article 43 and Article 40.3.2°, Article 1 of Protocol 1 to the European Convention on Human Rights, and Article 17 of the EU Charter of Fundamental Rights, and contrary to fair procedures and/or natural and/or constitutional justice."

**Law in relation to reasons/ failure to engage with submissions/ property rights**

38. The law in relation to reasons including failure to engage with submissions is set out in *Killegland v. Meath County Council* [2022] IEHC 393 (Unreported, High Court, 1<sup>st</sup> July, 2022), and can be incorporated by reference here.
39. As regards property rights, it is true that the adoption of a development plan map with an indicative future development such as a road does not interfere with the current use of the lands in a direct way, although it may make such lands less usable or marketable and was likely to have done so here. So I think the applicants' pleaded position is correct that "the mere presence of the current road route alignment directly across the Applicants' Lands as contained in the said County Development Plan has had a significant adverse ... effect on the value of the Applicants' property" (para. 40 of statement of grounds). Hence it is not an answer to the problem to say the route is merely "indicative".
40. However, insofar as any impact of any given public law measure affects the value of particular lands, that is not automatically the sort of effect that requires compensation, or that amounts to an unjust attack, and nor is it the sort of effect that can logically be separated from the enhancement of the value of lands affected by their zoning. The applicants obtain a benefit from that zoning and there is a certain degree of interconnectedness between that benefit and the need, as seen by the council, for a road network. In effect the disbenefit of the road comes as part of the price tag for the benefit of that zoning provision.
41. As regards proportionality, it is not the case that the council cannot impact on private property through the Development Plan unless there is no reasonable alternative. The primary process is that the council has to form a judgement as to what is required by proper planning and sustainable development and give reasons for that. If such a reasoned decision impacts on property rights, that is not in itself unjust. Only if there is a choice between options that are equally compatible with proper planning could the question of proportionality normally be decisive.
42. The applicants argue based on *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506, particularly at para. 12.11, that in essence insofar as a particular provision of a Development Plan imposes a burden on property by indicating a future restriction on the use of land especially one for which the owner will be financially liable, this constitutes an interference with constitutional and ECHR property rights which must pass a proportionality test. However, insofar as constitutional rights are concerned, I do not accept that submission. Proper planning and sustainable development is the prior and superior concept. There is no constitutional right to do anything that is not in accordance with proper planning and sustainable development. So, if the act that a landowner is prevented from carrying out is one that would not be in accordance with proper planning and sustainable development as determined by the relevant statutory decision-maker, no constitutional right is engaged and axiomatically the question of interference, still less disproportionate interference, with constitutional rights simply does not arise.



43. The ECHR situation is more nuanced. As *Sporrong and Lönnroth v. Sweden*, Application No. 7151/75, [1982] ECHR 5, [1983] 3 EHRR 35 (European Court of Human Rights, 23<sup>rd</sup> September, 1982), indicates, a restriction that leaves intact the owner's right to use and dispose of her possessions may still nonetheless engage Article 1 of Protocol 1 and constitute an interference with the right to private property (see para. 60).
44. Measures such as restrictions on use and the lack of compensation can create a situation which upsets the fair balance between the protection of the right of property and the requirements of the general interest. Thus, an individual and excessive burden may be created which could only be rendered legitimate if there was a possibility of seeking a reduction of the time limit during which a restriction applied or of claiming compensation (para. 73). There is a certain analogy with the situation here.
45. Also relevant is *Kapa v. Poland*, Application Nos. 75031/13, [2022] 74 EHRR 18 (European Court of Human Rights, 28<sup>th</sup> February, 2022), where the relevant authorities of the contracting party failed to adequately examine an objection as to the effect of ending a motorway at a particular junction without any alternative road connection. Insofar as proportionality is required, it seems to have been part of the applicants' case there that the alternative options put forward on their behalf should have been considered (see para. 18).

#### **Application of law to the facts**

46. The applicants' complaint is that they have:

"no idea why [their] submissions have been rejected. There is no evidence of any consideration of alternatives, no treatise of the viability of same, no consideration of same in light of the proportionality of intrusion into property rights etc. There is simply no evidence of any consideration of the TrafficWise report. Rather, there is nothing but an incantation to the effect that the 'road is happening.' That may be a crass way of putting it, but it reflects the evidence."

47. As regards reasons, the basic question is whether the applicants were given the main reasons on the main issues here, particularly:
- (i). was there a need for a new road in this area;
  - (ii). whether it could take a route that goes outside the applicants' lands rather than through them; and
  - (iii). if not, why did it have to take the diagonal route indicated indicatively on the development plan.
48. As far as the need for the road at all is concerned, it's true on the one hand that the road was existing policy going back a number of years to the previous plan and the prior LAP. That eliminates the need for reiteration of pre-existing reasons unless there is a change in

circumstances or some significant new point raised in submissions that properly generates a need for a reason.

49. Was there such a new point here? It seems to me that the detailed TrafficWise study went so far beyond any previous material that it warranted being addressed by way of reasons.
50. One then has to ask whether reasons were given. And in one sense there were reasons albeit somewhat generic. Were these reasons adequate? That is not always a cut-and-dried question and in fairness to the council is not absolutely cut-and-dried here. Generally one has to avoid setting an impossible standard. It's not enough to ask whether the council could have given more reasons, because one can always give more reasons. In one sense the question is whether, within the gap between what the council did give and what they could have given, lies something that the applicants and the court should legitimately be entitled to. That may be somewhat fact-specific; and obviously facts differ from case to case.
51. No reason was given for rejecting the point that there was no evidence of an appropriate integrated land use and transportation study to justify the proposal to connect the MP2 and MP3 lands through The Hub Logistics Park as alleged at p. 5 of the applicant's submission quoting from the TrafficWise report. There were no reasons for rejecting the point that the R147 was an adequate link or that the proposed road would "provide a disjointed route paralleling the R147", and that it was irrational to duplicate this infrastructure particularly having regard to low employment and low traffic demand.
52. I acknowledge that it is a fairly fine line, and that the council did provide some reasons, and also that the council had a huge number of submissions to deal with, but I think on balance, albeit with some hesitation in view of the council's vigorous submissions on this point, that the circumstances called for more articulation of why the applicants' expert report was to be rejected. It's not a case where there was some expert report on the other side. Rather this was a raw and largely unexplained planning judgement by the council. Maybe one could posit an assumption that such a judgement is backed up by weighty recognised national or international standards for how, when and where new roads should be commissioned, with particular reference to joining up business campuses, albeit that this wasn't articulated, and I don't in any way take from the council's expertise and right to make such a judgement. If a decision-maker had two expert reports, in principle the council could prefer one over the other, impliedly preferring the analysis of the report that was looked on favourably, assuming that its reasoning was sufficient in itself; but that isn't the situation here.
53. The generic points about improving permeability, avoiding security issues, reducing unauthorised parking and increasing network resilience would apply to almost any road proposal so don't really cut the mustard in a context where an applicant comes forward with a detailed expert report. And as regards the masterplan and existing permissions, they are only relevant to the entry point on the lands, not the indicative route thereafter.

54. Anticipating the next ground if I may be forgiven for doing so, the reasons given are also erroneous on their face. Insofar as the Chief Executive says that the road is an “objective” (which is a term of art – see *Killegland*) of the County Development Plan, that is not correct. It was an objective of the previous County Development Plan. CER OBJ 3, but that was removed in the current plan.
55. The council’s deponent, Mr. Maguire, acknowledges in effect that there was no objective corresponding to CER OBJ 3 included in what became the current Development Plan. He refers in his affidavit (at para. 9) to objective MOV OBJ 52, which is “[t]o continue to support the delivery of key strategic roads within Dunboyne to include an eastern distributor road to facilitate rail-focused development, new bus routes and reduce traffic levels in the town.” However, despite the impression that might superficially strike one on reading his carefully-phrased averment (not that I have anything against careful phrasing), it’s crucial to note that he only mentions this objective and does not assert that the contested road comes within it.
56. He does not say that this is a key strategic road, and the Development Plan does not say that either. In the absence of the council actually stating evidentially that this is a key strategic road, MOV OBJ 52 simply is not relevant.
57. In legal submissions it was somewhat faintly suggested that given that the plan refers to the area as strategic, it is not much of a stretch to assume that the council thought that this particular mid-ranking road was a “key strategic road”. The very fact that we are now reduced to talking about degrees of stretch indicates just how *post hoc* this argument is. The problem with that argument is that it totally devalues the phrase “key strategic road” by equating it with “road in a strategic area”, and involves the necessary implication that all roads in a strategic area are not just strategic roads in themselves but are “key” strategic roads. That’s obviously a distortion of language I’m afraid.
58. The simple fact is that the development plan does not say that this is a key strategic road and the council’s affidavits do not say that either. MOV OBJ 3 doesn’t apply, and there isn’t anything else that does in terms of objectives. Thus the council’s reasons, even if they were otherwise adequate, which they aren’t, are erroneous on their face insofar as they claim that this particular road is an objective of the plan.
59. It may also be convenient to note here that as regards MP23, the written statement for the area claims that a “masterplan is in place for these lands”, but that is also clearly erroneous on its face. The only plan was the one submitted by Runways, subsequently amended in the EngineNode application, which does not cover the totality of the lands. Fortunately for the council however, that point is not pleaded by the applicants in the present case, so is not a ground for any formal order of *certiorari*, but could be relevant context if there is any issue as to the form of the order.
60. As to whether the council failed to give reasons for requiring individual landowners to host the road themselves rather than have it built at public expense, I am less persuaded that the

applicants have made out their ground of challenge. I appreciate that the applicants don't want the inconvenience and expense of dealing with the construction of the road and the consumption of land that would be involved, but on the other hand the council's logic is fairly self-evident – the road is a *quid pro quo* for any future development proposals that landowners may wish to put forward. Assuming for the purposes of this heading that the road is going ahead in principle, I don't think there is any obligation to give reasons for the obvious. No lack of reasons or other legal breach that would justify *certiorari* or other relief has been made out in relation to that particular sub-point as to why the applicants would have to have the road on their own lands.

61. That takes us to the route of the road.
62. The new diagonal line for the indicative route crashes into the geography of the situation out of nowhere in 2021. No material particularly explaining the indicative route of this road has been produced. The most the council can say is firstly that the applicants asked for the road not to use its own internal roads or impact on its buildings, secondly that the new route connects to local road L1010, the MP2 lands and Pace junction, and thirdly that it is indicative.
63. Insofar as it is suggested that the route was only indicative and could be changed, that is not an answer as to why *this particular route* was stated as being the indicative route. As noted above, even an indicative route has an impact on a landowner.
64. The reasons referred to by the Chief Executive would apply irrespective of the route and cannot particularly be a justification as such for that route. Thus, insofar as the Chief Executive's report of 12<sup>th</sup> August, 2021 deals with the rationale for the decision, and insofar as reliance is placed on issues of connectivity or permeability, the material amendment does not merely address the lack of connection in the draft plan as published but also sweeps the road up to the northwest of the applicants' lands.
65. Even assuming that the road being part-authorised under previous permissions was a valid reason for the road happening at all, that might perhaps explain the point at which the road enters the applicants' lands, but it does not constitute a reason for completing it in the manner proposed or in the route proposed.
66. Overall it is not possible to discern a clear reason for the particular route.
67. Overall having regard to all of the foregoing issues, as regards proportionality and property rights for the purposes of art. 1 of Protocol 1 of the ECHR specifically, the erroneous reason and the lack of reasons has the effect in law that one cannot conclude that the council has properly addressed the proportionality issue.
68. As regards alternatives, the only alternatives that featured seem to have been:
  - (i). the original route – rejected as erroneous;

- (ii). the applicants' proposal that the road not be built at all – rejected on a basis dealt with above;
  - (iii). the applicants' proposal that the road be built outside its lands – rejected seemingly on the basis of the council's policy position that each landowner had to build its own section of the road on its own lands (I'm not sure whether this was ever articulated in quite those terms but that's what it seems to amount to); and
  - (iv). the adopted route.
69. What's missing from all that is whether there could have been a further option of a route that skirted the boundary of applicants' lands albeit within them, as was facilitated for Facebook next door, so causing minimum interference while respecting the council's policy decisions that there be a road at all and that it be built on the basis that each owner had to host its own section. Or to put it over-simply perhaps, since the council was prepared to discuss the route with Facebook and come up with something mutually agreeable within Facebook's lands, albeit in the context of a permission application, maybe there might have been merit in the same co-operative procedure being attempted in relation to the applicants here.
70. The council would no doubt say that that's a matter for the applicants to propose, but the problem there is that the adopted route only appeared at the material amendment stage at which point no further major amendments of the plan were possible.
71. Even assuming that the road must go ahead and that the applicants' option of running it outside their lands could be discounted on a policy basis, one is at a loss to know whether there was any less intrusive route available. There doesn't seem to have been any meaningful consultation or negotiation, still less a collaborative process involving all relevant stakeholders, which is something I would encourage even at this late stage. The development plan consultation doesn't constitute such a process because the last-minute nature of the new route at the material amendment stage was a take-it-or-leave-it exercise.
72. Finally it is claimed by the council that the applicants changed their position.
73. But again that has to be viewed in the context of the fact that the council changed the route of the road at the material alteration stage. It is claimed that the late stage of the applicants' second submissions was such that the council was constrained into either accepting or rejecting the material amendment. But that cannot be held against the applicants in circumstances where the current route only emanated from the council at the last stages of the process.

#### **Core grounds 2 and 4 – predetermination and irrelevant considerations**

74. Core ground 2 and 4 provide as follows:

"2. In adopting proposed material amendment "Proposed Dunboyne/Clonee/Pace Amendment No. 5" as part of the Meath County Development Plan 2021-2027, the Council has acted

unlawfully and/or had regard to irrelevant considerations insofar the Council has relied on a reason (which itself is bad in law) that “the proposed road is an objective of the CDP (See Section 7 ‘Masterplans’ contained in the Dunboyne/Clonee/ Pace Written Statement and is in part, authorised by way of planning permission sub-ref PA reference RA/180671 and RA/191593”. Further, the Council has wrongly construed the said grants of permission insofar as it has taken the view that parts of the present road objective have been consented already.  
...

4. In adopting proposed material amendment “Proposed Dunboyne/Clonee/Pace Amendment No. 5” as part of the Meath County Development Plan 2021-2027, the Council has impermissibly fettered its statutory discretion and/or the decision by the Council to adopt that material amendment is tainted by unfairness and/or objective bias insofar as the Chief Executive’s Report dated 12th August 2021 (Vol. 2) (on the submissions received by the Council on the proposed material amendment at issue) contains a statement of prejudgment and/or predetermination regarding development of the proposed road to which the material amendment relates and itself evidences underlying prejudgement and/or predetermination on the inclusion of the road objective.”

#### **Law relating to predetermination and irrelevant considerations**

75. The law regarding irrelevant considerations is set out in *Killegland* and can be incorporated here by reference.
76. As regards the law regarding predetermination, there did not appear to be any major dispute about that, and it seems capable of being summarised by saying that a reasonable person apprised of the relevant issues and participating in the process should not have a reasonable apprehension that the decision-maker was approaching the matter with an unlawfully fixed prior conclusion in mind in respect of matters that are properly open to submission and evaluation. An administrative decision-maker should not have an open mind on matters that are not up for debate, such as the constitutional validity of statute law for example which is a matter for the High Court and not the decision-maker herself.

#### **Application of the law to the facts**

77. The Chief Executive states:

“the removal of the objective on the basis that the entire south-east half of the land zoned for development has effectively already been developed and the objective for which the distributor road has been proposed to meet is now redundant. This is incorrect. The proposed road is an objective of the CDP (See Section 7 ‘Masterplans’ contained in the Dunboyne/Clonee/ Pace Written Statement) and is in part, authorised by way of planning permission granted as part of Runways application RA/180671 and RA/191593 required. The remaining part of the proposed road will be authorized by and the subject of a further planning application and shall be developed commensurate with adjoining development.”

78. The error on the face of the reasons has already been addressed above.

79. As regards the complaint that the Chief Executive said that the road was already part-authorised, it's true that "the proposed road" was not formally part-authorised, strictly speaking, because the Runways masterplan didn't settle anything in relation to the applicants' lands. But that is best viewed as loose wording at worst rather than anything else. The Chief Executive obviously means that the sections of road already authorised are intended to form part of a larger road development which includes the applicants' lands. The reference to previous permissions is not in itself inherently irrelevant even if it does not perhaps provide a reason for rejecting the applicants' submission. It would be relevant to the question of the entry point of the road into the applicants' lands, because the idea would be that the road pieces should all join up. In that sense, the unchallenged nature of the permissions next door might arguably legitimately constrain the extent to which the applicants can complain now about the entry point of the road, subject to any EU law argument to the contrary. So one can't say it's irrelevant to mention those permissions.
80. Insofar as the Chief Executive refers to the proposed road as something that *will* be authorised by further permissions, that is best viewed as a methodological statement rather than as prejudgment. What she clearly means is that the council's intention is that developers will have to build the road themselves. That methodology has not been shown to be unlawful.
81. As regards predetermination otherwise, assuming that the decision was otherwise correct in every respect, I don't think that the wording of the response crosses the line into giving the impression of a fixed and pre-determined position. Any decision-maker (and that includes courts, I'm afraid) that rejects a submission is going to run the risk of sounding overly definite by the losing party, but there is no law against being definite in one's decisions. In an ideal world, there is a place for admitting doubts and hesitations, and sometimes decisions can be more convincing because of, rather than in spite of, such doubt and hesitation and public wrestling with the almost-irreconcilable pros and cons. But there is no law requiring decisions to be masterpieces, only requiring them to be lawful.
82. So no additional illegality arises under this heading that has not been addressed already.

**Core ground 6 – failure to take account of relevant considerations/Development Plan Guidelines 2007**

83. Core ground 6 provides as follows:

"In adopting the Meath County Development Plan 2021-2027, the Council failed to take account of relevant considerations and had regard to irrelevant considerations in adopting proposed material amendment "Proposed Dunboyne/Clonee/Pace Amendment No. 5" which amended Land Use Zoning Map Sheet 13(a) 'Dunboyne-Clonee-Pace Land Use Zoning Map' to provide a road alignment route which goes directly through the Applicants' Lands."

**Law regarding relevant considerations and Development Plan Guidelines 2007**

84. The law relating to relevant considerations and the Development Plan Guidelines 2007 has been set out in *Killegland* and that discussion can be incorporated by reference here.

**Application of law to the facts**

85. Two basic issues under this heading are raised in the applicants' written submissions:

- (i). the 2007 guidelines and
- (ii). lack of regard to the applicants' existing permissions.

86. As regards the 2007 guidelines, the obligation is only a "have regard to" obligation. The fact that the council seems to be proceeding on the basis that the road is to be built by landowners under conditions for future permissions rather than from the council's own resources is not unlawful by reference to the 2007 guidelines. The argument that the council failed to have regard to those guidelines has not been demonstrated.

87. As regards failing to consider a relevant consideration, the applicants claim that insofar as the council relied on permissions for Facebook, it should also have taken into account the fact that "the road seriously undermines the viability of the permission granted to the first named applicant under RA/150972". But the factual premise of that complaint is incorrect because the road is not incompatible with the applicants' existing permission insofar as it skirts around it in the adopted indicative route.

**EU law points**

88. Two EU law points were raised by the applicant:

- (i). project-splitting contrary to the EIA/habitats directives and
- (ii). breach of the SEA directive in relation to the masterplan.

**Core ground 3 – project splitting contrary to EIA and habitats directives**

89. Core ground 3 provides as follows:

"In adopting proposed material amendment "Proposed Dunboyne/Clonee/Pace Amendment No. 5" as part of the Meath County Development Plan 2021-2027, the Council has acted ultra vires and contrary to the requirements of Directive 2011/92/EU as amended by Directive 2014/52/EU (the "EIA Directive") and the Habitats Directive and in this regard has confirmed the occurrence of impermissible "project splitting" by way of the splitting of the single road 'project' to which the material amendment at issue relates. Further or in the alternative (and without prejudice to the foregoing), the Council failed to have any or any proper regard to the issue of project splitting."

**Law in relation to project splitting**

90. In a possibly over-simplified summary, the law in relation to project splitting for the purposes of EIA and AA includes the following:

- (i). the assessment of a project that has significant effects cannot be diluted if the execution of the project is split or salami-sliced into individual development consent



applicants in such a way that thresholds for screening are avoided or the impact of the whole project is not assessed;

- (ii). EIA/AA must in all cases consider cumulative effect of the project as a whole;
- (iii). thus in the context of a development consent for part of a project, the whole project has to be assessed.
- (iv). that does not require a formal EIA report in advance for stages of the project which are not the subject of a development consent application, but the implications of each step have to consider the impact in the context of the project overall and the wider interaction of the individual step with all parts of the project.

### **Application of the law to the facts**

91. The fundamental problem for the applicants here is that the Development Plan is not a project or a development consent and the doctrine just doesn't apply. This argument does not stand up as an independent basis to complain about the plan, but really is only another way of phrasing the masterplan complaint.

### **Core ground 1 – SEA and AA of masterplans**

92. Core ground 1 provides as follows:

"In adopting proposed material amendment "Proposed Dunboyne/Clonee/Pace Amendment No. 5" as part of the Meath County Development Plan 2021-2027, the Council has acted ultra vires and contrary to the requirements of Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment (the "SEA Directive") and/or Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive") and/or had regard to irrelevant considerations in purporting to justify retaining objective CER OBJ 3 (which the road at issue is proposed to meet), by reason of the approval/adoption, via the grant of permission/ individual development consents RA/180671 and RA/191593, of a non-statutory Masterplan (that falls within the definition of "plans and programmes" contained in Article 2(a) of the SEA Directive) which should have been, but was not, subject to SEA or to screening for SEA under Article 3 of the SEA Directive and/or should have been, but was not, subject to screening for AA in accordance with the requirements of the Habitats Directive."

### **Issues arising in relation to core ground 1**

93. This ground is rich with EU law points, and the question of consulting the CJEU was touched on at the hearing. A court should generally be open to the possibility of invoking art. 267 TFEU, and on one view Irish jurisprudence over recent years arguably illustrates a rebalancing of a possible historical under-utilisation in that regard. In deciding whether to refer, or how to dispose oneself of, an EU law point, it can help to define in very specific terms what the question might be, and in that regard at least as regards SEA, I have attempted the following (one could also propose something similar regarding AA):

- (i). Does art. 2(a) of directive 2001/42 have the effect that a plan or programme prepared by a developer in consultation with a competent authority and is prepared to accompany a planning application that is subsequently approved by the competent authority is a plan or programme within the meaning of the directive;
- (ii). Does article 3(2)(a) of directive 2001/42 have the effect that a plan or programme that sets out planned future developments, that accompanies a development consent application, that is not legally binding (because the developing consent is the binding legal instrument) and that is to be updated with each future application for development consent, is a plan or programme that sets the framework for future development consent of projects listed in Annexes I and II to Directive 2011/92
- (iii). Does directive 2001/42, in particular art. 3(1), have the effect that where a current plan or programme is subject to assessment under the directive, but where part of the rationale for a provision of the plan or programme is contained in another prior plan or programme that was not subjected to assessment under the directive, the competent authorities of the member state concerned have an obligation to remedy any previous failure to comply with the directive, irrespective of whether the relationship between the current and previous plans or programmes is that of a multi-stage development consent process or not.
- (iv). Does directive 2001/42, in particular art. 3(1), have the effect that where a current plan or programme is subject to assessment under the directive, but where part of the rationale for a provision of the plan or programme is contained in another prior plan or programme that was not subjected to assessment under the directive, an applicant is precluded from impugning the validity of the current plan or programme by reference to an argument as to the lack of compliance with the directive in respect of the prior plan or programme, or precluding the court from granting any effective remedy, merely because:
  - (a). the prior plan or programme was not challenged either at all or within the time for challenge set out in domestic legislation;
  - (b). the applicant's argument would have the logical consequence that previous unchallenged developing consents should not have been granted;
  - (c). the prior plan or programme was a lower-order plan as compared with the current plan;
  - (d). the prior plan or programme is relied on as part of the rationale of the proposal rather than as setting out the full proposal;
  - (e). the current plan or programme has been assessed for the purposes of the directive (albeit not specifically by reference to the matters in the prior plan or programme).

94. Fascinating as these questions might be in another case, the problem from the applicants' point of view is that they haven't pleaded or demonstrated that SEA (or AA) screening of the masterplan would have made any difference to anything. The only way the masterplan impacts on the applicants' lands is firstly that there is a road at all and secondly that the entry point into the lands is to some extent defined by the master plan. But the applicants haven't pleaded that those outcomes would or could have been different if SEA screening had been applied, and haven't pleaded that specified alternatives could or should have been considered that would or might have resulted in a different impact on their lands in terms of the substantive grounds pleaded. Maybe they see that as implied but that's not the impression that a reasonable respondent would get from the statement of grounds. Hindsight is perfect vision of course and it's not all that easy to avoid the risk that one will draw excessively on that quality when announcing a judgment. But what tips the point over the edge here into something that I would decline to imply is the fact that the applicants haven't challenged the SEA of the development plan by reference to the lack of assessment of alternatives regarding the road being there at all or regarding its entry point into the applicants' lands. Had they done that, one could read the challenge to the non-assessed masterplan as implicitly relevant by reasons of those factors. But in the absence of such a plea, the point is advanced as a pure technicality, not as something that makes any difference to anything in specific terms.
95. An applicant has to show a route-map from the provision relied on to the relief claimed (see *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2021] IEHC 648 (Unreported, High Court, 20<sup>th</sup> October, 2021) (under appeal) at paras. 20-26). These applicants haven't done that – the route-map stops abruptly at the technicality. All of the questions in the tottering inverted pyramid of complexity that I have set out above could be answered in favour of the applicants, but they haven't pleaded anything specific that would then make any difference to the outcome of the development plan process. A respondent is entitled to reasonable notice of that and didn't get it, so I think that point dies here.

### **Order**

96. In summary:
- (i). as regards the claim for relief regarding the road insofar as it crosses the applicants' lands, I will in principle make an order in favour of the applicants and
  - (ii). as regards the claim in respect of breach of the SEA directive, I don't consider it necessary to refer the questions involved to the CJEU and I don't think that the applicants have made out that claim.
97. As regards the road specifically, the issues can be very briefly summarised as follows:
- (i). as to the question of whether there should be a road at all, even though the road was existing policy, the reasons given for the road being built at all were not adequate in the light of the new material in the applicants' expert report; and in

addition the reasons given are erroneous on their face insofar as they state that the road is an objective of the plan;

- (ii). as to the question of requiring the applicants to build the road on their own lands, if the council's decision to have a road had been adequately reasoned, there would have been no illegality or lack of reasons for the policy decision to require individual landowners to build sections of the road on their own land as a condition of successive planning applications;
  - (iii). as to the route chosen, no or no adequate reasons were given as to why the particular route chosen was selected as the indicative route; and
  - (iv). the erroneous reasons and lack of reasons has the consequence that there was an interference with the applicants' right to the peaceful enjoyment of their possessions under Art. 1 of Protocol 1 of the ECHR as applied by the 2003 Act.
98. The council in submissions indicated that in the event of any infirmity being found, they would prefer a further opportunity for submissions as to the appropriate order. I propose to accede to that request.
99. Accordingly, the order will be as follows:
- (i). the challenge to MA05 on the basis of the SEA directive is dismissed;
  - (ii). as regards the challenge to the indicative road route insofar as it crosses the applicants' lands, I will in principle grant relief;
  - (iii). in that regard I will give the parties liberty to make written legal submissions as to the form of the order by Friday 22<sup>nd</sup> July, 2022;
  - (iv). in the event that any other part of the plan needs to be modified in the light of any relief I will give the parties liberty to make any submission on the possibility of exercising the functions conferred by s. 50A(9) of the 2000 Act which allows the court to consequentially amend a partly-quashed decision;
  - (v). in the event of the possibility arising that the matter may be progressed otherwise than by direction of the court, I will give liberty to seek an adjournment of the process of finalising the order, with or without an interim stay or other order of some form, if the parties wish to consider any possible process of consultation, negotiation or mediation either *inter se* or involving other relevant stakeholders; and
  - (vi). I will list the matter on Monday the 25th day of July, 2022 for mention to fix a date to deal with any outstanding issues.