



[2024] IEHC 301

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000686]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS
AMENDED

BETWEEN

CHRISTOPHER (OTHERWISE CHRIS) JONES AND JONES INVESTMENTS LTD

APPLICANTS

AND

SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

AND

THE MINISTER FOR EDUCATION

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Thursday the 11th day of July 2024

1. Welcome to groundhog day. In *Killegland Estates Ltd. v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109 and *McGarrell Reilly Homes Ltd & Anor. v. Meath County Council* [2023] IESC 40, [2023] 12 JIC 2110, Hogan J., writing for a unanimous seven-judge Supreme Court, rejected two challenges to development plan provisions, holding, or citing approvingly propositions to the effect, among other things, that any land use objective is “liable potentially to be changed via this democratic process at some future stage when the next development plan is adopted”, that this “does not entitle [an] applicant to compensation even though the value of [the] land may have been reduced as a result”, that “the power to make a development plan is [a] function of the elected members”, that [w]hen the Council exercises these ... powers, it acts as of necessity as a deliberative assembly”, that “any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature”, that [t]hese sentiments now apply with even greater force following the subsequent adoption of Article 28A.1 of the Constitution in 1999 with its recognition of “the role of local government in providing a forum for the democratic representation of local authorities in exercising and performing at local level powers and functions conferred by law”, that “one key object of ... core strategy provisions is to ensure that development plans take proper account of projected population growth in any given areas”, that “[t]his in turn implies that the promiscuous and unlimited rezoning of land for residential land – which in the past was often an unhappy feature of the entire development plan process – should no longer be permitted”, and that “the elected members were empowered by law to make a democratic decision regarding the scope of the development plan and this they duly did”. In the present case, the applicants challenge the reservation of their lands for a school, a reservation which the council provided, in the words of Hogan J., to “take proper account of projected population growth”. The applicant landowners want the school to be somewhere else – just not-in-my-backyard. The council’s view, in effect, is that housing in this area without the social provision represented by the school reservation is tantamount to “the promiscuous and unlimited rezoning of land for residential land – which in the past was often an unhappy feature of the entire development plan process – [which] should no longer be permitted”. Indeed the Department of Education described the school reservation as “vital”. The primary question is whether the applicants’ attack on the council’s democratic decision through the guise of various legal doctrines is in reality an impermissible merits-based complaint which falls outside the competence of the judicial branch of government.

Geographical context

2. The dispute relates to a greenfield site at Stocking Avenue, Ballycullen in the Dublin 16 area of South Dublin County. Its approximate location is close to:

<https://www.google.ie/maps/@53.2719243,-6.321532,3a,75y,185.68h,71.84t/data=!3m6!1e1!3m4!1sMJepeo9YGRYSq14ycucZhw!2e0!7i16384!8i8192?entry=ttu>.

3. The site sits at the southern edge of current residential development in that area of south Dublin. Tallaght is towards the north-west, Rathfarnham towards the north-east. The Hellfire Club (see *Hellfire Massey Residents Association v. An Bord Pleanála & Ors.* [2021] IEHC 424, [2021] 7 JIC 0201) is less than 4 km to the south with the Dublin mountains beyond.

Facts

4. In 1997, the site was transferred into the name of the first named applicant and his sisters.

5. The location was first specified in the local plan-making process as a primary school site within the Ballycullen/Oldcourt Area Action Plan (AAP) 2000.

- 6.** The AAP related to lands with an area of 92.5 hectares (228.6 acres) at Ballycullen-Oldcourt, including the land in question here, which were zoned objective "A1" which is "To provide for new residential communities in accordance with approved Action Area Plans" in the South Dublin County Development Plan 1998-2004. The overriding development concept for the AAP lands was "to develop a sustainable community where all residents are within a convenient walking distance to schools, parks, and community facilities".
- 7.** The rationale for the reservation of the site as set out in the AAP was as follows:
 "An existing primary school in the adjoining Ballycragh neighbourhood to the west has not sufficient capacity to facilitate the entire zoned area. There is a need for an additional primary school to serve the scale of the development anticipated. A site has therefore been reserved for a primary school to the east of the Ballycullen Road where the larger population of the zoned lands is located. The site has been reserved central to the area to be served so as to discourage excessive transport of children to school by private car. A site for a post primary school is not required".
- 8.** In 2004, the site was allocated a specific objective (SO, inaccurately referred to in the pleadings as an SLO) to provide a primary school in the SDCC Development Plan 2004 – 2010 (Sheet 4 of the plan).
- 9.** On 19th September 2006, a letter was sent from the first named applicant to the Minister enquiring as to the Department's future plans for the Ballycullen site and requesting a proposed timeline.
- 10.** On 27th September 2006, a letter was sent from the Minister to the first named applicant acknowledging receipt of the letter dated 19th September, and stating enquiries were being made and that another letter would follow.
- 11.** On 25th October 2006, the first named applicant sent a letter to the private secretary of the Minister to enquire if there has been any progression in relation to the above matter.
- 12.** On 31st October 2006, the Minister sent a letter to the first named applicant acknowledging receipt of the letter dated 21st October, and stating enquiries were being made and that another letter would follow.
- 13.** On 18th January 2007, the Minister sent a letter to the first named applicant outlining that the Minister had no immediate plans to acquire the preserved site but that it was to remain as a reserved site. It was noted that the Department was anxious to ensure that reservations were not held on sites that would not be required.
- 14.** On 10th March 2008, the first named applicant sent a letter to the Minister enquiring if the Minister intended to acquire the land, noting an announcement regarding new primary schools and the absence of the Ballycullen site.
- 15.** On 20th March 2008, the Minister sent a letter to the first named applicant acknowledging receipt of the letter dated on 10th March and that the matter would be referred to the Property Management Section of the Department.
- 16.** On 1st July 2008, the first named applicant sent a letter to the Minister notifying her of the lack of response.
- 17.** On 11th July 2008, a letter was sent from the Minister to the first named applicant acknowledging receipt.
- 18.** On 23rd July 2008, the Minister sent a letter to the first named applicant stating that a new primary school would be required and that this would be acted upon in a timely manner.
- 19.** In 2007, ministerial guidelines on development plans were made: (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/111134/f57187a6-da41-4b1d-87d1-fe6bd880310f.pdf#page=null>).
- 20.** In July 2008, the government issued a document entitled *The Provision of Schools and the Planning System: A Code of Practice for Planning Authorities, the Department of Education and Science, and the Department of the Environment, Heritage and Local Government*. Despite the title, the document describes itself as a guideline under s. 28 of the 2000 Act (see p. 1).
- 21.** In 2010, the SO was maintained in the SDCC Development Plan 2010-2016 (Map 7 of the plan).
- 22.** On 8th June 2012, the council wrote to Ellier Developments Ltd (which was co-founded by the first named applicant) on behalf of the Department of Education to enter into negotiations to purchase the site.
- 23.** In 2014, the SO was maintained in the Ballycullen/Oldcourt Local Area Plan 2014 at Objective SSP1. At p. 37, an indicative layout for future development for the site was set out which clearly sets out the council's view of the feasibility of a school development on the site consisting of two buildings and three playing pitches. The lands to the south of Stocking Avenue on the eastern portion of the AAP as well as lands to the west of Ballycullen Road, south of the Oldcourt Road, remained largely undeveloped by the time of adoption of the 2014 LAP, due largely to the economic crash.

- 24.** On 18th September 2015, two submissions on the Draft South Dublin Development Plan 2016-2022 were made on behalf of the second named applicant.
- 25.** That plan was adopted in 2016 and the SO was maintained (2016-2022 development plan Including Variations 1 and 2 Map).
- 26.** On 13th April 2016, the first named applicant emailed the council requesting that the site be purchased or the designation removed. An enquiry was made into the progress of the matter with the Department.
- 27.** On 18th April 2016, the council emailed the first named applicant outlining the need for the site for a post-primary school in the area and noting that the selection process had been advanced and that the council would bring clarity to the situation in a month or two.
- 28.** On 13th May 2016, the first named applicant sent a letter to the council expressing dissatisfaction at the current situation and noting that the site had been rejected for a post primary school.
- 29.** On 30th May 2016, the second named applicant emailed the council again.
- 30.** On 22nd June 2016, the second named applicant sent another letter to the Minister for Housing, Planning and Local Government citing the need to remove the designation after the 14 year period in order to allow them to construct housing.
- 31.** On 24th June 2016, the Department of Environment, Community and Local Government sent a letter to the second named applicant stating that the Minister's role in respect to the planning system was to provide policy and legislative framework and advised the second named applicant to remain in contact with the council.
- 32.** On 15th September 2016, the second named applicant sent a letter to the council highlighting that it was ready to start construction once the school location issue was resolved. On 20th September 2016, the council sent a letter to the second named applicant acknowledging receipt.
- 33.** On 22nd November 2017, the Minister sent a letter to the second named applicant outlining a proposed acquisition of the site, at €40,000 per acre. This was in the context of discussions leading to a proposed contract for development of an alternative site (Site B) as a post primary and primary school campus.
- 34.** On 24th May 2018, the Minister sent a letter to the council supporting the second named applicant's application for a school on Site B.
- 35.** From approximately 2017 development of the surrounding area picked up again, but this was slowed at a later stage by the COVID-19 pandemic.
- 36.** On 1st June 2018, the applicants submitted planning application SD 18A/0204 for 60 houses on Site A and a post-primary school campus and pitches at Site B.
- 37.** On 24th July 2018, planning application was refused by the council.
- 38.** On 20th August 2018, an appeal was lodged with the board (ABP-302414-18). That was refused on 20th February 2019.
- 39.** In 2019 there was correspondence between the first named applicant and the chief executive of the council requesting a meeting in relation to the site. The chief executive declined to meet with the first named applicant, confirming the status of Site A and Site B remained unchanged and could only be reviewed as part of development plan process to commence the following year.
- 40.** On 4th April 2019, the Minister sent an email to the council that contained the following:
 "The primary school site reservation in the Firhouse LAP is to cater for future expected need. As yet, the need for the school has not yet firmed up, but given the amount of development in this area, a requirement is expected to materialise within the foreseeable future. (I can't give you an exact indication right now, but we will discuss with out Forward Planning Section). In terms of the size of any proposed future school, in an area such as Firhouse any new school would generally be 16 classrooms and depending on the demographics, we often build 16 classrooms with the capability to extend expand to 24 classrooms, in order to future proof".
- 41.** On 14th May 2019, the Minister sent an email to the council entitled "Request for details of Significant Residential Development", seeking an update on any residential developments over 100 units which have received planning permission since April 2018, specifically for the Newcastle, Rathcoole and Sagart areas and any indication of any significant developments that were at pre-planning stage of these areas.
- 42.** On 17th May 2019, the council emailed the Minister outlining planning permissions granted in period 2018-19.
- 43.** On 15th July 2019, the Minister emailed the council seeking a further update on completed or ongoing development in the county to aid their demographic review of school provision.
- 44.** On 26th July 2019, the council emailed the Minister in response to the request for data.

- 45.** On 5th November 2019, the second named applicant sent a letter to the council outlining its frustration regarding its sites located in Ballycullen, Old Court Area. On 6th November 2019, the council sent a letter to the second named applicant acknowledging receipt of that letter.
- 46.** On 20th November 2019, the council sent a letter to the second named applicant stating that the status of those sites remains unchanged and would be reviewed in the County Development Review.
- 47.** On 31st July 2020, the council gave notice of intention to review the plan and to prepare a new development plan for its functional area.
- 48.** On 18th August 2020, a meeting to review the development plan took place between the Department and the council. The council outlined the future population growth in the county to the Department's Forward Planning Unit, following which the council provided relevant documentation for review of the Minister.
- 49.** On 4th September 2020, an email was sent from the council to the Minister, attaching information on indicative population growth by Neighbourhood Areas for 2031 and 2040 for their review before the next meeting in September. Construction data within each of the Schools Planning Areas (SPAs) was also attached. The Neighbourhood Areas were set by the council as part of the development plan while the SPAs are set by the Department.
- 50.** An initial issue paper was put out to public consultation under s. 11 of the 2000 Act. On 14th September 2020, there was a s. 11(3)(c) consultation with providers, infrastructure and other stakeholders. A departmental representative attended.
- 51.** On 15th September 2020, a further development plan meeting on review of school provision took place between the Department and the council. The Department advised the council that information on school sites would issue around December 2020.
- 52.** The Department made a submission to the council on 28th September 2020, in the context of the process under s. 11 (Ref. SD-C147-116). This submission was summarised in the chief executive report (at p. 113) as follows:
 "The submission from the Department of Education and Skills (DES) identifies that the Development Plan should include policy and objectives which support the provision of new schools, while protecting what already exists. The submission 'welcomes the positive and proactive interaction with officials in SDCC to date in respect of this Development Plan, as well as school accommodation matters generally'. The submission calls for a specific community and infrastructure land use zoning objective; that sites identified by the DES for school provision are explicitly supported through appropriate zoning and /or specific local objectives (SLOs) in the Plan; that consideration should be given to education development zonings adjacent to established schools to allow for future expansion; that schools should be located in built-up areas with the associated population to achieve compact growth; that zoned lands should be flexible to allow for the development of schools and that consideration is given to potential synergies with adjacent facilities in the siting of schools. It is further outlined that revised guidelines for schools will be published by DES in 2020".
- 53.** In addition, Appendix E of the chief executive's report summarised submissions made by the Department under the heading "Community Services: Education":
 "2. This submission states that the SD CDP 2022-2028 should include policy and objectives which support the provision of new schools, while protecting what already exists, as well as the development of infrastructure and amenities. (SD-C147-116, Department of Education & Skills).
 3. The inclusion of a community and infrastructure land use zoning for the county. Alternatively, SLO (Specific Local Objectives) for school provision can be used. School provision should be located in built up areas in order to school the increasing population of the county while achieving compact growth. That the CDP's zoned lands be flexible for the development of schools. (SD-C147-116, Department of Education & Skills)".
- 54.** On 19th November 2020, the chief executive's report under s. 11(4)(a) regarding s. 11 submissions and engagement was issued.
- 55.** On 27th January and 2nd and 4th February 2021 there were a number of strategic meetings for the purposes of s. 11(4)(e) of the 2000 Act.
- 56.** On 5th February 2021, the council emailed the Minister seeking a timeline within which the Minister would be in a position to issue their required schools' sites to input into the development plan process. The email indicated that the council was finalising population projections for the development plan period.
- 57.** On 12th February 2021, the council emailed the Minister indicating that it had been working closely with the Department to understand the need for schools and the reservation of school sites to inform the forthcoming development plan. The email indicated that meetings had taken place between the bodies, culminating with the council providing population projections for various areas within the county.

58. On 19th February 2021, there was a meeting between the council and the Department, which discussed the requirements for each Neighbourhood Area for 2031 and 2040. Their combined understanding of the population projections for the development plan and school's needs were examined, in order to come to an understanding of future requirements.

59. On 11th March 2021, the council emailed the Minister with queries following the development plan meeting on 19th February 2021. It attached a summary for the Templeogue Neighbourhood Area which set out population and housing figures for that area and outlining existing schools in the area and the council's understanding as to their capacity. The email queried whether, if the Ballycullen LAP were built out in the lifetime of the development plan, provision of a primary school to the east would be sufficient to cater for needs, noting that the bulk of the remaining capacity in the LAP would be to the west and be 1.5 to 2.5 kilometres from the school site reserved to the east.

60. On 24th March 2021, the council sent a follow up email to the Minister to the same effect.

61. The Department confirmed the need for the schools reservation as set out in the Ballycullen LAP by email of 31st March 2021:

"As we understand there could be 700-800 units built on the lands to the west of the LAP area (adjoining the cemetery) and a similar number built on the lands to the east of the LAP area (where the school site is). From a school planning perspective, there is already pressure for school places around the east of the LAP area where the school site is located and we see this site as one that is likely to be needed in the relatively near short term and would seem to be quite readily deliverable in terms of access, location and services.

Given the reality of the geography of the Dublin mountains behind Bohernabreena, it would seem unlikely but there would be much further development higher up done that already proposed on the green field area between the cemetery and the oldcourt allotments. We think that the population that emerges from that (say if 900 units get built, generating about 250 primary school age group children), we think there would be capacity to cater for them between the following schools:

- Holy Rosary NS RN 24 classroom new (600 pupil capacity based on 25:1 PTR – current enrolment almost 600 pupils)
- Firhouse ETNS RN 16 classroom new school (400 pupil capacity based on 25:1 PTR, current enrolments 288 pupils)
- Gaelscoil na Guise 16 classroom new school (400 pupil capacity based on 25:1 PTR – current enrolment 170 pupils)
- New school which is likely to get built on the site at Stocking Ave

We understand that all of these schools (except Holy Rosary) are more than 1km from the proposed development near Bohernabreena, nevertheless, there would not seem to be a robust case to zone a site for school in that area simply to meet the scale of development proposed for that area."

62. On 5th May 2021, under s. 11(5)(a) the draft plan was issued to elected members.

63. On 17th June 2021, a vote took place on a motion to remove the SO symbol. The minute of this discussion is as follows:

"DPM53/0621 Item ID:71583

Submitted by Councillor B. Lawlor, Councillor Baby Pereppadan, Councillor David McManus
Proposed by Councillor B. Lawlor, Seconded by Councillor A. Egan

That the 'Proposed Primary School' Specific Objective be removed from the 1.9 hectares of lands at Stocking Avenue [Site A],

REPORT:

This motion seeks to remove the School Symbol Objective from the 1.9 hectares of land at Stocking Avenue. It is noted that there is no proposed justification supporting this motion or alternative for the schooling need in the Templeogue area.

The Planning Department liaised with the Department of Education and Skills (DES) in preparation of the draft Plan. Based on the information in the Core Strategy and the DES's own internal analysis of schooling requirements it was determined that there was a need for an additional school on this site. This requirement is above any schools which have been granted permission and awaiting funding or in the process of seeking planning permission. On this basis, the proposed motion should not be adopted.

Recommendation

It is recommended that this motion is not adopted.

[Link to Map

Map 1]

A discussion ensued with contributions from Councillors B. Lawlor, P. Gogarty, C. Bailey, A. Edge, L. Donaghy, E. Murphy, C. King, L. Dunne, L. O'Toole, D. O'Donovan, P. Kearns, S. Sinclair, R. McMahon, Ms H. Craigie, Senior Planner responded to queries raised.

A Roll Call vote on the Motion followed, the result of which was as follows:

FOR 13 (THIRTEEN)
 AGAINST 24 (TWENTY-FOUR)
 ABSTAIN Nil
 (roll call link)
 The motion FELL.”

- 64.** Consequently the elected members made an affirmative majority decision, by roll-call vote, to retain the SO objective. That was on foot of and in accordance with a chief executive’s report which expressly set out reasons for retaining the objective.
- 65.** In July 2021, the draft development plan was published which included a specific objective that the applicants’ lands be reserved for a school site.
- 66.** On 7th July 2021, a s.12(1)(a) notice and copy of draft development plan was sent to Minister, OPR, EMRA and prescribed bodies.
- 67.** On the same day a s.12 (1)(b) notice of draft development plan, inviting submissions from the public until 15th September 2021, was published.
- 68.** On 30th July 2021, an email was sent from the council to the Minister on foot of a customer care query which sought a timeline for delivery of the reserved school site. The council noted that planning permission had been refused for a school campus on a different site on Stocking Avenue and that a school symbol was attached to the site in the draft 2022 development plan and queried the Minister’s intention in respect of the site.
- 69.** Submissions were made by the second named applicant and by McCann Fitzgerald Solicitors on its behalf.
- 70.** On 9th August 2021, the Department issued a circular letter requesting that regard be had to draft development plan guidelines. However the draft plan was already out to consultation at that stage.
- 71.** On 10th August 2021, a follow up email was sent by the council to the Minister seeking an indication of timelines for the school site on the site. No response was received from the Minister.
- 72.** On 15th September 2021, submissions were made by the Department on the draft development plan.
- 73.** On the same day, submissions were made on behalf of the applicants on draft development plan by McCann Fitzgerald, enclosing a report of Tom Phillips & Associates.
- 74.** On 17th September 2021, there was a request under the Access to Information on the Environment (AIE) regulations from McCann FitzGerald to the Minister for Education in relation to the Stocking Avenue site, Ballycullen and the imposition of the ‘Specific Local Objective’. An AIE request appears to have been sent to the council in similar terms around the same time.
- 75.** On 12th October 2021, the council sent a response to the AIE request from McCann FitzGerald in relation to the Stocking Avenue site, providing a schedule of records and noting that they were publicly available.
- 76.** On 20th October 2021, an email was sent from McCann FitzGerald to the Minister for Education noting the lack of acknowledgment of the receipt of the letter sent on 17th September 2021.
- 77.** On 20th October 2021, the Minister sent an email to McCann FitzGerald apologising for the lack of response, citing an administrative error.
- 78.** On 26th October 2021, an email was sent from the Minister to McCann FitzGerald notifying them that the request had been forwarded to the Forward Planning Section.
- 79.** On 18th November 2021, the Minister sent a letter (although not apparently under AIE) to McCann FitzGerald stating that the Minister had no records as to why the site was selected for the specific objective and why it was changed to provide for a school rather than a primary school. The response included a schedule of records.
- 80.** On 7th December 2021, the chief executive issued a report on the public consultation on the draft plan. The report referenced a submission from the Department as follows:
 “SD-C195-256 Department of Education & Skills
 In relation to Templeogue, Walkinstown, Rathfarnham, Firhouse, the Department of Education (DES) note that the 9% population increase indicated for this neighbourhood in the Draft Plan equates to 15% of the overall population increase for South County Dublin. The DES in their submission details the three new school sites provided in this area, as referenced in the Draft Plan, as follows:
- the site in Knocklyon is to provide a permanent building for Gaelscoil Chnoc Liamhna and this building is currently under construction
 - the site on Stocking Avenue is to cater for the future needs of the Ballycullen/Oldcourt area where there is further significant proposed residential development that is projected to generate a school requirement for this community in the relative short-term. The Department regards this site as vital to meet the future needs of the area and it is readily deliverable to meet a school need in terms of location, access and services

- the site on Hunter's Road is to provide a permanent building for Firhouse Educate Together Secondary School. The plans are at detailed design stage and the projected is being expedited as it is required urgently.

CE Response:

The contents of this submission are noted and acknowledged. The Draft Development Plan maps set out the 'School Sites' in this area as referred to by the DES in their submission.

CE Recommendation:

No change to the Draft Plan."

81. The report included the following in relation to the second named applicant's submission:

"SD-C195-150 Jones Investments Limited

The submission seeks the rezoning of c. 8.1 ha subject lands located east of Ballycullen Road, Dublin 16 from 'natural amenity'- Objective HA to Objective RES-N and Objective OS, respectively.

The submission considers that this is a positive scenario for both the landowners and the local area/Council as it provides additional land for much needed residential housing and also provides playing pitches for the local area.

The submission puts forward a number of reasons justifying such a rezoning request to include the following:

- Rezoning of the subject lands continues the logical expansion of housing adjacent to Abbots Grove and along Ballycullen Road;
 - Lower density housing on the subject lands is in line with the contours of the site and the Draft Plan;
 - Subject lands (Parcel A) can provide c. 200 No. units at 40 No. units per hectare (lower density housing).
 - Provision of much needed housing and an increased quantum of land must be zoned in order to meet the high quantum of homes (33,000) per year that are required as identified in the Housing for All initiative;
 - Suitable for the sustainable provision of housing due to its proximity to public transport;
 - Development on the subject lands will 'complete' Ballycullen Road to provide a smoother transition from the urban to the rural;
 - Parcel B could accommodate 3 No. All Weather/Artificial Grass Pitches (AGP) with specific reference to COS4 Objective 1;
 - Playing pitches at the southern end of the subject lands will help blend the boundary between the urban and the rural environment along with the retention of hedgerows and trees above the 120 m contour line:
 - Some 79% of the site resides above the 120 m contour;
 - Accords with NCBH4 Objective 3 that states that intact hedgerows/trees will be maintained above the 120 m contour line; and
- Facilitate public access to two protected structures and to a proposed 'Sites and Monuments Record Zone' to include 19th Century Cross (RPS Ref. No. 360) and St Columbcille's Well (RPS Ref. No. 362) and a Well is a proposed Sites and Monuments Record Zone' (Map Ref. R149348) (Recorded Monument and Places Ref. DU022-028).

CE Response:

The issues raised in the submission are noted.

The submission requests the rezoning of c 8.1 hectares of the subject lands to RES-N and OS to provide for residential units and playing pitches. The Core Strategy and Settlement Strategy in Chapter 2 sets out population and housing figures which must be consistent with the National Planning Framework (NPF) and the Regional Spatial and Economic Strategy (RSES) as required under the Planning and Development Act 2000 (As Amended). South Dublin County is anticipated to grow by 46,518 persons by 2028 with the housing target for the County, as set by Ministerial Guidelines and the NPF Road Map, being 17,817 homes up to 2028. Chapter 2 also confirms that the County has enough land for a further 10,470 units (79%) above the net household need and therefore there is no need to re-zone additional lands or zone new additional lands over and above those currently set out under the current 2016 County Development Plan.

Having regard to above figures set out in the Core Strategy and the current excess of zoned land, without the need for further zoning, it is considered that there is sufficient flexibility to meet the household requirements for 2031 and potentially up to 2040. The revised target figures in response to the OPR recommendations, set out separately under the response to the OPR, do not impact on the excess land capacity available to meet the revised targets. Therefore, to re-zone or zone new additional lands over and above those currently set out in the Draft Plan would be contrary to National and Regional planning policy.

Furthermore, the subject lands are currently zoned rural, located at the southern edge of the Dublin City and Suburbs settlement boundary. The core principle of the NPF is compact urban growth through the consolidation of the existing-built footprint of settlements. The Draft Plan priorities the development of existing zoned lands particularly within MASP growth areas. To re-zone additional lands, especially at the periphery of the County which would continue the sprawl of the urban area towards the mountains is not appropriate.

Development which further sprawls the settlement boundary is contrary to the analysis carried out in Chapter 2 having regard to the projected population growth for the Dublin City and Suburbs settlement and parameters under of NSO 1, and NPO 3b. As such, there is no requirement to re-zone additional land for residential purposes to meet the needs of the targeted population increase and thus household need up to 2028.

In this context, the rezoning of the subject lands undermines the delivery of households within strategic residential growth sites identified within the Regional Metropolitan Area Strategic Plan at:

Adamstown, Clonburris, Tallaght, Naas Road and Fortunestown which would be contrary to National and Regional Planning Policy.

CE Recommendation:

No change to the Draft Plan”

- 82.** In relation to the second named applicant’s submission together with the McCann Fitzgerald submission, the report stated as follows:

“SD-C195-141 Jones Investments Limited

SD-C195-235 McCann Fitzgerald

This submissions calls for the Removal of the S (School)

Zoning on lands at Stocking Avenue so that the underlying ‘New Residential’ zoning can be fulfilled.

In this regard, it is submitted that there has been no intent shown to locate a school on the Site, let alone a plan for the school to be developed on a phased basis. It is submitted that it is now likely that the surrounding ‘new residential’ land will be developed prior to a school being developed on the subject site and the school objective should be located elsewhere (e.g. at the ‘School (‘S’)’objective site c. 600 m away) so that a proper phasing plan can be put in place.

The submission refers to Section 1.5 of the Draft Development Plan Guidelines, which states that ‘seeking to prioritise development at a location where there is an obvious deficit in services and/or infrastructure and without a clear commitment and timescale for resolution is unlikely to be appropriate’. In this regard, it is submitted that SDCC should prioritise development at serviced lands, like the subject site, which would be consistent with section 15(1) of the Planning Acts, under which SDCC is obliged to take steps to secure the objectives of the plan. It is further submitted that SDCC has assumed for 21 years that the lands will be required for a primary school, but this assumption has been proven to be wholly unjustified and has placed a burden of sterilization on the subject site for 21 years without a clear commitment or timescale for resolution.

The submission refers to Section 11(3)(c) of the Planning Acts, as highlighted in the Draft Development Guidelines, and the need to plan from an evidence base, with the plan-making process to include ‘[a] clear and transparent analysis of an existing baseline of plan-related information with a focus on an examination of the effectiveness of previous plans in achieving their stated objective’. In this regard, it is submitted that this approach has never been applied in relation to the SLO.

The submission raises concerns regarding the amended wording in the SLO which preserves the site for a school, as opposed to a primary school, as the DES indicated previously that the site is not large enough to properly accommodate a post-primary school.

It is submitted that the Draft Plan cannot lawfully retain the SLO without clear evidence, guidance and analysis of why: (A) the Site was initially selected as appropriate for the SLO; (B) the Site is still considered the most appropriate site to be subject to the SLO; and, (C) the SLO was amended to provide for a school, rather than a primary school.

It is submitted that Jones Investments Ltd have shown a repeated willingness to facilitate the development of the subject site as a school and has tried to work with SDCC and the DES to achieve the SLO and expended considerable resources.

The submission refers to the High Court judgement *Kemper v. An Bord Pleanala* [2020] IEHC 601 and the legislative requirements under Section 11 (3) I to carry out the necessary consultation and submits that the SLO would be open to challenge if the legislation has not been adhered to.

The submission refers to the High Court judgements *Reid v. Industrial Development Agency* [2015] 4 IR 494 and *Heaney v. Ireland* [1994] 3 IR 593 which highlight issues around

proportionality of the interference relevant to the authorised aim. It is submitted that the SLO fails in relation to this criterion; is entirely unfair, and based on considerations that have no evidential basis; impairs the owner's rights to the maximum extent preventing them from any use of the lands, burdening them to remain custodian of the lands and incur related costs, without making any compensation or return for this disproportionate interference.

The developer indicated that it would be unlawful for SDCC to make a development plan that retains the SLO, or changes it to refer to merely a school, where:

- no evidential basis for the SLO has been disclosed;
- as a matter of fact, proven by 21 years of inaction, the subject site is not required for a primary school, and is unfit for a post-primary school;
- when a decision to locate a school in the area was made in 2012, the Site was not selected;
- no meaningful consultation with education service providers has been completed, in breach of section 11(3)I of the Planning Acts;
- the Site is zoned for residential development, which zoning objective has been frustrated by the SLO, and by the evident disinterest in acquiring the lands for that school purpose,
- in breach of section 15(1) of the Planning Acts; and,
- the SLO has sterilised the lands for 21 years, in breach of the owners' constitutionally protected property rights. The SLO impairs the owners' rights to the maximum extent, preventing the owners from any use of the lands, burdening them to remain custodian of the lands and incur those costs, without making any compensation or return for this disproportionate interference.

For all of these reasons, the submission insists that SDCC remove the SLO from these lands.

CE Response:

The contents of this submission are noted and acknowledged.

The subject site is zoned for residential development (RES-N) which is 'to provide for new residential communities in accordance with approved area plans'. It is submitted that the zoning objective has been frustrated and prevented by a Specific Local Objective (SLO) to provide a primary school that is contained in various South Dublin County Council (SDCC) development plans since 2005.

The site on Stocking Avenue is to cater for the future needs of the Ballycullen/Oldcourt area where there is further significant proposed residential development that is projected to generate a school requirement for this community in the relative short-term. Education facilities have a central role to play in developing sustainable and balanced communities. In their submission to the Draft Plan the Department of Education and Skills have stated that they regard this site as vital to meet the future needs of the area and it is readily deliverable to meet a school need in terms of location, access and services.

The submission proposes a school site c.600m from the stocking Lane site. The proposed school site mentioned is indicated as being c.600m from the Stocking Lane site and is located on land Zoned Objective RU — 'To protect and improve rural amenity and to provide for the development of agriculture'. It is considered that, given the submission from the Department of Education, there is no justification for the removal of the proposed school site as requested by the submission.

[map inserted]

Figure 1: Extract taken from Draft SDCC Development Plan —Map Sheet 10 identifying the Specific Objective — Proposed School and Zoning Objective RES-N.

This correlates with COS8 Objective 2 & 3 which states:

COS8 Objective 2:

To facilitate the development of new schools, the re-development of existing schools and extensions planned as part of the Government's School Building Programme.

COS8 Objective 3:

To require schools to be provided in new communities on a phased basis in tandem with the delivery of residential development, in accordance with the phasing requirements of Local Area Plans and Planning Schemes or as may be otherwise required.

The Planning Department have been in discussions with the Department of Education and Skills (DES) in preparation of the Draft Plan, as per Policy COS8(a) and COS8(b):

Policy COS8(a):

Work in conjunction with the Department of Education and Skills to promote and support the provision of primary and post-primary schools in the County to reflect the diverse educational needs of communities.

Policy COS8(b):

Engage with the Department of Education and Skills and support the Department's School Building Programme by actively identifying sites for primary and post primary schools at suitable locations, based on forecast need.

The Draft Plan has a single symbol for schools. This is a change from the 2016 County Development Plan which had a separate symbol for primary and post primary schools. In discussion with the Department, it was agreed that a single symbol was a preferred approach, providing for a degree of flexibility should needs change over the course of the plan.

Ballycullen — Oldcourt Local Area Plan 2014 5.4.8 School Provision

The Department of Education and Skills indicate that there is currently a need for a new primary school facility to serve existing populations in the surrounding area of the Plan Lands and that development of the Plan Lands will generate the need for a second new primary school facility.

The Planning Department have been in discussions with the Department of Education and Skills (DES) in preparation of the Draft Plan.

As stated above, The Department of Education and Skills regards this site as vital to meet the future needs of the area and it is readily deliverable to meet a school need in terms of location, access and services.

CE Recommendation: No change to Draft Plan."

83. On 17th December 2021, a letter was sent from McCann FitzGerald to the council regarding their response to the AIE request, stating that variance in the response from the Minister and the council suggested that the council was not furnishing all information.

84. On the same day, an email was sent from McCann FitzGerald to the Minister as an AIE review request on the basis that no response was made under the AIE regulations.

85. On 21st December 2021, an email was sent from the Minister to McCann FitzGerald stating that there would be an internal review under AIE.

86. On 17th January 2022, a letter was sent from the Minister to McCann FitzGerald with the conclusion of the AIE review request confirming that the Minister did not hold any records prior to 2013 in relation to the site.

87. Council meetings addressing the report were held on a range of dates including 1st, 3rd, 7th and 9th March 2022.

88. As part of that discussion a motion was passed by a majority of the members strengthening the need for additional school provision set out in the draft plan at COS8 objective 3 unless the Department confirmed that existing capacity was sufficient, even though the chief executive considered that the existing liaison with the Department was working well and the amendment was unnecessary. That majority decision was consistent with the earlier specific decision to maintain the school provision for the site in question.

89. As a result of the meetings, material alterations were made which were put out to public consultation, and submissions were received.

90. On 22nd May 2022, the chief executive then provided a further report on the material alterations under s. 12(4) of the 2000 Act. That includes the following in relation to a submission from the Department of Education and Skills:

"SD-C226-63 Department of Education & Skills

The submission indicates that the material alterations do not result in a projected change to the school place requirements

The submission also notes Amendment 21 and the redistributed settlement targets and indicates that the redistribution of projected growth is not considered significant enough to result in a change in the projected school place requirements.

CE Response:

The content of the submission from the Department of Education is noted in regard to the redistributed settlement targets for the County and that the extent of change does not require changes to the projected school place requirements set out in the Draft

CE Recommendation:

No change to Amendment 2.1."

91. The members met to make the final decisions, and on 22nd June 2022, SDCC Development Plan 2022-2028 was made.

92. Section 8.10 of the 2022 Development Plan states that:

"The Department of Education identifies the need for new schools through a nationwide demographic review, using a Geographical Information System (with data from the CSO, OSI and Department of Social Protection in addition to the DoE's own databases). Locations where pressure for additional primary and post-primary school places will arise are identified and this need is catered for either by new schools or the expansion of existing schools. Demographic changes in South Dublin County will continue to be monitored by the

Department of Education on an ongoing basis. In addition, the Council has engaged extensively with the Department, as part of the preparation of this Plan, to identify school need in each neighbourhood area based on the population growth identified in the core strategy. This engagement involved the review of school reservations on the 2016 Development Plan maps and within LAPs to ascertain whether they should be retained as part of this Plan and an assessment, based on the core strategy, of whether new schools would be required. This is reflected in the objectives contained within the Development Plan maps and are also identified in Appendix 12: Our Neighbourhoods.”

93. The SO was amended in the 2022-2028 Development Plan from “primary school” to “school” (11 Sheet Map 10 of the 2022-2028 Development Plan). The SO and similar SOs of this type do not now differentiate between a primary school and a post primary school, unlike previous development plans. This change was to provide a greater degree of flexibility in school provision to align with needs at a given time. A similar approach was apparently also taken in other county development plans.

94. On 1st July 2022, the new section 28 guidelines on development plans were made (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/228826/6e26204a-ffd0-42a4-b868-097d647e537f.pdf#page=null>).

95. On 3rd August 2022, the plan came into effect (6 weeks after its adoption on 22nd June 2022).

96. The Ballycullen LAP was extended in accordance with s. 19(1)(d) of the 2000 Act. The current expiry date of the LAP is 29th September 2024.

97. The statement of opposition points out that development on the Ballycullen LAP lands is ongoing. As of January 2024, 1,311 units have been completed, 49 units are under construction and 358 have been permitted but not commenced. A further approximately 810-915 units can be accommodated on the remaining lands within the Ballycullen LAP where no planning application has yet been lodged / approved (§18).

Procedural history

98. The action falls under s. 50(2)(a) of the 2000 Act. On 4th August 2022, the proceedings were issued in the judicial review list.

99. On 7th November 2022, Meenan J. directed leave be sought on notice to the council.

100. On 16th November 2022, the notice of motion was filed. On 17th November 2022, the notice of motion was served on the council.

101. On 30th January 2023, leave was granted in the judicial review list.

102. On 5th April 2023, a notice of motion for entry in what is now the Planning & Environment List was filed. On 24th April 2023, the case was mentioned in this list and admitted on standard terms. It was listed for mention on 8th May 2023.

103. On 27th April 2023, an amended statement of grounds was filed.

104. On 8th May 2023, the council proposed a revised timetable for directions which was agreed as follows:

- (i). council opposition papers – 30th June 2023;
- (ii). applicants’ replying affidavits (if any) – 7th July 2023;
- (iii). council replies (if any) – 27th July 2023; and
- (iv). for mention (subject to court) – 31st July 2023.

105. The matter was ultimately listed for mention on 2nd October 2023. On 13th November 2023, the case was for mention at the applicants’ request. A new timetable for delivery of opposition papers was agreed.

106. On 12th February 2024, the applicants sought a date. That application was granted and I listed the matter for hearing on 14th May 2024, with an initial call over on 29th April 2024.

107. On 9th February 2024, the council’s opposition papers were filed.

108. On 15th April 2024, the applicants’ replying affidavit was filed.

109. In view of the fact that judgment remained pending in the CJEU on SEA issues in *Friends of the Irish Environment*, the matter was modularised on 29th April 2024 so that Module I (domestic law issues) would be taken first.

110. On 13th May 2024, there was a final call over before the hearing.

111. The Minister did not get involved in the proceedings. While the applicants made much of that, it is of no legal significance. The Minister wasn’t obliged to take part and no relief was sought against her. Not appearing isn’t equivalent to a concession of the applicants’ case or an acceptance that there is no necessity for the reservation.

112. Module I was heard on 14th and 15th May 2024. At the conclusion of the hearing, the matter was adjourned to 10th June 2024, for clarification of the position under s. 153 of the 2000 Act, a matter to which I now turn.

The need for express authorisation of the members

113. Section 153 of the Local Government Act 2001 provides as follows:

“153.—(1) The [chief executive] for a local authority—
 (a) shall act for and on behalf of the local authority in every action or other legal proceeding whether civil or criminal, instituted by or against the local authority, and
 (b) may do all such acts, matters, and things as he or she may consider necessary for the preparation and prosecution or defence of such action or other proceeding in the same manner in all respects as if (as the case may require) he or she were the plaintiff, prosecutor, defendant or other party to that action or other proceeding.
 (2) Where an action or other proceeding relates to the exercise or performance by the local authority of a reserved function, the [chief executive] for that authority shall, in the doing of any such act, matter, or thing referred to in subsection (1), act with the express authorisation of the elected council of such local authority, and in any proceedings such authorisation shall be deemed to have been given unless or until the contrary is shown.”

114. Because a challenge to the development plan relates to a reserved function, the “express authorisation” of the members is required: see *Protect East Meath v. An Bord Pleanála* [2023] IEHC 218, [2023] 5 JIC 0301 para. 13. In *Killegland*, the approval was given the day before the matter was heard in the High Court.

115. Such approval is presumed unless the contrary is shown, but the council did confirm in response to my query that there wasn’t initially such an express authorisation. A situation where X is presumed unless the contrary is shown means that X is displaced if the contrary is indeed shown or admitted. That general principle applies to s. 153: *Oceanscape Unlimited Company v. Dún Laoghaire-Rathdown County Council* [2024] IEHC 381 (Unreported, High Court, 27th June 2024) per Farrell J.

116. While I agree with Farrell J. that the requirement to obtain the members’ express authorisation is the governing and prior concept, the presumption does in practice allow council management to get the defence of proceedings underway, at least unless and until someone (including the court) asks whether there is an express authorisation. At that point the fuzziness of a presumption must yield to the hardness of a yes or no answer – a forensic version of Schrödinger’s cat. As long as the box is closed we can hope that all is well, but once we look inside, the situation resolves into a binary position. The presumption is no longer useful once we actually know that it has been rebutted.

117. The chief executive did inform the corporate policy committee of the proceedings, as one would expect, although consultation or even the agreement of a committee or even consultation or information to all members at a meeting or otherwise isn’t the same thing as “express authorisation” by the elected members expressed formally at a meeting of the full council.

118. On 10th June 2024, the council indicated a preference to adjourn the present case pending clarification of the meaning of s. 153(2) in *Oceanscape*. The applicants understandably were unhappy about that, and they sought, and were given, liberty to bring a motion which would in effect debar the chief executive from defending the proceedings due to non-compliance with the provision, returnable for 27th June 2024 and to be heard on that date. However that liberty was conditional on the council failing to confirm by 14th June 2024 that it would put the matter before the members for express authorisation. The council, sensibly, did in fact confirm that by the deadline so when the matter was mentioned again on 17th June 2024 I dealt with the matter on the basis that judgment be reserved subject only to confirmation that the members had given such an authorisation and that no issue arose therefrom.

119. On an empirical note it might be said that the Dún Laoghaire-Rathdown-based campaign for chief executive’s rights that erupted in *Oceanscape* is a somewhat lonely one because all other chief executives in cases where this issue has arisen have been agreeable to submit the matter to the approval of the elected representatives. Irrespective of the legal merits, one would have thought that more democracy rather than less would be in keeping with the spirit of the age: see for just one example *Heneghan v. Minister for Housing, Planning & Local Government & ors.* [2023] IESC 7, [2023] 2 I.L.R.M. 1. But that’s by the way. What is perhaps less irrelevant is the fact that s. 153(2) does serve one important forensic purpose which is it puts on the record the question of whether the members have considered the proceedings and made a decision whether to defend them or not. That is a protection for challenging applicants more than anybody. I will return to that.

120. The council’s ultimate proposal was to put the matter before the elected members at the monthly meeting next following the annual meeting on Friday 21st June (i.e., 2 weeks after the local elections held on Friday 7th June 2024). The next meeting was scheduled for 8th July 2024. Following that meeting the council wrote to the court on 9th July 2024 as follows:

“I understand the Directions of [the court] in this case to be :

1. Reserve judgment pending the outcome of the Council meeting on 8 July 2024
2. SDCC to advise the parties as soon as possible after the meeting on 8 July 2024 as to whether authorisation was obtained or not

3. If authorisation is obtained, the Applicant to write to say that it is happy for the Court to deliver judgment

In compliance with 2. above I confirm that express authorisation to defend this case was obtained at the Council meeting on 8th July .”

121. The applicants replied on the same date saying:

“We act for the applicants in these proceedings and acknowledge the letter from the respondent dated 9 July 2024 confirming the respondent has obtained express authorisation to defend these proceedings pursuant to section 153(2) of the Local Government Act 2001, as amended. I note that a copy of this letter has been uploaded to the ShareFile. The solicitors for the respondent and notice parties are copied on this email.

As directed by [the court] on 17 June 2024, the parties await delivery of judgment in this matter by the Court in due course.”

122. While not expressly stating that no further issues in relation to s. 153 arose, having regard to the context that letter can only be construed as not raising any such issues. On that basis the judgment can now proceed, as indeed expressly envisaged in the applicants’ final letter.

Relief sought

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

“(D) Reliefs sought:

~~1. An Order of Certiorari by way of application for judicial review quashing the decision (the ‘impugned decision’) of the Respondent, South Dublin County Council, of 22nd June 2022 to make and adopt the South County Dublin County Development Plan 2022-2028 (‘CDP’) that is scheduled to come into force on 3rd August 2022.~~

~~1. An Order of Certiorari, in the alternative, by way of application for judicial review quashing the the impugned decision of the Council to attach a Specific Local Objective (‘SLO’) contained in the South County Dublin County Development Plan 2022-2028 (‘the CDP’) adopted by the Council on 22nd June 2022 and which came into force on 3rd August 2022 and which is attached to the Applicant’s lands which are located at a 5 acre site on Stocking Avenue, Ballycullen (Folio DN16077).~~

~~2. Such Declarations of the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or legal position of the Council as the Court considers appropriate.~~

~~3. A Declaration that the Council, in adopting the CDP, erred in law in failing to comply with the requirements of sections 10 and 11 of the Planning and Development Act 2000, as amended (the ‘2000 Act’).~~

~~4. A Declaration that in adopting the CDP the Council failed to provide any or any adequate reasons for rejecting the submissions made by or on behalf of the Applicants in respect of the site and/or the decision fails to accord with the Applicant’s rights to natural and constitutional rights and fair procedures.~~

~~5. A Declaration that the impugned decision is invalid as the application of the SLO to the Site constitutes an impermissible and disproportionate attack on the Applicant’s constitutionally protected property rights pursuant to Article 40.3 and/or Article 43 of the Constitution.~~

~~6. A Declaration that the Council, in adopting the CDP, erred in law in failing to consider, or include adequately or at all, reasonable alternatives for the purposes of the Planning and Development Regulations 2001 (as amended) (the ‘2001 Regulations’) and the Strategic Environmental Assessment Directive (2001/42/EC) (the ‘SEA Directive’).~~

~~7.3. A Declaration that Section 50B of the 2000 Act, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and/or that the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.~~

~~8.4. An Order for costs.~~

~~9.5. Further or other order.”~~

Grounds of challenge

124. The core grounds of challenge are as follows:

“(E) Grounds:

a) Core Grounds

Domestic Law Grounds

Core Ground 1: The impugned decision is invalid as it failed to comply with or have any or any adequate regard to the necessity for evidence-based planning as required by the Ministerial Guidelines for Planning Authorities on the preparation of Development Plans

pursuant to section 28 of the 2000 Act and/or in contravention of the requirements of section 10(1A) of that Act.

Core Ground 2: The impugned decision is invalid as the Council failed to provide any or any adequate evidence base and/or any or any adequate reasons for attaching the SLO to the Site and/or it was irrational and unreasonable for the Council to do so and/or was contrary to the evidence identified on behalf of the Applicants.

Core Ground 3: The impugned decision is invalid as the Council failed to conduct any or any adequate consultation for the purposes of section 11(3)(c) of the 2000 Act and/or failed to comply with the requirements of section 11(4) of the 2000 Act.

Core Ground 4: The impugned decision is invalid as the Council failed to provide any or any adequate reasons for rejecting the submissions made by or on behalf of the Applicants in respect of the site and/or the decision fails to accord with the Applicant's rights to natural and constitutional rights and fair procedures.

Core Ground 5: The impugned decision is invalid as the application of the SLO to the Site constitutes an impermissible and disproportionate attack on the Applicant's constitutionally protected property rights pursuant to Article 40.3 and/or Article 43 of the Constitution.

European Law Ground

Core Ground 6: The impugned decision is invalid as it failed to consider adequately, or at all, reasonable alternatives for the purposes of Article 13E(1), Schedule 2B, and Article 13H of the 2001 Regulations, as required by Articles 5 and 9(1) of the SEA Directive."

Some general considerations in relation to development plan challenges

125. While once a rarity, challenges to development plans have become something of a cottage industry in recent years. All the more reason to emphasise certain basic contextual factors.

126. In *Killegland Estates Ltd. v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109, Hogan J. laid out a number of propositions of general relevance in relation to development plan challenges.

127. At para. 56 he said:

"it is clear from the express language of s.11(8) of the 2000 Act that there can be no expectation as such that a particular zoning of land in a given development plan will remain inviolate. Accordingly, any such zoning is liable potentially to be changed via this democratic process at some future stage when the next development plan is adopted. This was the very point made by Dunne J. in *Mahon v. An Bord Pleanála* [2010] IEHC 495 when she remarked with reference to s. 11(8) that a change in zoning 'does not entitle the applicant to compensation even though the value of his land may have been reduced as a result.'"

128. At para. 57 he continued:

"the power to make a development plan is [a] function of the elected members: see s. 12(6) of the 2000 Act. When the Council exercises these ... powers, it acts as of necessity as a deliberative assembly. To that extent, it follows that, as Lynch J. said in *Malahide Community Council Ltd. v. Fingal County Council* [1997] 3 IR 383 at 397: '...any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature.'"

129. At paras. 58 and 59 he noted:

"58. These sentiments now apply with even greater force following the subsequent adoption of Article 28A.1 of the Constitution in 1999 with its recognition of 'the role of local government in providing a forum for the democratic representation of local authorities in exercising and performing at local level powers and functions conferred by law...'

59. Given the deliberative quality of the decision-making process the reasons for a particular decision may not necessarily be as neatly packaged and presented as would be in the case where, for example, ... functions were discharged by the Council qua planning authority. The duty on the part of the elected members when passing a resolution under their executive powers was nonetheless summarised by Finlay C.J. in *P & F Sharpe Ltd. v. Dublin City and County Manager* [1989] IR 701 at 720-721 as involving 'an obligation to ensure that an adequate note was taken, not necessarily verbatim but of sufficient detail to permit a court upon review to ascertain the material on which the decision had been reached.'"

130. As regards reasons, Hogan J. addressed the situation where the members went against a reasoned recommendation, at para. 67:

"... in making a change of this kind to the development plan the councillors are going against the advice of the Chief Executive and the planning officials, the reasons for such a decision should be properly evidenced and justified. Accordingly, the reasons for such a decision should either be clear from the resolution itself or from the documentation before the councillors when the making of the resolution was discussed. In exceptional cases it may be sufficient to show that the reasons for the decision were well understood."

131. At para. 69 he went on:

"Turning now to the first question: were reasons given and did they adequately the rationale for that decision? To my mind, there can be but one answer. It is clear that the councillors proposing this change had on many occasions explained the reasons for their decision. They wanted to preserve the 0.7ha site as the access point from Churchfield to the proposed park, thereby facilitating an access road and servicing a car park to that proposed park. While it is true that these reasons were expressed in different ways and at different times and that there is no single written expression of that view (as would normally be the case with, for example, planning decisions under the 2000 Act), nevertheless no one could really have been in any doubt as to the reasons given for the de-zoning"

132. The punchline came at paras. 83 to 85:

"83. Here one might note that unlike earlier cases such as Flanagan or Griffin there was no suggestion that the decision to de-zone had been adopted for irrelevant personal reasons. Nor was there any suggestion that unlike those cases or cases such as Farrell that the proposed de-zoning would be inconsistent with the proper planning and development of the area or (again as in Farrell) that it would jeopardise existing heritage conservation or environmental objectives. Again, unlike the situation in Farrell, the reasons given for disregarding the advice of the officials were for the most part planning-based reasons.

84. It is, however, true that an examination of the minutes and the transcript of various meeting discloses that at least some of the councillors believed that these lands were in the ownership of the Roman Catholic Church and that this was the reason why up to that point no application to develop this site had materialised. This, however, was not only a factual error – because in the meantime the lands had been purchased by Killegland – but because as cases such as Flanagan and Griffin show, questions of the identity of the owner of lands are in general an irrelevant consideration in planning matters. Planning and zoning decisions should, generally speaking, at least, be blind as to issues of ownership. It is also true that the councillors wrongly believed that a 'swap' of the Giltinane lands was necessary to facilitate the de-zoning of the Killegland lands. In this the councillors were mistaken, since these latter lands could have been de-zoned on a stand-alone basis.

85. It is true that both of these considerations – the issue as to the ownership of the lands and the necessity to 'swap' the lands – were irrelevant to the planning decision which the councillors were required to make. Unlike the situation disclosed by earlier cases such as Flanagan and Griffin, it may be said that these considerations were not absolutely central to the de-zoning decision. On the facts of the present case, they were really at best marginal considerations, and they cannot be said to have thereby vitiated the overall decision to dezone."

133. Referring to s. 10 of the 2000 Act, Hogan J. said at para. 89:

"... one key object of these core strategy provisions is to ensure that development plans take proper account of projected population growth in any given areas. This in turn implies that the promiscuous and unlimited rezoning of land for residential land – which in the past was often an unhappy feature of the entire development plan process – should no longer be permitted."

134. At para. 100, referring to the provisions on compliance with the NPF and RSES, he said:

"... the overall effect of these provisions is to constrain to some degree the Council and the elected members so far as the making of development plans are concerned. Some allowance must, of course, be made for the large scale nature of this exercise and it would be unrealistic to expect perfect consistency or alignment with national planning guidelines or frameworks such as the NPF. The elected members are, nonetheless, not at large, and any such development must align itself at least in general with certain national and local policy objectives."

135. At paras. 101-103 he said:

"If objective 3c had been made the equivalent of a mandatory statutory obligation so that it required every in-fill site of this kind to be zoned suitable for housing, then the applicant's case would have much to commend it.

102. Where I respectfully part company with the arguments advanced by Killegland on this point is that I do not consider that one can read either the relevant statutory provisions – 46 particularly s. 12(18) – or the objectives of the NPF in this way. In the first instance, s.12(18) simply requires that the development plan is 'consistent' with the 'objectives' of the NPF. Like [the trial judge], I read this language as meaning consistent generally, as distinct from complying in every detailed and minor particular. The language of objective 3c is moreover generally precatory ('...a preferred approach...') rather than imposing a legally prescriptive standard which required every available in-fill site to be zoned for housing. This is further reflected in section 4.5 of the NPF which, as we have seen, speaks of a 'target' of

a 'significant proportion of future urban development on infill/brownfield development sites' within existing settlements.

103. All of this again suggests that the NPF is in this respect as I have just said largely precatory and aspirational. It might well have been different if the development plan had shown a casual disregard throughout the county of the need to encourage in-fill development on brownfield and other sites immediately contiguous to the core areas of each urban settlement, but that particular case has never been advanced. As [the trial judge] also observed (at paragraph 146), one must also have regard to the fact that by contrast to the language of s. 12(18) the Oireachtas used mandatory and prescriptive language in other parts of closely related sections. Thus, for example, as we have already noted, s. 10(2A(a) provides that a core strategy 'shall' contain sufficient information to show that development plans are 'consistent' with the NPF. The obligation to provide the information is thereby made mandatory ('shall'), but a more accommodating standard ('consistent') is provided in relation to the actual contents of the development plan itself."

136. At para. 107 he went on:

"I do not consider that this amounts to some imperative requirement that all in-fill sites (such as the present one) in existing urban areas must be zoned for housing development. It might be different if a development plan studiously avoided such zoning for in-fill sites throughout the county. As [the trial judge] observed (at para. 180) 'these objectives are compatible with downzoning lands not required during the lifetime of the plan.' I can only agree."

137. His powerful conclusion at para. 109 has significant resonance here:

"One might accordingly say that the elected members were empowered by law to make a democratic decision regarding the scope of the development plan and this they duly did. They took this decision principally for valid planning reasons in accordance with the terms of the 2000 Act and unlike cases such as *Flanagan and Griffin*, they did not have regard to irrelevant considerations in a manner which was material and central to their decision. Nor in the circumstances can one conclude that this de-zoning had the effect of infringing any relevant objectives delineated in either the NPF or the RSES. While one may understand *Killegland's* objections to this decision inasmuch as its lands presumably suffered a diminution in value as a result, I see no basis in law by which the validity of that decision can properly be impugned."

138. An obvious point is that, as the council submits, "judicial review is not an invitation to the Court to embark on a merits-based assessment of the rights or wrongs of the impugned decision".

139. In *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, [1989] I.L.R.M. 768, [1989] 5 JIC 0503 McCarthy J. described a development plan as an "environmental contract" (see also *Byrne v. Fingal County Council* [2001] IEHC 141, [2001] 4 I.R. 565, [2002] 2 I.L.R.M. 321, [2001] 8 JIC 0201 per McKechnie J.) The very nature of that process inherently involves a fair margin of appreciation and a fair degree of discretion, as was noted in *Killegland Estates Limited v. Meath County Council (No. 1)* [2022] IEHC 393, [2022] 7 JIC 0106 at para. 44. see *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, Simons J., 10th March, 2020). This is reflected in section 10(2)(a) of the 2000 Act.

140. Finally, under the heading of general considerations, as with any case in general or any judicial review in particular, the applicants are confined to their pleadings.

141. As discussed in similar terms elsewhere, most recently in *Save Roscam Peninsula CLG & Others v. An Bord Pleanála & Others* [2024] IEHC 335, the rules of pleading are clear and unambiguous. In particular:

- (i) applicants are confined to their pleadings: *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501 (Murray C.J., Denham J.), *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42, [2021] 7 JIC 1606 (Baker J.) at §§29 and 31;
- (ii) pleading requirements in judicial review are "stringent", allowing "little room for manoeuvre": *People Over Wind & Another v. An Bord Pleanála & Ors (No. 1)* [2015] IEHC 271, [2015] 5 JIC 0106 (Haughton J.);
- (iii) "It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground": Order 84 r. 20(3) RSC;
- (iv) it is particularly important, in the case of an allegation of a failure properly to transpose an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed, *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (*Sweetman XV*), *per* McDonald J. at para 103, *Rushe v. An Bord Pleanála* [2020]

- IEHC 122, [2020] 3 JIC 0502 *per* Barniville J.; attempts to launch for example non-transposition claims not set out on the pleadings are impermissible: *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Costello J.);
- (v) "if on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it", *per* Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2022] IEHC 7, [2022] 1 JIC 1001 at para. 308;
 - (vi) the rules of pleading are well-established, clear and mandatory, and are of particular importance in a context of special complexity such as technical EU-heavy areas of planning law; while exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment: *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024] 1 JIC 2401; and
 - (vii) a court only decides points that are not academic, and that are properly pleaded and actually in dispute between the parties, and even then only when it is necessary and appropriate to do so: *Friends of the Irish Environment v. Government of Ireland* [2023] IEHC 562, [2023] 10 JIC 1904 at §117.

142. We can now turn to the specific points made on the pleadings.

Core ground 1 – guidelines

143. Core ground 1 is:

"Core Ground 1: The impugned decision is invalid as it failed to comply with or have any or any adequate regard to the necessity for evidence-based planning as required by the *Ministerial Guidelines for Planning Authorities on the preparation of Development Plans* pursuant to section 28 of the 2000 Act and/or in contravention of the requirements of section 10(1A) of that Act."

144. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 1

Applicant: The impugned decision is invalid as it failed to comply with or have any or any adequate regard to the necessity for evidence-based planning as required by the Ministerial Guidelines for Planning Authorities on the preparation of Development Plans pursuant to section 28 of the 2000 Act and/or in contravention of the requirements of section 10(1A) of that Act.

Respondent: Section 28(1) of the 2000 Act requires that a planning authority 'have regard' to guidelines issued under that section. The Respondent had regard to 'The Provision of Schools and the Planning System - Code of Practice for Planning Authorities, the Department of Education and Science, and the Department of the Environment, Heritage and Local Government' (July 2008) ('the Schools Code of Practice Guidelines') and the 'Development Plans - Guidelines for Planning Authorities' (June 2007) ('the 2007 Development Plan Guidelines') in making the Development Plan, as confirmed in Appendix 1 to the SDCC Development Plan 2022-2028.

The Applicants have sought to frame Core Ground 1 on the basis that there is an obligation to comply with the relevant section 28 guidelines. This is a misunderstanding of the section 28(1) 'have regard to' obligation."

145. One unfortunate problem for the applicants at the outset is the rather basic question – what guidelines are they talking about? The words "*Ministerial Guidelines for Planning Authorities on the preparation of Development Plans*" appear in italics in core ground 1, which is the conventional way of representing the title to a book or book-type publication. The relevant part of the Modern Language Association Style Guide, probably the go-to source for many scholarly citations, has been summarised by one educational institution as follows:

"List the full title as it is written on the source. Exceptions to this rule are for standardization of capitalization and subtitle punctuation.

Capitalize all principal words (nouns, verbs, adjectives, etc.). Do not capitalize articles, prepositions, or conjunctions when they fall in the middle of a title.

Separate a subtitle with a colon and a space.

Italicize titles if the source is self-contained and independent. Titles of books, plays, films, periodicals, databases, and websites are italicized."

(<https://irsc.libguides.com/c.php?g=483085&p=3303403>; see also the UCD style guide to the same effect: https://libguides.ucd.ie/ld.php?content_id=450289)

146. Unfortunately, the statement of grounds falls foul of this established convention - there is no publication with the italicised name cited, so it is certainly not "the full title as written on the source". There are two guidelines about development plans, from 2007 and 2022, both of which

are entitled *Development Plans: Guidelines for Planning Authorities*. Which one did the applicants mean? The 2022 version didn't apply, so presumably the 2007 version? But wait – the quoted text is from a completely different set of guidelines made in 2008 about school provision. We will come back to that.

147. As well as creating confusion about which guidelines apply, a further initial problem for the applicants is that the statement of grounds mis-states the statutory position. It baldly pleads that the decision "is invalid as it failed to comply with ... the Ministerial Guidelines ... and/or [was] in contravention of ... section 10(1A) ...".

148. Sub-ground 3 pleads that:

"... the Council has not complied with its obligations pursuant to section 10 of the 2000 Act to show that the CDP is consistent, as far as practicable, with the Ministerial Guidelines for Planning Authorities on the preparation of Development Plans ...".

149. But that misrepresents the statute. Section 10 contains no such "obligations". Sub-section (1A) merely requires a statement of consistency, as far as practicable, with *specific planning policy requirements* (SPPRs) in ministerial guidelines, not with guidelines overall. But no SPPRs are pleaded or relied on, and none apply, either in the pleaded guidelines or any other guidelines.

150. Section 28 of the Planning and Development Act 2000 provides:

"28.—(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

[(1A) Without prejudice to the generality of subsection (1) and for the purposes of that subsection a planning authority in having regard to the guidelines issued by the Minister under that subsection, shall—

(a) consider the policies and objectives of the Minister contained in the guidelines when preparing and making the draft development plan and the development plan, and

(b) append a statement to the draft development plan and the development plan which shall include the information referred to in subsection (1B).

(1B) The statement which the planning authority shall append to the draft development plan and the development plan under subsection (1A) shall include information which demonstrates—

(a) how the planning authority has implemented the policies and objectives of the Minister contained in the guidelines when considering their application to the area or part of the area of the draft development plan and the development plan, or

(b) if applicable, that the planning authority has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why the policies and objectives of the Minister have not been so implemented.]

[(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply.]

[(1D) A strategic environmental assessment or an appropriate assessment shall, as the case may require, be conducted in relation to a draft of guidelines proposed to be issued under subsection (1).]

(2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions.

(3) Any planning guidelines made by the Minister and any general policy directives issued under section 7 of the Act of 1982 prior to the commencement of this Part and still in force immediately before such commencement shall be deemed to be guidelines under this section.

(4) The Minister may revoke or amend guidelines issued under this section.

(5) The Minister shall cause a copy of any guidelines issued under this section and of any amendment or revocation of those guidelines to be laid before each House of the Oireachtas.

(6) A planning authority shall make available for inspection by members of the public any guidelines issued to it under this section.

(7) The Minister shall publish or cause to be published, in such manner as he or she considers appropriate, guidelines issued under this section."

151. The basic requirement for s. 28 guidelines is to "have regard" to and "consider" them (s. 28(1) and (1A)(a)), but if the guidelines contain specific planning policy requirements (SPPRs) then councils must "comply" (s. 28(1C)). When making a development plan the council must include a statement as to how it has "implemented" the policies and objectives contained in the guidelines, or explain why not.

152. The applicants use the language of compliance in their pleadings but that is based on a totally false legal premise, because the guidelines relied on do not involve SPPRs. Indeed no SPPR is even pleaded.

153. This crucial distinction between compliance in relation to SPPRs in guidelines and regard in relation to other policies in guidelines is also reflected in s. 10 of the 2000 Act, in particular sub-ss. (1A) and (2A):

“10.—(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question. [(1A) The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the [National Planning Framework] and [the regional spatial and economic strategy] [and with specific planning policy requirements specified in guidelines under subsection (1) of section 28].

(1B) [...]

(1C) [...]

(1D) The written statement referred to in subsection (1) shall also include a separate statement which shows that the development objectives in the development plan are consistent, as far as practicable, with the conservation and protection of the environment.]

(2) Without prejudice to the generality of subsection (1), a development plan shall include objectives for—

(a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated;

[(b) the provision or facilitation of the provision of infrastructure including—

(i) transport, energy and communication facilities,

(ii) water supplies and waste water services (regard having been had to the water services strategic plan for the area made in accordance with the Water Services Act 2007),

(iii) waste recovery and disposal facilities (regard having been had to the waste management plan for the area made in accordance with the Waste Management Act 1996), and

(iv) any ancillary facilities or services;]

(c) the conservation and protection of the environment including, in particular, the archaeological and natural heritage and the conservation and protection of European sites and any other sites which may be prescribed for the purposes of this paragraph;

[(ca) the encouragement, pursuant to Article 10 of the Habitats Directive of the management of features of the landscape, such as traditional field boundaries, important for the ecological coherence of the Natura 2000 network and essential for the migration, dispersal and genetic exchange of wild species;

(cb) the promotion of compliance with environmental standards and objectives established—
(i) for bodies of surface water, by the European Communities (Surface Waters) Regulations 2009;

(ii) for groundwater, by the European Communities (Groundwater) Regulations 2010; which standards and objectives are included in river basin management plans (within the meaning of Regulation 13 of the European Communities (Water Policy) Regulations 2003);]

(d) the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population;

(e) the preservation of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest;

(f) the protection of structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest;

(g) the preservation of the character of architectural conservation areas;

[(h) the development and renewal of areas, identified having regard to the core strategy, that are in need of regeneration, in order to prevent—

(i) adverse effects on existing amenities in such areas, in particular as a result of the ruinous or neglected condition of any land,

(ii) urban blight and decay,

(iii) anti-social behaviour, or

(iv) a shortage of habitable houses or of land suitable for residential use or a mixture of residential and other uses;]

- (i) the provision of accommodation for travellers, and the use of particular areas for that purpose;
- (j) the preservation, improvement and extension of amenities and recreational amenities;
- (k) the control, having regard to the provisions of the Major Accidents Directive and any regulations, under any enactment, giving effect to that Directive, of—
 - (i) siting of new establishments,
 - (ii) modification of existing establishments, and
 - (iii) development in the vicinity of such establishments,
 for the purposes of reducing the risk, or limiting the consequences, of a major accident;
- [(l) the provision, or facilitation of the provision, of services for the community including, in particular, schools, crèches and other education and childcare facilities;
- (m) the protection of the linguistic and cultural heritage of the Gaeltacht including the promotion of Irish as the community language, where there is a Gaeltacht area in the area of the development plan;
- (n) the promotion of sustainable settlement and transportation strategies in urban and rural areas including the promotion of measures to—
 - (i) reduce energy demand in response to the likelihood of increases in energy and other costs due to long-term decline in non-renewable resources,
 - [(ii) reduce anthropogenic greenhouse gas emissions and address the necessity of adaptation to climate change, taking account of the local authority climate action plan (within the meaning of section 14B of the Climate Action and Low Carbon Development Act 2015), where such a plan has been made for the area in question;]
 - (iii) [...]
 in particular, having regard to location, layout and design of new development;
- (o) the preservation of public rights of way which give access to seashore, mountain, lakeshore, riverbank or other place of natural beauty or recreational utility, which public rights of way shall be identified both by marking them on at least one of the maps forming part of the development plan and by indicating their location on a list appended to the development plan, and
- (p) landscape, in accordance with relevant policies or objectives for the time being of the Government or any Minister of the Government relating to providing a framework for identification, assessment, protection, management and planning of landscapes and developed having regard to the European Landscape Convention done at Florence on 20 October 2000.]
 - [(2A) Without prejudice to the generality of subsection (1A), a core strategy shall—
 - (a) provide relevant information to show that the development plan and the housing strategy are consistent with the [National Planning Framework] and [the regional spatial and economic strategy] [and with the specific planning policy requirements specified in guidelines under subsection (1) of section 28],
 - (b) take account of any policies of the Minister in relation to national and regional population targets,
 - (c) in respect of the area in the development plan already zoned for residential use or a mixture of residential and other uses, provide details of—
 - (i) the size of the area in hectares, and
 - (ii) the proposed number of housing units to be included in the area,
 - (d) in respect of the area in the development plan proposed to be zoned for residential use or a mixture of residential and other uses, provide details of—
 - (i) the size of the area in hectares,
 - (ii) how the zoning proposals accord with national policy that development of land shall take place on a phased basis,
 - (e) provide relevant information to show that, in setting out objectives regarding retail development contained in the development plan, the planning authority has had regard to any guidelines that relate to retail development issued by the Minister under section 28,
 - (f) in respect of the area of the development plan of a county council, set out a settlement hierarchy and provide details of—
 - (i) whether a city or town referred to in the hierarchy is designated as a gateway or hub for the purposes of the [National Planning Framework],
 - (ii) other towns referred to in the hierarchy,
 - (iii) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to towns and cities referred to in the hierarchy,

- (iv) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to the areas or classes of areas not included in the hierarchy,
- (v) projected population growth of cities and towns in the hierarchy,
- (vi) aggregate projected population, other than population referred to in subparagraph (v), in—
 - (I) villages and smaller towns with a population of under 1,500 persons, and
 - (II) open countryside outside of villages and towns,
- (vii) relevant roads that have been classified as national primary or secondary roads under section 10 of the Roads Act 1993 and relevant regional and local roads within the meaning of section 2 of that Act,
- (viii) relevant inter-urban and commuter rail routes, and
- (ix) where appropriate, rural areas in respect of which planning guidelines relating to sustainable rural housing issued by the Minister under section 28 apply,
- [(g) in respect of the development plan of a city, provide details of—
 - (i) the city centre concerned,
 - (ii) the areas designated for significant development during the period of the development plan, particularly areas for which it is intended to prepare a local area plan,
 - (iii) the availability of public transport within the catchment of residential or commercial development, and
 - (iv) retail centres in that city,]
- [(h) in respect of the area of the development plan of a city and county council set out a settlement hierarchy and provide details of matters referred to in paragraph (f) and (g).]
- (2B) The information referred to in subparagraphs (vii) to (ix) of paragraph (f) and in paragraph (g) shall also be represented in the core strategy by a diagrammatic map or other such visual representation.
- (2C) In subsection (2A)(f) 'settlement hierarchy' means a rank given by a planning authority to a city or town in the area of its development plan, with a population that exceeded 1,500 persons in the census of population most recently published before the making by the planning authority of the hierarchy, and given on the basis of—
 - (a) its designation as a gateway city or town or as a hub town, as the case may be, under the [National Planning Framework],
 - (b) the assessment by the planning authority of—
 - (i) the proposed function and role of the city or town, which assessment shall be consistent with any [regional spatial and economic strategy] in force, and
 - (ii) the potential for economic and social development of the city or town, which assessment shall be in compliance with policy directives of the Minister issued under section 29, have regard to guidelines issued by the Minister under section 28, or take account of any relevant policies or objectives of the Government, the Minister or any other Minister of the Government, as the case may be.]
- (3) Without prejudice to subsection (2), a development plan may indicate objectives for any of the purposes referred to in the First Schedule.
- (4) The Minister may prescribe additional objectives for the purposes of subsection (2) or for the purposes of the First Schedule.
- [(5) The Minister may, for the purposes of giving effect to Directive 2001/42/EC of the European Parliament and Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (No. 2001/42/EC, O.J. No. L 197, 21 July 2001 P. 0030-0037), by regulations make provision in relation to consideration of the likely significant effects on the environment of implementing a development plan.]
- [(5A) Where required, a strategic environmental assessment or an appropriate assessment of a draft development plan shall be carried out.]
- (6) Where a planning authority proposes to include in a development plan any development objective the responsibility for the effecting of which would fall on another local authority, the planning authority shall not include that objective in the plan except after consultation with the other local authority.
- (7) A development plan may indicate that specified development in a particular area will be subject to the making of a local area plan.
- (8) There shall be no presumption in law that any land zoned in a particular development plan (including a development plan that has been varied) shall remain so zoned in any subsequent development plan.
- [(9) Nothing in this section shall affect the existence or validity of any public right of way.]

(10) No objective included in a development plan under this section shall be construed as affecting the power of a local authority to extinguish a public right of way under section 73 of the Roads Act 1993.]”

154. That distinction is foundational to the whole relationship between national and local decision-makers, who require and deserve certainty and clarity as to their respective rights and duties.

155. The 2007 guidelines draw attention to the mandatory nature of s. 10(2)(l) in relation to the need to make provision for objectives regarding schools:

"Mandatory objective 11: Community services

4.68 Section 10(2)(l) of the Act requires that a development plan shall include objectives for: 'the provision, or facilitation of the provision, of services for the community including, in particular, schools, crèches and other education and childcare facilities.' The term 'community services' potentially covers a very broad range of infrastructure and service provision to meet the needs of residents in the planning authority's area. The emphasis in the Act is on childcare and educational facilities and includes services such as pre-schools, naíonraí (Irish language playgroups), daycare services, crèches, playgroups, childminding, after-school groups and primary, secondary and special needs schools. It is important that planning authorities consult widely and appropriately in relation to the provision of these services. In this context, consultation with the County/City Development Boards will be particularly relevant in view of their remit and also as key agencies such as the Department of Education and Science, County/City Childcare Committees and the Department of Social and Family Affairs are represented on the Boards. With regard to school provision, development plans must facilitate the provision of sufficient land to meet the need for new schools or expansion of existing schools in accordance with the requirements of the community and of the relevant education authorities. The latter authorities should be made aware of settlement strategy proposals to be included in development plans at an early stage in the preparation process to ensure that needs can be fully evaluated and responded to. Attention is drawn to Appendix F, which sets out the current guidelines used by the Department of Education and Science in relation to school accommodation. Planning authorities are advised to consult directly with that Department in relation to guidelines and/or their website at www.education.ie.

4.69 Other community facilities that would be subject to Section 10 (2)(l) include places of worship, burial grounds, hospital and health centres, facilities for the elderly and persons with disabilities, facilities for children's play including, playgrounds, skateboard parks and other facilities, libraries, shops, banks and community halls. This list is not exhaustive and planning authorities must respond to the circumstances of their own local communities when formulating development plans. Generally, appropriate policies and objectives for inclusion in plans will relate to allocation and reservation of land, setting appropriate development control standards and indicating provision of specific facilities."

156. While not in fact an SPPR, the 2007 guideline to the effect that "[w]ith regard to school provision, development plans must facilitate the provision of sufficient land to meet the need for new schools or expansion of existing schools in accordance with the requirements of the community and of the relevant education authorities" is highly pertinent and derives its imperative flavour from the provisions of s. 10(2)(l) recited above. The applicants' pleadings make no reference to this, and essentially are an attempt to cherry-pick snippets of material that they think are helpful while passing over other highly relevant provisions.

157. Sub-ground 1 pleads as follows:

"1. The Ministerial Guidelines for Planning Authorities on the preparation of Development Plans are Guidelines for the purposes of section 28 of the 2000 Act. In relevant part they require the Council to do three things in the CDP development process:

'Anticipate the demand for new schools infrastructure that will arise from new development within the drafting process for development plans and local area plans using the Department of Education and Science approach outlined above, and through these plans, will facilitate the identification of suitable lands to meet the need for new schools or expansion of existing schools to serve new or expanding communities.

Consult at an early stage of plan preparation regarding the approach to schools provision with the Forward Planning Unit of the Department of Education and Science and local school providers.

Work closely with the Site Acquisitions and Property Management Unit of the Department of Education and Science in assessing specific land requirements for schools, including the assessment of the suitability of particular sites, thereby ensuring an agreed basis for schools provision in the development plan and local area plan processes."

158. This is unfortunately badly confused. The extract quoted does not appear in the 2007 ministerial guidelines on development plans. The quoted passage is in a wholly different document,

the 2008 schools guidelines, at p. 9. But those guidelines don't constitute SPPRs either. Therefore "compliance" doesn't arise.

159. In that regard, it is significant that s. 28(1B)(a) (which isn't pleaded by the applicants) requires a council to state "how the planning authority has implemented the policies and objectives of the Minister contained in the guidelines". What is required is the council's view as to *how* it has implemented the policies and objectives, not *that* it has implemented every detail in a mandatory manner. The contextual premise of that wording is that it is expressly set out in ss. 10 and 28 that only the SPPRs are mandatory, so insofar as the council has a discretion and margin of appreciation in relation its actions having had regard to the other provisions of guidelines, it will be giving an account of how it has exercised that discretion rather than being mandatorily required to state that it has complied with every detail. If the latter had been what s. 28(1B) means, it would nullify the express distinctions set out elsewhere in s. 28 and in s. 10. A harmonious reading is totally available and indeed obvious. The comply with/have regard to distinction is central and foundational, and the statement showing "how" implementation occurred involves the council showing how it exercised the margin of appreciation inherent in the former foundational distinction. Any more imperative interpretation creates immediate statutory contradiction and confusion. And, to repeat, the applicants didn't plead a more imperative interpretation, indeed didn't plead sub-s. (1B) at all.

160. The comply/have regard distinction has been emphasised in a number of cases: *per* Baker J. in *Brophy v. An Bord Pleanála* [2015] IEHC 433, [2015] 7 JIC 0306 (Unreported, High Court, 3rd July, 2015), para. 36 *Cork County Council v. Minister for Housing & Anor.* [2021] IEHC 683, [2021] 11 JIC 0502, *Glencar Exploration PLC v. Mayo County Council* [2001] IESC 64, [2002] 1 I.R. 84, [2002] 1 I.L.R.M. 481, [2001] 7 JIC 1901 at 142 *per* Keane C.J.

161. The applicants' case is confoundingly pleaded on any analysis. It was thus no surprise that, in oral submissions, the applicants more or less abandoned the misconceived and unsustainable pleaded claims to the effect that there was any obligation to comply with the relevant guidelines. When we subtract those misconceptions of the statutory position, all that's left is the complaint that the decision "failed to ... have any or any adequate regard" to the guidelines. We can note that the attempt to impermissibly slip in the intensifier "adequate" before the word "regard" is precisely the same misreading by sleight-of-hand that was committed by the OPR and the Minister in the *Cork County Council* case.

162. Even apart from that insuperable problem, the point is in any event entirely without substance evidentially.

163. The critical principle is set out in *G.K. & Ors v. Minister for Justice, Equality and Law Reform* [2001] IESC 205, [2002] 2 I.R. 418, [2001] 12 JIC 1704 (Hardiman J.): where the decision-maker says that she has had regard to certain matters there is an evidential onus to be overcome to displace that. Such an onus had not been satisfied in that case, or in *Cork County Council*, and it hasn't been satisfied here either.

164. The council expressly states in the challenged development plan that it has had regard to the schools guidelines and outlines how it has implemented them. Appendix 1 to the 2022 Development Plan is entitled "Statement of Compliance with Section 28 Guidelines". It states:

"Pursuant to Section 28 of the Planning and Development Act 2000 (as amended) it is a requirement of the Planning Authority to append a statement to the Development Plan demonstrating: How the planning authority has implemented the policies and objectives of the Minister contained in the guidelines when considering their application to the area or part of the area of the development plan, or If applicable, that the planning authority has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why policies and objectives of the Minister have not been so implemented."

165. Table 1 in Appendix 1 lists both the pleaded guideline and the schools guideline, stating:

- (i) as regards the 2007 development plan guidelines, "The Plan implements the policies and objectives of these Guidelines throughout"; and
- (ii) as regards the 2008 schools guidelines, "Chapter 8 Community Infrastructure and Open Space and Chapter 12 Implementation and Monitoring implement the relevant policies and objectives of these Guidelines".

166. The applicants have not evidentially displaced these statements.

167. Insofar as the allegation is that the council misconstrued the guidelines (relying on *Jennings & Anor v. An Bord Pleanála & Ors* [2023] IEHC 14, [2023] 2 JIC 1711 *per* Holland J., *Spencer Place Development Company Ltd. v. Dublin City Council* [2019] IEHC 384, [2019] 5 JIC 3004, *Atlantic Diamond Limited v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403), this isn't pleaded under core ground 1. Sub-grounds 1 to 4 are geared towards the misconceived argument that the council

was obliged to comply with the guidelines. Only sub-ground 5 touches on the alternative argument that the council did not have regard to the guidelines, but using much of the language of the misconceived compliance argument.

168. Even if the “misconstruction” argument had been pleaded as part of this argument, it does not stand up.

169. First of all, the 2008 schools guidelines don’t require any detailed site assessment to be carried out at the initial stage of reservation.

170. Secondly it’s incorrect to say that there was no site assessment. In fact the site suitability was the central original reason for the objective. As noted above, the original designation in the AAP stated as follows:

“An existing primary school in the adjoining Ballycragh neighbourhood to the west has not sufficient capacity to facilitate the entire zoned area. There is a need for an additional primary school to serve the scale of the development anticipated. A site has therefore been reserved for a primary school to the east of the Ballycullen Road where the larger population of the zoned lands is located. The site has been reserved central to the area to be served so as to discourage excessive transport of children to school by private car. A site for a post primary school is not required”.

171. And thirdly in any event, “compliance” with the 2008 guidelines isn’t required. Only regard. Therefore the whole argument is based on sand – the council remained free to implement the guidelines in its own way and it hasn’t been demonstrated that in doing so it misunderstood the plan. That very freedom means that one can’t simply read-across from any hypothetical non-compliance (even if such were demonstrated) to a legal breach in the form of misreading.

172. Mandatory language in non-mandatory guidelines, even if there was such language, doesn’t make such guidelines mandatory: *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0501. Nor does such language have the effect that a council is misunderstanding and misconstruing the guidelines in the event hypothetically that it does something different.

Core ground 2 – reasons etc.

173. Core ground 2 is:

“Core Ground 2: The impugned decision is invalid as the Council failed to provide any or any adequate evidence base and/or any or any adequate reasons for attaching the SLO to the Site and/or it was irrational and unreasonable for the Council to do so and/or was contrary to the evidence identified on behalf of the Applicants.”

174. The parties’ positions as recorded in the statement of case are summarised as follows:

“Core Ground 2

Applicant: The impugned decision is invalid as the Council failed to provide any or any adequate evidence base and/or any or any adequate reasons for attaching the SLO to the Site and/or it was irrational and unreasonable for the Council to do so and/or was contrary to the evidence identified on behalf of the Applicants.

Respondent: The Council identified, by way of correspondence exchanged between it and the Department, the evidence-based approach for schools, including the reservation of the Applicants’ lands as the location for a school. The location of schools is clear from correspondence and consultation between the Council and the Department, in advance of and during the course of the development plan review process.

The Applicants’ submissions now seek to frame this complaint in terms of the absence of a site-specific assessment. However, this isn’t how the ground is pleaded and insofar as the submissions seek to narrow the focus to a site specific assessment being required to satisfy an evidenced-based assessment, this is objected to and it would appear to suffer from a misunderstanding that the Council must undertake a site specific assessment, without providing any evidence as to what this would be.”

175. The relevant sub-grounds are:

“6. The only rationale for attaching the SLO to the Site is that contained in the Chief Executive’s Report provided in response to the submissions made on the Applicant’s behalf. That rationale and/or the text does not disclose the basis for the Council’s decision to attach the SLO other than to record the fact that that the Department has confirmed that the Zoning should be retained to meet projected educational need.

7. However, the fact that the SLO is of significant vintage in no way effects or obviates the necessity to conduct the evidence based exercise mandated by the Guidelines, to identify the outcome of that exercise and to provide reasons for the conclusion. Critically, nowhere in the Department’s submission is this exercise conducted and, insofar as the Council may be taken as adopted the approach of the Department, this does not avail the Council in respect of this objection.

8. None of those steps have been taken and the Council has instead simply relied on a submission to the effect that the SLO is required. The Council was obliged pursuant to section 10 of the 2000 Act to 'set out an overall strategy for the proper planning and sustainable development of the area of the development plan' and that the approach adopted in respect of the SLO at least does not comply with that obligation. Nor do the reasons provided by the Council in the Chief Executive's Report (or the body of the CDP itself) disclose why the Council was of the view that it was appropriate for SLO to be attached to the site, other than the reference to the Department's submission. The Council cannot abdicate its planning functions and obligations to the Department and the fact of a submission having been made by it and/or the Council fettered its discretion in accepting the Departments' submission without question.

9. The Council does not identify any material that would lead a reasonable decision-maker to conclude that there is a need to retain the SLO. That objective has been retained for 22 years notwithstanding the efforts made by the Applicants to progress matters with the Council and the Department and no evidence was advanced by the Department or relied upon by the Council in the course of the CDP making procedure.

10. It is the Applicant's case that this renders the SLO's retention unlawful not only on the basis that not all relevant matters had been duly considered and taken into account, but also on the basis that legally irrelevant considerations – that the SLO pre-dated the creation of the CDP and was therefore 'caught' by the Department's blanket submission that all of the school SLO's should be retained, underlay or contributed to the decision to retain the SLO.

11. Further, any reliance on the fact that an SLO had been placed on the Site previously for the purposes of its retention in the new CDP is vitiated as irrational and otherwise unlawful in circumstances where there is nothing in the Department's submission to the Council justifying the application of the SLO in the first place or its continuation for the purposes of this CDP.

12. Accordingly, it is the Applicant's case that the Council's decision is vitiated by a dual material failure to conduct the requisite site-specific exercise and then to give reasons as to why the result of that exercise justifies the Council's decision to attach the SLO to the Site. Neither element of that requirement is apparent from the Council's decision.

13. Further, it is the Applicant's case that in the absence of any such evidence base, it was irrational and unreasonable for the Council to attach the SLO to the Site and/or it was a decision no reasonable decision maker could have arrived at, in circumstances where there was no evidence before the Council justifying it being applied to the Site."

176. One can see immediately that the pleading problems permeating core ground 1 have spilled into this ground also. The complaint as to the "necessity" to do what is "mandated" by the guidelines (sub-ground 7) or to conduct a "requisite" exercise (sub-ground 12) is wholly confused and misconceived for reasons already explained. The guidelines aren't mandatory, but even if they were, the language is not particularly mandatory and even on their own terms allow flexibility as to when and how matters are to be carried out.

177. Insofar as it goes beyond the mere giving of reasons, the critical complaint at sub-ground 9 to the effect that "the Council doesn't identify any material that would lead a reasonable decision-maker to conclude that there is a need to retain" the SO is in its context a reversal of the burden of proof. It is the supine applicant's fallacy – the idea that all an applicant need to do is to lie back and wait for the decision-maker to prove that her decision is valid. The conceit is that the decision-maker and indeed the court have to do all the work – as in *O'Donnell & Ors v. An Bord Pleanála & Ors (No. 1)* [2023] IEHC 381, [2023] 7 JIC 0501 para. 143.

178. Insofar as this constitutes a complaint about reasons, this inappropriately overlooks and to an extent mischaracterises the reasons actually given.

179. The chief executive's response to the submissions made on behalf of the applicants to the draft 2022 development plan refers to the fact that the Subject Lands are required to:

"cater for the future needs of the Ballycullen / Oldcourt area where there is a further significant proposed residential development that is projected to generate a school requirement for this community in the relative short-term. Education facilities have a central role to play in developing sustainable and balanced communities."

180. There was nothing illegal or irrational about placing weight on the Department's preference to retain existing school reservations. Agreeing with someone else is not an abdication of a function or a fettering of discretion, in the overheated language of the applicants' pleadings. It is the *exercise* of a function, not the abdication of the function. Indeed one would have to seek forgiveness for being tempted to irreverently christen this attitude the Brexiteer's fallacy - the view that co-operating or agreeing with other actors is a surrender of one's freedom. Rather, co-operation and agreement is the *exercise* of freedom on the basis of a judgment that the greater good is thereby

served. Obviously other judgments are possible on that balance (so one can be neutral about the merits of Brexit as such, or any other controversy, for the avoidance of doubt). The issue isn't what choice is best but rather the misconception that one side has a monopoly on freedom. The move to characterise agreement as an abdication or fettering of a function is the fallacy we see in that context and in the applicants' case here.

181. The applicants naturally characterise the material from the Department as supporting provision for schools but not providing a basis for a school at this particular site. There are a couple of problems with that. First of all, provision for schools inherently involves provision at *some* site, and there may not be that much to choose from as between different possible sites. There are always arguments against any particular site. The applicants' attitude is the geographical equivalent of the temporal hesitations of St Augustine of Hippo – let there be social provision, but just not here. That attitude can apply to any site.

182. But even more fundamentally, there was an *existing* decision as to the location of the site. That was the *status quo ante bellum* into which the present development plan came into being. And the Department didn't just want provision somewhere or anywhere. It supported the concept of retaining existing reservations. So the applicants' innocent cry that there is no support for this particular site is a mischaracterisation.

183. Insofar as the applicants' complaint is that the inclusion of the SO was unlawful all along and hence its status as an existing decision can't be relied on, this is the attitude, painfully familiar from the world of immigration litigation, that "every day is a new day" (*Igbosonu v. Minister for Justice and Equality* [2017] IEHC 681, [2017] 10 JIC 0407). The fallacy is that the making of any new decision allows one to impugn the legality of all previous decisions. Unfortunately for the applicants, every process must be allowed to move on. With a similar logic to the contemnor in breach of an unappealed order who impermissibly tries to argue that the original order should not have been made, the applicants illegitimately plead that "any reliance on the fact that an [SO] had been placed on the Site previously for the purposes of its retention in the new CDP is vitiated as irrational and otherwise unlawful in circumstances where there is nothing in the Department's submission to the Council justifying the application of the [SO] in the first place". The adoption of development plans and LAPs is covered by s. 50 of the 2000 Act. If unchallenged within 8 weeks they are then unchallengeable, with only limited exceptions which don't apply here. The status of a previous unchallenged or unsuccessfully challenged decision as a fact is something that a decision-maker can permissibly take into account for the purposes of a later decision.

184. And insofar as the applicants claim that no rational decision-maker couldn't have come to this decision, that hasn't been demonstrated. All that has been demonstrated is that they don't agree with it and made a case against it. But the existence of the applicants' contrary perspective isn't a basis for relief by way of judicial review.

185. The central complaint of a lack of evidence base is simply misconceived. The basis for the reservation is clear and has been evidenced. The applicants' point is simply a merits-based disagreement dressed up in legal language.

186. As noted above, the Department confirmed the need for the schools reservation as set out in the Ballycullen LAP by email of 31st March 2021, referencing expressly that as regards the expected population increase:

"we think there would be capacity to cater for them between the following schools: ...

- New school which is likely to get built on the site at Stocking Ave ..."

187. The applicants' complaints about a lack of site-specific assessment are ultimately merits-based. The doctrine of reasons is not a Trojan horse for the conversion of a duty to explain the main issues in a decision into a vehicle for substantive review of the meritoriousness of the decision, save for the exceptional cases of irrationality or disproportionality, which haven't been demonstrated in this case. No lack of reasons has been made out. The site has been assessed as suitable for a primary school. One suspects that there isn't any form of site assessment that would have satisfied the applicants. In any event no legal breach has been established in that regard. Furthermore the actual decision made can be rationally related to the material before the council, which involved consideration of population growth and proportionate school needs as stated by the Department. This is reflected in the chief executive report:

"The site on Stocking Avenue is to cater for the future needs of the Ballycullen/Oldcourt area where there is further significant proposed residential development that is projected to generate a school requirement for this community in the relative short-term".

188. To conclude on the issue of reasons, as with Hogan J.'s view at para. 69 of *Killeglad*, "no one could really have been in any doubt as to the reasons given" for the reservation.

Core ground 3 - consultation

189. Core ground 3 is:

"Core Ground 3: The impugned decision is invalid as the Council failed to conduct any or any adequate consultation for the purposes of section 11(3)(c) of the 2000 Act and/or failed to comply with the requirements of section 11(4) of the 2000 Act."

190. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 3

Applicant: The impugned decision is invalid as the Council failed to conduct any or any adequate consultation for the purposes of section 11(3)(c) of the 2000 Act and/or failed to comply with the requirements of section 11(4) of the 2000 Act.

Respondent: Section 11 provides for a review of the Development Plan, which is strategic in nature. Section 11(3)(c) gives the planning authority wide discretion to take whatever steps that it considers necessary to consult with providers of education, in the context of the consideration of long-term strategy in relation to education within its functional area. The wording of section 11(3)(a) allows a planning authority not to consult at all if it considers that it is not required. The Council consulted with the Department, in circumstances where the Department provides funding for the acquisition of school sites and the provision of schools and having regard to the strategic nature of the consultation under section 11 of the 2000 Act. The Council accepts that it did not directly consult with school patrons or boards of management in relation to the matters referred to in section 11(3)(c), but its position is that it was not under an obligation to do so if it did not consider it necessary to consult with them in respect of such matters.

The Chief Executive prepared a report, dated 19 November 2020, pursuant to section 11(4) of the 2000 Act in respect of submissions received as part of the pre-draft plan consultation. The Report set out, inter alia, summaries of the themed stakeholder meetings – the relevant one for schools was held on 14 September 2020 under the theme 'Community and Placemaking', which was attended by a representative of the Department. Appendix C of the report sets out details of the consultation strategy employed. It also summarised a submission to the Council on 28 September 2020 in the context of the section 11 process. The Council pleads that the report complied with the requirements of section 11(4)."

191. We need to look at the complaint that is actually pleaded. That is limited to an allegation of breach of (3)(c) and (4).

192. Subsection 11(3)(c) says:

"(3) (a) As soon as may be after giving notice under this section of its intention to review a development plan and to prepare a new development plan, a planning authority shall take whatever additional measures it considers necessary to consult with the general public and other interested bodies.

[(b) Without prejudice to the generality of paragraph (a), a planning authority—

(i) shall consult with members of the public in such manner (which shall include the holding of a public meeting or an online public meeting) as it considers appropriate, and invite submissions in writing from members of the public, in relation to a proposed development plan, and

(ii) may invite oral submissions from members of the public in relation to a proposed development plan.]

(c) In addition to paragraphs (a) and (b), a planning authority shall take whatever measures it considers necessary to consult with the providers of energy, telecommunications, transport and any other relevant infrastructure and of education, health, policing and other services in order to ascertain any long-term plans for the provision of the infrastructure and services in the area of the planning authority and the providers shall furnish the necessary information to the planning authority."

193. The applicants face several fairly significant obstacles here. Subsection (3) is highly permissive because it only requires such consultation as the council "considers necessary". That is, to use Hogan J.'s term in *Killegland*, precatory at best. It could only constitute a justiciable standard if for example there was a wholly unreasonable failure to conduct consultations. The applicants haven't demonstrated that or indeed any other basis for judicial intervention.

194. The applicants' interpretation is that the paragraph makes it mandatory to consult with all service-providers (which must include all individual schools), but the only discretion is how this is to be done. That is wholly implausible especially in the context of s. 11(2) which requires mandatory notice to particular actors. In that context and reading the section as a whole, it makes little sense to suggest that s. 11(3) means that mandatory notice is also required to every school in the county.

195. Furthermore, the consultation required is aimed at ascertaining the long-term service needs. An individual school patron isn't in a position to have an overview of that. A school's focus is on its own particular requirements, making individual consultation something that a reasonable council could lawfully dispense with, especially bearing in mind that there are over 100 schools in the

council's functional area. On the applicants' logic, consulting 99 wouldn't be enough – the plan would be invalid if one was left out.

196. Most fundamentally of all, there was general consultation *urbi et orbi* by way of public notice, even if it wasn't specifically addressed to particular schools. But such schools were as able as anyone else to respond to such consultation. The second named applicant made a submission even though there wasn't a specific invitation to do so.

197. In any event the subsection isn't particularly designed to confer rights on applicants. Any hypothetical failure to engage in direct (as opposed to general) consultation with an individual actor doesn't have the effect that, at the suit of some wholly different actor, the entire plan or any part of it is invalid, at least barring some evidence that some critical view that would have made a difference wasn't given the opportunity to be incorporated in the discussion. There is no such evidence.

198. There is a possible distinction here between a measure of general application such as a plan versus an individual decision such as a planning application which is addressed to particular actors. It is not totally implausible that an individual planning application could be impugned by reference to failure to notify a statutory consultee that would have had something to contribute. But even if such an approach did apply, and even if in particular circumstances that concept could be extended to a challenge to a general measure, an applicant can't invalidate such a measure without adequate evidence that the process was genuinely compromised as a result.

199. On the particular facts here it's no surprise that there isn't such evidence, especially as the pleaded breach of consultation occurred at the initial stage under s. 11, which was followed by two further opportunities for any interested parties (even if schools were such interested parties) to comment – at the draft plan stage and the material amendment stage. So this point isn't a basis for *certiorari* on any view.

200. Turning to subsection (4), this states:

“(4) (a) Not later than 16 weeks after giving notice under subsection (1), the [chief executive] of a planning authority shall prepare a report on any submissions or observations received under subsection (2) or (3) and the matters arising out of any consultations under subsection (3).

[(aa) A chief executive's report prepared for the purposes of paragraph (a) shall be published on the website of the planning authority concerned as soon as practicable following its preparation.]

(b) A report under paragraph (a) shall—

(i) list the persons or bodies who made submissions or observations under this section as well as any persons or bodies consulted by the authority,

[(ii) summarise the issues raised in the submissions and during the consultations, where appropriate, but shall not refer to a submission relating to a request or proposal for zoning of particular land for any purpose.]

(iii) give the opinion of the [chief executive] to the issues raised, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area, and any relevant policies or objectives for the time being of the Government or of any Minister of the Government, and

(iv) state the [chief executive's recommendations] on the policies to be included in the draft development plan.

[(bb) In the case of each planning authority within the GDA, a report under paragraph (a) shall summarise the issues raised and the recommendations made by the DTA in a report prepared in accordance with section 31B and outline the recommendations of the [chief executive] in relation to the manner in which those issues and recommendations should be addressed in the draft development plan.]

[(bc) A report under paragraph (a) shall summarise the issues raised and recommendations made by the relevant F99[regional assembly] in a report prepared in accordance with section 27A (inserted by section 17 of the Act of 2010) and outline the recommendations of the [chief executive] in relation to the manner in which those issues and recommendations should be addressed in the draft development plan.]

(c) A report under paragraph (a) shall be submitted to the members of the planning authority, or to a committee of the planning authority, as may be decided by the members of the authority, for their consideration.

(d) Following the consideration of a report under paragraph (c), the members of the planning authority or of the committee, as the case may be, may issue directions to the [chief executive] regarding the preparation of the draft development plan, [and any such directions shall be strategic in nature, consistent with the draft core strategy, and shall take account of] the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government, and the [chief executive] shall comply with any such directions.

(e) Directions under paragraph (d) shall be issued not later than 10 weeks after the submission of a report in accordance with paragraph (c).

(f) In issuing directions under paragraph (d), the members shall be restricted to considering the proper planning and sustainable development of the area to which the development plan relates."

201. The claim of breach of s. 11(4) is pleaded in highly conditional and slightly tortured terms at sub-ground 19 as being "in the alternative and insofar as the Council relies on its consultations with the Department as discharging its obligations pursuant to section 11(3)(c)". Since the council's defence of the sub-section (3)(c) point isn't dependent on reliance on an assertion that consultation with the Department was necessary to satisfy that, then the complaint about sub-section (4) doesn't arise. In any event it is totally misconceived and the previous points apply here also.

202. The applicants in oral submissions also tried to argue that the council's reliance on additional material received from the Department breached sub-section (3A). That complaint isn't pleaded so doesn't arise. But it has no merit anyway. A council like any decision-maker has an institutional body of knowledge and has ongoing channels of communication with other decision-makers. That doesn't shut down merely because a particular statutory process commences. There wasn't anything unlawful about the council having ongoing contacts with the Department. And more fundamentally there wasn't anything in such contacts that nullified the Department's support for the continuation of the reservation.

203. Thus there wasn't any unfairness to the applicants or any inconsistent occult communication from the Department that fundamentally altered the position. The applicants' reliance on *Hickwell v. Meath County Council* [2022] IEHC 418, [2022] 7 JIC 1206 is misplaced. The proposed school site designation was in the draft plan from the outset so the applicants could *and did* comment on it. They were also aware of its previous designation in previous plans. There was no failure to publicise the relevant procedure as in *Keshmore Homes v. An Bord Pleanála* [2023] IEHC 369, [2023] 6 JIC 2702 (Phelan J.).

204. As the council submits:

"The thrust of the communication between the Council and Department concerned the continued designation of the Subject Lands as a school site in the 2022 Development Plan and to that extent did not go further than what appeared in the draft Development Plan."

205. Again to apply Hogan J.'s view at para. 69 of *Killegland* by analogy, "no one could really have been in any doubt" as to the Department's position.

Core ground 4 – reasons and fair procedures

206. Core ground 4 is:

"Core Ground 4: The impugned decision is invalid as the Council failed to provide any or any adequate reasons for rejecting the submissions made by or on behalf of the Applicants in respect of the site and/or the decision fails to accord with the Applicant's rights to natural and constitutional rights and fair procedures."

207. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 4

Applicant: The impugned decision is invalid as the Council failed to provide any or any adequate reasons for rejecting the submissions made by or on behalf of the Applicants in respect of the site and/or the decision fails to accord with the Applicant's rights to natural and constitutional rights and fair procedures.

Respondent: The Chief Executive's report for the purposes of section 12(4) of the 2000 Act is dated 7 December 2021. As regards the Applicants' submissions, it complies with the obligations of this subsection. It summarises the submission and then comprehensively addresses the reasons why the school site designation should continue to apply to the site and provides the Chief Executive's recommendation that the designation should remain as per the draft Plan.

There was no obligation to give reasons, in circumstances where the school site designation which was in the previous development plan was being maintained (*Killegland* (No.1), §69). Neither was there an obligation on the Council to 'engage' with the issues in the Applicants' submission and/or to give reasons as to why the Council 'did not uphold these particular objections'. Nonetheless, it is clear that the Chief Executive provided a clear rationale and reasons for maintaining a school objective in respect of the lands and did not rely 'entirely' on the submission made by the Department. The case law makes clear that the duty is to 'adequately explain the rationale for the ... decision' (*Killegland*, Supreme Court) and this obligation is more than met by the Chief Executive in her report.

The Chief Executive's recommendation that the designation should remain as per the draft Plan was accepted by the elected members."

208. Section 12 of the 2000 Act provides:

"Making of development plan.

12.—(1) Where the draft development plan has been prepared in accordance with section 11, the planning authority shall within 2 weeks of the period referred to in section 11(5)(c)—
 [(a) send notice and a copy of the draft development plan to the Minister[, the Office of the Planning Regulator], the Board, the relevant regional assembly, the prescribed authorities and any local community development committee in the area, and]

(b) publish notice of the preparation of the draft in one or more newspapers circulating in its area.

(2) A notice under subsection (1) shall state that—

(a) a copy of the draft may be inspected at a stated place or places and at stated times during a stated period of not less than 10 weeks (and the copy shall be kept available for inspection accordingly), and

(b) written submissions or observations with respect to the draft made to the planning authority within the stated period will be taken into consideration before the making of the plan.

[(2A) The Minister or the Office of the Planning Regulator may, in relation to a draft development plan, make such recommendations as the Minister or that Office, as the case may be, considers appropriate.]

(3) (a) Where the draft includes any provision relating to any addition to or deletion from the record of protected structures, the planning authority shall serve on each person who is the owner or occupier of the proposed protected structure or the protected structure, as the case may be, a notice of the proposed addition or deletion, including the particulars.

(b) A notice under paragraph (a) shall state—

(i) that a copy of the proposed addition or deletion may be inspected at a stated place or places and at stated times during a stated period of not less than 10 weeks (and the copy shall be kept available for inspection accordingly),

(ii) that written submissions or observations with respect to the proposed addition or deletion made to the planning authority within the stated period will be taken into consideration before the making of the addition or deletion,

(iii) whether or not the proposed addition or deletion was recommended by the Minister for Arts, Heritage, Gaeltacht and the Islands, and

(iv) that, if the proposed addition or deletion was recommended by the Minister for Arts, Heritage, Gaeltacht and the Islands, the planning authority shall forward to that Minister for his or her observations a copy of any submission or observation made under subparagraph (ii) (and any such observations shall be taken into consideration accordingly).

(4) (a) Not later than 22 weeks after giving notice under subsection (1) and, if appropriate, subsection (3), the [chief executive] of a planning authority shall prepare a report on any submissions or observations received under subsection (2) or (3) and submit the report to the members of the authority for their consideration.

[(aa) A chief executive's report prepared for the purposes of paragraph (a) shall be published on the website of the planning authority concerned as soon as practicable following submission to the members of the authority under paragraph (a).]

(b) A report under paragraph (a) shall—

(i) list the persons or bodies who made submissions or observations under this section,

[(ii) provide a summary of—

(I) the recommendations, submissions and observations made by the Minister, where the notice under paragraph (a) of subsection (2) was sent before the establishment of the Office of the Planning Regulator,

(II) the recommendations, submissions and observations made by the Office of the Planning Regulator, and

(III) the submissions and observations made by any other persons, in relation to the draft development plan in accordance with this section,]

(iii) give the response of the [chief executive] to the issues raised, taking account of any directions of the members of the authority or the committee under section 11(4), the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives of the Government or of any Minister of the Government and, if appropriate, any observations made by the Minister for Arts, Heritage, Gaeltacht and the Islands under subsection (3)(b)(iv).

[(ba) A report prepared and submitted in accordance with paragraph (a) shall contain a summary of the observations, submissions and recommendations made by the Office of the Planning Regulator under section 31AM to the planning authority concerned.]

[(bb) In the case of each planning authority within the GDA, a report under paragraph (a) shall summarise the issues raised and the recommendations made by the DTA in its written submission prepared in accordance with section 31C and outline the recommendations of

the [chief executive] in relation to the manner in which those issues and recommendations should be addressed in the development plan.]

[(bc) A report under paragraph (a) shall summarise the issues raised and recommendations made by the relevant [regional assembly] in its written submission prepared in accordance with section 27B (inserted by section 18 of the Act of 2010) and outline the recommendations of the [chief executive] in relation to the manner in which those issues and recommendations should be addressed in the development plan.]

(5) (a) The members of a planning authority shall consider the draft plan and the report of the [chief executive] under subsection (4).

[(aa) Following consideration of the draft plan and the report of the [chief executive] under paragraph (a) where a planning authority, after considering a submission of, or observation or recommendation from the Minister made to the authority under this section [or from the Office of the Planning Regulator made to that planning authority under section 31AM] or from a [regional assembly] made to the authority under section 27B, decides not to comply with any recommendation made in the draft plan and report, it shall so inform [the Office of the Planning Regulator and] the Minister or [regional assembly], as the case may be, as soon as practicable by notice in writing which notice shall contain reasons for the decision.]

(b) The consideration of a draft plan and the [chief executive's report] under paragraph (a) shall be completed within 12 weeks of the submission of the [chief executive's report] to the members of the authority.

(6) Where, following the consideration of the draft development plan and the [chief executive's report], it appears to the members of the authority that the draft should be accepted or amended, subject to subsection (7), they may, by resolution, accept or amend the draft and make the development plan accordingly.

[(7) (a) Subject to paragraphs (aa) and (ae) in a case where the proposed amendment would, if made, be a material alteration of the draft concerned, the planning authority shall, not later than 3 weeks after the passing of a resolution under subsection (6), publish notice of the proposed amendment in at least one newspaper circulating in its area and send notice and a copy of the proposed amendment to the Minister, [the Office of the Planning Regulator,] the Board and the prescribed authorities.]

[(aa) The planning authority shall determine if a strategic environmental assessment or an appropriate assessment or both such assessments, as the case may be, is or are required to be carried out as respects one or more than one proposed material alteration of the draft development plan.

(ab) The [chief executive], not later than 2 weeks after a determination under paragraph (aa) shall specify such period as he or she considers necessary following the passing of a resolution under subsection (6) as being required to facilitate an assessment referred to in paragraph (aa).

(ac) The planning authority shall publish notice of the proposed material alteration, and where appropriate in the circumstances, the making of a determination that an assessment referred to in paragraph (aa) is required, in at least one newspaper circulating in its area.

(ad) The notice referred to in paragraph (ac) shall state—

(i) that a copy of the proposed material alteration and of any determination by the authority that an assessment referred to in paragraph (aa) is required may be inspected at a stated place or places and at stated times, and on the authority's website, during a stated period of not less than 4 weeks (and that copies will be kept for inspection accordingly), and

(ii) that written submissions or observations with respect to the proposed material alteration or an assessment referred to in paragraph (aa) and made to the planning authority within a stated period shall be taken into account by the authority before the development plan is made.

(ae) The planning authority shall carry out an assessment referred to in paragraph (aa) of the proposed material alteration of the draft development plan within the period specified by the [chief executive].]

[(b) A notice under paragraph (a) or (ac) (inserted by section 9 of the Act of 2010)] shall state that—

(i) a copy of the proposed amendment of the draft development plan may be inspected at a stated place and at stated times during a stated period of not less than 4 weeks (and the copy shall be kept available for inspection accordingly), and

(ii) written submissions or observations with respect to the proposed amendment of the draft made to the planning authority within the stated period shall be taken into consideration before the making of any amendment.

(8) (a) Not later than 8 weeks after giving notice under subsection (7), the [chief executive] of a planning authority shall prepare a report on any submissions or observations received

under that subsection and submit the report to the members of the authority for their consideration.

[(aa) A chief executive's report prepared for the purposes of paragraph (a) shall be published on the website of the planning authority concerned as soon as practicable following submission to the members of the authority under paragraph (a).]

(b) A report under paragraph (a) shall—

(i) list the persons or bodies who made submissions or observations under this section,

[(ii) provide a summary of—

(I) the recommendations, submissions and observations made by the Minister, where the notice under paragraph (a) of subsection (2) was sent before the establishment of the Office of the Planning Regulator,

(II) the recommendations, submissions and observations made by the Office of the Planning Regulator, and

(III) the submissions and observations made by any other persons,

in relation to the draft development plan in accordance with this section,]

(iii) give the response of the [chief executive] to the issues raised, taking account of the directions of the members of the authority or the committee under section 11(4), the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

[(8A) (a) Written submissions or observations received by a planning authority under this section shall, subject to paragraph (b), be published on the website of the authority within 10 working days of its receipt by that authority.

(b) Publication in accordance with paragraph (a)—

(i) does not apply where the planning authority is of the opinion that the submission or observation is vexatious, libellous or contains confidential information relating to a third party in respect of which the third party has not, expressly, or impliedly in the circumstances, consented to its disclosure,

(ii) does not apply where the planning authority has sought and receives, either before or after the period of 10 working days referred to in paragraph (a), legal advice to the effect that it should not publish under that paragraph or should cease to so publish, as the case may be, the submission or observation concerned,

(iii) does not apply to the extent that the local authority has sought and received, either before or after the period of 10 working days referred to in paragraph (a), legal advice that part of the submission or observation concerned should not be published on the website of the planning authority or should cease to be so published, as the case may be, or

(iv) does not apply where the submission or observation relates to matters prescribed by the Minister for the purpose of this provision or does not apply to the extent that so much of the submission or observation relates to matters prescribed by the Minister.]

(9) (a) The members of a planning authority shall consider the amendment and the report of the [chief executive] under subsection (8).

(b) The consideration of the amendment and the [chief executive's report] under paragraph (a) shall be completed not later than 6 weeks after the submission of the [chief executive's report] to the members of the authority.

[(10) (a) The members of the authority shall, by resolution, having considered the [chief executive's report], make the plan with or without the proposed amendment that would, if made, be a material alteration, except that where they decide to accept the amendment they may do so subject to any modifications to the amendments as they consider appropriate, which may include the making of a further modification to the alteration and paragraph (c) shall apply in relation to any further modification.]

(b) The requirements of subsections (7) to (9) shall not apply in relation to modifications made in accordance with paragraph (a).

[(c) A further modification to the alteration—

(i) may be made where it is minor in nature and therefore not likely to have significant effects on the environment or adversely affect the integrity of a European site,

(ii) shall not be made where it relates to—

(I) an increase in the area of land zoned for any purpose, or

(II) an addition to or deletion from the record of protected structures.]

(11) In making the development plan under subsection (6) or (10), the members shall be restricted to considering the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government.

(12) (a) Where a planning authority makes a development plan, it shall publish a notice of the making of the plan in at least one newspaper circulating in its area.

(b) A notice under this subsection shall state that a copy of the plan is available for inspection at a stated place or places (and the copy shall be kept available for inspection accordingly).

(c) In addition to the requirements of paragraphs (a) and (b), a planning authority shall send a copy of the development plan to the Minister, [the Office of the Planning Regulator,] the prescribed authorities, any adjoining planning authorities, the Board, [and any local community development committee] within its area.

(13) As soon as may be after making an addition to or a deletion from the record of protected structures under this section, a planning authority shall serve on the owner and on the occupier of the structure concerned a notice of the addition or deletion, including the particulars.

[(14) (a) Notwithstanding any other provision of this Part, where a planning authority fails to make a development plan within a period referred to in paragraph (b), the [chief executive] shall make the plan provided that so much of the plan as had been agreed by the members of the planning authority shall be included as part of the plan as made by the [chief executive].

(b) The period referred to in paragraph (a) is—

(i) not more than 2 years from the giving of notice under section 11(1), or

(ii) where subsection (7)(aa) (inserted by section 9 of the Act of 2010) applies—

(I) not more than 2 years and 4 weeks, or

(II) if appropriate in the circumstances, such longer period than 2 years and 4 weeks as is specified under subsection (7)(ab) (inserted by section 9 of the Act of 2010) by the [chief executive] as being required to facilitate an assessment referred to in subsection (7)(aa).]

[(14A) During the period beginning on the date on which section 4 of the Planning and Development (Amendment) Act 2021 comes into operation and ending on 31 December 2023, notwithstanding the expiration of the period referred to in subsection (14), the chief executive shall not make the development plan under subsection (14)(a) if, in a case where section 9A applies, the planning authority makes the plan during any period extended in accordance with that section 9A.]

(15) When considering the draft development plan, or amendments thereto, a planning authority may invite such persons as it considers appropriate to make oral submissions regarding such plan or amendment.

(16) A person shall not question the validity of the development plan by reason only that the procedures as set out under subsections (3) to (5) of section 11 and [subsections (1), (4), (5), (6), (7), (8) and (9)] of this section were not completed within the time required under the relevant subsection.

(17) A development plan made under this section shall have effect [6 weeks] from the day that it is made.

[(18) In this section 'statutory obligations' includes—

(a) in relation to a local authority, the obligation to ensure that the development plan is consistent with—

(i) the national and regional development objectives specified in—

(I) the National Planning Framework, and

(II) the regional spatial and economic strategy, and

(ii) specific planning policy requirements specified in guidelines under subsection (1) of section 28, and

(b) in relation to a local authority that is a coastal planning authority, the obligation to ensure that the development plan is, in addition to being consistent with the obligation referred to in paragraph (a), consistent with the National Marine Planning Framework.]”

209. The point made in *Killegland Estates Limited v. Meath County Council (No.1)* [2022] IEHC 393, [2022] 7 JIC 0106 para. 69 was that where the *status quo* is being changed on the basis of a reasoned recommendation of the chief executive, then such a recommendation would satisfy the legal requirement for reasons. Where the *status quo* is being changed contrary to a reasoned recommendation, then there is a need to address that by putting forward a reason, which was held to have been done in *Killegland*. But where the *status quo* is simply being maintained, there is no inherent legal requirement in principle to give further reasons on the basis that the original reasons can be assumed to continue to apply. That certainly is the situation here.

210. The Supreme Court decision is consistent with that. At §67 of *Killegland Estates Ltd v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109, Hogan J. stated:

“67. Given, however, that in making a change of this kind to the development plan the councillors are going against the advice of the Chief Executive and the planning officials, the reasons for such a decision should be properly evidenced and justified. Accordingly, the

reasons for such a decision should either be clear from the resolution itself or from the documentation before the councillors when the making of the resolution was discussed. In exceptional cases it may be sufficient to show that the reasons for the decision were well understood. As the words which I have taken the liberty of highlighting in Christian show, this is in essence what Clarke J. had in mind in that case.” (emphasis added)

211. The initial qualifier is that the obligation arose where the change went against the reasoned advice of the chief executive. That doesn’t apply here.

212. But in fact the chief executive did give reasons, and the actions of the members in adopting the plan on foot of that report constitute acceptance of such reasons.

213. The applicants aren’t entitled to micro-specific reasons – their attempt to comb through their submissions and identify micro-points which they say are not narratively addressed does not furnish a basis for judicial review. If that is a lawful ground for *certiorari* here then we may as well forget about permitting any legally sustainable decision to be made by anybody. The obligation is to provide the main reasons for the main issues. That was done.

214. The sub-grounds here are:

“ 20. The Applicants and their agents made extensive submissions why the SLO in the (then) Draft CDP should be either removed entirely. They made, inter alia, the following points:

a) that the retention of the SLO in the CDP would have the effect of severely restricting the development potential of the site.

b) That no evidence base for the SLO had ever been produced.

c) That the SLO on the site was irrational given that the Department had never indicated the requirement for a school to be located at the site.

d) That the retention of the SLO on the site constituted an unconstitutional infringement of the Applicant’s constitutionally protected property rights and was disproportionate.

21. None of these issues were engaged with by the Council in the Chief Executive’s Report and no responses to any of the issues raised by the Applicants was provided. Instead, as above, the Chief Executive relied entirely on the fact that a submission had been made by the Department asking for the retention of the SLO.

22. It is the Applicant’s case that, where material was provided identifying specific and significant problems with the approach carried out by the Council in respect of the Draft CDP, the Chief Executive was under an obligation to give reasons as to why it did not uphold these particular objections.

23. It is the Applicant’s case that the whole point of public participation is entirely set at nought if, in providing detailed and relevant submissions to the Council, the Council can dismiss or ignore same by relying, in effect, on a bald statement as to the claimed necessity to maintain the SLO from the Department. At no point did the Chief Executive weigh the submissions made or query or conduct an analysis of the basis, including the factual basis (if any) for the submission made by the Department in light of the Applicant’s detailed submission.

24. The Applicant relies upon the decision of the High Court in *Balz v An Bord Pleanala* [2018] IEHC 309 and *Mallak v Minister for Justice Equality & Law Reform* [2012] 3 I.R. 297 et al. It is the Applicant’s case that the information submitted by participants in the public consultation process is entitled to be given similar and substantive weight and respect from the Council as the observation of the Department and if the Council wished to prefer the latter over the former it was required to engage substantively with the submission and give reasons in that regard.”

215. This is badly misconceived. The council can’t be said to have disagreed with the concept that the reservation would restrict the “development potential” of the site. That’s the very point of the reservation. The complaint about “evidence base” is a merits complaint. The complaint about irrationality is simply wrong at every level. The Department wanted the existing reservations to be maintained. The complaint of unconstitutionality and disproportion is the throwing down of a legal gauntlet and is not the sort of complaint that is amenable to a reasoned response during the decision-making process. It is a complaint in principle that the applicants don’t accept the foundational premise that the 2000 Act can create such a restriction on their right to develop their lands. The exercise by the council of the powers created by the 2000 Act inherently involves an assertion by the council that they don’t agree with that objection in principle. Reasons as such aren’t involved. A decision-maker is not required to write a legal essay, conduct some sort of legal bingo or tick off key phrases: see *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 98, [2018] 1 JIC 1607 (Unreported, High Court, 16th January, 2008). Denham J., as she then was, referred in *Oguekwe & Ors v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795, [2008] 2 I.L.R.M. 481, [2008] 5 JIC 0103 to the lack of a need for a “micro specific format” (at

p. 819). In *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, at p. 600, Costello J., as he then was, held that a decision was not invalid because “the Minister himself did not take down the Constitution ... before reaching a decision.” The same approach was taken in *B.I.S. v. Minister for Justice Equality and Law Reform* [2007] IEHC 398, [2007] 11 JIC 3003 (Unreported, High Court, 30th November, 2007), at para. 39 onwards, per Dunne J.

216. In any event the applicants mischaracterise the reasons as being confined solely to agreeing with the Department – but that wasn’t the sole reason. And even if it had been, it would have been sufficient.

217. The chief executive’s s. 12(4) report of 7th December 2021 identifies the second named applicant’s submission and the submission made by McCann FitzGerald Solicitors and provides a link. The reasons go well beyond mere reliance on the Department.

218. The applicants mis-state the law by saying that “where expert evidence was submitted to the Council, it had to assess the submissions and then identify a precise basis as to why it has decided to prefer the department’s evidence over the Applicants [sic] submission” (at §97). There is no such obligation. If that were the case, all a participant would have to do would be to come forward with an expert report and thereby create an obligation for elevated and “precise” reasons (probably no reasons could ever be precise enough for an applicant). But in any event the complaints relied on are not really ones of expert opinion:

- (i) the point that the retention of the SO in the CDP would have the effect of restricting the development potential of the site isn’t really in dispute;
- (ii) the argument that no evidence base for the SO had ever been produced is just a merits complaint – the applicants can’t be in doubt that the council think that the site is in fact suitable;
- (iii) the argument that the SO on the site was irrational given that the Department had never indicated the requirement for a school to be located at the site is simply wrong on the facts; and
- (iv) the argument that the retention of the SO on the site constituted an unconstitutional infringement of the applicants’ constitutionally protected property rights and was disproportionate is a matter of legal submission by way of an objection in principle, not expert evidence, and is in the “write an essay” territory where no obligation exists to reach for the Constitution and write replying legal submissions during the administrative process.

219. Even assuming that reasons are required in the context of simply maintaining the *status quo*, one can draw on Hogan J. in *Killegland*:

“This accordingly brings us to the heart of this element of the case. One may thus ask: is there a documentary record which sufficiently explains the rationale for the decision of the elected members? If so, are those reasons consistent with the requirements of the 2000 Act? Were reasons given and, if so, did they adequately explain the rationale for the zoning decision?”

220. There is no doubt about the answer to that. The chief executive clearly did adequately explain the reasons. As the council submits:

“The CE was not obliged to ‘assess’ the Applicants’ submissions or say why he preferred the Department’s submissions over them.

Moreover, there was no obligation on the Council to ‘engage’ with the issues in the Applicants’ submission and/or to give reasons as to why the Council ‘did not uphold these particular objections’. Nonetheless, it is clear that the Chief Executive provided a clear rationale and reasons for maintaining a school objective in respect of the lands and did not rely ‘entirely’ on the submission made by the Department.”

221. Furthermore the applicants mischaracterise the reasons by calling them a mere reliance on the Department. But objective factors are referred to such as the terms of the draft plan, its policies and objectives, the proposals for future residential development, and the consequent demand for a school that would be likely to be generated by the consequent increase in residential population.

222. Again, as with Hogan J.’s view at para. 69 of *Killegland*, “no one could really have been in any doubt as to the reasons given”.

Core ground 5 – property rights

223. Core ground 5 is:

“Core Ground 5: The impugned decision is invalid as the application of the SLO to the Site constitutes an impermissible and disproportionate attack on the Applicant’s constitutionally protected property rights pursuant to Article 40.3 and/or Article 43 of the Constitution.”

224. The parties’ positions as recorded in the statement of case are summarised as follows:

“Core Ground 5

Applicant: The impugned decision is invalid as the application of the SLO to the Site constitutes an impermissible and disproportionate attack on the Applicant's constitutionally protected property rights pursuant to Article 40.3 and/or Article 43 of the Constitution.

Respondent: The residential development proposed under the Ballycullen-Oldcourt LAP demonstrates the need for a school in the area and that the Subject Lands is the most suitable site for the location of a school to serve the intended residential development in the area, as confirmed in the correspondence between the Respondent and the Notice Party.

Section 10(3) of the 2000 Act provides that, without prejudice to section 10(2), a development plan may indicate objectives for any of the purposes referred to in the First Schedule.

There is no constitutional right to carry out development on privately-owned lands or to do so in a way that is contrary to proper planning and sustainable development as determined by the relevant planning decision-makers, one of which is the Council when making and adopting a development plan.

The imposition of the school objective in respect of the Subject Lands must be considered in the context of the proper planning and sustainable development of the Respondent's functional area. The development plan is a strategic document that must consider the optimal use of lands within the county as a whole for different functions and purposes. It is lawful and entirely appropriate and in accordance with national and regional policy to reserve lands for the provision of schools, having regard to the Development Plan Guidelines and the Schools Code of Practice Guidelines.

The Respondent has formed a judgement as to what is required by proper planning and sustainable development with regard to the appropriateness of reserving the Subject Lands as a school site. That is not in itself unjust or a disproportionate attack on property rights.

The fact that the Applicants will receive compensation when the Department acquires the site for a school, shows that there is no real loss to the Applicants by the decision to include the school designation."

225. Paragraph 1 of Part I of the First Schedule to the 2000 Act expressly provides that a council has power to provide for reserving land in any development plan:

"1. Reserving or allocating any particular land, or all land in any particular area, for development of a specified class or classes, or prohibiting or restricting, either permanently or temporarily, development on any specified land."

226. The applicants didn't argue that this couldn't be operated, or that there wasn't a power vested in the council to reserve sites for schools (see amended statement of grounds, sub-ground 25). So they have to serve up their objection as essentially procedural.

227. But that complaint falls flat. As the council submits:

"... the imposition of a school objective in respect of the Subject Lands in the 2022 Development Plan is not a private matter as between the Applicants and the Council. It affects all citizens. The imposition of the school objective is the outcome of the development plan review process, which included public consultation, and the exercise of the Council's judgement as to what is required by the overarching principles of proper planning and sustainable development. The right to private property must be balanced with the needs of ensuring proper planning and sustainable development within the Council's functional area."

228. No constitutional right is therefore infringed. No procedural shortcoming, either going to *certiorari* or at all, has been made out either. As noted in *Hickwell Ltd v. Meath County Council* [2022] IEHC 418, [2022] 7 JIC 1206:

"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."

229. The applicants point out that independently of the reservation, the land is zoned for housing. But zoning is only about what is possible. It doesn't create a right to a permission authorising such a use. And any alleged contradiction in that regard isn't a pleaded ground. Even if it was, the 2000 Act does not require zoning to be "cleared away" before a specific objective can be provided for a site.

230. The determination of land use objectives in a development plan is perhaps the single most significant policy function entrusted to elected local councils, who must account for their policy stewardship directly to the electorate every 5 years. That is not an unlimited power of course, but, especially as a collective, policy-based, merits-based, decision made by an elected, deliberative, political assembly, it is one which necessarily involves a significant margin of appreciation. Insofar as controls on planning decisions by local authorities have been put in place in recent decades, much of that has, as Hogan J. noted, been driven by attempts to avoid the compromised planning process of a previous time where swathes of land were zoned for housing without the necessary provision being made for schools and other social infrastructure.

231. Land is different from other types of property for a number of poignant reasons. There is only so much of it, and the use of one piece of land impacts on other pieces of land in a way that requires compromises and burdens that inescapably and by definition fall unequally on differing rights-holders at different times. More broadly, the planet and its atmosphere is a total ecosystem. Any interest in land is ultimately tantamount to a leasehold held by the current generation. Legislative regulation must address not just the balance of interests between current actors but the issue of sustainability into the far future and intergenerational justice and rights in that context. Land must be subject to community regulation in a way that would not be acceptable if applied to, for example, regulation of how people use fungible assets. Such regulation inherently involves winners and losers – that's baked in. Anyone who acquires rights in land knows that, or certainly should know that, before they become a rights holder. That very fact hobbles the cry of unconstitutional restriction of rights from the outset.

232. As the Supreme Court has stated, "Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest" (*In re Article 26 in the matter of the Planning and Development Bill 1999* [2000] 2 I.R. 321). A present-day rights-holder's wish to engage in the most profitable use of her land must yield to the long-term interests of future generations. One rights-holder's entitlement under a permission to build to a given height can impact on the neighbouring rights-holder's right to views or light. One rights-holder's entitlement under a permission to conduct one form of activity may render the conduct of another particular activity next door impracticable or inappropriate or just less rewarding. Courts in their historical role as providers of commutative justice tend to gravitate towards a need for equality, but by definition there can be no inherent and rigid equality in such outcomes. All that can happen is a policy-based, merits-based, judgement of the appropriateness of different land uses on particular, finite, pieces of land. Only a crude, blinkered, 19th century view of property rights would find a violation of the "right" of a current-day property rights-holder to do as they will by reason of an otherwise lawful limitation put in place to address the needs of future generations. To repeat, there is simply no getting away from the fact that the regulation of land use involves winners and losers. The winners don't litigate. Only the losers come to court, and they come with heartfelt cries of the type which courts are used to hearing in the commutative justice context. But there simply can't be a read-across to the distributive justice context where not every ticket can be a winning ticket.

233. Residential development in a particular area creates a need for schools and other community facilities. That can't be got away from without violating the overarching requirements of proper planning and sustainable development. Deciding which parcels of land are to be used for housing and which for the less lucrative and less immediate community uses is a function of the statutory democratic decision-makers. The local electoral ballot-box is the tie-breaker for different views as to what the public good requires. The court can't usurp that role, and nor can it illegitimately convert the losers in such a weighing exercise into winners. People can complain as to why the ballot-box should decide such matters, but Winston Churchill's comment to the House of Commons on 11th November 1947 applies: "democracy is the worst form of Government except for all those other forms that have been tried from time to time" (Parliament Bill HC Deb vol 444 cc 203-321 at 207).

234. The applicants naturally tried to characterise the SO as all burden for them and no benefit for the public – no school as yet and a denial of the possibility of using the lands for other purpose such as housing. They use the inflammatory language of "sterilisation" of the site and cry foul about their property rights. The fact that the school has yet to be put in place is condemned as "the ultimate failure of land use planning". They try to launch all sorts of merits-based arguments which

they couldn't persuade either the members or the officials of the council about at any stage of the process – other schools have opened in recent years, the site is unsuitable, there are other sites, it won't fit a 1000-pupil secondary school, and so on. And the council did a fair job of representing in detail the applicants' submissions in the chief executive's report – so all those complaints were before the members at all material times in digestible form, and the full submissions were linked to. The complaints sound vaguely attractive at first sight. But it is important to emphasise the ramifications of the court blundering in to an area such as this and holding that a long-term intention to create social infrastructure violates property rights simply because the development has yet to take place or is not imminent. Long-term planning, whether that be for roads, schools, or anything else, by definition requires looking ahead, sometimes far ahead. By definition it involves reserving sites, because once the site is built on, the objective is frustrated for a very substantial period of time or indefinitely. Courts are equipped for commutative justice – party A owes party B a specific sum for a specific wrong. But they are totally unequipped and utterly unqualified for distributive justice – for example, how to balance the distribution of intergenerational social goods, such as restricting land use now in the interests of predicted social needs at an indeterminate future point. To enforce the uninformed, amateurish, subjective opinion of a self-regarding court, institutionally skewed by the adversarial system towards a focus on the demands of the particular litigants loudly before it, and away from the interests of the wider community and voiceless future generations, in substitution for the policy judgement of democratically accountable institutions, would result in frightening and chaotic outcomes even if counterfactually it did not illegitimately breach the separation of powers. It would empower and incentivise the litigious to obtain policy outcomes in the courts that they could never get through lawful and democratic means. Once that Pandora's box is open, the anarchy can't be confined to this one case. The applicants' honeyed submissions here invite the wolf of judicial overreach in the sheep's clothing of rights-language.

235. The cry that the site is unsuitable is ultimately a merits-based disagreement. The Department in effect and the council expressly considered that the site is suitable, at least for a primary school. Indeed they said it was "vital". That doesn't sound particularly unsuitable. The council's intention is that the operationalisation of the school would be put in place once the planned nearby residential development is built. That involves holding the site in place until those developments happen. Sure, 24 years plus is painful for these applicants or for any landowner. But it isn't an inherently unlawful period given the long-term scale of the development of a whole area – indeed there isn't really any justiciable standard here as to how long is too long. Reservations for roads, facilities or other infrastructure can last for many long decades for a whole range of reasons. For a court to blunder in to endorse the applicants' characterisation of that situation as a loss for the community would not in fact do anything for the community. It would be to engage in a lawless endorsement of a particular view of what is of benefit (short-term, unplanned, for-profit housing) in illegitimate preference for the statutory decision-maker's view of what is of benefit (long-term planning for community infrastructure).

236. One can note in concluding that when in due course the site is to be used as a school, what is envisaged is that it would be purchased at market value. No constitutional right is being infringed because the applicants' property is not being expropriated without due compensation, and nor is it being restricted otherwise than in accordance with law and for a legitimate purpose that is necessary in a democratic society, namely social provision that is required to accompany population and housing growth. To the extent that the reservation is inhibiting profit maximisation, that is not unjust or unfair because there is no constitutional right to profit maximisation. In an ordered society there is no unqualified human right to do whatever you want with your land. The uses of any given piece of land are inherently, structurally, philosophically, geographically and legally indivisible from an overall judgement as to the common good in relation to the requirements of proper planning and sustainable development for an area as a whole – not least for the reasons adverted to by Hogan J. in *Killegland*. Insofar as a burden has to fall on somebody to make way for social provision, the individual applicant concerned doesn't have a valid legal complaint on that ground unless the chosen option is clearly disproportionate or irrational. That is a significant hurdle for an applicant to surmount in an area where the decision requires complex policy assessment that the court really has no competence to engage in. Certainly the applicants here haven't come anywhere near evidentially establishing that the council's choice as expressed in the development plan was irrational or disproportionate.

237. If I can be forgiven the analogy, what I was reminded of by the applicants' cry that two or three decades is too long was the position adopted by John Mackay, a "creationist" who unwisely submitted to being argumentatively vivisected by Richard Dawkins for the latter's 2008 documentary, *The Genius of Charles Darwin*. Mackay threw down his best pre-Enlightenment move: "if evolution is true, why can't we see it happen?". Dawkins' reply was as annihilating as it was simple: "if a phenomenon takes millions of years, of course you're not going to see it". In the present case, the applicants ask: "if this school is needed why aren't we seeing it happen". The

council's reply is, in effect, "if the need will crystallise in a period measured in a significant number of decades as the settlement is built out in the course of a couple of generations, of course you are not going to see it happen in 25 years or some other arbitrary period determined by you." With no disrespect intended to the applicants, their fallacy has the same energy.

238. On a final and perhaps more sympathetic note to the applicants, while their legal complaint in the present Module is not one that I can uphold, I was anxious to ensure that the letter of s. 153(2) of the 2001 Act would be observed, not least because that would have given the elected members an opportunity to decide whether or not to agree with the applicants and in particular to decide whether to decline to defend the case if they were so minded. In the result, the members did not take up that option, and voted on 8th July 2024 to approve the defence of the proceedings, fully consistent with their three earlier decisions to defeat a motion to remove the SO, to reinforce the wording on school provision and to adopt the plan overall. Where the members of a democratically elected institution adopt a decision they have statutory power to make, which is within the zone of reasonableness, and *a fortiori* where they reaffirm such a decision at every opportunity, a court might legitimately hesitate before setting itself up as knowing better.

Summary

239. In outline summary, without taking from the more specific terms of this judgment:

- (i) Where a decision-maker states that she has had regard to something, in this instance ministerial guidelines, an applicant has the onus of proof to displace that. Here, the applicants have failed to do that.
- (ii) The applicants haven't in any event established that the council departed from the guidelines on the facts here. But even if they had, any such departure would be lawful because the relevant provisions enjoy a have-regard-to status, not a comply-with status.
- (iii) A council remains free to implement guidelines in its own way, and that very freedom means that one can't simply read-across from any hypothetical non-compliance (even if such were demonstrated) to a legal breach in the form of misreading. Mandatory language in non-mandatory guidelines, even if there was such language, doesn't make such guidelines mandatory. Nor does such language have the effect that a council is misunderstanding and misconstruing the guidelines in the event hypothetically that it does something different.
- (iv) The doctrine of reasons is not a Trojan horse for the conversion of a duty to explain the main issues in a decision into a vehicle for substantive review of the meritoriousness of the decision save for the exceptional cases of irrationality or disproportionality, which haven't been demonstrated in this case. No lack of reasons has been made out here.
- (v) Section 11(3) of the 2000 Act only requires such consultation with specific service-providers as the council considers necessary. The council wasn't under a duty to consult with specific schools above and beyond the general notice of the draft plan. Nor is the provision for consultation of service-providers intended to confer rights on individual applicants, or to permit the invalidation of a general measure such as a plan, at least barring evidence that the process was compromised as a result. No such evidence has been adduced here.
- (vi) The applicants' submission that the council relied entirely on the Department is unfounded on the facts. A series of objective reasons going beyond mere deference to the Department were provided for the decision. Even if that counterfactually was not the case, the council was entitled to agree with the Department.
- (vii) No breach of the duty to give reasons has been made out. A decision-maker is not required to write a legal essay, for example as to why the decision would not breach an applicant's constitutional rights. Rather the decision-maker must give the main reasons on the main issues, which was done here.
- (viii) Interests in land are structurally more qualified than absolute interest in fungible property because of the need to regulate land in the interests of other rights-holders and future generations. The putting in place of a restriction on the use of land in the exercise of statutorily conferred jurisdiction to consider inter-generational needs such as education requirements at a future point when residential developments are complete is not in itself an unlawful or unconstitutional violation of rights enjoyed by the owner of an interest in land. There is no specific justiciable standard as to a length of time for which an inter-generational and cross-decade provision should be maintained, and certainly no standard that has been identified as having been breached here.

Order

240. For the foregoing reasons, it is ordered that:

- (i) the proceedings be dismissed insofar as concerns Module I (core grounds 1-5);
- (ii) the matter be listed on 9th September 2024 for mention to set a date in Michaelmas 2024 for the processing of Module II (core ground 6), and the parties are invited to attempt to agree possible dates in the meantime and communicate with the court in early course;
- (iii) the issue of costs be adjourned pending the outcome of Module II; and
- (iv) the perfection of the order regarding dismissal of Module I be postponed pending the outcome of the final module.