

**THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW**

**IN THE MATTER OF SECTION 50 AND 50A AND OF SECTION 31 AND 31AM OF THE PLANNING AND
DEVELOPMENT ACT 2000 (AS AMENDED)**

2023/745 JR

BETWEEN

BALLINDOOLEY DEVELOPMENTS LIMITED

APPLICANT

AND

**THE MINISTER FOR HOUSING LOCAL GOVERNMENT AND HERITAGE
THE OFFICE OF THE PLANNING REGULATOR
AND
GALWAY CITY COUNCIL**

RESPONDENTS

RULING OF MR JUSTICE HOLLAND DELIVERED EX TEMPORE ON 20 FEBRUARY 2025¹

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INTRODUCTION

1. In these proceedings, the Applicant impugns the dezoning of its Site at Coolagh, Galway (“the Site”), to which the Galway City Development Plan 2023 - 2029 (the ‘Development Plan’) applies, from a residential zoning in the previous development plan to no zoning. The elected members of Galway City Council (“GCC”), in making the Development Plan, had zoned it for residential development. But the Minister for Housing, Local Government and Heritage (“the Minister”), on the recommendation of the Office of the Planning Regulator (the “OPR”), and by direction under s.31 PDA 2000² (“the Direction”), in effect amended the Development Plan in various respects, including dezoning the Site.

2. This is my ruling in an application by the Minister and the OPR in the part-heard trial of this matter. Their

¹ This is the written and edited form of my ruling delivered orally on 20 February 2025.

² Planning and Development Act 2000 as amended.

application is to submit to a mandatory order directing that they provide clear and complete statements of the reasons for their Impugned Decisions as they relate specifically to the Site. They so apply on the footing that the case will be adjourned pending provision of those reasons, with a view thereafter to resuming the trial and considering the outstanding issues. I should acknowledge that the application was prompted by my inquiring, in a provisional way, as to whether such an order might be appropriate but, as I say, this is a ruling on an application by those respondents.

3. The Applicant opposes the application. I adjourned the proceedings overnight to enable the Applicant to consider and respond to the application and I am satisfied that it has had adequate opportunity to do so.

4. The Minister and the OPR propose the order sought, essentially, as a pragmatic and proportionate solution - availing of the flexibility of judicial review to fashion a remedy suited to the circumstances of the case. I accept that characterisation.

5. I intend to make the order sought ("the Intended Order").

6. I propose to consider the Intended Order as relating specifically to the reasons for the issue of two particular instruments.

- The first instrument is the OPR's Notice under s.31AN(4) PDA 2000³ dated 23 March 2023, recommending that the Minister issue a direction under s.31 PDA 2000. S.31AN(4) PDA 2000 does not in terms require that the OPR state its reasons for such a recommendation. In contrast, it provides an explicit obligation to state reasons where the OPR takes the option of not so recommending. But in this case in fact, and in my view in law correctly, the OPR did in its s.31AN(4) notice, state its reasons for the recommendation it made to the Minister.

- The second instrument to which I propose to apply the intended order is the Direction that GCC amend the Development Plan in various respects, including by way of rezoning the Applicant's lands from a residential zoning to no zoning. S.31(1) obliges the Minister to state his reasons for any such direction.

For present purposes, I will refer to the OPR's s.31AN(4) Notice and the Minister's s.31 Direction together as the "Impugned Decisions". If any party considers that the Intended Order should relate also to reasons for earlier interim decisions in the relevant statutory process, other than the "Impugned Decisions", I will hear them on that issue.

7. The Applicant's pleadings allege various grounds of illegality of the Impugned Decisions. I need not elaborate on those pleadings, save to observe that they include the alleged legal uncertainty of the reasons for the Impugned Decisions - *inter alia* in the particular respect that the Impugned Decisions fail to identify

³ Planning and Development Act 2000 as amended.

which of the reasons stated apply specifically to the Site.

8. This case is unusual in a sense. Typically in judicial review (though not invariably), applicants complain of a paucity of reasons – and do so in respect of a single discrete decision affecting, at least in planning judicial review, a discrete site or proposed development. Here the problem is, in some ways, the converse. It is not of a paucity, but of an embarrassment, of reasons and a multiplicity of sites. Significantly, the Impugned Decisions are lengthy documents and on their face state numerous reasons as to numerous sites. The difficulty is one of identifying precisely which stated reasons apply to which of the many sites to which the Impugned Decisions apply. The individual facts and circumstances of those sites, as relevant for planning purposes, inevitably differ inter se in varying degrees, though many will have significant features in common. More specifically in this case the question is: which of the stated reasons apply to the Applicant's Site?

THE LEGAL CONTEXT & THE ILLEGALITY CRITERION

9. The legal context in which the Impugned Decisions were made is that of a detailed and complex statutory process whereby, ultimately, the Minister on the recommendation of the OPR may by direction override the decision of the elected members of a planning authority as to the content of their development plan.

10. I need not describe that complex statutory process here. For that description I can refer, for example, to the cases of **Tristor**,⁴ a **Cork County Council** case⁵ and **Mount Salus**.⁶ It is a process characterised by iteration and by repeated rights to be heard: rights of the public, rights of landowners and rights of elected members.

11. However, there are some principles underlying the process, which are acknowledged in the cases, and which are acknowledged also in the affidavit sworn by Ms Mulhern for the Minister on 18 January 2024. As she acknowledges, s.31 allows the Minister to intervene by direction:

- first, as, "*A measure of last resort where intervention is required for reasons prescribed in statute*"; and
- second, "*When a planning authority has made a development plan that is not in accordance with law.*"

12. As has been the case since **Tristor**, and has remained the case despite amendments since **Tristor** of the relevant statutory provisions, and as noted in the more recent cases, a mere difference of planning judgement, as between the Minister and the planning authority as to what the development plan ought to contain, will not suffice in law to support a direction. The essential premise of a direction is a ministerial opinion that the development plan is tainted by illegality in the form of a breach of one or more provisions of the PDA 2000 and in the specific respects in which a direction is made. (I pause to say that the word "opinion"

⁴ *Tristor Ltd v Minister for the Environment*, [2010] IEHC 397, [2012] 3 ICLMD 78, Clarke J.

⁵ *Cork County Council v Minister for Housing* [2021] IEHC 683.

⁶ *Mount Salus Residents v An Bord Pleanála, Minister for Housing, OPR & Smyth* [2025] IEHC 14.

is important for reasons discussed in the other judgments but upon which I need not dwell here). As Humphreys J said in a relatively recent **FoIE** case,⁷ citing **Tristor**, "*The OPR and the Minister are, in performing their functions pursuant to this statutory process, law enforcers, not law givers.*"

13. Usually, perhaps necessarily, but in any event in this case, a particular species of illegality identified in a direction is breach of s.10 PDA 2000, inasmuch as it requires, *inter alia*, that a development plan set out an overall strategy for the proper planning and sustainable development of the area of the development plan.

14. In consequence, the Direction must ultimately be interpreted as an expression of the Minister's opinion that it was an illegal act, on the part of the elected members of GCC, to zone the Site for residential use.

15. As to legal context, I should also mention is s.10(8) PDA 2000. It provides that there is no presumption in law - landowners are entitled to no presumption - that the zoning of their land will persist from one development plan to the next. The purchaser of zoned lands takes the commercial risk that their present zoning will not survive the making of a new plan. No doubt the practical reality, predictability, degree and weight of that risk will vary as between sites – but, whatever it may be, the landowner must bear it. As will be seen, however, that that does not deprive them of all rights in respect of a rezoning, or as the term is used a "dezoning", of lands to a less commercially valuable zoning or to no zoning.

THE FACTS

16. It is necessary to briefly describe the facts of the case. But I will simplify them very considerably and I will describe them only as to the issue of zoning. I will ignore other issues such as, particularly, the question of deletion by the Direction of a special development objective as it related to the Site - though the terms of this ruling and the Intended Order will apply also to that issue in the sense in which I will direct a statement of reasons to be given by the OPR and the Minister.

17. As I say, simplifying the facts very considerably, from 2011 in the 2011 Galway City development plan and also in the 2017 development plan, the Site was zoned for low density residential development. That has been known as the "LDR" zoning.

18. In 2021, that is to say before the expiry of the 2017 plan, the applicants bought the lands for a figure stated in the papers as being in the region of €2.5 million. The precise figure doesn't matter for present purposes. Nor, indeed, does the size of the figure - except as it illustrates the fact, rather than establishing the fact, that the Applicant's legitimate property rights and interests are engaged by the process whereby their lands have been dezoned. While, by s.10(8), they had no presumptive right to have the zoning continue, that

⁷ Friends of the Irish Environment v Minister for Housing, the OPR and DAA [2024] IEHC 588.

does not deprive them of all rights in the matter. Specifically, in my view, it does not deprive them of the right, established in cases such as **Christian**,⁸ to be told the reasons for the rezoning. Nor, in fairness, have the Respondents, at least yet, argued otherwise.

19. In January 2022, GCC published a Draft City Development Plan which identified the Site and specifically intended that it would be maintained in residential zoning - the LDR zoning. Later, the question of residential zoning took on a slightly different aspect insofar as GCC generally replaced the LDR zoning with an "R2" residential zoning in somewhat different terms to the LDR Zoning. But we need not dwell on the differences here. It suffices to note that, in November 2022, the elected members made the Development Plan 2023 to 2029 - with the Site to be zoned R2.

20. In the statutory process between January 2022 and November 2022, the OPR had made known to GCC its opposition to any residential zoning of the lands. It is fair to say, without being dramatic about it, that in November 2022, the elected members defied the OPR by zoning the lands residential. The OPR then set in train the statutory process which led to the Direction - which was to amend the Development Plan by rezoning the Site and, specifically, leaving it unzoned.

21. I can take judicial notice that the effect of that Direction, which automatically amends the Development Plan unless it is upset in these proceedings, was to greatly diminish both the prospect of the development of the Site and its commercial value to the Applicants.

22. I should say that ultimately by the Direction, and at least as arguably broadly relevant to these proceedings, three categories of property were affected as to zoning. I leave aside the content of the Direction as it related to other matters entirely. The three categories were as follows:

- First, there are 15 sites in respect of which GCC was directed to reinstate earlier zoning objectives.
- Second, as to 11 sites, of which the Site was one, the direction was to delete the zoning objectives and to leave the lands unzoned.
- There was a third category of sites, of which the Site was one, in respect of which omission of special development objectives was directed.

I have not analysed or determined the overlap between the third category and the other two, but what can be said is that at least 26 sites were affected by the three categories of direction which I have just described.

23. It is also clear and is important that the Minister's own position is that not every reason given in the Direction applies to every property affected by the Direction. Indeed, that is how the question arises, which reasons stated in the Impugned Decisions relate specifically to the Site? Certain of the content of the Impugned Decisions can be identified as reasons for the Impugned Decisions as they relate to the Site but beyond that there is appreciable difficulty, as the Minister and the OPR now concede, in discerning from the Impugned Decisions what is the complete body of reasons, from the many reasons set out in the Impugned

⁸ Christian v Dublin City Council [2012] 2 IR 506.

Decisions, which relate specifically to the Site.

FINDING AS TO REASONS

24. On the consent of the Minister and the OPR, I initially contemplated presuming, without so finding, that the reasons which had been given in the Impugned Decisions were inadequate in the sense only that they failed to identify the reasons applicable to the Site. I may as well say that that was not a presumption which I found difficult to envisage. I should add, importantly, that the Applicant complains in the proceedings, amongst other complaints, of that very inadequacy. However, in response to submissions by the Applicant, the Minister and the OPR invited me to make findings that the Impugned Decisions were legally inadequate in the specific respect of failing to identify, from amongst the reasons they stated, the reasons specifically applicable to the rezoning of the Site.

25. This situation seems to me to be effectively the same as the situation which arises in an application on consent to dispose of judicial review proceedings, in which the Court retains a supervisory jurisdiction whether to grant the relief to which all parties have consented - see **Ballyboden Tidy Towns Group v An Bord Pleanála & Ardstone**.⁹

26. I have not heard full argument in this case. Far from it. However, I have considered the relevant documents sufficiently to allow me to conclude, which I do, that I should accede to the Minister's and the OPR's invitation to make those findings against them which they have invited me to make.

THE LAW AS TO REASONS

27. It's important to again specify the precise form of inadequacy of reasons to be addressed by the Intended Order. It must be clearly said there is no question of the Minister's or the OPR's improving their reasons or making the reasons clearer, save in the limited extent that the question to be addressed is one only of identification of the reasons which, *ex hypothesi*, already apply as a matter of fact to the Site.

28. I refer to the decisions in **Connelly**,¹⁰ **Christian** and **Mallak**.¹¹ They are authority that, as I have said, despite s.10(8) and the absence of a presumption that zoning will persist, the property rights or at least interests at stake are such that the Applicants are entitled to know the main reasons on the main issues for the Impugned Decisions as they relate specifically to the Site.

⁹ [2024] IESC 4.

¹⁰ *Connelly v An Bord Pleanála, Clare County Council & McMahon Finn Wind* [2021] 2 IR 752

¹¹ *Mallak v Minister for Justice* [2012] IESC 59, [2012] 3 IR 297.

29. These decisions also make it clear that, in the striking phrase used in **Connolly**: *"reasons can be found anywhere"*. But that is subject to the important proviso that *"it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning."* – *"the reasons must actually be ascertainable and capable of being determined."* It is not enough to find material which may explain the decision. It must be clear that the material states the reasons which actually, and as a matter of fact, motivated the decision. To put it another way, the reasons must be clearly identifiable as such. **Connolly** and **Christian** refer to: *"The requirement of reasonable certainty as to the reasons."* and say that: *"The reasons must be capable of being determined with some degree of precision."* They state that *"any document recording the reasons must be such that it's possible to say that the document concerned actually represents the reasons for the decision in question in a way which ought not to be capable of real debate."* Connolly cites **EMI**¹² to the effect that *"Legal certainty requires, as it was pointed out in Christian, that it must be possible to accurately determine what the reasons were and they must be capable of being readily determined by any person affected by the decision."*

30. These cases were concerned with finding reasons other than on the face of the decision itself - with finding reasons in other documents. But, it seems to me that the principle that the reasons must be capable of definite ascertainment applies just as much where the impugned decision itself is proffered as stating on its face the reasons which underlie it.

31. I accept that sometimes, even in decisions applicable to multiple properties, the reasons will be the same as applicable to all. But where that is not so, as here, a property owner cannot be expected to sift through a haystack of reasons, relating to a large number of properties, to identify the needles which specifically point in its specific direction.

32. Leaving aside decisions on policy, which were dealt with distinctly in the **Christian** case, and considering only administrative decisions affecting individual rights and interests, in my view the modern law has reached the stage, and probably did so in **Mallak**,¹³ at which, with possibly rare exceptions, capricious, arbitrary and/or unreasoned decisions are anathema. The resultant obligation is generally characterised as one to state the main reasons on the main issues for the decision. But it must not be forgotten that the obligation to state reasons is necessarily underlain by a more fundamental obligation. It is axiomatic that the decision-maker must, as a matter of fact, have actually had reasons for its decision.

33. As was said in **Stapleton**¹⁴ as to the statement of reasons: *"All that is required is that the reasons be briefly stated which, given the reasoning which has ex hypothesi occurred, should not ordinarily be too burdensome"*. In other words, to state reasons implies that, as a matter of fact logically preceding the statement in point of time, if infinitesimally, there must actually be reasons for the decision. That observation is of some importance to an understanding of an order to state reasons of the type now contemplated.

¹² EMI Records v Data Protection Comm [2013] IESC 34, [2014] 1 ILRM 225.

¹³ Mallak v Minister for Justice [2012] IESC 59, [2012] 3 IR 297 – cited to this effect in Connolly.

¹⁴ Stapleton v ABP & Savona [2024] IEHC 3.

JURISDICTION TO MAKE THE INTENDED ORDER

34. I am satisfied that there is a jurisdiction to make orders in terms of the intended order. In **Krupecki**¹⁵ the headnote states, *inter alia*:

- The court had a discretion as to what order was appropriate where reasons for an administrative decision were lacking.
- The overriding consideration was the interests of justice and the court had to be sensitive to fashion a proportionate and just remedy rather than automatically reaching for the crude, option of immediately quashing a decision in full simply because of the identification of any error.
- In exercising its discretion, the court could have regard to all relevant circumstances, including the risk of retrospective creation of reasons, whether it was practicable to require the decision-maker to state the original reasons and whether the lapse of time since the original decision was such that reasons could not be identified.
- While the risk of reasons being retrospectively manufactured was a factor that the court could consider in the interests of justice in any given case, that risk could be dealt with by requiring the decision-maker to positively state whether the reasons were in his or her mind at the relevant time.

35. Turning to the judgment, **Krupecki** assists:

- First it is stated: *"A nuanced approach to the remedies available to the court best respects the separation of powers."*¹⁶ - that is say, the separation of powers as between the executive and the judicial arms of government. It says: *"It means an executive decision is only overturned to the extent to which it is proportional to do so and is not overturned if it can be dealt with in some other way such as by ordering and then reviewing the reasons for that decision."*
- Humphreys J also addressed the risk of retrospective reasoning.¹⁷ He says:

"It is certainly the case that allowing reasons to be provided after a decision creates risks in any given case that reasons may be manufactured or retrospectively created for the purposes of the litigation. The court should be 'circumspect' in relation to permitting late reasons, having regard to such considerations. That is not, of course, an absolute prohibition on later reasons; simply a note of caution."

"One way of preventing the retrospective creation of reasons was to require the decisionmaker to positively state whether the reasons were in their mind at the relevant time, and I incorporated such a requirement into the order made ...".

I infer that such positive statement was to be supplied on affidavit.

¹⁵ *Krupecki v The Minister for Justice* [2019] 3 IR 67.

¹⁶ §22.

¹⁷ §§14 to 16.

36. In **RPS Consulting**,¹⁸ Humphreys said:

"Certainly, however, the risk of retrospective reasons is a factor and is one of a number of factors that the court can consider in the interests of justice in any given case. However, as I say, that can be dealt with by directing the decision-maker to inform an applicant as to whether the reasons were in their mind at the relevant time."

"Clearly there can be no retrospective creation of reasons. The new letter of reasons must be confined to the actually significant specific facts which exemplify the general descriptions previously given, as those specific facts existed in the minds of those who assessed the tenders at the time the contract was awarded. When furnishing the reasons, the council must confirm that the officials who assessed the tenders have confirmed that these were the significant specific matters to which they had regard on the date of the award, if that be the case. If any one or more of those officials is not prepared to make the statement, the respondent must also inform the applicant of this when furnishing the new letter of reasons."

37. That reference to "*significant specific facts*" may not precisely apply in the current case. But certainly the principles which underlie that observation in **RPS Consulting** are generally applicable and apply in the present case.

38. Returning to **Krupecki**, Humphreys J dealt with the assertion that there was an artificiality to directing late reasons.¹⁹ He noted that counsel for the applicants "*submits that it would be artificial to ask*" the respondent "*to elaborate on the reasons as to why in September, 2017 the Department decided on a particular exclusion period. That is covered by the approach in RPS Consulting that, where there is a risk of such a problem, there can be a requirement for a positive statement on behalf of the decision-maker as to whether those were the reasons in their mind at the time.*"

39. Finally, I should record that the form of order made in **RPS Consulting** and **Krupecki** was the same as the Intended Order in the respect that pending the compliance with the order the proceedings would be adjourned part-heard in contemplation of the completion of the argument of the case in light of the statements of reasons which will presumably ensue from the making of the Intended Order. That form of order is intended to preserve all parties' positions in the proceedings.

40. At cost of some repetition, it is critical to distinguish different forms of uncertainty of reasons (by no means do I suggest that this is a complete list of those forms). Reasons can be uncertain as to what I will call identification. That is to say in this case, what are the reasons, amongst those reasons stated, which apply to the Site? That is the only issue to which the Intended Order will be directed. In contrast, uncertainty can arise

¹⁸ RPS Consulting v Kildare County Council [2017] 3 IR 61 §16 & 109.

¹⁹ Krupecki §19.

as to the substance of reasons. Are the reasons, once identified, illegally uncertain or otherwise legally inadequate in their substance? Whatever the outcome of the Intended Order, it remains open to the Applicant to argue questions of uncertainty of the substance of whatever reasons may be apparent once the Intended Order has been complied with.

41. At cost of further repetition, this is not a case of asking – or for that matter permitting - the Minister or the OPR to state reasons which have not already been stated. It is not a case of asking or permitting them to state new reasons or to amplify or elaborate on reasons already stated. It is a case of asking them to identify which of the reasons already stated in the Impugned Decisions were, when the decision was made, considered by them respectively to apply specifically to the Site.

APPLICANT'S ARGUMENTS

42. I will now consider arguments made against the Intended Order.

43. First, there was an argument, ultimately not strongly pressed, that the OPR and the Minister are *functus officio* and that this observation should stand in the way of an order. I respond that such a situation is a commonplace of judicial review and it does not inhibit a remedy, most obviously for example, the remedy of remittal.

44. Second, counsel for the Applicant argued that such an order would be premature in advance of a finding, such as occurred in **Krupecki**, that the reasons were invalid. While I am not convinced the argument is a good one, it is met in any case by the concession by the OPR and the Minister, that I may now find, as I do, that the reasons were invalid specifically as to the identification of which of the many reasons given apply to the Site. That concession, in my view, also meets any difficulty which might otherwise be posed by the fact that the application before me is, as yet, part-heard.

45. Third, counsel for the Applicant also argued that the logic of that concession of a finding that the reasons as they relate to the Site were inadequately identified by the OPR, is that the Minister's subsequent decision was inadequately informed by the OPR's earlier decision, such that he could not have formulated adequate reasons and that this issue can be decided now such that the Impugned Decisions should be quashed. I see the logic of that argument. However, and on balance, it does not weigh with me sufficiently in the exercise of my discretionary jurisdiction to prevent my making the Intended Order. That said, it is clear that the Applicant is not prevented from making any such an argument at the resumed trial. Indeed, if the argument is valid, it seems to me that there is an appreciable prospect that the outcome of the Intended Order may strengthen the argument.

46. Fourth, counsel for the Applicant sought to distinguish **Krupecki** on the basis that, in that case, no reasons had been given by the decisionmaker. That argument must be rejected on two bases.

- First, in RPS an attempt to give reasons had been made - yet the order now sought was made in that case.

- Second, as counsel for the OPR observed and given that the OPR and the Minister have given reasons (albeit arguably indiscriminately as between the various properties affected) as to which reasons they are confined by the Intended Order, the scope of the present case for retrospective creation of reasons is appreciably lesser in this case than even it was in **Krupecki** - and that risk did not deter Humphreys J from making the order in **Krupecki**.

47. Fifth, counsel also argued that the Applicant's case is not limited to a complaint of a failure by the Minister and the OPR to identify their reasons as they apply to his client's lands. He has other arguments. To that the answer is that, on the resumption of the case, he will not be shut out of any such arguments. He may, in receiving the statements of reasons, apply to amend his proceedings to plead any alleged deficiency in the Impugned Decisions which such statements may reveal. I cannot predict, much less determine, the outcome of any such amendment application. But, *ceteris paribus*, I do not consider that any risk, whatever risk there may be, of his being refused any such amendment, weighs sufficiently to dissuade me from exercising my discretion to make the Intended Order.

48. Sixth, counsel pointed to his complaint of failure by the OPR and the Minister in their reasons to engage with his client's submissions in the statutory process - referring to the obligation in that regard identified by the Supreme Court in **Balz**,²⁰ **Killegland**²¹ and **Hickwell**.²² That is readily answered – at least for the present. The Intended Order will enable the Minister and the OPR to identify their reasons as they existed when they made their respective Impugned Decisions. It will not allow them to amend, supplement, explain or amplify those reasons. Therefore, whatever the degree of engagement with the Applicants' submissions the existing reasons reveal, that degree may not be increased or bettered by compliance with the Intended Order.

49. Seventh, and as to any prospect of reconstruction of reasons in a way that might be objectionable, I refer to what the Supreme Court said in **Crofton**²³ citing **East Donegal**²⁴ - public law decision makers must act lawfully and fairly and are presumed to do so unless the contrary is shown.

50. In any event, I must presume that, unless such an affidavit can be truthfully sworn, neither the Minister nor the OPR will swear or procure the swearing of an affidavit positively stating that the reasons stated in the document to be prepared, on behalf of each of them, were the reasons which in fact informed their respective decisions as they related to specifically the Site. Two possibilities arise:

- The first is that the affidavit is sworn. In that case, it is difficult to see what prejudice will have accrued to the Applicant. A defect in the decisions will, by such an affidavit and statement, have been corrected by a remedy proportionate to the defect - in the sense in which that criterion of proportionality was used by Humphreys J in **Krupecki**.

²⁰ Balz v An Bord Pleanála [2019] IESC 90.

²¹ Killegland v Meath County Council [2022] IEHC 393.

²² Hickwell Ltd v Meath County Council [2022] IEHC 418.

²³ Crofton Buildings & Anor v An Bord Pleanála [2024] IESC 12 §46, 58 & 59.

²⁴ East Donegal Co-operative Ltd v Attorney General [1970] IR 317.

- The second possibility is that the affidavit is not sworn. That presumably would be because the Minister or the OPR are now unable, for whatever reason, to identify the reasons which were in fact the reasons which informed their Impugned Decisions specifically as to the Site when they made their respective decisions. In such a case and not least given the concessions that the decisions in their present form failed to adequately identify those reasons, it is difficult to see that the Applicant's hand in the proceedings will not have been strengthened.

In either eventuality it appears to me that either as a matter of likelihood the Applicant's case will have been strengthened by the absence of the provision of the statements required by the Intended Order, or if they are provided, the Applicant will not be prejudiced by reason of a remedy which will have proportionately corrected a defect of which they complain.

51. Eighth, counsel for the Applicant also impressed upon me that the process which led to the Direction is an iterative statutory process which involved public consultation. Counsel argued that the earlier documents in the process informed both public consultation and elected members' participation in the process and that they had lacked the benefit of the clarity of identification of reasons which compliance with the Intended Order will belatedly provide. Rather they were informed, as counsel suggested, by earlier and defective iteration of the identification of those reasons.

Counsel made an associated argument that the statutory process here was distinguished from other statutory processes in that a draft direction was circulated for public consultation before the OPR's s.31AN(4) recommendation and the Minister's direction issued.

52. I respectfully reject those arguments as lacking the weight necessary to appreciably influence the exercise of my discretion.

- First, they invoke a *jus tertii* of the public and elected members that they were entitled to have had opportunity to make properly informed submissions as to reasons bearing on the Impugned Decisions as related specifically to the Applicant's lands. By that I am not referring, not just to reasons referable only to the applicant's lands, but to the reasons generally as they related to the applicant's lands.

- Second, these arguments are largely theoretical and abstract as to what such submissions might have been in substance. In fairness, that is in some degree understandable in advance of a proper identification of the reasons. But it was at least clear in the iterations of the process that what was at stake for the Applicant was the rezoning of its lands on bases which were broadly discernible. And the Applicant itself availed of repeated and detailed arguments by professional planning consultants as to all issues relevant to that broad question. Indeed, the Applicant made a submission opposing the Draft Direction.

53. Ninth, counsel argued that the Intended Orders raises the prospect that the Minister's compliance with it would be informed by the output of the OPR's prior compliance with it. The answer to that is simple. Where the exercise to be performed pursuant to the Intended Order is one merely of identification of what was in the minds of the respective decisionmakers when they made their decisions, that identification in each case

should be informed only by the materials which had been before the OPR and the Minister respectively when they made their respective decisions. The Minister's compliance with the Order will not be informed by the OPR's compliance with the Order.

54. The Minister's and the OPR's compliance with the Intended Order will occur in obedience to this Order but otherwise independently of the proceedings and without regard to the proceedings or to submissions, written or oral, made in the proceedings.

55. Tenth, counsel for the Applicant argued that there may be an unreality to that stipulation insofar as it is entirely possible that those who in practice will have the task of complying with the Order may already have had regard to submissions in the case. The observation by counsel for the OPR that its submission hadn't addressed the issue of reasons provides some measure of reassurance in this regard. Nonetheless, I accept that such a prospect arises. But ultimately I consider that, given the obligations imposed by **East Donegal** and **Crofton**, the public officials in question must be expected to comply faithfully with the Order in not having regard to material to which they ought not have regard. On balance and while I recognise some force in what counsel for the Applicant has said, it is not sufficient to dissuade me from making the Intended Order.

CONCLUDING OBSERVATIONS

56. To summarise, I expect the exercise to be performed by the Minister and the OPR, in their obligation to comply with the Intended Order, to consist, at least in part, of the following (I am not pretending a complete description): each will perform its compliance with the Intended Order,

- by way of a statement which, importantly, will identify and state all reasons applicable to the decision to dezone the Site and must be devoid of any reasons inapplicable to the decision to dezone the Site. The purpose here is clarity, not elaboration;
- on foot only of the documents what had been before them respectively when they made their respective decisions;
- independently of the other;
- in obedience to the Order but otherwise independently of the proceedings and without regard to submissions or proceedings in the proceedings;
- supported by what I will call a Krupecki affidavit. If it is found that it is not possible to swear such an affidavit, there will be liberty to apply for further directions.

57. So that Applicant can verify that what has been conducted is an exercise in the identification of reasons rather than their elaboration or amplification, by some appropriate means the statements are to cross-reference the reasons identified to the content of Impugned Decisions in which they are identified so that it will be simple to ascertain that the limits of the Order I am now making have been complied with.

58. I invite the parties to assist the Registrar by agreeing a draft Order on foot of this ruling. I think a

relatively simple order will suffice as, in case of doubt or dispute as to compliance, regard may be had to this ruling. The order should stipulate the statements of reasons and what I have called the Krupecki affidavits and also liberty to apply as envisaged above. It should also stipulate the adjournment of the trial pending compliance with the order.

59. On reflection since I delivered this ruling orally, it occurs to me that the Intended Order should also record the finding which I have made, at the invitation of the Minister and the OPR, that the reasons stated in the Impugned Decisions were deficient in the specific respect stated above. I will hear the parties further in this regard.

60. I direct that these proceedings be listed for mention on 3 March, pending which the Order on foot of this ruling will not be perfected.

A handwritten signature in black ink, appearing to read 'David Holland', with a stylized flourish at the end.

DAVID HOLLAND
20/2/25