

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 147; Record No. 2021/No.492JR

IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND THE RESIDENTIAL
TENANCIES ACT 2016
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF THE
PLANNING AND DEVELOPMENT ACT 2000

Between:

MANLEY CONSTRUCTION LIMITED

Applicant

and

AN BORD PLEANÁLA

Respondent

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INTRODUCTION & IMPUGNED DECISION

1. The Applicant (“Manley”) owns a 5.6ha site at The Spires, The Commons, Navan Road, Duleek, County Meath (“the Site”). It lies about 750m west of Duleek town centre. The Respondent (“the Board”) by Order dated 29 March 2021 (the “Impugned Decision”) in conformity with its Inspector’s report and recommendation, refused Manley’s application for a Strategic Housing Development (“SHD”) planning permission to build 142 residential units – 82 houses and 60 apartments - on the site. That decision was made pursuant to the Planning and Development (Housing) and Residential Tenancies Act, 2016 (“the 2016 Act”) which provides a fast track planning permission procedure by way of direct application to the Board for planning permission for substantial housing developments which fall within the definition of “strategic housing development” in s.3 of the 2016 Act. Manley seeks to quash that decision.

2. It is common case that the Development Plan relevant to the Impugned Decision was the Meath County Development Plan 2013 – 2019 (the “2013 Development Plan”). As the Impugned Decision is dated 29 March 2021, it is necessary to record that the duration of the 2013 Development Plan was extended such that it remained current at the date of the Impugned Decision.

3. In terms identical, save in one respect to which I will return, to its Inspector’s recommendation, the Board’s Order recorded the basis of its refusal of permission as follows:

“The subject lands are zoned ‘A2’ in the Meath County Development Plan 2013-2019 as varied, the objective of which is “to provide for new residential communities with ancillary community facilities, neighbourhood facilities and employment uses as considered appropriate for the status of the centre in the Settlement Hierarchy”. The lands are identified as Phase II lands in Variation Number 2 of the County Development Plan where Strategic Policy SP3 seeks to operate an Order of Priority for the release of residential lands with Phase II lands stated as not available for residential development within the life of the Development Plan. Having regard to section 9(6)(b) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended the Board is precluded from granting permission for the development and, therefore, permission is refused.”

4. S.9(6)(b) of the 2016 Act (“S.9(6)(b)”) provides as follows:

“(6) (b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.”

5. The substance of the Board's reasoning therefore is that permission in this case would have materially contravened "*the development plan in relation to the zoning of the land*" because, as zoned A2 New Residential Phase II¹, the Plan identified the lands as "*not available for residential development within the life of the Development Plan.*"² It is common case that the Board took this view on the basis of the decision of McDonald J. in **Highlands Residents**³ - a case which involved the interpretation of the Drogheda Southern Environs⁴ Local Area Plan. Manley argues, in essence, that the Board erred in that **Highlands Residents** was a decision made in a different context and is distinguishable accordingly. Manley argues in the alternative that **Highlands Residents** was wrongly decided. The Board defends the impugned decision on the basis that the Board was correct in applying **Highlands Residents**.

6. The case can be reduced to a net point: was the Board correct in applying **Highlands Residents** in making the impugned decision?

7. Some sense of the significance of the matter from Manley's point of view can be gleaned from the fact that the Inspector's report records that the Draft Meath County Development Plan 2021-2027 envisaged that the Site would be downzoned to a 'Rural Area' zoning and so placed outside the Duleek settlement boundary. This, it seems, on the basis that future residential development of Duleek will take a more sequential approach - prioritising lands closer to the town centre and business park and under-utilised infill and brownfield lands.

8. By agreement of the parties I have been provided with copies of, and have considered for the purposes of this judgment, some documents addition to those exhibited. I have listed them in an appendix below.

MEATH DEVELOPMENT PLAN, VARIATION #2

9. Though the position was a little unclear at trial, the Site seems to have been residentially zoned in the previous, 2009, Development Plan and Duleek Local Area Plan.

10. The 2013 Development Plan explicitly envisaged its own variation within a year of its adoption. Its Core Strategy included "CS" objectives, amongst which Objective CS OBJ 2 envisaged variation to introduce land use zoning objectives and an order of priority for the release of lands in, inter alia, Drogheda Environs, to be followed by publication of, inter alia, an amended Drogheda Environs Local Area Plan "*consistent with the Development Plan, as varied, and particularly the*

¹ Emphasis added

² The middle portion of the site is zoned F1: *To provide for and improve open spaces for active and passive recreational amenities and subject to an overhead ESB cable line buffer but these can be ignored for purposes of the issues arising in this judgment.*

³ *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (High Court (Judicial Review), McDonald J., 2 December 2020)

⁴ The area in question is also described as "Drogheda Environs" but it is seems clear that the designations are interchangeable.

settlement strategy, core strategy and household allocations outlined in Table 2.4. of the Development Plan". Objective CS OBJ 3 envisaged variation to provide development and zoning objectives for, inter alia, Duleek to *"give effect to and be consistent with the core strategy, policies and objectives of the Development Plan"* – to be followed by revocation of the earlier Duleek Local Area Plan. Objective CS OBJ 5 was to ensure that those reviews, inter alia, of planning policy for Drogheda Environs and Duleek, *"achieve consistency with the core strategy of the Meath County Development Plan 2013–2019 by only identifying for release during the lifetime of the Meath County Development Plan 2013–2019 the quantity of land required to meet household projections as set out in Table 2.4"*.

11. It was clear therefore, from the adoption of the 2013 Development Plan, that significant residential zoning changes were likely to ensue in early course and would involve limiting release of land for residential development. It was also clear that the review of zoning of Drogheda Environs and Duleek was part of a systematic zoning review of 29 urban centre in County Meath with an overview to *"consistency with the core strategy"*.

12. As thus envisaged, Variation Number 2 of the 2013 Development Plan ("Variation #2") ensued in May 2014 – as did an accompanying "Introduction and Explanatory Document". It is important to state that this document applies to Variation #2 as a whole – not just to Duleek or Drogheda Environs. It includes the following⁵:

- The 2013 Development Plan Core Strategy outlines future population and housing growth targets over the plan period. It also provides for written statements outlining development objectives and land use zoning objectives for 29 settlements/centres (including Drogheda Environs and Duleek).
- Variation #2 collectively forms Volume 5 of the 2013 Development Plan and is entitled *"Written Statement & Development Objectives for Urban Centres"*. It consists of land use zoning objectives for the 5 centres where Local Area Plans are being retained (including Drogheda Environs) and incorporates detailed objectives including land use zoning objectives into the Development Plan for the remaining centres (including Duleek) - where Local Area Plans are not being retained.
- The purpose of Variation #2 included effecting objectives CS OBJ 2, CS OBJ 3 and CS OBJ 5 cited above.
- Notably, Variation #2 *"involved ensuring that only the quantum of land required to meet the household projections as set out in Table 2.4 for each centre is identified for release during the lifetime of the Meath County Development Plan 2013–2019. This will ensure consistency with the Core Strategy of the Meath County Development Plan 2013–2019;"*

⁵ Not verbatim save where indicated.

- Variation #2 *“involved applying the land use zoning objectives contained in the Core Strategy of the Meath County Development Plan 2013 – 2019 to the land use zoning objectives maps which are being incorporated into the Meath County Development Plan 2013 – 2019.”*
- The Introduction and Explanatory Document to Variation #2 stated that those *“objectives seek to ensure that the development frameworks and land use zoning objectives of individual centres adhere to the settlement strategy and Core Strategy, particularly Table 2.4, of this Development Plan. This required a review of the existing land use zoning objectives to ensure compliance with the new land use zoning objectives contained in the County Development Plan and to ensure that the quantum of lands identified for residential development adheres to the household allocation for each centre.”*
- The Introduction and Explanatory Document to Variation #2 records that *“Volume 5 contains a written statement inclusive of development objectives and land use zoning objectives for each of the 29 no. development centres Each written statement consists of an outline of the development strategy for each centre, followed by a policy framework consisting of policies and objectives. A land use zoning objectives map for each centre has also been produced and other development objectives are also included, where possible, on these maps. The format of the written statements is generally consistent for each urban centre.”*

13. Table 2.4 of the 2013 Development Plan Core Strategy⁶ details the household allocations⁷ for the lifetime of the 2013 Development Plan and, by reference to such allocations, the shortfall or excess of lands previously zoned in each centre. The accompanying text⁸ describes how the allocations were derived. It need not be recited here but clearly reflects a considered approach to the issue. It is stated that Variation #2 *“effectively implemented the household allocation requirements of the Core Strategy for these centres with an Order of Priority Phasing Arrangement for Residential Zoned Lands.”* It is also stated that *“In order to ensure towns and villages grow at a suitable and sustainable scale, appropriate to their position in the settlement hierarchy and this core strategy, measures must be put in place to ensure that the quantum and scale of residential development that will take place in urban centres complies with that shown in Table 2.4”.*

⁶ As amended by Variation #2

⁷ i.e. the number of new housing units to be developed in a given urban centre.

⁸ Pp 11 – 17 Development Plan Chapter 2, Core Strategy

Extract - Table 2.4 - Housing Allocation & Zoned Land Requirements							
	Household Allocation 2013 - 2019	Av. Net Density Applicable unit/ha	Quantity of Residential Zoned Land Required	Available Land Zoned for Residential Use (Ha)	Available Land Zoned for Mixed Use incl. Residential (Ha)	Total Available Zoned Land (Ha)	Deficit/ Excess (ha)
Drogheda Environs	857	43	19.9	157.2	1.8	159.1	139.1
Duleek	239	25	9.6	34.6	0.6	35.2	25.7

As to Duleek, Table 2.4 shows that, in the Council’s view, 25.7 hectares had been zoned residential in excess of requirements as indicated by the up-to-date household allocations. The excess in Drogheda Environs was 139.1 hectares.

14. Returning to the Variation #2 Introduction and Explanatory Document, the following appears:

“Table 2.4 demonstrates that there is presently an excess of residentially zoned land contained in most of the towns and villages in Meath for which Local Area Plans had been prepared. The County Development Plan, as varied by Variation No. 2, presents a strategy to deal with the excess of residentially zoned land as it applies to the urban centres. In order to address the level of over provision of zoned residential lands, phasing of land in the form of an Order of Priority is detailed in the accompanying written statements and land use zoning objectives maps which are incorporated into the Development Plan in Volume 5. It should be noted that the inclusion of lands in Phase II which is indicated as being required beyond the life of the present County Development Plan i.e. post 2019, does infer⁹ a prior commitment on the part of Meath County Council regarding their future zoning for residential or employment purposes during the review of the present plan and preparation of a new County Development Plan expected to occur during the 2017 – 2019 period. Any subsequent decision will be considered within the framework of national and regional population targets applicable at that time, the Core Strategy and the proper planning and sustainable development of County Meath. An evidence based approach was applied to determine the Order of Priority primarily for lands with a residential land use zoning objective.”

15. The Variation #2 Introduction and Explanatory document then describes that evidence-based approach – which I need not do here. However, it included a system for ranking residentially-zoned sites in each centre, by reference to stated criteria for the purpose of identifying those to be developed sooner in “Phase I” and those to be developed later in “Phase II”. The criteria involved

⁹ Sic.

primarily a sequential approach moving out from town centres but also other criteria. It is stated that *“Collectively, these criteria are considered to constitute the proper planning and sustainable development of the centre”*.

16. Before considering the terms of the respective Duleek Written Statement and Drogheda Environs LAP adopted in Variation #2, it is important to state that there is no evidential or analytical basis to justify the averment sworn by Gabriel Manley, Director of Manley Construction, that any part of the decision-making process, from the evidence-gathering and analysis by the Council Executive to inform Variation #2, through the adoption of Variation #2, to the Board’s decision on the planning application was performed *“without notice”* or was *“an informal and ad hoc administrative process”* allegedly *“superseding and displacing the residential zoning, which zoning was made as part of a formal statutory procedure and adopted by resolution of the elected members”*.

Unfortunately, the averment was unclear as to precisely what process, of the three I have just described or part of any such process, was characterised as *“informal and ad hoc”*. However, the Statement of Grounds sheds a little further light in asserting that the residential zoning of the lands *“is not displaced by or set aside arising from a variation which seeks to order the priority in respect of development in respect of these lands, and or by a subsequent administrative decision as to the sequencing of the development of these lands, which decision was a desk top exercise and could not supplant a decision on zoning which is a power reserved to the elected members”*. For the avoidance of doubt, the Variation #2 Introduction and Explanatory Document describes at some length an evidence-based approach to the analysis by the Council Executive. One may of course disagree with its substance but that was not the accusation levied. The variation of a Development Plan is in no way informal or ad hoc – being governed by statute, involving public notice of the intended variation and rights of public consultation and participation in the process and adoption by the democratically elected member of the Planning Authority¹⁰. Nor was any justification proffered for such a characterisation of the Impugned Decision, if that was intended.

I acknowledge the entitlement to seek to challenge administrative decisions in judicial review and complain, robustly, of unfairness, irrationality or other illegality. But affidavits are to be sworn evidence of fact – not of unsupported polemic.

17. I make the foregoing observation as is important to state that there is not, and could not at this remove of time have been, in these proceedings any challenge to the validity of any of the 2013 Development Plan, Variation #2, the Duleek Written Statement and the Drogheda Environs LAP. Accordingly, the question before the Board, and now before this court, was never of *“superseding and displacing”* the Duleek Written Statement and its zoning provisions – the question was and is confined to their proper interpretation.

¹⁰ See generally S.13 Planning and Development Act 2000.

DULEEK WRITTEN STATEMENT & DROGHEDA SOUTHERN ENVIRONS LAP – SP3 & SP1

18. The Duleek Written Statement and the Drogheda Southern Environs LAP both contain “Strategic Policies. In Highlands Residents, McDonald J. construed Strategic Policy SP1 of the Drogheda Southern Environs LAP. In the Impugned Decision the Board relied on that construction to in turn construe Strategic Policy SP3 of the Duleek Written Statement.

19. Manley, in written submissions, impugns that construction on the basis that Highlands Residents, allegedly, related, inter alia, to “*a different plan, a different Planning Authority*”. The latter assertion is simply incorrect: Meath County Council is the relevant Planning Authority in both cases. There is some formal accuracy in the reference to a “*different plan*” but both the Duleek Written Statement and the Drogheda Southern Environs LAP were adopted by the same Variation #2 and both in pursuance of explicit 2013 Development Plan Objectives (set out above) with a common overall purpose to rationalise residential zoning in Meath towns and villages. Both were incorporated in Volume 5 of the Development Plan and by S.19(2) PDA 2000¹¹ the LAP must be consistent with the objectives of the Development Plan and its core strategy. Notably in this case and explicitly as set out above, Variation #2 and hence both the Duleek Written Statement and the Drogheda Southern Environs LAP, proceeded from the same core strategy as to household allocations to 29 villages and towns in County Meath, by way of a systematic approach common to all, to a Written Statement or (in the case of 5 larger centres) Local Area Plan particular to each. Accordingly, a coherent interpretation of the 2013 Development Plan, Variation #2, the Duleek Written Statement and the Drogheda Southern Environs LAP, as between the treatment of various centres and their written statements, is to be expected – without ruling out the possibility of differences and even incongruities where the text and context demands. But coherence is the expectation and differences and incongruities are not lightly to be found. Further, Variation #2 was adopted with a view, inter alia, to addressing “*an excess of residentially zoned land contained in most of the towns and villages in Meath*”. It was inevitable that remedying such excesses would be disadvantageous to owners of at least some zoned lands.

20. Though in the end it was not seriously pursued, it was at one point suggested on behalf of the Applicant that the wordings were different as between Duleek Written Statement SP3 and the Drogheda Southern Environs LAP SP1. It may assist to set both out below:

¹¹ Planning & Development Act 2000.

Duleek Written Statement

- SP 3** To operate an Order of Priority for the release of residential lands in compliance with the requirements of CS OBJ 6 of the County Development Plan as follows:
- i) The lands identified with an A2 "New Residential" land use zoning objective corresponds with the requirements of Table 2.4 Housing Allocation & Zoned Land Requirements in Volume I of this County Development Plan and are available for residential development within the life of this Development Plan.
 - ii) The lands identified with an A2 "New Residential" land use zoning objective but qualified as "*Residential Phase II (Post 2019)*" are not available for residential development within the life of this Development Plan

Drogheda Southern Environs

Strategic Policy

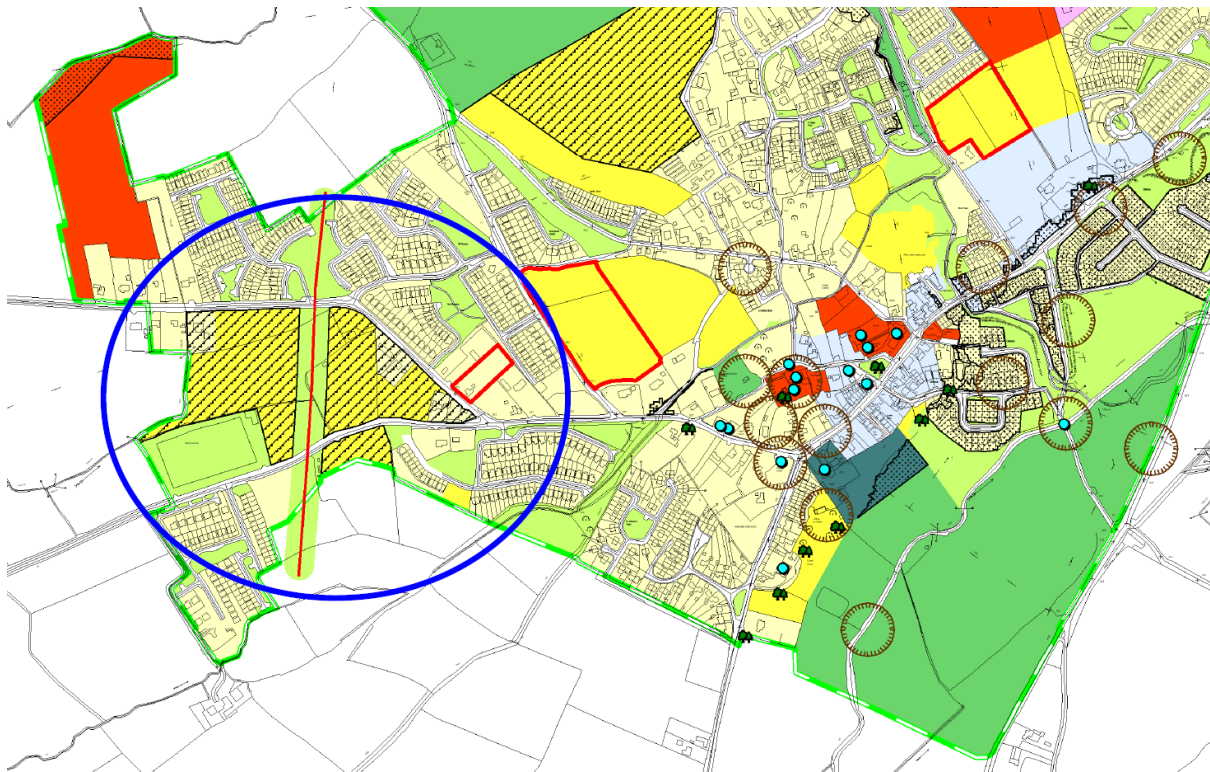
- SP 1** To operate an Order of Priority for the release of residential lands in compliance with the requirements of CS OBJ 6 of the County Development Plan as follows:
- i) The lands identified with an A2 '*New Residential*' land use zoning objective corresponds with the requirements of Table 2.4 Housing Allocation & Zoned Land Requirements in Volume I of this County Development Plan and are available for residential development within the life of this Development Plan.
 - ii) The lands identified with an A2 '*New Residential*' land use zoning objective but qualified as '*Residential Phase II (Post 2019)*' are not available for residential development within the life of this Development Plan.

21. As will be obvious, the crucial, and identical, text is in paragraph ii) of each. Given the interpretation in **Highlands Residents** of paragraph ii) of Drogheda Southern Environs LAP SP1 - to which interpretation I will come presently - and the fact that the Board applied that same interpretation to the identical wording of paragraph ii) Duleek Written Statement SP3, Manley was driven to argue that those identical words meant something very different in the Duleek Written Statement SP3 than in Drogheda Southern Environs LAP SP1.

22. While Manley were, of course, entitled to so argue and the possibility of differing meanings by reason of differing contexts cannot be ruled out as a possibility, the position remains that, as I hope I have shown above, the origins and contexts of both the Drogheda Environs and the Duleek documents have very much in common and a coherent interpretation of the 2013 Development Plan, Variation #2, the Duleek Written Statement and the Drogheda Southern Environs LAP, as between the treatment of various centres and their written statements, is to be expected. Coherence is the expectation and differences and incongruities are not lightly to be found. Manley bore the burden of demonstrating any such differences and incongruities.

23. The starting point of analysis therefore, is that the words “*Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan*” have the same meaning in both Duleek Written Statement SP1 and Drogheda Southern Environs LAP SP2 and that such meaning has been authoritatively decided by McDonald J in **Highlands Residents**.

24. The Duleek Written Statement includes a Zoning Map. I set out an extract below, on which I have superimposed a blue circle surrounding the Site, which comprises most of the area coloured yellow with black stripes lying between the two east-west roads depicted in grey. The red line bisecting the site represents an electricity cable buffer zoned differently but which can be ignored for present purposes.



The legend to the Zoning Map is informative. Under the heading “Land Use Zoning Objectives” the Yellow lands are zoned A2. Under the heading “Specific Objectives” the Black stripes, in the case of the Site superimposed on the Yellow underlying, represent “*Residential Phase II (Post 2019)*”.

25. It will be immediately apparent from the map that the Site, coloured yellow and striped black, was thereby patently distinguished from lands merely coloured yellow. No-one looking at the map could fail to note the difference. No-one owning the site could reasonably have failed to enquire what that difference meant in planning terms. The text of the Duleek Written Statement, SP3(ii) in particular, would inform them that lands so designated, and in particular the Site, are “*not available for residential development within the life of this Development Plan*”. It is, frankly, difficult to see that context could easily make a difference to the plain and ordinary meaning of what are very clear, plain and ordinary words.

26. Manley argued:

- First, that the Zoning of the Site was A2 – residential – and that the qualification *“not available for residential development within the life of this Development Plan”* was not related to zoning such that it did not fall within S.9(6)(b). On that argument, S.9(6)(b) did not apply and the Board should have considered the planning application on its planning and other merits, including the possibility of permission in material contravention of the Development Plan on the bases permitted by S.9(6)(a&c) of the 2016 Act and S.37(2)(b) PDA 2000 which allow such permission on various conditions. The primary of those conditions is that the material contravention in question must be *“other than in relation to the zoning of the land”*. As will be seen, this argument, on identical wording, failed in **Highlands Residents** - such that counsel was driven to his next argument
- Second, that the context of the Duleek Written Statement, as contrasted with that of the Drogheda Southern Environs LAP, made a difference to the meaning of those words, such that they did not bear the meaning ascribed to them in **Highlands Residents**.

27. Accordingly, it is necessary to consider the text of the Duleek Written Statement in some greater detail. It includes the following¹²:

- Its *“Goal”* is *“To consolidate and strengthen the town through the provision of a well-defined and compact town centre area, the promotion of a range of land-uses to support the residential population of the town, to avoid a continuous outward spread in order to promote the efficient use of land and of energy, to minimize unnecessary transport demand and encourage walking and cycling and to enhance the built environment.”*
- *“Duleek has experienced growth related to commuter development over the past decade”* It has *“expanded rapidly in recent years”*
- *“The land use strategy for Duleek shall seek to accommodate the sustainable population growth of Duleek in line with its status as a ‘Small Town’ with the Phase 1 Residential lands chosen by way of a sequential approach from then town centre ...”* in addition to other criteria.
- *“Development needs to be consolidated and growth directed to appropriate locations within the town envelope*”
- *“The household allocation for Duleek [taken from the Core Strategy] of 239 over the life of this County Development Plan acknowledges that the projected rate of population increase whilst significant will be more moderate than that experienced over the past decade.”*

¹² Not verbatim save where indicated.

28. §04 of the Duleek Written Statement, as to “Residential Development”, bears quotation at some length¹³:

“Over the past decade significant residential development has taken place in the town with the population growing by 84% between the 2002 and 2011 inter censal periods noting that the rate of growth has slowed to 19% between the 2006 - 2011 period. Continued growth at these levels would be unsustainable and inappropriate to the ‘Small Town’ role of Duleek within the settlement hierarchy of the County Development Plan. It would also be out of step with the level of infrastructure, services, amenities and community facilities available in Duleek to cater for significant additional growth. For this reason, the County Development Plan envisages Small Towns within the Dublin catchment such as Duleek growing at a more moderate rate than that experienced over the previous decade linked more closely to local demand as opposed to facilitating population and housing pressures arising from its location within the Greater Dublin Area.

The aim of this Development Framework is to ensure that there is adequate land available at appropriate locations for housing, complemented by clear policies regarding any future development proposals to construct additional houses.

The availability of housing, catering for a range of household needs, is important for sustaining communities within smaller urban settlements such as Duleek and enhances the quality of life for their occupants. The release of future residential lands must be linked to the resolution of the deficit in water services infrastructure provision and must assess the adequacy of the social infrastructure, in particular educational, amenity and recreational uses to cater for the increased levels of population. The town should grow in a sustainable manner with new development contributing towards the consolidation of the town centre rather than its continuous outward spread, in order to promote the efficient use of land and of energy, to minimise unnecessary transport demand, encourage walking and cycling and to enhance the existing built environment.

The Core Strategy of the County Development Plan (Table 2.4 refers) provides a housing allocation of 239 units to Duleek over the 2013 – 2019 period. In addition, Table 2.5 indicates that there are a further 160 units committed to in the form of extant planning permissions.”

29. §04 of the Duleek Written Statement, as to “Residential Development”, continues in two important paragraphs as follows¹⁴:

“The land use zoning objectives map has identified the lands required to accommodate the allocation of 239 no. units provided for under the Core Strategy. This followed the carrying out of an examination of the lands previously identified for residential land use in the 2009 Duleek Local Area Plan and still available for development. The lands which have been identified for residential land use arising from this evaluation largely arise following the

¹³ Layout changed for exposition.

¹⁴ Layout changed for exposition.

*application of the sequential approach from the town centre outwards, in addition to proximity to the public transport corridor, brownfield/opportunity sites, environmental constraints/proximity to the River Nanny and tributaries which drain to a Natura 2000 site, and infill opportunities. The sites that were evaluated for inclusion within Phase 1 of the Order of Priority are presented in the Appendix attached to this Written Statement. **The Planning Authority is satisfied that sufficient lands have been identified within Phase I of the Order of Priority to accommodate the household allocation of 239 units.***¹⁵

*It was considered that the other sites which were previously identified for residential development in the 2009 Local Area Plan were discounted from being developed in Phase I due to their unfavourable position in the evaluation scoring table (see Appendix). **The remaining lands are identified as Residential Phase II (Post 2019) and are not intended for release within the life of this County Development Plan.***"¹⁶

30. The strategic policies appear later in the Duleek Written Statement. I have already set out SP3. SP2 bears mention. It reads:

"To encourage the sequential development of Duleek from the central core outwards, in order to ensure that the higher order facilities and the higher density development is located on the most central lands where possible, with optimum access and the highest level of services."

31. The Appendix to the Duleek Written Statement consists of an "Evaluation of Residential Zoned Lands" identified as 10 sites - "A" to "J". It is not disputed that the Site comprises sites E and G. An evaluation matrix completed by reference to listed criteria ranks site "E" joint 7th and Site G 9th. There follows a calculation of the expected unit yield of each site, reference to its size and expected unit density, the result of which is that the top 6 ranked sites are expected to yield 227 units and placed in Phase I – with the remaining sites, including the Site, consigned to Phase II.

THE INSPECTOR'S REPORT AND THE BOARD'S DIRECTION

32. Dated 11 March 2021, the Inspector's report, inter alia, records:

- The matters recorded above in this judgment as to the Site, the Proposed Development, and planning policy.
- Manley's submission that as the application is submitted post 2019 the Phase II designation of the site is moot.

¹⁵ Emphasis added.

¹⁶ Emphasis added.

- Manley’s submission that as there has been a failure to release Phase I land for housing in accordance with the core strategy, it is logical and reasonable to release the subject Site Phase II lands – citing RSES¹⁷ guidance to the effect that where lands have not been released for development release of other suitable lands with better prospects for delivery should be considered.
- Various submissions, citing **Highlands Residents**, that the Board was precluded by S.9(6)(b) from granting permission.

33. For reasons adopted by the Board and recorded in its decision and above, and specifically on the basis of **Highland Residents**, the Inspector considered that S.9(6)(b) precluded permission and recommended refusal accordingly. But, against the possibility that the Board might take a different view of the effect of S.9(6)(b), the Inspector considered the merits of the application. It’s fair to say that, as to general considerations of proper planning and sustainable development, he was favourable to the proposed development in many respects. But he could not conclude that the proposal would be acceptable from a road safety perspective. He also had concerns that the proposed unit mix had not been justified. He does not explicitly state whether, had S.9(6)(b) not applied, he would have recommended grant or refusal of permission. The latter may be more likely but I need not make a finding in this regard.

34. Also against the possibility that the Board might take a different view of the effect of S.9(6)(b), the Inspector concluded, on the basis of a preliminary examination, that Environmental Impact Assessment was unnecessary. He screened for Appropriate Assessment under the Habitats Directive and concluded it was not required.

35. Manley observed, correctly, that the inspector, at §7.3 and §12.2.1 of his report misquoted Zoning Objective A2 which, correctly, reads *“to provide for new residential communities with ancillary community facilities, neighbourhood facilities and employment uses as considered appropriate for the status of the centre in the Settlement Hierarchy”*. The inspector omitted the words *“neighbourhood facilities”*. However, the inspector cited the objective correctly in his recommended reasons and considerations later adopted in its correct text by the Board. Accordingly I am satisfied that no error of consequence was made - not least as the omission does not affect the zoning analysis which results in the application of the **Highlands Residents** ratio to the present case. In any event, counsel for Manley did not articulate how, in its submission, the omission made any difference to the proper outcome of the planning application or to the application or non-application thereto of the **Highlands Residents** ratio.

36. As I have recorded above, the Board’s Order recorded the basis of its refusal of permission in terms identical, save in one respect, to its Inspector’s recommendation. The Inspector

¹⁷ Regional Spatial & Economic Strategy

recommended a text which included the words *“The lands are identified as Phase II lands in Variation No. 2 of the County Development Plan where Strategic Policy SP1¹⁸ seeks to operate an Order of Priority for the release of residential lands with Phase II lands stated as not available for residential development within the life of the Development Plan.”* The Board’s direction was in identical terms. But the Board’s order cited “SP3” instead of “SP1”. It is clear that the change represented the correction of a typographical error. Indeed the Inspector had correctly cited and set out in full the terms of Duleek Written Statement SP3 earlier in his report¹⁹. As is clearly demonstrated above, in the Duleek Written Statement it is in fact SP3 which provides the order of priority. In the Drogheda South Environs LAP, SP1 provides the order of priority in precisely the same terms as Duleek Written Statement SP3. Correctly, “SP1” was cited in **Highlands Residents** and this may have prompted the error. Whether or not that is so, I am satisfied the error was typographical and that its correction in no way avails Manley’s challenge to the Impugned decision.

37. If I am wrong in that respect I would, as to this specific issue, exercise my discretion against the grant of relief as I consider that no substantive error was made and no consequences adverse to Manley flowed from such error as was made.

HIGHLANDS RESIDENTS

38. Counsel for Manley asserted in reply, but in an undeveloped and subsidiary argument in the alternative, that **Highlands Residents** was wrongly decided. There was no real attempt to engage with the **Worldport**²⁰ principle that *“as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong.”* Clarke J in that case described limited circumstances in which departure from an earlier judgment might be justified – described by Kearns P in **Brady v. Director of Public Prosecutions**²¹, citing Parke J in **Irish Trust Bank v. The Central Bank of Ireland**,²² as *“extremely rare”*. Those principles have been repeatedly applied and approved – including recently by the Supreme Court in **“A, S, and S and I”**²³ in which the principle was identified as grounded not merely in judicial comity but in the need for certainty in the law. Charleton J. said:

“Departure from horizontal precedent is possible. It is also not desirable without there being an expressed and good reason. The law operates as a fortress of certainty from within, whereby the shape of decisions is apparent to those approaching it.”

In similar vein, Dunne J. said:

¹⁸ Emphasis added

¹⁹ §12.2.6.

²⁰ In Re. Worldport Ireland Limited (In Liquidation) [2005] IEHC 189.

²¹ [2010] IEHC 231 – cited in GE Capital Woodchester Homeloans Ltd v Maureen Faulkner Madden & Ors [2013] IEHC 540.

²² [1976- 7] I.L.R.M. 50.

²³ A, S, and S and I v The Minister for Justice and Equality, Ireland and the Attorney General [2020] IESC 70.

“Different decisions on the same issue by different members of the same court can only give rise to a situation where judges and practitioners alike would be unable to say with clarity what the state of the law is in any given area. Apart from the obvious uncertainty posed by a situation where judges were free to come to a view on a particular issue without regard to the view expressed previously by a colleague, as Clarke J. noted, the lack of certainty could give rise to increased litigation as parties and practitioners struggled to ascertain the legal status of a particular legal principle or the correct interpretation of a piece of legislation. It is for that reason that a judge of the same jurisdiction should have regard to a decision of a colleague on the same issue and should as a general rule follow that decision unless there is a clear basis for departing from that decision.”

39. I therefore respectfully decline such invitation as was issued to disagree with the decision of McDonald J. in **Highlands Residents**. My so declining is not based not merely on Worldport principles and Manley’s failure to argue a basis for departure from the principle of stare decisis (other than the undeveloped, and in any event insufficient, argument merely that **Highlands Residents** was wrongly decided) but also on my presuming to agree with McDonald J. - with whose decision I would not differ if I could.

40. **Highlands Residents** concerned a challenge to a decision by the Board to grant planning permission for a strategic housing development on lands on the outskirts of Drogheda. The Applicants in judicial review successfully argued, relying on S.9(6)(b), that the decision was invalid as the Board was “precluded” (the word used in the judgment) from granting planning permission as the proposed development involved a material contravention of a zoning objective of the Development Plan – that is the same Development Plan with which we are concerned, and the same zoning objective, A2 Residential. The core question on the zoning issue was the meaning and effect of SP1 of Drogheda Southern Environs LAP – in particular, whether §(ii) of SP1 and the qualification “Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan” constituted a zoning objective within S.9(6)(b) such that permission was precluded. As recorded above, that wording is identical to the wording of §(ii) of SP3 of the Duleek Written Statement with which this judgment is concerned.

41. McDonald J. recited the adoption and terms of the Development Plan and Variation #2 in terms similar to those I have set out above. He describes the Drogheda Southern Environs LAP zoning map in terms identical to mine of the Duleek Written Statement: yellow denoting A2 residential zoning and superimposed black stripes denoting “Residential Phase II (Post 2019)” and, like the Site in this case, the site in **Highlands Residents** was coloured yellow with black stripes.

42. Accordingly, the Highland residents argued that in reality the lands were not zoned residential at the date of the Board decision. Alternatively they argued that even if the qualification “Residential Phase II (Post 2019) (are) not available for residential development within the life of the Development Plan” was not itself a zoning objective it was, within S.9(6)(b), an objective “in relation

to zoning". In either case, they argued, S.9(6)(b) precluded permission. They cited the same introduction & explanatory document to Variation #2 as that which I have cited above – in particular as to the realisation of Core Strategy Objective CS OBJ 5 to only identify “for release during the lifetime of the ... County Development Plan ... the quantity of land required to meet household projections as set out in Table 2.4” and as to a strategy to deal with the “over provision of” - the “excess of residentially zoned land contained in most of the towns and villages in Meath” by way of “phasing of land in the form of an Order of Priority”.

43. McDonald J. applied the agreed and well-known “XJS”²⁴ principles of interpretation of planning documents as if by ordinary reasonably informed members of the public without legal training as well as by developers and their agents, and also the principle of interpretation of such documents as a whole – see generally **Lanigan v Barry**²⁵ and **Camiveo Ltd v Dunnes Stores**²⁶. Importantly, McDonald J. also applied **Redmond v An Bord Pleanála**²⁷ to the effect that the court will construe the substance of a development plan policy or objective in order to determine its true nature – as opposed to the label (e.g. “Zoning objective”) put on it in the development plan. That label is not conclusive of its nature – though the two will usually coincide. The concept of a zoning objective is a term of art under the planning legislation and zoning objectives have enhanced status thereunder - for reasons stated by Simons J. in **Redmond**. S.9(6)(b) is an example of that enhanced status²⁸. McDonald J. elucidates²⁹ the statutory system of development plans, core strategies and their importance and the place of zoning objectives within them in terms which I need not repeat - save for his finding that that “zoning relates to the use for which lands are designated zoning of land means the designation of that land for a particular use.”³⁰

44. The Board in **Highland Residents** made and lost, in effect, the argument Manley makes now. It argued that the “Residential Phase II (Post 2019)” designation in Variation #2 related to the order of priority whereas the land use zoning objectives (including the designation of areas in deep yellow on the zoning objectives map) were concerned with zoning, properly so-called. The Board argued that the order of priority qualification, “Residential Phase II (Post 2019) (are) not available for residential development within the life of the Development Plan”, was a separate and distinct concept from the zoning for residential use. This argument, rejected by McDonald J. in **Highland Residents**, is in substance the same argument now made by Manley in its Statement of Grounds in asserting “fundamental error of law and fact in [the Board’s] consideration and determination of the application insofar as it conflated the issue of phasing and/or the issue of sequence of development with the issue of land use zoning.”

²⁴ Re. XJS Investments Ltd [1986] I.R. 750 - as reiterated by the Supreme Court in **Lanigan v. Barry** [2019] 1 I.R. 656.

²⁵ [2019] 1 I.R. 656.

²⁶ [2019] IECA 138.

²⁷ [2020] IEHC 151.

²⁸ See also S10(2)(a) & Part XII PDA 2000.

²⁹ §26 et seq.

³⁰ §37.

45. McDonald J., considering the substance of the relevant objectives to determine their true nature, as would be determined by ordinary reasonably informed members of the public without legal training as well as by developers and their agents, observed that the zoning map must be read in the context of Variation #2 as a whole and in the explanatory document issued by the planning authority in respect of that variation.³¹ He concluded that *“read as a whole, ... the purpose of Variation No. 2 was to present a strategy to deal with the excess of residentially zoned land as identified in Table 2.4.”* Importantly, he observed, citing s.9 PDA 2000, that development plans have a limited lifetime such that:

“.....when para. (ii) of SP 1 speaks of land not being available for residential development “within the life” of the County Development Plan, that seems to me to plainly prohibit the use of such lands for residential development for the duration of the Plan and I believe that this is the way in which the words used would be read by the ordinary and reasonably informed member of the public.”³²

46. McDonald J. continued:

*“This conclusion is strongly reinforced by a consideration of the terms of Variation No. 2 quoted in para. 23 above. The language used is unequivocal. It plainly states that there is “no justification for the release of any additional lands over and above those specified in Table 8 and illustrated on the land use zoning objectives map for Drogheda Southern Environs”. The same paragraph also states that: “the requirement for any further release of residential zoned land in the Southern Environs of Drogheda will be assessed following the making of the **next County Development Plan**³³ in line with the population projections contained therein” (emphasis added). In my view, this makes very clear that the lands which are hatched with diagonal lines on the land use zoning objectives map for Drogheda Southern Environs are not available during the currency of the current County Development Plan for residential use. The variation effected by Variation No. 2 has, in substance, put those lands beyond use for residential purposes for the duration of the Development Plan. I believe that this is the conclusion which an ordinary and reasonably informed member of the public would reach on an objective consideration of the terms of the County Development Plan (as varied). I believe that such a person would discount the notion that the lands in question have been zoned for residential use but that such use has simply been postponed, by reference to an order of priority. That conclusion might well make sense if the development plan was intended to subsist for more than six years and in particular was intended to subsist beyond 2019. That is, however, plainly not the case. The final year of the duration of the current Development Plan is 2019. Thus, the designation on the land use zoning objectives map of “Residential Phase II (Post 2019)” means, in substance, that the lands cannot be used for residential purposes during the currency of the 2013-2019 Plan. This is stated in stark terms in the passage quoted above which makes it clear that any further release of land for residential purposes will be assessed following the making of the next County Development*

³¹ §38.

³² §42.

³³ Emphasis added

Plan. Furthermore, while para. 3.3 of the introduction and explanatory document states that the inclusion of lands in Phase II “does infer a prior commitment ... regarding their future zoning ... during the preparation of a new ... Plan...”, any new development plan would have to undergo the procedures outlined in ss. 11 and 12 of the 2000 Act and would have to comply with the requirements of s. 10 of that Act. Thus, there is no guarantee that Phase II would allow residential use in the future once the 2013-2019 Plan expires.”

47. In the present case, counsel for Manley notes of the foregoing passage, correctly, that the unequivocal language cited by McDonald J. as from Variation #2, is specifically from that part of Variation #2 consisting in the Drogheda Southern Environs LAP and does not appear in the Duleek Written Statement. Counsel for Manley also observes that though the plans were extended, the 2019 date had passed by the time of the impugned decision. He relies on these observations to distinguish **Highland Residents** from the present case.

48. McDonald J. proceeded to his conclusions³⁴:

- *“... in substance, the lands in issue could not be said to have been zoned for residential³⁵ use at the time the Board made its decision ...”*
- *“... the distinction made on the land use zoning objectives map for Drogheda Southern Environs between “land use zoning objectives” on the one hand and “specific objectives”, on the other, does not seem to me to be material. the labels used by a planning authority are not determinative. The court, in considering an issue of this kind, is entitled to form its own view based on the substance of the terms of the relevant county development plan.”*
- *“Accordingly, in circumstances where **the lands were not all zoned for residential purposes at the time of the decision made by the Board, I am of the view that the Board was precluded by s.9(6) of the 2016 Act from granting planning permission in this case for the proposed development ...**”³⁶*
- *“...the Board was precluded by s.9(6)(b) of the 2016 Act from granting permission ..”.*

49. McDonald J., explicitly obiter as it was unnecessary to his decision, considered the Highland residents fall-back argument that the words “*in relation to*” in s.9(6)(b) captured the “*Residential Phase II (Post 2019)*” designation on the zoning objectives map even if that designation was not itself a zoning objective. McDonald J., observed that the words “*in relation to*”, in the absence of some indication to the contrary in the relevant statutory provision, are generally regarded as wide words³⁷

³⁴ §§43 - 45.

³⁵ The judgment says “recreational” but that is clearly a typo.

³⁶ Emphases added.

³⁷ Citing *PMT Partners Pty Ltd (in liquidation) v. Australian National Parks and Wildlife Service* (1995) 184 CLR 301 to the effect that the words ‘in or in relation to’ are particularly wide -prima facie broad and designed to catch things which have sufficient nexus to the subject. The question of sufficiency of nexus is, of course, dependent on the statutory context. Citing also, *Murphy J., in Eccles Hall Ltd Bank of Nova*

and the choice of such wide words by the Oireachtas is striking when narrower words could have easily been chosen. So, the found substance in the Highland residents fall-back argument such that *“even if the designation falls short of a zoning objective per se, there would appear to be a proper basis to conclude that the decision of the Board materially contravened the County Development Plan in relation to the zoning of the land.”* However, he stressed that the observation was *obiter* and the matter might well require more significant debate if it arose in any future proceedings.

PROVISIONAL CONCLUSION

50. Thus far, and leaving aside pro tem Manley’s reliance on the arguments identified at §46 above, I see no reason why the intelligent layperson, reading Variation #2 as a whole and in the context of the County Meath planning policy scheme as a whole including the Development Plan, Variation #2, Drogheda Southern Environs LAP and the Duleek Written Statement, and specifically reading the words *“Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan”*, would make flesh of them in SP1 of Drogheda Southern Environs LAP and fowl of them in SP3 of the Duleek Written Statement.

51. To these considerations one may add what are clearly identical systems of marking and providing legends for the respective zoning maps. That they should be deemed to mean different things would be a recipe for unnecessary confusion.

52. On that basis, **Highlands Residents** is clear authority that those words are integral to and part of Zoning objective A2 residential in its particular application to the subject lands such that I conclude provisionally that the Board was correct in its Impugned Decision that it was precluded by S.9(6)(b) from granting the Permission sought by Manley.

THAT IMPUGNED DECISION DEPRIVED THE SITE OF ITS ZONING and some other issues

53. Manley repeatedly complained that the Board’s Impugned Decision had wrongly “deprived” it of the benefit of residential zoning of its land – as if the Board took something from Manley which it otherwise would have kept or as if it had changed a pre-existing zoning. The Board had no power to do that and did not do that or purport to do so. The Board merely interpreted the planning status of the lands by reference to the 2013 Development Plan, Variation #2 and the decision in **Highlands Residents**.

Scotia (High Court, unreported, 3rd February, 1995) to the effect that the somewhat similar phrase “in connection with” used in s. 60 of the Companies Act, 1963 are “of wide import”.

54. As I have said, I am unclear of the zoning status of the land prior to Variation #2. But, in Manley's favour, assuming it was residential, any deprivation of the benefit of such a zoning occurred at the adoption of Variation #2 and, specifically, the Duleek Written Statement. Variation #2 and the Duleek Written Statement adopted in 2014 are not, and given the passage of time could not have been, challenged in these proceedings.

55. Manley argued that the Board's decision (as it characterised it) to "deprive" Manley of the benefit of the zoning which gave value to its land wrongfully interfered in its constitutional rights of property.. However, the argument was in any event undeveloped – it was mentioned rather than pursued and no authority was cited in support. In any event, and if for no other reason, it fails on the basis that as I have just observed, the Board's decision did not deprive Manley's lands of any zoning status – it merely interpreted that status as put in place in 2014 by Variation #2 which has not been impugned in these proceedings.

56. Manley's argument that only the Courts perform the task of interpretation of a Development Plan, to the exclusion of the Board, is without basis. True, the interpretation of a Development Plan is a matter of law and ultimately for the Courts: but, subject to correction by the courts, the Board is fully entitled to interpret development plans. If it did not do so, indeed do so daily, its work would be impossible given the statutory obligation on it to have regard to development plans.

57. Though not pursued in submissions, Manley's Statement of Grounds made a fair procedures point that it had not been heard on the zoning issue. That is a function of the fast-track SHD procedure which, to the benefit of intending developers in the SHD planning process and in the cause of expedition, truncates the normal to and fro of planning applications. A quid pro quo of that system is that the developer is expected to anticipate and address in its planning application all issues likely to arise in the application. The pre-application process is intended to assist it to that end but the responsibility for addressing all relevant matters in the planning application remains the developer's. Manley has not challenged the validity, on Constitutional or other grounds, of the 2016 Act and so, in my view, was wise not to pursue this issue.

58. Manley's Statement of Grounds pleaded a *"legitimate expectation arising from the zoning not to have this zoning removed or disapplied in the manner relied on by the Respondent"*. Correctly in my view, this was not pursued in written or oral submissions. Similarly, and equally correctly, a plea that Section 28 PDA 2000 Ministerial Guidelines "Rebuilding Ireland-An Action Plan for Homelessness" *"supersede the provisions of the Development Plan"* was not pursued. In an SHD planning application Ministerial Guidelines may inform permission despite a material contravention of a "non-zoning" objective of a Development Plan but they do not amend the Development Plan or any objective of it or somehow transmute a zoning objective into a non-zoning objective such as to render S.9(6)(b) inapplicable to a particular material contravention.

59. Manley's Statement of Grounds pleads that 2013 Development Plan Variation #5 in 2018 removed a similar A2 phasing objective from lands at Donore Village thereby highlighting critical issues as to lack of housing delivery and supply. That may well be correct but it is not evidence that similar issues arise in Duleek and, more importantly, it highlights the facts that no similar change was made to the Duleek Written Statement: if anything it argues against Manley's case.

POSITED DIFFERENCES BETWEEN DROGHEDA SOUTHERN ENVIRONS LAP AND DULEEK WRITTEN STATEMENT

60. The conclusion expressed above, that the Board was correct in its Impugned Decision that it was precluded by S.9(6)(b) from granting the Permission sought by Manley, is provisional as it does not rule out the possibility that on a "*text in context*" interpretation the phrase "*Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan*" should be interpreted differently as between SP1 of Drogheda Southern Environs LAP and SP3 of the Duleek Written Statement such that it is to be considered a zoning objective in the former but not in the latter. Accordingly, it is necessary to consider Manley's arguments. However, and clearly, very strong reasons would be required to justify such an interpretive incongruity as between two documents so closely related via Variation #2 and both proceeding from the core strategy of the 2013 Development Plan.

Textual Differences

61. As to the meaning of the words "*Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan*", Manley seeks to distinguish this case from **Highlands Residents** and the Duleek Written Statement from the Drogheda Southern Environs LAP on the basis that the wording of the latter, identified above and identified by McDonald J. as "unequivocal", does not appear in the former. The relevant wordings are:

- "*no justification for the release of any additional lands over and above those specified in Table 8 and illustrated on the land use zoning objectives map for Drogheda Southern Environs*".
- "*the requirement for any further release of residential zoned land in the Southern Environs of Drogheda will be assessed following the making of the next County Development Plan in line with the population projections contained therein*".

62. I respectfully reject that submission:

- a. First, it is important to state that, while McDonald J. was clearly impressed by these wordings in the Drogheda Southern Environs LAP, his conclusion did not depend on them. In the passage of his judgment immediately preceding his consideration of these

wordings he had already reached the conclusion that *“when para. (ii) of SP 1 speaks of land not being available for residential development “within the life” of the County Development Plan, that seems to me to plainly prohibit the use of such lands for residential development for the duration of the Plan”*. Explicitly, he saw this as a *“conclusion”* which was *“reinforced” – “strongly”*, but nonetheless reinforced - by the *“stark”* wordings in question. The clear implication of reinforcement is that he would have drawn the same conclusion even without those wordings.

- b. Second, Counsel for Manley did not articulate clearly what difference the absence of these words from the Duleek Written Statement should make and why.
- c. Third, there remains the actual wording of the Duleek Written Statement and the absence from it of any wording which could be considered to dilute the plain meaning of the words *“Residential Phase II (Post 2019) not available for residential development within the life of the Development Plan”*. On the contrary, and while not as striking as those which reinforced the view of McDonald J., the following phrases in the Duleek Written Statement nonetheless strongly support the same approach to phasing as was found by McDonald J. in the Drogheda Southern Environs LAP.
 - *The Planning Authority is satisfied that sufficient lands have been identified within Phase I of the Order of Priority to accommodate the household allocation of 239 units.*
 - *The remaining lands are identified as Residential Phase II (Post 2019) and are not intended for release within the life of this County Development Plan.*

Admittedly the latter is the same wording as that from SP3 being construed, but it at least adds emphasis by repetition.

- d. Fourth, it is, of course, a logical fallacy to assume that better evidence for the interpretation ascribed by McDonald J to SP1(ii) of the Drogheda Southern Environs LAP implies that lesser evidence for the same interpretation of SP3(ii) of the Duleek Written Statement does not suffice to justify the same conclusion as to the meaning of the words in question. That is perhaps especially so of documents drafted largely by planners, not lawyers, and to be interpreted as if by an intelligent layperson.

63. Manley points also to the following wording in the Duleek Written Statement as, it says, importing flexibility to the phasing provision of the Statement:

“The availability of housing, catering for a range of household needs, is important for sustaining communities within smaller urban settlements such as Duleek and enhances the quality of life for their occupants. The release of future residential lands must be linked to the resolution of the deficit in water services infrastructure provision and must assess the adequacy of the social infrastructure, in particular educational, amenity and recreational uses to cater for the increased levels of population. The town should grow in a sustainable

manner with new development contributing towards the consolidation of the town centre rather than its continuous outward spread, ...”

64. It seems to me that Manley heaps far more weight on this wording than it can bear - even while pointing out that its lands are serviced. All it is is a statement of unsurprising and uncontroversial propositions as to the benefits of housing and as to the necessity that residential lands be serviced both directly (water supply) and indirectly (social infrastructure). If anything, this is a rationale for clarity of plan-led residential development rather than for regarding phasing as indeterminate and the words “*not available for residential development within the life of the Development Plan*” as meaning something other than their plain meaning. That is particularly so given the description of the system underlying, and the outcome of, the ranking of available residential sites in the Appendix to the Duleek Written Statement. The point is not that one might not disagree with the ranking: the point is that the ranking and the consequent assignment to phases I and II are clear as to their meaning and effect. I respectfully reject that submission also.

Housing Shortfall

65. Manley also sought to advance its interpretation of the Duleek Written Statement on the basis that the housing allocation specified in the Duleek Written Statement had not, over the duration of the 2013 Development Plan, been realised. There was dispute as to the extent of the shortfall: Manley says 400³⁸; the Board says 118³⁹. But nothing turns on that. Manley’s argument⁴⁰ was that the shortfall was such that, remedially, the Site, though in Phase II, should be deemed available for residential development within the life of the 2013 Development Plan. This seems to me an untenable argument. The Duleek Written Statement must mean the same thing now as it did in 2014, unless amended. It cannot be amended, over time and gradually, by reference to incremental considerations of how many houses were or were not built in Duleek. That would undermine the certainty of the Duleek Written Statement. That is not to say that flexibility cannot be built into such a plan, but if it was, it would have to have been introduced by the terms of the plan and not introduced into an otherwise clear and certain plan (in the phasing respect) by the subsequent actions or inactions of developers and landowners in building or not building houses⁴¹. Manley offered no analysis of criteria by which, or a point in time at which, or a quantum of undersupply of housing by reference to which, the Site should have been considered to have moved, in effect, from Phase II to Phase I. Of course, as any such shortfall became apparent, the Duleek Written Statement could have been varied via the relevant statutory processes – but that was not done.

³⁸ §15.10 of its material contravention statement.

³⁹ Inspector’s report §9.1.3.

⁴⁰ §15.10 of its material contravention statement.

⁴¹ Lest I be misunderstood: the words “actions or inactions” are here descriptive not normative.

Planning Application After 2019

66. Finally, Manley argued that, as the planning application post-dated 2019, the phasing stated in the plan should be disregarded such that all that remained was residential zoning simpliciter - of which the Proposed Development could not be in material contravention such that S.9(6)(b) did not apply. It is true that McDonald J in **Highlands Residents**, said that the intelligent layperson:

“..... would discount the notion that the lands in question have been zoned for residential use but that such use has simply been postponed, by reference to an order of priority. That conclusion might well make sense if the development plan was intended to subsist for more than six years and in particular was intended to subsist beyond 2019. That is, however, plainly not the case. The final year of the duration of the current Development Plan is 2019.”

As matters transpired, the Development Plan review was delayed for two reasons: to await the Eastern and Midlands Regional Spatial & Economic Strategy (“RSES”)⁴² and it was further delayed due to Covid 19.

67. I observe as follows on these issues:

- a. First, the comments of McDonald J were clearly obiter, in contemplation of a situation which he did not understand to have actually arisen.
- b. Second, the comments of McDonald J, in terms with which I agree, merely confirm his conclusion that in substance and as a matter of interpretation the lands were not in 2014 by Variation #2 zoned residential and that this is explained by the expectation at that time that the plan would expire in 2019. It is the Council’s expectation in 2014 which assists in explaining the decision of the Council in adopting Variation #2 and hence assist in its interpretation. It does not follow in logic, nor is it necessary or even desirable in law, that the fact that such expectation was not realised 5 years later retroactively implies that a different decision as to zoning was in fact made in 2014.
- c. Third, and remembering the importance of planning policy and plan-led development in the planning system, the posited “automatic resumption”⁴³ of residential zoning, as opposed to its resumption on due consideration in the development plan review process or a development plan variation process, is not something lightly to be inferred – not least in the context that Phase I lands remained undeveloped.
- d. Fourth, it by no means necessarily follows as a matter of proper planning and sustainable development that the solution to non-development of Phase I lands deemed more sequentially suitable for development is the development of Phase II lands less sequentially suitable for development. Less still does it follow that such a proposition implies development of specifically the Site. I say “necessarily” as it might well be that

⁴² ABP Opposition - Inspector’s report p48.

⁴³ This was not a phrase used by counsel for Manley but does seem to aptly describe the substance of its position.

the Planning Authority, on considering the issue would favour the development of the Manley Site for this reason – but that implies the value of the Planning Authority actually considering the issue, as opposed to the posited automatic resumption of residential zoning.

- e. Fifth, the statement in the introduction and explanatory document to Variation #2 that the inclusion of lands in Phase II “*does infer⁴⁴ a prior commitment on the part of Meath County Council regarding their future zoning*” after 2019 cannot be binding. As McDonald J. observed “... *any new development plan would have to undergo the procedures outlined in ss. 11 and 12 of the 2000 Act and would have to comply with the requirements of s. 10 of that Act. Thus, there is no guarantee that Phase II would allow residential use in the future once the 2013-2019 Plan expires.*”
- f. Sixth, interpreting the 2013 Development Plan as a whole, the words “*Residential Phase II (Post 2019) (are) not available for residential development within the life of the Development Plan*” and similar uses of the formulation “*Residential Phase II (Post 2019)*” (for example on the zoning maps) reflect the entirely understandable expectation in 2013 and 2014 that the 2013 Development Plan would expire at the end of the 6-year period stipulated by S.9 PDA 2000. “*Post 2019*” is, in effect, shorthand for “*the life of the Development Plan*” and in my view this latter phrase governs that shorthand.
- g. Seventh, the extension of the period of the 2013 Development Plan occurred pursuant to statutory processes⁴⁵. There is no reason to infer a statutory intention that during the period of, and by reason of, such extension the substantive content of a development plan would be automatically altered. Indeed one would presume the opposite save insofar as the extension may have necessitated such alteration. A fortiori, there is no reason to infer such an intention as to an issue as fundamental in the planning system as land use zoning – the “*enhanced status*” of objectives in that regard being established in statute and recognised in the caselaw.

68. Accordingly I respectfully reject Manley’s argued based on the fact that the planning application post-dated 2019.

PRE-APPLICATION CONSULTATIONS & ESTOPPEL

69. Manley argued that it had gone through the process, required by the 2016 Act, of pre-application consultation with the Board and the resultant Board opinion, issued under S.6(7) of the 2016 Act, had confirmed in advance of the planning application that Manley had a reasonable basis upon which to make an SHD Planning application and had not ruled out such an application on the

⁴⁴ Sic.

⁴⁵ As to deferral of development plan review pending a regional spatial and economic strategy, see S.11(1)(b) PDA 2000 as amended. As to deferral for Covid reasons see S.9A PDA 2000.

grounds of material contravention of a zoning objective and S.9(6)(b) – as it did in the substantive application. Manley points, with understandable chagrin, to its considerable expenditure on the SHD planning application in reliance on the Board’s opinion. Manley makes two arguments in consequence:

- That the Board’s opinion finally determined the S.9(6)(b) issue in its favour such that the Board could not revisit it.
- That the Board was estopped by Manley’s reliance on the Board’s S.6(7) opinion from determining the S.9(6)(b) issue against it.

70. Manley framed these arguments as “jurisdictional” issues – asserting in effect that, as the definition of strategic housing development in S.3 of the 2016 Act required that the lands in question be “zoned for residential use or for a mixture of residential and other uses”, the Board’s S.6(7) opinion must be taken to have determined that zoning issue in its favour.

71. In my view, both arguments fail for reasons articulated by the Board in its submissions.

72. It is clear that a public body cannot acquire or have conferred upon it by estoppel, a power or jurisdiction which it otherwise lacks – much less one explicitly denied it by statute - see **Podariu v The Veterinary Council of Ireland**⁴⁶ and cases cited therein. S.9(6)(b) clearly prohibits the grant of permissions in material contravention of a Development Plan in relation to zoning. If s.9(6)(b) applies, as I have found it does, no estoppel can overturn that prohibition.

73. As to the proposition that the Board’s S.6(7) opinion finally determined the S.9(6) issue in Manley’s favour, it would have been possible and, in hindsight helpful, had the Board pointed out the S.9(6)(b) difficulty in its opinion. However that does not per se imply that, not having done so, the Board was prohibited from doing so later. And one can have some sympathy with the Board in this respect. It must be doubtful that Manley would have accepted that opinion – for the very reasons it prosecutes these proceedings. Also, **Highlands Residents** did not clarify the position until 6 months after the Board’s opinion.

74. The Board’s S.6(7) opinion is in fact not (contrary to suggestion by Manley) that the documents Manley had submitted constituted a reasonable basis for an SHD planning application. Nor is an opinion that such documents constitute a reasonable basis for an SHD planning application a precondition to the making of an SHD planning application. In this case, as it was entitled to do, the

⁴⁶[2017] IECA 272 (Court of Appeal, Hogan J, 24 October 2017) “The law in relation to estoppel by conduct is illustrated by a trilogy of leading Supreme Court decisions from the 1970s: *Re Greendale Building Co. Ltd.* [1977] I.R. 256; *Corrigan v. Irish Land Commission* [1977] I.R. 317 and *The State (Byrne) v. Frawley* [1978] I.R. 326. It is quite clear from these cases that an entirely new jurisdiction cannot be created by estoppel.”

Board notified Manley that its documents required further consideration and amendment to constitute a reasonable basis for an SHD application and specified issues which, if addressed, could result in a reasonable basis for an SHD Application. Amongst those issues identified by the Board to Manley were the “*core strategy and phasing provisions of the development plan*”. While that passage of the opinion goes on to focus on other aspects of the core strategy and phasing provisions, equally, from that opinion Manley was as well-positioned, availing of advice no doubt available to it, to understand the applicable law as was the Board.

75. More importantly, nothing substantive can be finally decided at the pre-application stage, in which there is no public participation, as such a position would deprive third parties of their right to rely on statutory provisions – in this case S.9(6) of the 2016 Act - and be inconsistent with the scheme of the 2016 Act. In particular, s.6(9) of the 2016 Act provides that neither pre-application consultation nor the resultant opinion shall prejudice the Board’s performance of any other of its functions and, save for very limited exceptions, they can’t be relied upon in the formal planning process or in legal proceedings: see **Dempsey v An Bord Pleanála**.⁴⁷ As to the analogous statutory provisions relating to strategic infrastructure development, and albeit in different circumstances in that the Applicant asserted and was refused an entitlement to be heard in the pre-application phase, the Supreme Court in **Callaghan v An Bord Pleanála**⁴⁸ determined that the designation of a project as SID was final only as to routing the planning application directly to the Board as opposed to first to the planning authority. Otherwise,

“The proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage when a final decision potentially affecting the rights or obligations of any individual is to be made. It follows in turn that the default position in this case must be that the Board cannot be bound or influenced by its earlier decision to go down the SID route when considering the strategic importance of the proposed development in the context of making a final decision as to whether to grant permission.”

76. This case amply illustrates the forgoing principle in action: multiple observers in the planning application cited S.9(6)(b) as precluding permission and, if Manley is correct, would have been shut out from ever doing so by an, in effect, ex parte opinion of the Board.

77. Accordingly, in **Redmond v An Bord Pleanála**⁴⁹ Simons J. noted the care of the Oireachtas in enacting the 2016 Act to ensure, by precluding reliance on the pre-application stage in the determination of the subsequent planning application, that the pre-application consultation process

⁴⁷ [2020] IEHC 188 §33 et seq – and the very limited exceptions noted in O’Flynn Capital Partners v. Dun Laoghaire Rathdown County Council [2016] IEHC 480, §31, 32.

⁴⁸ [2018] IESC 39 §7.10.

⁴⁹ [2020] IEHC 151 at §132-140.

does not give rise to any reasonable apprehension of prejudice or predetermination on the part of the Board in respect of that planning application.

78. So, I reject Manley's arguments based on the Board's pre-application opinion and on estoppel.

79. I would add that Manley's Material Contravention Statement, submitted with its SHD planning application, explicitly⁵⁰ "*flagged potentially, the core strategy, the phasing of the lands as phase ii post 2019 as a potential material contravention of the development plan as the Board should direct its mind as to whether it is a material contravention or not and the power which resides in the Board notwithstanding to grant permission in accordance with S.37(2)(b) of the Act.*"⁵¹ This frames the potential phasing material contravention as a "non-zoning" issue and by implication asserts that S.9(6)(b) of the 2016 Act was inapplicable. So Manley had at least, no doubt on foot of the Board's opinion, been alive to and was heard on the issue of the nature of any material contravention as to phasing. Manley may or may not at that time have adverted to the possibility of its being a zoning material contravention but, if not, the Board cannot be blamed for that.

EIA/AA

80. Counsel for Manley argued that the Board's decision was defective for failure to perform obligations as to EIA and AA. These arguments were pleaded but had not featured in Manley's written submissions nor was authority cited.

81. The Inspector addressed both issues. Leaving aside any argument that the Board might be considered to have adopted the Inspector's report in these regards, it is correct to say that the impugned Board Order does not record consideration of these issues.

82. The point seems to me to be easily disposed of. Often, EIA and AA will be screened out or done in a development consent (e.g. planning permission) process which, following consideration of its merits, results in refusal of development consent. That refusal may be for reasons grounded in EIA or AA or for other reasons. The EIA or AA will invariably be recorded in the same document as the refusal. In such cases, entirely understandably, it will be seen in hindsight that EIA or AA will, as a matter of fact, have been done in what will have transpired to be a refusal of development consent. It is also the case, as counsel for Manley observed, that EIA must consider significant positive environmental effects as well as negative – such that, I infer, he argues that EIA could result in a grant of permission where, but for the EIA, permission would have been refused. While that might not be a common outcome it seems theoretically possible. But neither of these considerations, it

⁵⁰ At §15.5.

⁵¹ This is a reference to PDA 2000.

seems to me, render EIA or AA necessary in a circumstance in which the Board is in a position to discern that it is statutorily precluded from granting development consent – planning permission. EIA demonstrating positive effects could not override such a preclusion. And EIA and AA are fundamentally about considering the effects of projects on the environment. If the project does not proceed, it can have no effects. I reject Manley’s arguments in these regards.

CONCLUSION

83. For the reasons set out above, I dismiss this application for judicial review. In particular I find that the decision in **Highlands Residents**, as to the application of S.9(6)(b) of the 2016 Act, governs the present case. I can see no basis for distinguishing that decision.

84. I will list the matter for mention on 4 April 2021 with a view to making final orders.

David Holland
16/3/22

Appendix

- Meath County Development Plan 2013–2019 - Volume 1 Written Statement Incorporated as Variation No. 2 made on 19th May 2014.
- Meath County Development Plan 2013–2019 - Introduction & Explanatory Document to Variation No.2 made on 19th May 2014.
- Meath County Development Plan 2013–2019 - Core strategy pp 11 – 17 as updated by Variation No. 2 made on 19th May 2014 - incl. Table 2.4 Housing Allocation & Zoned Land Requirements - Table 2.5 Allocated and Committed Units as per the 2 year Review contained in the CDP Progress Report, Dec 2014.
- Zoning map of Duleek Written Statement incorporated in Meath County Development Plan 2013–2019 by Variation No. 2 made on 19th May 2014.
- Drogheda Southern Environs Local Area Plan Written Statement incorporated in Meath County Development Plan 2013–2019 by Variation No. 2 made on 19th May 2014.