

**THE HIGH COURT
COMMERCIAL**

**[2022] IEHC 393
[2021 No. 959 JR]
[2021 No. 144 COM]**

**IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT
2000 AS AMENDED**

BETWEEN

KILLEGLAND ESTATES LIMITED

APPLICANT

AND

MEATH COUNTY COUNCIL

RESPONDENT

AND

CORNELIUS GILTINANE AND PATRICIA GILTINANE

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Friday the 1st day of July, 2022

1. The applicant is a landowner in Ashbourne who challenges the Meath County Development Plan insofar as the downzoning of its lands is concerned, that is, a change in zoning whereby a more intense use of land is reduced to a less intense use. Most rezoning historically has been the other way. The proposal to zone the applicant's lands was passed at the same time as a separate proposal to rezone other lands owned by the notice parties. The main thrust of the submissions related to an alleged lack of reasons although other points were also advanced.
2. The previous development plan was adopted in December, 2012 and came into operation in January 2013. That plan (the Meath County Development Plan 2013 - 2019) sets out a series of land use zoning objectives. The relevant one is A2, new residential: "[t]o 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."
3. In the Development Plan 2013-2019, the applicant's lands were zoned A2 (New Residential). The notice parties' lands were zoned RA (Rural Area).
4. The Development Plan review process commenced in December, 2016.
5. A Regional Spatial and Economic Strategy (RSES) was adopted for the relevant region, the Eastern and Midland region, on 28th June, 2019.
6. A Strategic Environmental Assessment (SEA) report, titled Preliminary Draft Meath County Development Plan (Draft CDP) 2020-2026: Strategic Environmental Assessment (SEA) Environmental Report, Environmental Assessment: Built Environment, by Brady Shipman Martin was published by the council on 6th December, 2019 for the purposes of reg. 13C of

the Planning and Development Regulations 2001 (S.I. No 600 of 2001) as amended in particular by the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (S.I. No. 463 of 2004).

7. On 18th December, 2019, the Draft Meath County Development Plan 2020-2026 went on public display. In relation to these applicant's lands, it proposed retaining the pre-existing zonings.
8. 2,452 submissions were received during the period of display up to 6th March, 2020.
9. Among the submissions made were:
 - (i). a submission from the Office of the Planning Regulator ("OPR") in relation to the need for a tiered approach to zoning and
 - (ii). a submission from Cllr Alan Tobin, one of the Ashbourne local councillors, submission No. MH-C5-834, to which we will return.
10. Due to the Covid-19 emergency, the period for making the development plan was extended under s. 251A of the Planning and Development Act 2000. In consequence the citation of the draft plan was changed to the Draft Meath County Development Plan 2021-2027.
11. The Chief Executive reported on 13th August, 2020 in relation to the submissions proposing to retain the existing zoning of both the applicant's and the notice parties' lands. That report then came before the elected members and a number of motions were proposed seeking to change aspects of the draft plan. We will return to those in more detail later.
12. The Chief Executive then prepared a report in October 2020 in relation to the various motions again seeking to retain the existing zonings. The members then voted on the motions to amend the draft plan at a number of special meetings in the course of which a crucial motion No. 112 was proposed to change the zoning of the applicant's lands from A2 (New Residential) to F1 (Open greenspace). An amendment was moved from the floor and carried to change the original proposal in motion 112 so that the new zoning would be G1 (Community Infrastructure). The motion as amended was passed. A separate motion sought to rezone the notice party's lands to A2 (New Residential).
13. On 23rd December, 2020, the applicant signed a contract to purchase the lands. That sale closed on 12th May, 2021 and very shortly thereafter the applicant submitted a planning application to build 31 dwellings and carry out associated works on the lands. That was submitted on 28th May, 2021 under reference No. 21/1037.
14. The material amendments made to the draft plan were placed on public display on 31st May, 2021 for a period up to 29th June, 2021. Those attracted 308 submissions again including the OPR on 29th June, 2021 as well as Transport Infrastructure Ireland on 22nd June, 2021.

15. The OPR recommended that the Development Plan be made without 12 of the material amendments. Among the proposed amendments being sought to be excluded was the change in the notice parties' lands from RA to A2. No recommendation was made regarding the downzoning of the applicant's lands. Similarly, the Transport Infrastructure Ireland submission related only to the notice parties' lands.
16. The applicant also made a submission *via* Thornton O'Connor Planning Consultants (reference no. MH-C52-274, dated 29th June, 2021) arguing for the reinstatement of the pre-existing zoning.
17. On 12th August, 2021, the Chief Executive prepared a report on the submissions received. That was then considered at a series of decisive special meetings of the council which occurred in the period 20th - 22nd September, 2021.
18. On 20th September, 2021, at the first of those meetings, the members decided by a majority (19 votes to 15) to reject the Chief Executive's recommendation to reinstate the previous zonings of both the applicant's lands and the notice parties' lands.
19. It is apparent from the transcript of the meetings of September 2021 that what the members voted on when considering material amendment 8 (MA08) was the Chief Executive's recommendation that the Development Plan should be made without that amendment. The vote was to reject that recommendation.
20. At the end of the series of special meetings, the Meath County Development Plan 2021-2027 was formally adopted on 22nd September, 2021.
21. On 29th September, 2021, the Chief Executive informed the OPR that the Development Plan had been made without all of the OPR's recommendations being incorporated.
22. On 20th October, 2021, the OPR wrote to the relevant Minister of State, the Minister for Local Government and Planning, setting out a recommendation that a direction under s. 31 of the 2000 Act should be issued in respect of the notice parties' lands, but not the applicant's lands.
23. On 22nd October, 2021, the council granted the applicant's planning application for the lands in question. The new Development Plan had not formally come into operation at that stage, so notwithstanding that the grant of permission would have essentially nullified the decision by the council to downzone the lands, the application was dealt with on the basis of the Development Plan as it stood at that particular point in time. A subsequent change in the Development Plan would have to be factored in on appeal. Any decision has to be made in the light of the law as it stands at that particular point.
24. On 2nd November, 2021, the Minister gave notice of an intention to issue a direction under s. 31 of the 2000 Act relating to the notice parties' lands, again this did not impact on the applicant's lands.

25. The Development Plan came into force on 3rd November, 2021.
26. The adopted plan was accompanied by a number of documents including:
 - (i). an SEA statement, titled Meath County Development Plan (Draft CDP) 2021-2027: Strategic Environmental Assessment (SEA) Statement, Environmental Assessment: Built Environment, by Brady Shipman Martin dated November, 2021, containing Chapter 1 on an SEA statement, Chapter 2 on environmental considerations, Chapter 3 on the Environmental Report and submissions and observations, Chapter 4 on consideration of alternatives and the Development Plan, and Chapter 5 on monitoring measures and reporting – this is the statement for the purposes of reg. 13I of the 2001 regulations;
 - (ii). an SEA environmental report, also dated November 2021, which describes itself as Volume 2 – this is basically a non-statutory update of the 2019 environmental report, not required by the regulations but nonetheless supplementing the SEA statement; and
 - (iii). an SEA non-technical summary described as Volume 1.
27. The draft ministerial direction went on public display on 10th November, 2021 and submissions were invited.
28. The statement of grounds in the present proceedings was filed on 11th November, 2021. The primary relief sought is an order of *certiorari* by way of application for judicial review quashing the decision of the council on 22nd September, 2021 to make the Meath County Development Plan 2021-2027 so as to include material alteration MA08, which provided for a change of zoning of lands owned by the applicant at Killlegland, Ashbourne, County Meath from A2 (New Residential) to G1 (Community Infrastructure).
29. On 18th November, 2021, a number of third party appeals to the board were made against the grant of permission reference ABP-311978-21. Those appeals remain outstanding. Presumably the board has taken the prudent course of holding off on processing them in the light of the challenge before the courts, a course I would commend in such a situation, for a host of reasons.
30. Submissions on the draft direction closed on 23rd November, 2021 and the Chief Executive prepared a report which was communicated to the Minister.
31. On 28th January, 2022, the Minister issued a s. 31 direction which was self-executing and had the effect of reinstating the previous zoning in relation to the notice parties' lands. It did not affect the Ashbourne MA08 material alteration insofar as that referred to the applicant's lands.

Stay

32. When granting leave on 24th November, 2021, the court granted an *ex parte* stay on the plan insofar as related to the coming into operation of the change in zoning of the applicant's lands. I appreciate that a stay on an impugned decision is far from unusual, but it seems to me that special considerations apply to a stay on a measure of general application.
33. The jurisdiction to grant an injunction which would have the practical effect of preventing the operation of legislation pending the determination of proceedings is one which must be "most sparingly exercised" (*M.D. (An Infant) v. Ireland* [2009] IEHC 206, [2009] 3 I.R. 690, *Friends of the Irish Environment Ltd. v. Minister for Communications* [2019] IEHC 555, [2020] 3 I.R. 162).
34. Whatever about staying an individual planning decision, the Development Plan is a form of general measure adopted under statute. Similar considerations apply to such instruments or measures as would apply to legislation. At the time of the grant of the stay, the applicant had a planning permission which was capable of being appealed and was appealed. The question then is really whether the stay was intended to freeze the planning process or merely to freeze the adopted development plan but allow the planning process to continue. The former would not be massively problematic, but the wording of the stay actually sought and granted does not in fact articulate that expressly. The council's interpretation was that any planning appeals should be paused, and in fairness the board does seem to have paused such appeals and rightly so. If that was the applicant's intention, and if that intention was clear to the board, then there might not be quite such a problem other than that the wording did not expressly say that.
35. The latter scenario, however, is much more problematic. If the grant of a stay on the Development Plan, but not on the planning process, would have the effect of resulting in a situation where permission could be granted on appeal or by the council that was not contemplated by the new democratically-adopted Development Plan in such a way that the matter could not be unscrambled later, then the grant *ex parte* of a stay when granting leave could effectively determine the proceedings, render their further processing moot, and prevent the council from obtaining any benefit from either the new plan in this respect or from defending the proceedings, unless the stay was to be subsequently set aside prior to any decision or unless the final permission was to be judicially reviewed also.
36. The statement of grounds says as follows in relation to the stay:
- "If an appeal is brought against the Respondent's decision to grant permission, An Bord Pleanála must consider same by reference to the zoning objective of the lands which applies at the time it makes its decision, rather than that which applied when the planning application was made to the Respondent. This means that the appeal will be considered by An Bord Pleanála on the basis of the lands being zoned G1 (Community Infrastructure), which is likely to have a material impact on the outcome of the appeal detrimental to the Applicant.

In the circumstances, the granting of a stay is necessary to prevent serious and irreparable prejudice and injustice to the Applicant.”

37. If the board understood this as meaning that they should pause the potential appeals pending the determination of the proceedings, then that is not massively problematic in principle. If it means that the board should proceed with the appeals, but that the plan be paused then I am afraid I cannot agree with this analysis. If the applicant were to win the case and the old rezoning would revert, it could reactivate the planning application at that point. There would be no “serious and irreparable prejudice and injustice” to the applicant in such a situation. On the other hand, if the applicant were to lose the case but manage to get a windfall permission from the board in the meantime which was down to a stay granted *ex parte* by a judge which would prevent the elected development plan from coming into operation, then that would indeed constitute “serious and irreparable prejudice and injustice” - to the council and the people of County Meath rather than any particular applicant. I do not think that liberty to apply in relation to the stay is a complete solution in such a situation especially since permission could be granted without sufficient prior notice.
38. It seems to me that a development plan should not be stayed without exceptional circumstances much along the lines of other measures of general application like policy documents or legislation. A far more appropriate route is to word the stay in terms of a stay on the processing of any existing or potential future planning applications insofar as the change effected by the Development Plan might be relevant. Having discussed the matter with the parties on 25th May, 2022 I amended the stay in those terms with liberty to apply and discharged the stay on the Development Plan as such.

Some general considerations

39. At the risk of stating the obvious, a basic element of the philosophical infrastructure of judicial review is that while the merits of legislation are a matter for the legislature and the merits of administration are a matter for central and local government and statutory bodies, an assessment of the legality of such legislation and administration is a matter for the judicial branch of government. That is subject to the qualification that certain judicial review grounds interact in a limited way with merit issues, such as unreasonableness.
40. A further consideration is the inherently policy-related and political nature of decisions such as the adoption of a development plan, referred to as an “environmental contract” in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at 101. In *Byrne v. Fingal County Council* [2001] IEHC 141, [2001] 4 I.R. 565 at 580, McKechnie J. noted that a development plan is “founded upon and justified by the common good and answerable to public confidence” and “is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice.”

41. As Lynch J. said in *Malahide Community Council Ltd. v. Fingal County Council* [1997] 3 I.R. 383 at 398, “[a]ny court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature.” This reflects the fact that there is room for evaluative assessment of different planning options and thus in some situations there is no completely objective solution to the question of balancing different development considerations. But obviously weight of numbers on the council or an elevated position in the institutional decision-making hierarchy doesn’t guarantee that one has the right answer. Thus, the system has checks and balances - the legal framework policed by the courts that applies to all planning decision-makers irrespective of their composition and governance is one of those.
42. A further important point is that not all decisions require reasons: see *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506 at p. 537. There is an important theoretical distinction between the adoption of measures of general application such as legislation, statutory instruments, policy documents and other such measures on the one hand and the making of individual decisions addressed to particular persons or bodies. That distinction is reflected most expressly in European law (Article 288 TFEU, which refers to the distinction between regulations and directives on the one hand, binding generally, and decisions on the other, binding on those to whom they are addressed), but it exists in domestic law also. For example, the three-month time limit for judicial review or any shorter limit in particular circumstances only applies to individual decisions, not general measures, in the absence of a specific statutory provision to the contrary: see *M.R. (Albania) v. Minister for Justice and Equality* [2020] IEHC 402, [2020] 8 JIC 1702 (Unreported, High Court, 17th August, 2020). The very wide terms of s. 50(2) of the 2000 Act do appear to be an exception however in that their language would seem to capture even general measures made by councils under the Act.
43. Broadly, there is no obligation to give reasons for the adoption of measures of general application like Public General Acts (as opposed to Private Acts whose reasoning is set out in a preamble) or statutory instruments or other measures of a general nature as opposed to individual decisions that may take the form of statutory documents. That is doubly so where those decisions are adopted by collective political bodies. The nature of the decision-maker in the present case is thus of relevance, as a collective politically-elected deliberative body made up of 40 members. On the other hand, individual decisions, and in certain circumstances those elements of a general instrument that could constitute individual decisions, do generally require reasons.
44. A related but perhaps equally obvious point is that a council has a fair degree of discretion in relation to its decisions on appropriate land use zoning: see *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, Simons J., 10th March, 2020). This is reflected in section 10(2)(a) of the 2000 Act which provides as follows:

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

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

45. Importantly there is no presumption in law that any land zoned in a particular way in one development plan will remain zoned in that way in any subsequent development plan. Section 10(8) of the 2000 Act provides as follows:

“(8) There shall be no presumption in law that any land zoned in a particular development plan (including a development plan that has been varied) shall remain so zoned in any subsequent development plan.”

46. In *Mahon v. An Bord Pleanála* [2010] IEHC 495, [2010] 12 JIC 2109 (Unreported, High Court, 21st December, 2010), Dunne J. said (at para. 96):

“As I have previously mentioned the effect of zoning of land can be to benefit the owner of land, for example, in circumstances where agricultural land is zoned for development. The zoning in a Development Plan does not have to be maintained in successive Development Plans and accordingly such land can be de-zoned. That naturally enough will have the effect of de-valuing the land. No complaint can be made about that by the landowner. In those circumstances can it be said that the applicant in these proceedings is in a position to make the case that the zoning of land in these circumstances has resulted in an unjust attack on his property rights within the meaning of Article 40.1 of the Constitution, in circumstances where no compensation has been provided to him? The answer to that question must be in the negative. A change in zoning does not entitle the applicant to compensation even though the value of his land may have been reduced as a result.”

47. Therefore, in principle a council is free in law to change the zoning of any particular piece of land regardless of the land uses permitted in any existing or previous development plan. Thus, there can be no form of fettering the council’s discretion or legitimate expectation that a zoning will not be changed. The guiding context is that zoning is not a private matter as between a landowner and the council. It affects all citizens. If in an exceptional case a council’s actions go beyond merely changing a zoning and in some way create a legally-enforceable injustice against a particular landowner, some remedy such as damages would have to be found other than requiring the council to effect or consider a change in the zoning or any other order that has the net effect of overriding or otherwise impinging upon a council’s judgment as to what zoning is required by the overarching principles of proper planning and sustainable development.

48. Standing back even further from this clear conclusion is the broader point that there is no constitutional right to carry out developments and certainly not to do so in a way that is contrary to proper planning and sustainable development as determined by the relevant planning decision-makers, one of whom is the relevant local authority when adopting the development plan: see *O'Mahony Developments Ltd. v. An Bord Pleanála* [2015] IEHC 757, [2015] 11 JIC 2706 (Unreported, High Court, 27th November, 2015), *Clonres CLG v. An Bord Pleanála* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May, 2021) at para. 81.
49. To summarise:
- (i). The merits of a decision are not a matter for the court, subject only to the qualification that certain judicial review grounds interact in a limited way with quasi-merit issues, such as unreasonableness.
 - (ii). The decision at issue in the adoption of a development plan is inherently policy-related and political, and a court must be very slow to interfere with that. Nonetheless the court is required to assess the legality of the decision.
 - (iii). Measures of general application such as public general legislation, policy documents, general statutory instruments and the like do not generally require reasons, especially where adopted by a collective, elected, political body.
 - (iv). On the other hand, individual decisions, and in certain circumstances those elements of a general instrument that could constitute individual decisions, do generally require reasons.
 - (v). A council has a fair degree discretion in relation to its zoning decisions.
 - (vi). There is no presumption that land zoned one way in a particular development plan will not be down-zoned in a subsequent development plan.
 - (vii). Therefore, in principle a council is free in law to change the zoning of any particular piece of land regardless of the land uses permitted in any existing or previous development plan.
 - (viii). There can be no form of fettering the council's discretion or legitimate expectation that a zoning will not be changed.
 - (ix). More generally there is no constitutional right to development, still less to carry out development that is contrary to proper planning and sustainable development as determined by the relevant planning decision-maker.

Core ground 4 - alleged breach of the sequential approach and the Development Plan Guidelines

50. It makes best explanatory sense to start with Core Ground 4. That provides as follows:

"The Respondent's decision to include the alterations proposed in MA08 in the Meath County Development Plan 2021–2027 was contrary to the sequential approach to zoning and the Respondent therefore failed to have regard to the Development Management Guidelines 2007 and acted inconsistently with the tiered approach to zoning contrary objectives 72a, b and c of the NPF and Appendix 3 thereof. The Applicants lands were sequentially preferable for residential development to the alternative lands nears the M2 motorway onto which Zoning Objective A2 (New Residential) has been moved."

Law in relation to the sequential approach

51. The claim under this ground argues for a breach of the sequential approach by reference to both the NPF and the Development Plan Guidelines.

52. The NPF issue will be dealt with under the heading of Core Ground 2 below. For present purposes I will address the Development Plan Guidelines 2007.

53. The legal status of the Development Plan Guidelines 2007 is that of guidelines under s. 28 of the 2000 Act, but without SPPRs. Therefore, the requirement was to "have regard to" those guidelines, not to comply with them. This is not a heavy bar: see *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021) at para. 39 (currently under appeal).

54. The 2007 Guidelines describe the sequential approach as follows:

"4.19. In order to maximise the utility of existing and future infrastructure provision and promote the achievement of sustainability, a logical sequential approach should be taken to the zoning of land for development:

(i) Zoning should extend outwards from the centre of an urban area, with undeveloped lands closest to the core and public transport routes being given preference (i.e. 'leapfrogging' to more remote areas should be avoided);

(ii) A strong emphasis should be placed on encouraging infill opportunities and better use of under-utilised lands; and

(iii) Areas to be zoned should be contiguous to existing zoned development lands.

Only in exceptional circumstances should the above principles be contravened, for example, where a barrier to development is involved such as a lake close to a town. Any exceptions must be clearly justified by local circumstances and such justification must be set out in the written statement of the development plan".

55. In *McCarthy Meats Ltd. v. The Minister for Housing, Planning and Local Government* [2020] IEHC 371, [2020] 7 JIC 2707 (Unreported, High Court, 27th July, 2020), in the context of a challenge to a s. 31 direction, Heslin J. stated (at para. 243):

"There was an absence of any acceptance by the local authority that residential development of the Applicant's 30 acres would be inconsistent with the sequential approach. There was an absence of any clear cogent explanation as to why, for example, the Applicant's lands should be zoned even though they are not closest to the core of Sallins, not closest to public transport routes and would not represent infill development. In short, the evidence demonstrates that there was no engagement with the entirety of the contents of s. 4.19 of the 2007 Guidelines on the issue of Sequential Approach" ...

"In essence, the elected members seem to have taken the view that, because one single element of Section 4.19 of the 2007 Guidelines was, in their view, complied with (namely part (iii)), this necessarily meant full compliance. I am satisfied that this was not so. In the manner explained earlier in this judgment, section 4.19 comprises a set of "*principles*" (plural), departure from which was permissible only in exceptional circumstances and such exceptions should be clearly justified by local circumstances and set out in the Development Plan. No reasons for departure were set out."

56. *McCarthy Meats* is not, of course, predicated on any assumption of a requirement to comply, but rather on a requirement to consider. That presupposes a correct understanding of the guidelines.
57. The new development plan guidelines published in 2021 would, if adopted, include SPPRs that would have a binding component. On the face of things that appears at first reading like a desirable evolution in the regulatory framework, but it remains in the hypothetical future.
58. The current position is that a council must have regard to the guidelines as well as complying as far as practicable with the objectives of the NPF and RSES. A failure to refer at all to the sequential test is thus an error of law: see the approach in *R. (Environment Agency) v. Tonbridge and Malling Borough Council* [2005] EWHC 3261 (Admin) *per* Lloyd Jones J. at para. 55: "[h]owever, the report contains no reference at all to the sequential test. Furthermore, it contains no reference to any other sites for the purposes of comparison and the performance of the sequential test".
59. To summarise:
 - (i). The legal status of the Development plan Guidelines 2007 is that of guidelines under s. 28 of the 2000 Act, but without SPPRs. Therefore, the requirement was to "have regard to" those guidelines. This is not a heavy bar.
 - (ii). The requirement to consider presupposes a correct understanding of the guidelines.
 - (iii). A council must have regard to the guidelines as well as complying as far as practicable with the related objectives of the NPF and RSES. A failure to refer at all to the sequential test is thus an error of law.

Application of the law to the facts

60. Insofar as concerns the alleged breach of the NPF, that issue will be dealt with later in this judgment.
61. In so far as the issue under the guidelines is concerned, the obligation is to have regard not to comply, and it is clear that the council did have regard to those guidelines. The logic of the decision was there was an objective reason for not permitting development on the particular lands in question, mainly the need to facilitate community infrastructure on that particular site. Under those circumstances, departure from the guidelines does not constitute a misunderstanding of them or a failure to have regard to them and therefore does not give rise to any ground for *certiorari*.

Core ground 1 - alleged lack of reasons/ failure to address submissions

62. Core ground 1 provides as follows:

“The Respondent’s decision is invalid on the basis that the elected members failed to give any or any adequate and/or intelligible reasons for amending the draft Development Plan to include the alterations proposed in MA08, particularly in circumstances where the Respondent’s Chief Executive had consistently recommended against making such alterations.”

The law in relation to reasons/ addressing submissions

63. The first issue is whether reasons are required for rezoning an individual piece of land.
64. The broad principle is that reasons are required for individual decisions as opposed to instruments of general application. Is the rezoning of an individual piece of land an individual decision in this sense, even if embodied in a general instrument like a development plan? In my view there is some necessity for reasons in a development plan context where members disagree with a reasoned recommendation of the Chief Executive to change a pre-existing plan in a way that addresses itself to specific private interests.
65. Where members accept a reasoned Chief Executive’s report (whether to keep a term of the existing plan such as zoning or to change it), that acceptance inherently involves the acceptance of the reasons stated, so no further articulation of reasons by the members is necessary.
66. If members simply vote to retain the pre-existing situation even if that is contrary to a Chief Executive recommendation for change, I do not see that as something that normally requires reasons since the reasons can be taken to remain as those already applicable in the previous plan context.
67. That might be said to reflect a broader principle that a decision-maker doesn’t need to give reasons for not changing her mind from an already-articulated position, or for not making an exception to a clear policy for which reasons have been previously articulated, unless there is a significant change in circumstances or the unusual case of a new point being made of such significance that it needs to be expressly addressed.

68. That principle in turn reflects an even broader principle that a re-iteration of a previous position or decision is not a new decision for the purposes of judicial review, and does not for example re-start the normal 3-month clock for challenge (or any shorter applicable period such as in the planning context). That said, a new plan is indeed a new decision and can be challenged afresh even if it contains the proverbial old wine in a new bottle. But an individual decision does not become a fresh decision merely because the decision-maker is asked to change her mind and doesn't.
69. It seems to me that reasons of some kind for a decision by members on a development plan would be required if three conditions are met:
- (i). the members vote to change the pre-existing plan;
 - (ii). doing so is contrary to a reasoned recommendation of the Chief Executive; and
 - (iii). the change addresses itself to specific private interests such as rezoning a particular piece of land.
70. On one view identifying a particular piece of land to be rezoned is much further along the spectrum of being an individual decision than is a general policy decision like setting a limit on building heights that impacts on a general category of private interests rather than any one landowner's property in particular, or determining what permissible uses should be allowed within a particular zoning category across the entire functional area of the council. On such a view, the policy at issue in *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506, [2013] 2 I.L.R.M. 466, was much more a general policy decision as to what institutional zoning should involve across the council's functional area, as opposed to singling out a particular individual's land.
71. To that extent it seems to me the real axis of analysis is as between general decisions and individual decisions rather than between policy decisions and "nuts and bolts" as phrased in *Christian*. "Nuts and bolts" is not a particularly legal term, and that perhaps illustrates, I might respectfully say, the disputability of the analysis. Many policies are quite detailed and thus could be said to involve "nuts and bolts". But the fact that a policy is detailed does not make it any less of a policy. Thus, while with great respect I don't find this aspect of *Christian* to be particularly convincing, that does not really matter because that sort of issue doesn't arise here. Rather the point here is that reasons *are* required in a situation where the specific rezoning of specific lands is being changed.
72. A related sub-point is whether in certain circumstances particular factors conspire to introduce a particular requirement for reasons from a decision maker. One such issue was argued to be a departure from a sequential approach of development as envisaged in the Development Plan Guidelines 2007.
73. But a sequential approach is not and cannot be mechanical. The principle of proper planning and sustainable development is overarching, so there may well be objective reasons for not

marching rigidly outwards from a settlement centre in particular cases – an obviously desirable example would be the insertion of green spaces or community infrastructure. I do not think that in and of itself a departure from a sequential approach requires any extra layer of reasons beyond that which applies anyway.

74. The principle of organising developments on a sequential basis does not require the council to indicate precisely whether or when any particular piece of land will be up-zoned for housing or other development. There is no obligation to change any zoning or give any particular comfort to any particular landowner, as long as an overall sequential approach is being followed, absent objective reasons to the contrary.
75. The second issue is the extent of reasons required. The Supreme Court has already answered that: *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453. The rule basically comes down to a requirement to give the main reasons for the main issues: see *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021).
76. *Balz v. An Board Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637, does not extend the duty to give reasons beyond *Connelly*, as explained in *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála (No. 1)* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020), at para. 37. *Balz* had the context of a point being improperly dismissed *in limine*.
77. In particular one must avoid the applicant's classic error of confusing lack of narrative discussion with failure to have regard to something. While failure to "engage with" submissions was pleaded in *Balscadden*, there is no obligation to "engage with" submissions in the sense of some sort of discursive, hand-to-hand combat sense, as distinct from the obligation to give reasons.
78. In *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* (under appeal), I endeavoured to summarise some of the principles from the caselaw regarding the obligation to have regard to something. That applies to submissions as much as anything else. The summary was as follows:
 - (i). Expressions like consider, take into account and have regard to all mean the same thing.
 - (ii). It is inherent in the objectivity of language that in principle that meaning is the same whether it is the State that is having regard to something, or that is seeking to have regard had by someone else to its views. The latter context does not impose a different or more exacting meaning on the term "have regard to".
 - (iii). Having regard implies looking at the matter concerned, and factoring in its relevance, if any, and weight, if any, as those matters appear to the decision-maker.

- (iv). Hence if the decision-maker fails to even look at the documents or matters to which it is to have regard, or if the evidence doesn't demonstrate that it has done so, then a ground for certiorari arises (*B.C. (Zimbabwe) v. International Protection Appeals Tribunal* [2019] IEHC 488, [2019] 7 JIC 0207 (Unreported, High Court, 2nd July, 2019), *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021)).
- (v). If the decision states that regard was had to something, then the onus is on the party challenging that to prove otherwise by evidence.
- (vi). Like the exercise of any public law duty, the process of having regard has to be carried out bona fide and in accordance with the statutory purpose and with all other administrative law duties. But those requirements are independent of, and not created by, the requirement to have regard.
- (vii). Once the decision-maker has looked at the matter, its determination as to relevance if any is subject to review for legality, and its determination as to weight if any is normally subject to review for unreasonableness only. The weight to be attached to a particular piece of material is peculiarly one for the decision-maker (*per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192, [2008] 6 JIC 2704 (Unreported, High Court, 27th June, 2008) at para. 27.
- (viii). There is no necessary obligation for the consideration to be lengthy or ponderous. By analogy, a court has regard to all submissions made, although some are rejected *in limine* on the grounds of invincible incomprehensibility, patent irrelevance or patent error, such as for example if a personal litigant citizen disputes the court's jurisdiction on the grounds that she has not consented to submit to it (see *Meads v. Meads* [2012] ABQB 571 *per* Rooke C.J.). Immediate rejection of a patently incomprehensible, irrelevant or erroneous matter is not a failure to have regard. It is decision-making in action – the decision-maker has looked at everything and is trying to sort the wheat (if any) from the chaff. This reflects the point that the degree of weight and consideration to be given to something depends in significant measure on that something, not on some completely dry, academic and disembodied conceptualisation of elaborate legal process in the abstract.
- (ix). The use of mandatory, strident, peremptory or any other sort of language in a document to which regard is being had doesn't elevate the duty to have regard to the document into any sort of enhanced level or require additional reasons. That would be a self-evidently bootstrapping conceit. If any possible enhanced duty exists in a particular situation, it has to come externally from the document itself, such as from the statute or the legal context, and can't be created out of whole cloth by the entity seeking to have regard had to its views.

- (x). The duty to have regard to something doesn't automatically create a duty to give reasons for not giving that matter more weight. That follows from the entitlement of the decision-maker to assess the weight to be given to the various matters which it is considering. An enhanced duty may be created expressly, as in s. 28(1B)(b) of the 2000 Act, or impliedly by virtue of the particular legal context (such as where the nature of the process is that a detailed discussion is carried out at a sub-level, such as by an inspector, so that when a more summary operative decision is being made, such as by the board, there would be a gap in reasoning if the board didn't give express and adequate reasons for disagreeing with the inspector, or where providing reasons is required under the principle of giving the main reasons for the main issues).
- (xi). However, if the provision concerned (external to the document being considered) uses an intensifier such as to have "due" regard to something (*e.g.*, Article 16.2.4° of the Constitution), or "appropriate and reasonable regard" (as in the SPPR considered in *Atlantic Diamond*) then that generally connotes an additional degree of weight to be given to the matter to which regard is to be had, with a general enhancement of the level of reasons that have to be given for not affording such weight. Here, the OPR erroneously criticised the council for not giving "sufficient" regard to the guidelines, whereas in fact the statute only requires "regard". Intensifiers can't simply be read into the statute by sleight of hand. They significantly change the meaning of the concept.
79. It's relatively easy to take sentences about reasons out of context here and there, for example from cases such as *Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta v. The Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1, *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, Holland J., 10th January, 2022) at para. 260, and *Board of Management of St. Audoen's National School v. An Bord Pleanála* [2021] IEHC 453, [2021] 7 JIC 1502 (Unreported, High Court, Simons J., 15th July, 2021), but individually or collectively they don't amount to an obligation to "address" or "engage with" submissions save in the sense of the standard of giving the main reasons on the main issues.
80. Indeed, a court doesn't take on some kind of superhuman obligation to explicitly give every micro-sub-reason for every micro-sub-issue that parties may seek to make in voluminous submissions or buried somewhere in thousands of pages of materials. It tries to make such sense as can be made of the significant issues and deal with those, with the insignificant issues sometimes being accepted or rejected, as the case may be, by necessary implication. If leadership involves not demanding of others what one is not prepared to do oneself, then it would be not just hypocritical but a failure of leadership for the judicial branch to impose some kind of elevated micro-reasons-related obligation on decision-makers that the courts would not be prepared to take on as a burden for themselves.

81. A third issue is where reasons can be found. The law has never been unduly prescriptive about that. Where reasons are required for a decision, there is no obligation to state reasons in the decision itself, either expressly or by reference to documentation that is expressly referred to. Nor is there an obligation to set out the reasons in a single document if they can be found in some other identified document. Even if no document is identified, reasons can be gathered from other documents which are not expressly referred to or from the overall context and circumstances, as the Supreme Court has found in *Connelly*. Paragraph 2.3(3) of the judgment in *Connelly* states that one of the specific grounds of appeal was that “[t]he High Court erred in holding that the Board could not refer to and rely on other material in its decision unless the particular observations or conclusions relied upon are identified with specific particularity on the face of the Board's Decision.” That ground was in effect upheld. A right to extract reasons from the documents and circumstances overall, rather than purely from what is signposted on the face of the decision, is implicit in *P. & F. Sharpe Ltd. v. Dublin City and County Manager* [1989] I.R. 701, where the court referred to the necessity for a note of the material on which the decision had been reached, not for the reasons to be expressly stated in the decision itself. Also, in *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, the Supreme Court referred again to the necessity for a record of the material relied on. Minutes even if the original notes were not available were considered an adequate record in *NWR FM Ltd. v. Broadcasting Commission of Ireland* [2004] IEHC 109, [2004] 4 I.R. 50.
82. In *Balscadden Road (No. 1)*, I referred to various recent decisions including *RPS Consulting Engineers Ltd. v. Kildare County Council* [2016] IEHC 113, [2017] 3 I.R. 61; *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, McDonald J., 20th December, 2019); *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225, [2020] 4 JIC 2405 (Unreported, High Court, Barr J., 24th April, 2020); *O’Neill v. An Bord Pleanála* [2020] IEHC 356, [2020] 7 JIC 2201 (Unreported, High Court, McDonald J., 22nd July, 2020); *Crekav Trading G.P. Ltd. v. An Bord Pleanála* [2020] IEHC 400, [2020] 7 JIC 3108 (Unreported, High Court, Barniville J., 31st July, 2020); and *Leefield Limited v. An Bord Pleanála* [2012] IEHC 539, [2012] 12 JIC 0404 (Unreported, High Court, Birmingham J., 4th December, 2012) and endeavoured to summarise (at para. 39) some other conclusions regarding reasons, including the following:
- (i). the extent of reasons depends on the context;
 - (ii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;
 - (iii). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;
 - (iv). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

- (v). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and
 - (vi). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved and should not be read in isolation.
83. I should perhaps add to the point about the context that there is no legal requirement to state reasons for what is obvious. If the rationale is clear from the circumstances even if it is not expressly articulated, then a legal obligation to so articulate the reasons would be “pointless formalism” (not a desirable approach to law in any context - see *Okunade v. Minister for Justice and Equality* [2018] IESC 56, [2018] 11 JIC 1401 (Unreported, Supreme Court, 14th November, 2018) *per* O’Donnell J. (Clarke C.J. and O’Malley JJ. concurring), at para. 21).
84. One problem with legal systems generally and the Irish system in particular, is that there is too much *ad hoc* law with individual areas operating in silos. Jurisprudence should strive to relate the different areas in some way that makes sense from an overall perspective, rather than simply allow a runaway process of inconsistent legal developments in different context like diverging species on isolated Galápagos Islands. Ronald Dworkin’s demand for joined-up law echoes loudly here. Describing Dworkin, Prof Laurence B. Solum said: “the judge should ask, “What is the best normative theory that can justify the law as whole?” That normative theory is then used to guide the judge's decision in the particular case. Like the criterion of fit, the criterion of justification is holistic. Although judges may, as a practical matter, seek the justification for a particular area of legal doctrine, in theory the question is, “What justifies the whole of the law?” This is another sense in which the law is a seamless web-it is the whole web and not a particular strand that is the object of normative justification.” (Isolum.typepad.com). It is that “holistic” objective to which the law should aspire.
85. Thus, when Clarke J. says at para. 84 of *Christian* that reasons should be in the decision or in some document referred to in the decision, I prefer to read that a comment on the facts of that particular case, based on the reasons not being findable elsewhere on those particular facts, to which that judgment is to be confined. It is not to be read as a normative legal statement that reasons in other cases can only be found within an artificial, narrow and technical zone that, like the proverbial restricted railroad ticket, is good for development plans and development plans only - some compulsory, enforced-by-*certiorari* mandatory requirement that is radically different from and much more restrictive than other contexts. There are a number of reasons to take such approach.
86. Indeed Clarke C.J. said almost as much in *Connelly* where he referred to his comments in *Christian* at para. 7.3 but went on as follows:
- “7.4 In this context it is also worth returning to the decision of Fennelly J. in *Mallak*. As noted above, at para. 66 of his judgment, Fennelly J. stated:- “The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying

with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

7.5 Therefore, it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, as is clear from the above analysis, this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In this regard, I refer to my judgment in *EMI*, where I stated at paragraph 6.8:- "While the comments made in *Christian* related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in *Christian*, that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision."

87. On any view therefore, having regard to the decisions in *Mallak*, *EMI* and *Connelly*, the law has evolved on this point.
88. One obvious reason not to accept some form of absolute formalistic requirement of an express statement on the face of the decision is that no authority is cited in *Christian* for such a proposition, so it makes sense that the judgment should not be interpreted as laying down such a requirement.
89. Another reason why one has to take a flexible approach with where the reasons are to be found is that in a case like the present one, the relevant decision is one that was made by a collective political assembly on the basis of a yes-or-no vote. That is not a procedure that lends itself to an over-formal imposition of a requirement to include certain wording in a specific motion, and hand out *certiorari* if not, if for no other reason that there isn't a motion in that situation. It is sufficient if reasons can be clearly understood from the overall procedure and circumstances.
90. Imposing an obligation to set out reasons on the face of a resolution or a document referred to in the resolution is that it would create an unacceptable anomaly in the law. Indeed, it would be illogical to allow a lower scope to enable reasons to be gathered from the context in the case of an administrative decision made at leisure by a decision-maker sitting behind a desk with time enough to compose the most elaborate formulations as to reasons, but would sternly demand a much more elaborate requirement for reasons being expressly signposted

on the face of a decision in a context such as a collective political decision-making process in the pressurised situation of a decisive and possibly late-night council meeting where amendments can be raised from the floor without notice, and where the whole context is one that makes any such academic, formalistic, legalistic hoop-jumping particularly difficult if not technically impossible. As in many contexts one must look at substance rather than form.

91. A further problem with an unduly literal interpretation of the comment in *Christian* is that such a reading presupposes a rather simplistic and even uninformed understanding of the decision-making process of an elected council. It assumes that all decisions are made by the passing of a motion which is capable of containing wording setting out reasons or specifying where reasons can be found. That unfortunately would be a major oversimplification and a misunderstanding of the actual process. As we shall see shortly in more detail, many local authority decisions are taken in a chain of related steps, some of which may involve formal motions, but some of which may simply be a yes-or-no vote to reject or accept a Chief Executive's recommendation, where there is no motion as such on the floor of the chamber.
92. Insofar as the vote on MA08 is concerned, that was a purely negative decision to reject the Chief Executive's recommendation to reverse the effect of among other changes motion No. 112 as amended. A negative vote to reject a recommendation by its very nature is not one to which reasons can be procedurally added because it is not a vote on a motion. It seems to me clearly inappropriate, having regard to the separation of powers if nothing else, for the courts to impose some sort of rigid and simplistic model of decision-making on elected councils. Councils quite legitimately have developed and sophisticated procedures of their own which involve in many cases situations that fall well outside the rudimentary model of the reasoned resolution.
93. Thus, in the case of a vote to reject a Chief Executive's proposal it is not possible for such a vote to adopt reasons. Therefore, the reasons must be found somewhere else. There is rich English authority on this subject, summarised in characteristically invaluable fashion in Fordham J.'s *Judicial Review Handbook*, 7th ed. (Oxford, Hart, 2020), p. 824. Some of that predated, but is not referenced in, *Christian*. Essentially it comes down to the proposition that the court can and primarily should look at the official records such as the minutes of a collective decision-making body as the first recourse in the quest for reasons: see *R. (Lanner Parish Council) v. Cornwall Council* [2013] EWCA Civ 1290 (at para. 64), *R. (Patel) v. Dacorum Borough Council* [2019] EWHC 2992 (Admin) (at para. 96), *R. v. Carrick District Council, ex parte Shelley* [1996] Env LR 273 at 283, *R. (Young) v. Oxford City Council* [2002] EWCA Civ 990 (at para. 20), *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 at 192.
94. Insofar as Clarke J. in *Christian* seemed somewhat sceptical about looking at the comments of members, that is expressly qualified by saying that that is "on the facts of this case" (p. 544). I prefer to read that as meaning that the minutes in that particular case did not in fact add to the reasons, rather than as a statement that one cannot look at all the context including minutes or the statements of the moving councillor if appropriate to determine the reasons.

As noted above there is detailed English authority allowing recourse to minutes, and no authority was cited under this heading in *Christian*. In fact, in other Irish caselaw since it is clear that recourse to the minutes has been accepted, for example *McCarthy Meats* where Heslin J. did look at the minutes (at para. 51), *Farrell v. Limerick County Council* [2009] IEHC 274 (Unreported, High Court, 17th June, 2009), where McGovern J. did examine the minutes (at para. 20). It is true that McGovern J. went on to say (at para. 28) that reasons had to be in the resolution itself, but again no authority was cited for that and the law has been clarified in the meantime as set out above. Blayney J. had regard to council minutes in *Flanagan v. Galway City and County Manager* [1990] 2 I.R. 66 and *Griffin v. Galway City and County Manager* [1990] 10 JIC 3102, (1991) WJSC-HC 626 (Unreported, High Court, 31st October, 1990), two decisions relied on by the applicant for what it is worth (submissions at para. 114).

95. Broadly the principle is that courts should not look at individual councillor's opinions if they contradict the official record. But the court can and should look at the official record such as the minutes and can look at other documents if the minutes do not state reasons, or if the minutes expressly or by implication direct the reader to other documents.
96. Specifically relevant in the local government context is the fact that the official minutes are formally adopted by resolution of the council itself. So they amount to a resolution anyway.
97. If the minutes do not clarify the reasons for the proposal a court is not in any way precluded from seeking to establish whether those reasons are available from the context otherwise. In the light of a broader view of the authorities, I don't think there is any basis to posit a rule out of jurisprudential thin air that the reasons must be specified in the resolution itself or in documents specified in that resolution. That is unworkable anyway because often there is no resolution as such. Planning law should not be some sort of peculiar and unexplained exception to the general law, and the general law is clear that reasons can be ascertained from the context or the background documentation generally rather than any specific document.
98. Finally, as acknowledged by Birmingham J. in *Sweetman v. An Bord Pleanála* [2009] IEHC 599, [2009] 10 JIC 0908 (Unreported, High Court, 9th October, 2009) at para. 104:

"The reasons for the decision must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. Therefore, a challenge based upon the reasons of the Board will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision."
99. To summarise therefore:
 - (i). The general principle is that reasons are required for decisions addressed to individuals, not for instruments of general application.

- (ii). The requirement for reasons applies to a decision to rezone an individual piece of land, even if that is contained in an instrument of general application like a development plan.
- (iii). Where a reasoned Chief Executive's report is accepted by members, that inherently involves an acceptance of the reasons stated therein, so no further reasons are necessary.
- (iv). Where members vote to keep the wording of an existing plan, even if contrary to a Chief Executive's report, no reasons are normally required, on the basis that the members can be taken to be still persuaded by the reasons already applicable in the context of the previous plan.
- (v). That is an illustration of a broader principle that a decision-maker doesn't need to give reasons for not changing her mind from an already-articulated position, or for not making an exception to a clear policy for which reasons have been previously articulated, unless there is a significant change in circumstances or the unusual case of a new point being made of such significance that it needs to be expressly addressed.
- (vi). Where members vote to change an existing development plan contrary to a reasoned recommendation of a Chief Executive, then if that constitutes a decision addressed to individuals (such as in relation to a change in the zoning of a particular piece of land), reasons are required.
- (vii). A sequential approach is not and cannot be mechanical. The principle of proper planning and sustainable development is overarching, so there may well be objective reasons for not marching rigidly outwards from a settlement centre in particular cases. A departure from a sequential approach does not require any extra layer of reasons beyond that which applies anyway.
- (viii). The principle of planning developments on a sequential basis does not require the council to indicate precisely whether or when any particular piece of land will be up-zoned for housing or other development. There is no obligation to change any zoning or give any particular comfort to any particular landowner, as long as an overall sequential approach is being followed, absent objective reasons to the contrary.
- (ix). The extent of reasons required is a requirement to give the main reasons for the main issues.
- (x). The extent of reasons depends on the context.
- (xi). This implies that there is no need to give express reasons for the obvious.

- (xii). There is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings.
- (xiii). Lack of narrative discussion does not equate to failure to have regard to something. There is no obligation to engage with a participant's points in a discursive, hand-to-hand combat manner, as distinct from the obligation to give reasons.
- (xiv). Expressions like consider, take into account and have regard to all mean the same thing.
- (xv). In principle that meaning is the same whether it is the State that is having regard to something, or that is seeking to have regard had by someone else to its views. The latter context does not impose a different or more exacting meaning on the term "have regard to".
- (xvi). Having regard implies looking at the matter concerned, and factoring in its relevance, if any, and weight, if any, as those matters appear to the decision-maker.
- (xvii). Hence if the decision-maker fails to even look at the documents or matters to which it is to have regard, or if the evidence doesn't demonstrate that it has done so, then a ground for *certiorari* arises.
- (xviii). If the decision states that regard was had to something, then the onus is on the party challenging that to prove otherwise by evidence.
- (xix). Like the exercise of any public law duty, the process of having regard has to be carried out *bona fide* and in accordance with the statutory purpose and with all other administrative law duties. But those requirements are independent of, and not created by, the requirement to have regard.
- (xx). Once the decision-maker has looked at the matter, its determination as to relevance if any is subject to review for legality, and its determination as to weight if any is normally subject to review for unreasonableness only. The weight to be attached to a particular piece of material is peculiarly one for the decision-maker.
- (xxi). There is no necessary obligation for the consideration to be lengthy or ponderous. Immediate rejection of a patently incomprehensible, irrelevant or erroneous matter is not a failure to have regard. It is decision-making in action – the decision-maker has looked at everything and is trying to sort the wheat (if any) from the chaff. This reflects the point that the degree of weight and consideration to be given to something depends in significant measure on that something, not on some completely dry, academic and disembodied conceptualisation of elaborate legal process in the abstract.

- (xxii). The use of mandatory, strident, peremptory or any other sort of language in a document to which regard is being had doesn't elevate the duty to have regard to the document into any sort of enhanced level or require additional reasons. If any possible enhanced duty exists in a particular situation, it has to come externally from the document itself, such as from the statute or the legal context, and can't be created out of whole cloth by the entity seeking to have regard had to its views.
- (xxiii). The duty to have regard to something doesn't automatically create a duty to give reasons for not giving that matter more weight. That follows from the entitlement of the decision-maker to assess the weight to be given to the various matters which it is considering. An enhanced duty may be created expressly, as in s. 28(1B)(b) of the 2000 Act, or impliedly by virtue of the particular legal context (such as where the nature of the process is that a detailed discussion is carried out at a sub-level, such as by an inspector, so that when a more summary operative decision is being made, such as by the board, there would be a gap in reasoning if the board didn't give express and adequate reasons for disagreeing with the inspector, or where providing reasons is required under the principle of giving the main reasons for the main issues).
- (xxiv). However, if the provision concerned (external to the document being considered) uses an intensifier such as to have "due" regard to something (*e.g.*, Article 16.2.4° of the Constitution), or "appropriate and reasonable regard" (as in the relevant SPPR in the Building Heights Guidelines) then that generally connotes an additional degree of weight to be given to the matter to which regard is to be had, with a general enhancement of the level of reasons that have to be given for not affording such weight. Intensifiers can't simply be read into the statute by sleight of hand. They significantly change the meaning of the concept.
- (xxv). It is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker.
- (xxvi). There is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision.
- (xxvii). Reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved and should not be read in isolation.
- (xxviii). Where reasons are required for a decision, there is no obligation to state reasons in the decision itself, either expressly or by reference to documentation that is expressly referred to. Nor is there an obligation to set out the reasons in a single document if they can be found in some other identified document. Even if no

document is identified, reasons can be gathered from other documents which are not expressly referred to or from the overall context and circumstances.

- (xxix). This also applies to the provision of reasons for decisions by elected members in the development plan context. The court is not artificially confined to seeking reasons on the face of the members' decision or any document referred to in it, but can identify reasons from other documents or from the overall context and circumstances in accordance with principles applying to reasons in public law decision-making generally. There is no rule of law that the reasons for a decision by the elected members can only be found in the resolution by which the decision is made or in a document expressly referred to in that resolution.
- (xxx). In the context of decisions by a collective political decision-making body, including decisions by councils on development plan, the minutes as adopted by that body should be the first recourse in the quest for reasons.
- (xxxii). Courts should not normally look at individual councillor's opinions if they contradict the official record. But the court can look at other documents if the minutes do not state reasons or more particularly if the minutes expressly or by implication direct the reader to other documents.
- (xxxiii). If a participant in the process is aware of the reasons anyway and is not handicapped by a lack of an express statement of reasons then *certiorari* is not generally appropriate.

Application of the law to the facts

- 100. An important contextual point is that 2,452 submissions were made on the development plan. Any practical and realistic assessment of the level of reasons required has to have some regard to that context.
- 101. On the facts of the present case, it is clear that the council was in principle entitled to down-zone the applicant's lands by changing the zoning from A2 to G1. It is also clear that the applicant cannot use the proceedings to launch a merits-based attack on that decision. And it is equally clear that the formal statutory obligation of the council, which was to consider MA08 and the Chief Executive's report under s. 12(8) of the 2000 Act within six weeks after the submission of that report pursuant to s. 12(9) and (10), was complied with.
- 102. The crucial point here touched on in the previous discussion is that there is a clear sequence connecting the various documents and motions here. Unlike the simplistic model of a council passing a motion which is valid if it contains or signposts reasons and invalid if it does not, there is in fact a complex choreography of different steps all of which have to be read together. I go back to the point that reasons must be judged from the standpoint of a reasonably intelligent person who is apprised of everything relevant and who examines the reasons in their context. A summary of the critical motions is as follows:

Submission, Motion or Material Amendment (MA)	Proposer	Date	When Decided/ Date of Adoption	What was it/Stage in Statutory Process	Outcome	Date Minutes Adopted
Motion 303	Cllr Alan Tobin	29/09/19	Special Planning Meeting date: 12/11/19	Pre-publication of draft plan - To change the zoning of applicant's lands from A2 New Residential to F1 Open Space	Chief Executive recommendation of no change was accepted at the meeting on 12/11/19 and Draft Plan went on display December 2019 with land zoned A2 New Residential	To be clarified
Submission MH-C5-834	Cllr Alan Tobin	6/3/20	Special Planning Meeting date: Considered by members on 21/01/2021	Public Consultation Period on Draft Plan - To dezone an area of 3 acres adjacent to Killigland graveyard and create a designated open green space (applicant's lands).	Submission superseded by Notice of Motion 112 on 21/01/2021	12/04/2021
Motion 111	Joint motion from Councillors Tobin, Tormey, Jamal, Smith and O'Neill	4/10/20	Special Planning Meeting date: Considered by members on 21/01/2021	Notice of Motions (NOMs) on CE Report on submission received to draft plan - To zone	Motion adopted on 21/01/2021	12/04/2021

	NOM 111 also references MH-C5-411 & Group Submission-Ashbourne Public Park			attached lands (33 hectares) to F1 Open space, with a view to create a public park,		
Motion 112	Joint motion from Councillors Tobin, Tormey, Jamal, Smith and O'Neill	4/10/20	Special Planning Meeting date: Considered by members on 21/01/2021	NOMs on CE Report on submission received to draft plan - To rezone this 3 acre site (applicant's lands), that has a protected structure, the Killlegland graveyard, from residential A2 to F1 open greenspace .	Superseded by NOM 112 amendment	12/04/2021
Motion 112 amendment	Amended from the floor	21/01/21	Special Planning Meeting 21st January, 2021 (page 84) Special Planning Meeting date: Considered by members	NOMs on CE Report on submission received to draft plan - To rezone this 3 acre site (applicant's lands), that has a protected structure, the Killlegland	Motion adopted on 21/01/2022	12/04/2021

			on 21/01/2022	graveyard, from residential A2 to G1 Community Infrastructure (linked to 114)		
Motion 114	Joint motion from Councillors Tobin, Tormey, Jamal, Smith and O'Neill	4/10/20	Special Planning Meeting date: Considered by members on 21/01/2021	NOMs on CE Report on submission received to draft plan - Serviced lands to the west end of the current Churchfields development are zoned A2 (Giltinane lands) (linked to 112 amendment)	Motion adopted on 21/01/2022	12/04/2021
Material amendment No. 08	NOM 112 & 114 Cllrs Tobin, Tormey, Jamal Smith and O'Neill Grouped Themed Submission No. 5 Lands adjacent to Churchfield	N/A	CE Report on Material Amendments August 2021 (Page 25) Special Planning Meeting date: 20th/21st September 2021	To amend the zoning of applicant's lands from A2 New Residential to G1 Community Infrastructure (lands to the east of Churchfields) (Applicant's lands) and to amend the zoning of Giltinane lands	Members voted to adopt MA 08. Subsequently Minister Direction removed A2 zoning to Giltinane lands.	04/10/21

				adjacent to the motorway from R/A Rural Area to A2 New Residential.		
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103. It would be unrealistic and inappropriate to try to judge the reasons for the ultimate decision in the absence of a holistic overview of all the various critical steps involved.
104. One initial point is that, in the discussion of the issue by the council, there was some overlap in the views of councillors as between the relationship between down-zoning the applicant's lands and up-zoning the notice parties' lands. Insofar as the applicant complains about the legality of that in a context where the up-zoning did not proceed, that argument completely ignores the element of *force majeure* that entered the position. The OPR and Minister's intervention was a subsequent development outside of the control of the council that reversed one element of the development plan relevant to the present discussion, but that did not nullify the rest of the council's decision or render it invalid simply because one of the factors considered had been subsequently frustrated. A decision cannot be invalid because councillors lacked some kind of "inspired legal clairvoyance" (*per* O'Donnell J. in *The People (Director of Public Prosecutions) v. J.C.* [2015] IESC 31, [2017] 1 I.R. 417), that at some later date the Minister would issue a s. 31 direction. Reasons do not become invalid because something happens later unless that something is in the nature of a retrospective judicial invalidation of a basis of the reasons, such as the fact that a decision was made having regard to a previous decision which was later quashed. However, we are not in that space here. The s. 31 direction was a prospective change, not a retrospective invalidation, still less a judicial intervention.
105. In any event, the rationale for the change to the notice parties' lands was quite different to that for the change to the applicant's lands. The rezoning of the notice parties' lands was to provide approximately seven acres of additional residentially zoned land, whereas the down-zoning of the applicant's land was to provide 0.84 hectares of community infrastructure, in particular an appropriately designed entrance to a proposed linear park along the Broadmeadow River, which when completed would be a quality recreational amenity for local residents. The entrance would also facilitate car parking and other community-related facilities. Thus, the change to the applicant's lands represented a distinct proposal quite separate from the notice parties' lands. The rationale for the down-zoning can stand independently anyway.
106. The reasoning for the change can be ascertained by working backwards from the decision on MA08. In the Chief Executive's report on material amendments, vol. 2, p. 25, she defines what MA08 is and expressly refers back to notice of motion 112 group theme submission no.

5, lands adjacent to Churchfield, and motion 114, as well as a submission by Armstrong Fenton Ltd. on behalf of the notice parties, ref: MH-C5-341. The document goes on to refer to submissions on the material amendments MH-C52-125 by Armstrong Fenton and MH-C52-274 by Ashcroft Developments objecting to the impugned down-zoning. MA08 was nothing more or less than a compilation of the amendments passed by the councillors previously. The Chief Executive's report signposts that expressly. The relevant one for present purposes is motion 112 as amended. The text of motion 112 as submitted has been exhibited in a document that states as follows:

"MOTION 112

From: Cllr Alan Tobin (MCC Ashbourne MD)

Sent: 04 October 2020 00:57

To: Notices of Motion Draft MCDP 2021-2027

Subject: Joint Motion No.2 from Cllrs Tobin, Tormey, Jamal, Smith and O'Neill - Fwd: I am sharing 'Motion 2' with you

Joint motion no.2 from Cllrs Tobin, Tormey, Jamal, Smith and O'Neill Councillor Alan Tobin

Ashbourne Municipal District - Meath Co Peace Commissioner

Member of Fine Gael Political Party Elected Representative 2019-2024 Director Ashbourne Auto Clinic Ltd Managing Director CPC Ireland

Director Irish Men's Shed Association CLG Director County Meath Chamber CLG Director Ashbourne Youth Cafe

Motion 2 Killegland Graveyard and adjoining 3 acres

Joint Motion from Ashbourne Municipal District Councillors Alan Tobin, Conor Tormey, Suzanne Jamal, Aisling O'Neill and Amanda Smith.

To rezone this 3 acre site, that has a protected structure, the Killegland graveyard, from residential A2 to F1 open greenspace .

The Killegland park zoning of 33 hectares plus the dezoning of this small 3 acres site are critical to the development of a park in the area. The vision here is to use a one way system for vehicular traffic to a designated entrance into the adjoining 33 hectare site (see previous joint motion). A small lane already exits up to the entrance to the graveyard, this would lead in to a proposed designated car park, cycle park and pedestrian walkway into the Killegland Park. It would also provide parking for people visiting the graveyard. (An original proposal that was never followed through when lands were left to St Finian's Trust by a Mr. Ned Nulty, now deceased).

Exiting the area would be through the main thoroughfare in Churchfields, allowing for the retention of the native hedgerows and also ensuring that no residents are inconvenienced with additional vehicular traffic near existing housing units in Churchfields.

In this 3 acres area, a small maintenance area, designated charge points, information boards and an outdoor educational facility could be provided for, so the nearby schools could use it for outdoor class activities and learning. In this new Covid reality, outdoor educational space will be most welcomed.

Residents in nearby Bourne View, West View and Churchfields have already expressed concerns over the sites current residential zoning. (See attached information) The Chief Executives recommendation on previous motion no. 303, does not take into account the new recommendation to zone what are known locally as Hoste's lands, on the r135 south of Ashbourne, the original preferred site of the park which will now be Strategic Industrial zoning.

The site has pedestrian and cycling linkages to the greenspace in Garden City and Crestwood and also is in very close proximity to Linear Park zone 4 (newly refurbished playground area) and the proposed Linear park zone 3 (promised as far back at 2003 and still off limits to the people of Ashbourne).

If this opportunity is not grasped now, we as a group feel that an integral properly landscaped and designed park could never become a reality as the space offers an exceptional opportunity for the town that will make Ashbourne a very attractive place to live, raise a family and generate new business in.

The residential zoning we would like moved to a site to the west of Churchfields that was part of the original land holding for that development. As per recommendations, we are told that we cannot zone additional land but we can move residential lands to different locations. (See joint motion 4)

In the attached photo, the proposed zoning change is in green area with linkages to nearby greenspace amenities, the blue arrows."

107. At the end of that document a photograph was inserted and a separate document was attached which does not seem to be part of the formal motion and reads as follows:

"Submission for residents in Churchfields – Bourne View – Westview – and surrounding area

As residents know the green area between the old Killegland graveyard and Churchfields/Bourne View, an area totalling 3 acres has been zoned residential for a number of years. Recent surveys in the area have alerted residents to the fact that plans for a possible 30 dwellings could be in the pipeline.

The land was left by Ned Nulty back in the late 80's for an extension to the graveyard or parochial house. Neither of which happened and the green area is now used by walkers, dog owners and young children in the area.

A number of months ago, a large number of concerned residents met to see if a group could be set up to try to get the area rezoned for open greenspace. The area is not suitable for housing as it the only access to the site is through a cul de sac in Churchfields. Open greenspace would be of benefit to all as access to the area wouldn't be restricted if appropriate agreements could be made with the current owners, St. Finian's Diocesan Trust.

Here are the current legitimate reasons why the area isn't suitable for housing

- 1) Visual impact
- 2) Environmental impact – loss of meadow and native hedgerow habitat
- 3) Detrimental to small bird life that comes to our gardens
- 4) Possible housing use, some developments sold to housing agencies, min. 10% social housing anyway
- 5) Loss of recreational space in Churchfields
- 6) Loss of current amenity
- 7) Boundary line problems
- 8) Extra traffic coming into estate and up current cul de sac
- 9) Shadowing on house in the mornings and evening (morning shade in Churchfields and evening shade in Bourne view)
- 10) Graveyard is a protected structure and buffer zone around it needs to be properly protected
- 11) Light pollution at night
- 12) Noisy neighbours
- 13) A lot of Garden City residents now elderly and vulnerable
- 14) New housing design allows for attic conversions that will over look all areas , also elevation of site is a concern
- 15) Bourne View on lower level, fear of flood risk
- 16) Rights of way into back gardens (Bourne View)

- 17) Future Analytics report stated that Ashbourne community has a deficit of 40 acres.
- 18) new creche in Churchfield being built on large greenspace”.
108. Assuming that the clock on the sender’s computer was set correctly, it’s hard not to notice in passing, for the benefit of any unfortunate uninformed persons who question the work-rate of elected representatives, that Cllr Tobin was at work on this motion coming up to 1 am on the night in question.
109. As regards the wording of that late-night missive, it should be noted that insofar as any non-planning considerations were advanced in support of the motion, these were withdrawn at the meeting and that is reflected in the minutes, which as noted above is the official record of the proceedings adopted by the resolution.
110. Returning then to the Chief Executive’s report, that refers expressly to the previous motion 303 on the draft plan and the previous submission MH-C5-834. The response of the Chief Executive thus refers expressly to Cllr Tobin’s submission MH-C5-834, illustrating the point that the whole decision-making process involved a related and identified chain of documentation rather than some kind of simplistic one-off resolution with a stated reason. That submission stated as follows in relation to the proposal:

“Dezoning & Zoning Killegland Ashbourne

- a) Proposal to dezone an area of 3 acres adjacent to Killegland graveyard and create a designated open space between Garden City (Bourne View) and Churchfields. There are a number of reasons for this. The green area is used by walkers, dog owners and young children in the area. A number of months ago, a large number of concerned residents met to see if a group could be set up to try and get the area rezoned for open green space. The area is not suitable for housing as it the only access to the site is through a cul de sac in Churchfields. Open greenspace would be of benefit to all as access to the area wouldn’t be restricted if appropriate agreements could be made with the current owners”.
111. In the case of the crucial January 2021 meeting which adopted motion No. 112, the council itself voted to adopt those minutes in April 2021. The minutes clearly specify that the rationale for the decision was outlined by the proposers, so one is indirectly directed to the transcript of the meeting which sets out the reasons in more detail. Notice of motion 112 was put down in the names of a number of councillors from the Ashbourne area. The minutes state as follows:

“NoM 112 – Councillors: Tobin, Tormey; Jamal, Smith and O’Neill

The Notice of Motion was proposed by Councillor Alan Tobin and seconded by Councillor Damien O’Reilly. The motion and its rationale was presented by Councillor Tobin with interventions from Councillors Nick Killian; Aisling O’Neill; Gillian Toole; and Elaine McGinty.

Questions were raised as to the ownership of the lands under consideration; the proposed re-zoning; and the legal implications of such a re-zoning.

In response, Mr Alan Russell stated that there was a linkage between NoM 112 and 114 and gave an overview of the sites under consideration. Furthermore, Mr Seán Clarke highlighted the impact of the vote on Group Submission No. 5 (which was deferred by the Council on November 23rd when considering the Group Submissions) and the Council's Law Agent responded on any potential legal implications. Councillor Tobin clarified that NoM 112 was being amended so that the re-zoning being sought is now from A2 to G1.

Following the intervention by Mr Russell and in accordance with the Ethical Framework for the Local Government Service, Councillor Conor Tormey declared a potential conflict of interest as his company has business dealings with the owners of the lands referenced in NoM 114. Councillor Tormey absented himself from the meeting and did not take any part in the discussions.

The Chief Executive's recommendation on the amended NoM was for no change and a roll call vote on this recommendation was conducted as follows".

112. There followed a roll-call vote whereby motion 112 as amended was passed.
113. In the light of the fact that the members did pass a resolution adopting these minutes and that the minutes specifically refer the reader to the reasons as outlined by the proposing member, it seems to me that that constitutes a more-than-sufficient articulation of where the reasons can be found. In fact, when we look at other background documents even going beyond that, they were all fairly consistent as to the rationale for the proposal.
114. The fundamental problem for the applicant is that the traditional core element of any requirement to give reasons, namely a sufficient amount of information to enable an assessment as to the lawfulness of the decision to be made or an assessment as to whether the decision should be challenged and to allow the court to assess the matter (although reasons also serve other purposes - see *RPS Consulting Engineers Ltd.*), was clearly satisfied on the particular facts here. The rationale for the down-zoning is clearly articulated in documents that are for good measure core parts of the record. The applicant and anybody else interested got the main reasons for the main issues and more. Even bearing in mind that the members were not following the Chief Executive, the reasons are clearly stated and cannot be in doubt. Similarly, the decision-maker is not obliged to respond to submissions on a point-by-point basis if the main reasons for the main issues are apparent.
115. It is not up to interested parties such as the applicant here to dictate the content of a decision or the format of the reasons. That is doubly so in the policy-heavy context of a political decision adopting a development plan. Nor is it the case that a decision-maker has to reiterate previously-articulated reasons just because a contrary submission is made subsequently. If the previous reasons deal with the essence of the main issues, then they do not need to be

reiterated just because a submission or a further submission is made thereafter, unless a significant new point emerges or there is a significant change of circumstances. Ultimately the whole argument being made is an attempt to detach the final decision of the elected members from its context and its clear procedural history including the notices of motion, submissions and debates that preceded the final decision. That is a technical and artificial exercise that is wholly without merit.

116. Finally, even if I am wrong that the council failed to give reasons it is entirely clear that the applicant fully understood what the reasons were as illustrated in the submission dated 29th June, 2021 made by Thornton O'Connor on behalf of the applicant. Paragraph 2.0 of the executive summary states that the "rationale for the rezoning is to facilitate the delivery of an access road and car park to an envisioned park on lands to the south". It is clear that the applicant was neither unaware of the reasons nor in any way handicapped from making a submission in that regard. Looking at it from another point of view, even if there was technical non-compliance with the duty to give reasons (which I don't accept), in the context of the discretionary remedy of *certiorari*, I do not think that could possibly be a basis for the grant of relief where the applicant was aware of the rationale for the decision, was not disadvantaged, and was not prevented or inhibited from making a submission addressing those reasons.
117. In a context like this the applicant's point comes down to a technical gotcha point. Yes, you may have had reasons and yes, they may be evident for the circumstances and yes, we may have known the reasons, and yes we made a submission in knowledge of and seeking to rebut those reasons, but you did not expressly specify them in the text of the resolution or in the text of a document expressly referred to in the resolution, so we claim *certiorari*. In my view that approach is meritless, illogical and inappropriate, and fails to respect the separation of powers. Indeed I reject the legal premise of that argument altogether as set out above, but even if I am wrong about that, it would be an imprudent and improvident exercise of the discretionary power to grant *certiorari* to give relief in such circumstances.
118. One thing that this case may possibly highlight is that it would be best practice if council management when preparing draft minutes of meetings were to endeavour to record the essence of the rationale for any decisions by elected members for disagreeing with reasoned recommendations of the Chief Executive. The adoption of minutes clearly stating such a rationale could help avoid arguments such as that here. Indeed, if I might be forgiven for suggesting this, it might be better if such a format for minutes was embodied under either an express legislative requirement or under an express provision of standing orders in any given council, but either way it seems a desirable practice in order to avoid the court having to look through other material in order to identify the rationale in any given case. That does put an onus on officialdom to fairly represent a view that it disagrees with, but that is an onus that officialdom is well able to meet and that it met here.

Core ground 2 - alleged inconsistency with national and regional plans

119. Core ground 2 provides as follows:

“The Respondent’s decision to include the alterations proposed in MA08 in the Meath County Development Plan 2021–2027 is unlawful on the basis that it is not consistent with the National Planning Framework and the Regional Spatial and Economic Strategy for the Eastern and Midland Regional Assembly Area, specifically objective NPO 3c of the National Planning Framework and objective RPO 3.2 of the Regional Spatial and Economic Strategy, in breach of sections 10(1A), 12(10) and 12(18) of the 2000 Act.”

Law in relation to consistency with National Planning Framework and regional plans

120. Before coming to the various planning policy documents, I think it is important to assay some form of definition of the central concepts, the sequential approach, the tiered approach and the phased approach:

- (i). The sequential approach is in broad summary the planning policy that the provision of new development of settlements should generally prioritise the in-fill of more central areas and work out to develop sites at the periphery ahead of more distant sites, subject to objective planning considerations to the contrary.
- (ii). The tiered approach is in effect a sub-set of that approach, which is to the effect that in relation to new residential and economic-related developments on lands zoned for that purpose, an infrastructure assessment should be conducted to distinguish between lands where the necessary services are in place (“serviced lands”) and those where further infrastructural work is required (“serviceable lands”).
- (iii). The phased approach is an approach whereby land would be zoned for residential or economic purposes in a given development plan but with differing commencement dates for that zoning. Thus, certain lands would enjoy zoned status immediately, whereas other lands would only benefit from that zoning later. Since the tiered approach only applies to lands zoned for residential and economic activity, and insofar a futuristic zoning that doesn’t permit such development in the here and now, this is best considered as a sub-set of the sequential approach rather than of the tiered approach.

121. The sequential approach has been a factor at least since the Development Plan Guidelines 2007. The tiered approach was specifically introduced at national level in the National Planning Framework 2018, which is a policy document published by the Department of Housing, Planning and Local Government in February 2018. The phased approach arose in the regional guidelines that apply here, adopted in 2019.

122. Chapter IIA of the 2000 Act, as inserted by section 18 of the Planning and Development (Amendment) Act 2018, places the NPF on a statutory footing.

123. The sequential approach was discussed by the Court of Appeal in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603

(Unreported, Court of Appeal, Costello J. (Haughton and Murray JJ. concurring), 26th November, 2021), at para. 22.

124. In the High Court decision in that case, *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225, [2020] 4 JIC 2405 (Unreported, High Court, 24th April, 2020), Barr J. noted at para. 5 that “The NPF is a high level policy document. It is a macro spatial strategy which maps out general development goals for the country for the period up to 2040.” Among the objectives identified was that “urban development will wherever possible be on infill and brownfield sites within the envelope of existing built-up areas” (para. 6). He went on to note that “The NPF also contains a number of National Policy Objectives, which are designed to guide the regional assemblies when drawing up the Regional Spatial and Economic Strategies and the local authorities when drawing up the relevant City and County Development Plans. These are general objectives which have to be adhered to by the lower tier planning authorities when drawing up their plans” (para. 8).

125. The overall effect is of a hierarchy of policy development whereby any given local authority is not completely at large in terms of housing provision for example, but must fit within the envelope of national strategy and then the more specific envelope of regional strategy. Thus, a development plan must also provide some justification for the amount of land zoned for residential use within the core strategy of the plan.

126. Section 10(1) and (1A) of the 2000 Act provide as follows:

“(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question.

(1A) The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements specified in guidelines under subsection (1) of section 28.”

127. McDonald J. commented on this in *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, 2nd December, 2020), at para. 39:

“The importance of a core strategy of this nature is reinforced by the provisions of s. 10(1A) of the 2000 Act which is clearly designed to ensure that the development objectives in a development plan are consistent, as far as practicable, with national and regional development objectives.”

128. Subsection (2A) goes on to state that:

“(2A) Without prejudice to the generality of subsection (1A) , a core strategy shall —

(a) provide relevant information to show that the development plan and the housing strategy are consistent with the National Planning Framework and the regional spatial and economic strategy and with the specific planning policy requirements specified in guidelines under subsection (1) of section 28,

(b) take account of any policies of the Minister in relation to national and regional population targets,

(c) in respect of the area in the development plan already zoned for residential use or a mixture of residential and other uses, provide details of —

(i) the size of the area in hectares, and

(ii) the proposed number of housing units to be included in the area,

(d) in respect of the area in the development plan proposed to be zoned for residential use or a mixture of residential and other uses, provide details of —

(i) the size of the area in hectares,

(ii) how the zoning proposals accord with national policy that development of land shall take place on a phased basis,

(e) provide relevant information to show that, in setting out objectives regarding retail development contained in the development plan, the planning authority has had regard to any guidelines that relate to retail development issued by the Minister under section 28,

(f) in respect of the area of the development plan of a county council, set out a settlement hierarchy and provide details of —

(i) whether a city or town referred to in the hierarchy is designated as a gateway or hub for the purposes of the National Planning Framework,

(ii) other towns referred to in the hierarchy,

(iii) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to towns and cities referred to in the hierarchy,

(iv) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to the areas or classes of areas not included in the hierarchy,

(v) projected population growth of cities and towns in the hierarchy,

(vi) aggregate projected population, other than population referred to in subparagraph (v), in —

(I) villages and smaller towns with a population of under 1,500 persons, and

(II) open countryside outside of villages and towns,

(vii) relevant roads that have been classified as national primary or secondary roads under section 10 of the Roads Act 1993 and relevant regional and local roads within the meaning of section 2 of that Act,

(viii) relevant inter-urban and commuter rail routes, and

(ix) where appropriate, rural areas in respect of which planning guidelines relating to sustainable rural housing issued by the Minister under section 28 apply,

(g) in respect of the development plan of a city, provide details of —

(i) the city centre concerned,

(ii) the areas designated for significant development during the period of the development plan, particularly areas for which it is intended to prepare a local area plan,

(iii) the availability of public transport within the catchment of residential or commercial development, and

(iv) retail centres in that city,

(h) in respect of the area of the development plan of a city and county council set out a settlement hierarchy and provide details of matters referred to in paragraph (f) and (g)."

129. Section 10(2A)(f)(v) and (vi) mandate the inclusion of projected population provision in any given settlement within the core strategy. This implies that this must inform the housing provision afforded by the plan in respect of that settlement, and that the overall provision within the functional area concerned must form a coherent whole. While the housing provision in a given core strategy can't be exceeded, s. 10(2A) implies that the provision in a core strategy should bear a reasonable relationship to (even if is not exactly mathematically the same as) the population projection in any given settlement, allowing for a certain and presumably modest level of friction in delivery. Otherwise, if there is a minimum but no maximum, a council could rezone massively more land for housing than was need, leading to a free-for-all that would be a negation of plan-led development.
130. Simons J. considered s. 10(2A) in the context of the requirement for a settlement hierarchy in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 450, [2019] 6 JIC 2103 (Unreported, High Court, 21st June, 2019). That case illustrates the requirement under national, regional and county or city policy for a careful ascertainment of the housing

capacity and a careful and logical allocation of that capacity to the different levels of settlement, as well as showing the pitfalls of exceeding such allocations. A permission that had that effect gave rise to a material contravention of the development plan in that case.

131. Section 11 provides in relevant part:

“(1)(b) For the purpose of enabling the incorporation of the National Planning Framework and a regional spatial and economic strategy into a development plan—

(i) where notice of a development plan review to be given in accordance with paragraph (a), (aa) or (ab) is prior to the making of the relevant regional spatial and economic strategy, then notice of the review shall be deferred until not later than 13 weeks after the relevant regional spatial and economic strategy has been made,

(ii) where a development plan review referred to in paragraph (a), (aa) or (ab) has commenced and a draft plan has not been submitted to the members of the planning authority concerned in accordance with subsection (5)(a) prior to the making of the relevant regional spatial and economic strategy, then the review process shall be suspended until not later than 13 weeks after the making of the relevant regional spatial and economic strategy,

(iii) where notice of a development plan review to be given in accordance with paragraph (a), (aa) or (ab) would, but for this subparagraph, be more than the period of 26 weeks after the making of the relevant regional spatial and economic strategy, then each planning authority concerned shall, within that period, either—

(I) give notice of a development plan variation in accordance with section 13, or

(II) give notice of a development plan review.

(1A) The review of the existing development plan and preparation of a new development plan under this section by the planning authority shall be strategic in nature for the purposes of developing —

(a) the objectives and policies to deliver an overall strategy for the proper planning and sustainable development of the area of the development plan, and

(b) the core strategy,

and shall take account of the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.”

132. One can note that “statutory obligations” are not defined for this purpose – only for the purposes of s. 12.

133. Section 12(11) provides that:

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

134. Subsection (18) of s. 12 provides that:

“(18) In this section ‘statutory obligations’ includes, in relation to a local authority, the obligation to ensure that the development plan is consistent with —

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

(i) the National Planning Framework, and

(ii) the regional spatial and economic strategy,

and

(b) specific planning policy requirements specified in guidelines under subsection (1) of section 28.”

135. We must now turn to the specific terms of the NPF and RSES.

136. As regards the NPF, National Policy Objective 3c arises in the context of Section 2.6 “Securing Compact and Sustainable Growth”. In that context, the NPF states (at p. 28, notes omitted):

“A preferred approach would be compact development that focuses on reusing previously developed, ‘brownfield’ land, building up infill sites, which may not have been built on before and either reusing or redeveloping existing sites and buildings. ...

In the long term, meeting Ireland’s development needs in housing, employment, services and amenities on mainly greenfield locations will cost at least twice that of a compact growth-based approach. Accordingly, subject to implementation of sustainable planning and environmental principles, the National Planning Framework sets the following urban development targets:...

National Policy Objective 3c

Deliver at least 30% of all new homes that are targeted in settlements other than the five Cities and their suburbs, within their existing built-up footprints.”

137. Footnote 19 to NPO 3c states:

“On the basis of National Policy Objective 2a, this effectively targets 15% of all new homes nationally. Individual or scheme homes delivered outside the CSO defined urban settlement boundary are classed as greenfield.”

138. Section 4.5 of the NPF is entitled, "Achieving Urban Infill/Brownfield Development" and states, *inter alia*:

"The National Planning Framework targets a significant proportion of future urban development on infill/brownfield development sites within the built footprint of existing urban areas. This is applicable to all scales of settlement, from the largest city, to the smallest village."

139. Page 95 of the NPF provides:

"Projecting housing requirements more accurately into the future at a Regional Spatial and Economic Strategy and local authority development plan level (e.g. through Core Strategies) will be enabled by the provision of new statutory guidelines to ensure consistency of approach, implementation and monitoring.

National Policy Objective 36

New statutory guidelines, supported by wider methodologies and data sources, will be put in place under Section 28 of the Planning and Development Act to improve the evidence base, effectiveness and consistency of the planning process for housing provision at regional, metropolitan and local authority levels. This will be supported by the provision of standardised requirements by regulation for the recording of planning and housing data by the local authorities in order to provide a consistent and robust evidence base for housing policy formulation."

140. The NPF crucially at p. 137 phrases this in partly aspirational terms. Some provisions, such as Appendix 3, are capable of being operated now, whereas other provisions could not be fully operable without future guidelines and methodologies that have never been put in place:

"A new, standardised methodology will be put in place for core strategies and will also address issues such as the differentiation between zoned land that is available for development and zoned land that requires significant further investment in services for infrastructure for development to be realised. This is set out in Appendix 3.

National Policy Objective 72a

Planning authorities will be required to apply a standardised, tiered approach to differentiate between i) zoned land that is serviced and ii) zoned land that is serviceable within the life of the plan.

National Policy Objective 72b

When considering zoning lands for development purposes that require investment in service infrastructure, planning authorities will make a reasonable estimate of the full cost of delivery of the specified services and prepare a report, detailing the estimated cost at draft and final plan stages.

National Policy Objective 72c

When considering zoning land for development purposes that cannot be serviced within the life of the relevant plan, such lands should not be zoned for development.

Prioritising Development Lands

There are many other planning considerations relevant to land zoning beyond the provision of basic enabling infrastructure including overall planned levels of growth, location, suitability for the type of development envisaged, availability of and proximity to amenities, schools, shops or employment, accessibility to transport services etc.

Weighing up all of these factors, together with the availability of infrastructure, will assist planning authorities in determining an order of priority to deliver planned growth and development. This will be supported by updated Statutory Guidelines that will be issued under section 28 of the Planning and Development Act 2000 (as amended).

National Policy Objective 73a

Guidance will be developed to enable planning authorities to apply an order of priority for development of land, taking account of proper planning and sustainable development, particularly in the case of adjoining interdependent landholdings.

National Policy Objective 73b

Planning authorities will use compulsory purchase powers to facilitate the delivery of enabling infrastructure to prioritised zoned lands, to accommodate planned growth.

National Policy Objective 73c

Planning authorities and infrastructure delivery agencies will focus on the timely delivery of enabling infrastructure to priority zoned lands in order to deliver planned growth and development.”

141. Where Objective 72a refers to a standardised methodology this means the methodology in Appendix 3. That is not therefore dependent on future guidance – the methodology is being provided now in the NPF and is thus immediately operable.
142. Appendix 3 of the NPF specifies the procedure for tiering of land and provides as follows:

“A Methodology for a Tiered Approach to Land Zoning

The National Planning Framework sets out a two-tier approach to land zoning as follows:

Tier 1: Serviced Zoned Land

This zoning comprises lands that are able to connect to existing development services, i.e. road and footpath access including public lighting, foul sewer drainage, surface water drainage and water supply, for which there is service capacity available, and can therefore accommodate new development. These lands will generally be positioned within the existing built-up footprint of a settlement or contiguous to existing developed lands. The location and geographical extent of such lands shall be determined by the planning authority at a settlement scale as an integral part of the plan-making process and shall include assessment

of available development services. Inclusion in Tier 1 will generally require the lands to be within the footprint of or spatially sequential within the identified settlement.

Tier 2: Serviceable Zoned Land

This zoning comprises lands that are not currently sufficiently serviced to support new development but have potential to become fully serviced within the life of the plan i.e. the lands are currently constrained due to the need to deliver some or all development services required to support new development, i.e. road or footpath access including lighting, foul sewer drainage, surface water drainage, water supply and/or additional service capacity. These lands may be positioned within the existing built-up footprint of a settlement, or contiguous to existing developed lands or to tier 1 zoned lands, where required to fulfil the spatially sequential approach to the location of the new development within the identified settlement. The potential for delivery of the required services and/or capacity to support new development must be identified and specific details provided by the planning authority at the time of publication of both the draft and final development or area plan. This infrastructural assessment must be aligned with the approved infrastructural investment programme(s) of the relevant delivery agency(ies), for example, Irish Water, or be based on a written commitment by the relevant delivery agency to provide the identified infrastructure within a specified timescale (i.e. within the lifetime of the plan). The planning authority may also commit to the delivery of the required and identified infrastructure in its own infrastructural investment programme (i.e. Budgeted Capital Programme) in order to support certain lands for zoning. The written infrastructural assessment of the planning authority must:

a) include a reasonable estimate of the full cost of delivery of the required infrastructure to the identified zoned lands;

b) Set out (a) above at both the draft plan and final plan stages of the plan making process.

Current development or area plans may include zoned lands that cannot be serviced during the life of a development or area plan by reference to the infrastructural assessment of the planning authority. This means that they cannot be categorised as either Tier 1 lands or Tier 2 lands per the above and therefore are not developable within the plan period. Such lands should not be zoned for development or included within a development plan core strategy for calculation purposes. Further guidance will be provided in updated Statutory Guidelines that will be issued under s.28 of the Planning & Development Act, 2000 (as amended)."

143. One notable and possibly strange feature of the NPF is that the crucial concept of the sequential approach is not in fact expressly included in any of the identified national policy objectives. Rather those objectives touch on the related but narrower concept of the tiered approach. All references to the sequential approach in the body of the NPF are in text, not in objectives. The sequential approach comes in *via* the terms of Appendix 3, compliance with which is an objective, but that only applies to zoned lands as discussed further below.

144. As regards the applicant's claim of non-compliance, there is firstly the question of whether the compliance must be with the totality of the documents in every jot and tittle, or whether the requirement is to comply with the "objectives" of the documents. The term "objective" in the context of a planning document is a term of art, not to be equated with some vague spirit of the document, but a specified principle, identified and expressly described as an objective in each case.
145. It's true that in *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* (under appeal), I did refer to section 10(1A) as providing mandatory criteria where consistency is required, but the particular refinement that arises here wasn't a feature of that case so it wasn't necessary to spell out that the obligation is only to comply with objectives as opposed to other provisions.
146. There is some different emphasis in the legislation between references to compliance with relevant policies and compliance with the objectives of those policies. Where the legislation is at its most mandatory and clear – section 10(1A) and s. 11(8) - it is limited to compliance with the objectives. Where the legislation refers to compliance *simpliciter* this is in a procedural context (s. 11(1)(b)), or by reference to the "provision of information" (s. 10(2A)), not an outright requirement to comply in every jot and tittle.
147. On such a reading, there is no real ambiguity here. On that overall reading, the only clear obligation on councils is to comply with the objectives of the policies. That mirrors the comparable architecture of s. 28 also where a council only has to comply with SPPRs (*Spencer Place Development Company Limited v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0202 (Unreported, Court of Appeal, Collins J. (Costello and Donnelly JJ. concurring), 2nd October, 2020), at para. 22), not with every word in guidelines.
148. If I am wrong and if there is an ambiguity, I think there must be at least a mild presumption in favour of the autonomy of local authorities, both in terms of the overall constitutional (with a small c) principle of local autonomy and subsidiarity, and in the specific light of Article 28A of the Constitution.
149. The fundamental principle is that constitutional architecture lends itself to autonomy of local authorities, so if central government propose to interfere, the entitlement to do so has to be at least tolerably clear. If legislation is ambiguous, there should be a mild presumption in favour of local authority autonomy, all other things being equal. Here, to the extent if any that the legislation is somewhat contradictory (and I don't think it is), I prefer to construe it as only requiring compliance with objectives.
150. That in fact makes much more sense because largely the objectives are phrased in fairly general terms. If the intention had been that every jot and tittle of the NPF and RSES documents was to be binding, it wouldn't make sense for there to be only general objectives or indeed for there to be objectives at all. Whereas if only the objectives are binding, it would make much more sense for those to be both specifically identified, and phrased in general

terms, leaving some zone of discretion in actual implementation, even if the rest of the NPF or RSES gives more detailed but non-binding guidance, to which a have-regard-to duty arises.

151. The applicant submits that the caselaw on material contravention doesn't distinguish between contravention of text of a development plan and the objectives of a development plan: see *Ballymac Designer Village Ltd. v. Louth County Council* [2002] IESC 59, [2002] 3 I.R. 247, *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, Simons J., 10th March, 2020), *Carman's Hall Community Interest Group v. Dublin City Council* [2017] IEHC 544, [2017] 10 JIC 1106 (Unreported, High Court, Binchy J., 11th October, 2017). But that's comparing apples and oranges. The issue is what is a council free to do, and in what way is it constrained. The issue of an individual decision contravening what the council decides to adopt is completely different and of course is not limited to the objectives of any given plan.
152. That is similar to the point made in *R. v. Secretary of State for the Environment, ex parte Norwich City Council* [1982] QB 808, [1982] 2 WLR 580 (which I discussed in *Cork County Council v. Minister for Housing, Local Government and Heritage (II) (No. 2)* [2022] IEHC 281, [2022] 5 JIC 2701 (Unreported, High Court, 27th May, 2022)), where Lord Denning M.R. considered what he called "a most coercive power in a Minister of the Crown" (p. 824) to declare that a local authority was not performing its duty and was in default and to take steps to ensure that the function is properly performed. He noted that during the passage of the legislation through Parliament "assurances were given by Ministers that necessary administrative steps would be taken to warn a local authority where the Secretary of State was contemplating serving a notice of intention". He went on to say that the power "enables the central government to interfere with a high hand over local authorities. Local self-government is such an important part of our constitution that, to my mind, the courts should be vigilant to see that this power of the central government is not exceeded or misused. Wherever the wording of the statute permits, the courts should read into it a provision that the "default power" should not be exercised except in accordance with the rules of natural justice."
153. The second issue for the applicant is that it hasn't been shown that the council is in breach of the objectives of the NPF.
154. Firstly under this heading, Objectives 72a to 72c and Appendix 3 only refer to "zoned land". All land is zoned one way or the other so the NPF would be meaningless and unworkable if it meant *any* zoning. In context it clearly means zoning for the purposes of housing or economic activity – see *e.g.*, section 2.2 "Overview of the NPF Strategy". Thus, a council is required to draw a distinction, in accordance with the Appendix 3 methodology, between lands zoned for housing or economic activity that are already serviced, and lands so zoned that are serviceable but that require further infrastructure. Thus, the infrastructure assessment report is required if development is to be permitted. Not if development is not being permitted. The purpose of it is to ensure that any such new development is supported by adequate infrastructure.

155. A related problem is that insofar as the sequential approach is required by Appendix 3, this is also exclusively related to zoned land. So it is in effect a negative requirement – a council should not allow development out of sequence, but it is not mandated to force development on a particular piece of land merely due to its proximity to the centre if that land is not zoned land, for the simple reason that the Appendix and the underlying Objective simply don't apply.
156. Even in cases (counterfactually here) where the sequential approach is required by virtue of the NPF and Appendix 3, it is phrased in general terms. Appendix 3 is explicit on this – inclusion in Tier 1 will “generally” require the lands to be sequential or within the footprint of existing development. That doesn't have the effect that a council cannot decide that any given piece of land should be zoned otherwise than for housing or economic activity, for example for community infrastructure based on specific objective reasons related to, for example, the geography or community needs at that particular precise location. A specific decision such as this one is not a failure to implement the objectives of the plan, in a context where there is a clear objective reason for it - namely to provide an entrance to the proposed linear park.
157. A separate aspect in relation to compliance with the objectives of national and regional policies is that, broadly the compliance required is only as far as practicable as stated in s. 10(1A).
158. While it doesn't apply to this specifically, section 9(6) is similar in that it provides that it provides that:
- “A development plan shall in so far as is practicable be consistent with such national plans, policies or strategies as the Minister determines relate to proper planning and sustainable development.”
159. This provision cannot apply to the NPF because the extent to which compliance with that is required is expressly set out in other provisions of the 2000 Act. Those provisions cannot be overridden by specifying the NPF for the purposes of s. 9(6). If I am wrong about that, there is no evidence anyway that the NPF was purportedly specified for this purpose: see *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* (under appeal).
160. But the limitation of practicability is nonetheless relevant under s. 10(1A).
161. The council argues here that it was not practicable to comply with Appendix 3 because the plan review process had already got underway prior to the adoption of one of the strategy documents concerned, and because of the lack of guidance. The new guidelines were never finalised. The NPF is dated February 2018, and draft guidelines were published in August 2021. SPPR 7 in those draft guidelines, while not binding of course, is still illuminative, and in a sense rectifies the omission of express reference to the sequential approach from objectives in the NPF:
- “Planning authorities shall adopt a sequential approach when zoning lands for development, whereby the most spatially centrally located development sites in settlements are prioritised

for new development first, with more spatially peripherally located development sites being zoned subsequently.”

162. While I accept that some aspects of the various relevant objectives cannot be implemented without further guidance, that doesn't apply to Appendix 3 and the corresponding Objective. Compliance with that wasn't impracticable when the current development plan was made, albeit that it mightn't have been totally convenient either. So if the council were, counterfactually, otherwise at odds with the NPF, I wouldn't have regarded the "as far as practicable" requirement as a get-out clause in the circumstances.
163. Strangely, while Appendix 3 requires a distinction to be drawn between Tier 1 and Tier 2 lands, it doesn't prescribe what is to happen then. It doesn't oblige any given council to for example phase the Tier 2 lands by providing that certain land uses would only arise at a certain point of the development plan's life. Any given landowner isn't therefore automatically any worse off because the assessment isn't carried out. Considerations would be different in the event of a more systemic environmental challenge to the way a council went about tiering land.
164. Finally under this heading, the core strategy is critical in determining anticipated population growth and catering for it. It is not possible to take any particular piece of land in isolation – everything must join up. Thus, in a case where the housing provision for a particular piece of land is dictated in a consistent way by the core strategy as part of a comprehensive hierarchical allocation of provision, it is misconceived to seek an order that would have the effect of changing the housing provision on any one piece of land without also challenging the core strategy. If the overall housing allocation is used up on other lands, then any attempt to compel a legal process which is aimed at producing more housing on an applicant's lands is futile and misconceived. A permission for housing in excess of that provided in the core strategy would result in material contravention of the development plan: *Heather Hill Management Company CLG v. An Bord Pleanála (No.2)*.
165. The basic point is that a litigant shouldn't be allowed cherry-pick pieces of an overall scheme that has to hang together. The analogy that comes to mind is that of the Supreme Court decision in *Bush v. Gore* 531 US 98 (2000) whereby one of the problems that the respondent to the appeal encountered was that only certain aspects of the process (that suited him to challenge) were impugned, leaving other parts proceeding unchallenged and thereby creating conflict and inconsistency as well as an equal protection issue.
166. We then turn to the relevant regional strategy which is the Eastern & Midland Regional Assembly RSES.
167. Section 21 of the 2000 Act provides that a regional assembly may make a regional spatial and economic strategy.
168. As David Browne B.L. in *Simons on Planning Law*, 3rd ed. (Dublin, Round Hall, 2021) notes at para. 1–426, the objective of the RSES is to support the implementation of the National

Planning Framework and the economic policies and objectives of the Government by providing a long-term strategic planning and economic framework for the development of the region. Where a strategy is prepared, it should be consistent with the National Planning Framework and the economic policies or objectives of the Government.

169. The relevant RSES was made by the Eastern and Midland Regional Assembly on 28th June, 2019.

170. Regional Policy objective 3.2 is as follows (p. 39):

“Local authorities, in their core strategies shall set out measures to achieve compact urban development targets of at least 50% of all new homes within or contiguous to the built up area of Dublin city and suburbs and a target of at least 30% for other urban areas.”

171. That is a general statement which does not preclude departure from it for objective reasons.

172. The introduction to section 4.3 of the RSES entitled “Defining a Settlement Typology” (p. 46) provides:

“The NPF sets the policy parameters for the Region to better manage the growth of Dublin as a city of international scale supported by the growth of the key Regional Growth Centres of Athlone, Dundalk and Drogheda, which form the upper two tiers in the settlement hierarchy. To achieve effective regional development, Dublin and the Regional Growth Centres will be supported by the complementary development and regeneration of a small number of selected Key Towns.”

173. Section 4.3 goes on to state (p. 46):

“The RSES identifies a third tier of Key Towns which are Swords, Maynooth, Bray, Navan, Naas, Wicklow-Rathnew, Longford, Mullingar, Tullamore, Portlaoise and Graiguecullen (Carlow).”

174. Section 4.3 sets out the following “guiding principle” (p. 46) for planning authorities when preparing core strategies for development plans:

“Core Strategies

Local authorities, in the preparation of their core strategies should have due regard to the settlement typology of towns in the Region and carefully consider the phasing of development lands to ensure that towns grow at a sustainable level appropriate to their position in the hierarchy. See Tables 4.2 and 4.3 for further guidance.”

175. Table 4.2 sets out the Settlement Hierarchy for the Eastern Region, as follows:

- Dublin City and suburbs;
- Regional Growth Centres - Drogheda, Athlone, Dundalk;

- Key Towns - Bray, Maynooth, Swords, Navan, Naas, Wicklow-Rathnew. Graiguecullen (Carlow), Longford, Mullingar, Tullamore, Portlaoise;
- Self-sustaining Growth Towns [and] Self-Sustaining Towns - To be defined by development plans)
- Towns and Villages - To be defined by development plans
- Rural - To be defined by development plans.

176. The RSES contains certain commentary as follows:

“Taking Account of Existing Plans

Where there may not be an ideal fit between some current plans and the more up to date broad national and regional future development parameters set out under the NPF, this Strategy and/or updated data that might be circulated by the Department from time to time as new information (i.e. Census data) becomes available, appropriate transitional arrangements will be put in place.

For example, the consideration of development land prioritisation measures by local authorities rather than ‘dezoning’ of land, where there may be a surplus, would be more appropriate. The Department of Housing Planning and Local Government (DHPLG) will provide updated planning guidelines on their development plan functions to planning authorities in this regard. The NPF or the NPF Implementation Roadmap document, do not seek the downzoning of land, however.

Core strategies may apply prioritisation measures and/ or de-zoning of land where a surplus of land is identified in plans with regard to the NPF Implementation Roadmap up to 2031. In preparing core strategies account should also be given to the consideration of sequential lands which are suitable for the delivery of housing but may not be forthcoming in the plan period having regard to 2031 roadmap targets, subject to proper planning and sustainable development.”

177. These provisions preferring prioritisation over dezoning are text rather than objectives, and so are subject to a have-regard-to obligation only.

178. The RSES sets out formal objectives including the following (p. 51):

“RPO 4.1: In preparing core strategies for development plans, local authorities shall determine the hierarchy of settlements in accordance with the hierarchy, guiding principles and typology of settlements in the RSES, within the population projections set out in the National Planning Framework to ensure that towns grow at a sustainable and appropriate level, by setting out a rationale for land proposed to be zoned for residential, employment and mixed-use development across the Region. Core strategies shall also be developed having regard to the

infill/brownfield targets set out in the National Planning Framework, National Policy Objectives 3a-3c.

RPO 4.2: Infrastructure investment and priorities shall be aligned with the spatial planning strategy of the RSES. All residential and employment developments should be planned on a phased basis in collaboration with infrastructure providers so as to ensure adequate capacity for services (e.g. water supply, wastewater, transport, broadband) is available to match projected demand for services and that the assimilative capacity of the receiving environment is not exceeded.”

179. These objectives, particularly RPO 4.1, seem to me to imply that development plans must join up as part of a coherent whole with regional and national housing provision. The binding requirement that growth be sustainable and appropriate implies that the housing provision for any given settlement has to bear a reasonable relationship to the projected housing need for that settlement.
180. In particular these objectives are compatible with downzoning lands not required during the lifetime of the plan.
181. To summarise the foregoing discussion therefore:
- (i). The development plan must include a core strategy showing that the objectives of the plan are consistent as far as practicable with the NPF and regional strategy (s. 10(1A)).
 - (ii). Section 10(2A)(f)(v) and (vi) mandate inclusion of projected population provision in any given settlement within the core strategy. This implies that this must inform the housing provision afforded by the plan in respect of that settlement, and that the overall provision within the functional area concerned must form a coherent whole. While the housing provision in a given core strategy can't be exceeded, s. 10(2A) implies that the provision in a core strategy should bear a reasonable relationship to (even if is not exactly mathematically the same as) the population projection in any given settlement, allowing for a certain and presumably modest level of friction in delivery. Otherwise, if there is a minimum but no maximum, a council could rezone massively more land for housing than was need, leading to a free-for-all that would be a negation of plan-led development.
 - (iii). In making the development plan, the council must consider the statutory obligation to ensure that the plan is consistent with the national and regional development objectives specified in the NPF and RSES.
 - (iv). The development plan is not required to comply with every provision of the NPF or RSES, only with objectives (which is a term of art and only relates to objectives that are expressly identified as such).

- (v). One of the objectives so specified is that planning authorities will be required to apply a standardised, tiered approach to differentiate between: i) zoned land that is serviced; and ii) zoned land that is serviceable within the life of the plan (NPF National Policy Objective 72a). As to serviceable land, a report on the cost of delivery of the services is required (Objective 72b). Land that is not serviceable during the life of the plan should not be zoned for development (Objective 72c).
- (vi). The standardised, tiered approach referred to in Objective 72a is that set out in Appendix 3. That does not depend on future guidance, so the requirements of Appendix 3 are, therefore, currently operable obligations on planning authorities in the development plan context.
- (vii). Appendix 3 requires a sequential approach in relation to lands zoned for development.
- (viii). As far as tiering (distinguishing between serviced and serviceable zoned land) is concerned, the tiering approach required by Objective 72a is set out in Appendix 3 of the NPF. This includes a requirement for an infrastructure assessment report. This applies only to lands "zoned" for development, not lands not so zoned. There is no requirement for an infrastructure assessment report for lands not currently being zoned for housing or economic activity during the lifetime of the given plan. Relatedly, insofar as the sequential approach is required by Appendix 3, this is also exclusively related to zoned land. So it is in effect a negative requirement – a council should not allow development out of sequence, but it is not mandated to force development on a particular piece of land merely due to its proximity to the centre if that land is not zoned land, for the simple reason that the Appendix and the underlying Objective simply don't apply.
- (ix). Insofar as the sequential approach does apply, that is phrased as required "generally" so that a council can decide that any given piece of land should be zoned otherwise than for housing or economic activity, for example for community infrastructure based on specific objective reasons related to, for example, geographical features or community needs at that particular location.
- (x). Compliance with the objectives of national and regional plans is required only as far as practicable. While some aspects of the various relevant objectives cannot be implemented without further guidance, that doesn't apply to Appendix 3 and the corresponding Objective.
- (xi). While Appendix 3 requires a distinction to be drawn between Tier 1 and Tier 2 lands, it doesn't prescribe what is to happen then. It doesn't oblige any given council to for example phase the Tier 2 lands by providing that certain land uses would only arise at a certain point of the development plan's life, but the tiering would be a relevant consideration that the council would have to consider.

- (xii). In a case where the housing provision for a particular piece of land is dictated in a consistent way by the core strategy as part of a comprehensive hierarchical allocation of provision, it is misconceived to seek an order that would have the effect of changing the housing provision on any one piece of land without also challenging the core strategy.
- (xiii). Insofar as the Eastern and Midland Regional Assembly RSES is concerned, the provisions preferring prioritisation over rezoning are text rather than objectives, and so are subject to a have-regard-to obligation only. The objectives are subject to a comply-with obligation.
- (xiv). Objective RPO 4.1 in the Eastern and Midland Regional Assembly RSES implies that development plans must join up as part of a coherent whole with regional and national housing provision. The binding requirement that growth be sustainable and appropriate implies that the housing provision for any given settlement has to bear a reasonable relationship to the projected housing need for that settlement.

Application of the law to the facts

182. Insofar as it is alleged that the council failed to adopt a tiered approach contrary to the NPF, that has not been made out. A specific form of tiering under the sub-headings of Objective 72 and Appendix 3 only applies to “zoned” lands, which means lands that are zoned for housing or economic activity during the currency of the relevant development plan. In accordance with *Highlands Residents*, that does not include these lands.
183. If I am wrong about that and if the tiered approach applies, I consider that the Chief Executive’s report contains adequate reasons for not strictly following the tiered approach. Two headings are referred to – lack of guidance and the question of information from service providers.
184. Admittedly, if the tiered approach applies, I think it can be operated notwithstanding the lack of additional guidance, but whether a particular council has exceeded the margin of appreciation given to it in terms of its judgement about practicability could legitimately take into account the lack of such guidance. That said, I don’t think that alone could justify non-implementation of Appendix 3, without more.
185. The Chief Executive also refers to information available from infrastructure providers. That inferentially means the lack of such information.
186. On the one hand, that is a reason rather than an evidential statement, but on the other hand, the onus being on the applicant in judicial review, there is nothing to suggest that this was not correct. The Chief Executive’s report says in relation to recommendation 11 that as of 13th August, 2020 it was not possible to produce what she calls a “table” by reference to the lack of guidance and information available.

187. Even though she considered that in effect full compliance was not possible, the Chief Executive's report refers to regard being had to a tiered approach. The report itself says that "the decision of which lands to zone and dezone was influenced by the application of the principles of the tiered zoning approach" and regard was also had to tiering in the SEA report.
188. Insofar as it is alleged that the council failed to produce an infrastructure assessment report specifically, the same point applies. The obligation to produce such a report exists, but only in relation to zoned lands - that is land zoned for housing or economic activity during the currency of the development plan concerned. None of these lands fell into that category.
189. Insofar as it is alleged that the council failed to conduct an exercise that amounted to a valid infrastructure assessment, that complaint fails for the same reasons.
190. Insofar as it is alleged that the council failed to provide adequate reasons for any infrastructure assessment that it did carry out, that involves a micro-specific attempt to go beyond the sort of reasons that an applicant is entitled to. An applicant is entitled to reasons for a change in zoning of its lands, but those reasons have been provided in the Chief Executive's report on submissions to the required standards of the main reasons for the main issues. I will discuss that further below.
191. As regards non-compliance with the RSES, the law does not require compliance save in respect of objectives. That inherently means that, in respect of matters in the RSES going beyond objectives, a council has a decision-making margin of appreciation.
192. Insofar as the objectives are concerned these are not absolute and inflexible, and do not prohibit a departure from a sequential approach for objective reasons.
193. A council must comply with objectives, which the council did; and have regard to the RSES overall which I am satisfied happened; and it must do this in accordance with the correct interpretation of the RSES, which I am satisfied it adopted.

Core ground 3 - alleged illegality regarding relevant and irrelevant considerations

194. Core ground 3 provides:

"The Respondent failed to take relevant considerations into account and/or took irrelevant considerations into account in deciding to make the Meath County Development Plan 2021-2027 with the alterations proposed in MA08 contained therein."

Law in relation to relevant and irrelevant considerations

195. Planning decision-makers should consider all relevant considerations, and only relevant considerations (*McCaughey Developments Ltd. v. Dundalk Town Council* [2011] IEHC 193, [2011] 5 JIC 1002 (Unreported, High Court, Hedigan J., 10th May, 2011), *P. & F. Sharpe Ltd.*), but that doesn't make them any different from any other decision-maker. The requirement in relation to relevant considerations is a general principle in administrative law.

196. In relation to relevant and irrelevant considerations, there is a characteristically invaluable summary in Fordham J.'s *Judicial Review Handbook* at p. 692. The critical point stated at p. 697 is that:

"Public law distinguishes between (a) matters whose relevance or irrelevance is obligatory (usually because expressly or impliedly prescribed by a relevant superior source) and (b) matters whose relevance or irrelevance is an evaluative judgment for the public authority as primary decision-maker (with its built-in latitude). Identifying (a) is a hard-edged question for the Court. The public authority's evaluative judgment as to (b) is the subject of 'soft' (reasonableness) review."

197. Generally, relevance is capable of being a question of law, whereas weight is generally a matter of evaluative judgment unless the relevant instrument prescribes otherwise (p. 700). Once a decision-maker treats something as relevant or refers to it otherwise, the weight if any to be given to that something is primarily a matter for the decision-maker herself: see *per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192, [2008] 6 JIC 2704 (Unreported, High Court, 27th June, 2008) at para. 27.

198. Some considerations are lawfully required, others prohibited. In between lies a zone of evaluation where a decision-maker enjoys a discretion as to what to take into account.

199. The obligation to consider, and consider only, relevant considerations applies to planning decision like any other decisions: *McCaughey Developments, P. & F. Sharpe Ltd., Flanagan v. Galway City and County Manager* and *Griffin v. Galway City and County Manager*.

200. That said, the greater the policy content of the decision the less searching the review must be. For example, it is not for the court to reassess the weight to be attached to the relevant factors as long as the council has correctly considered the essential relevant matters, which is clearly the case here: see *Eastleigh Borough Council v. Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin) at paras. 13 and 15, and *St. Modwen Developments Ltd. v. Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at para. 51.

201. The applicant contends that, because zoning affects private property, any landowner's representations should be considered, relying on *Finn v. Bray Urban District Council* [1969] I.R. 169, *Central Dublin Development Association v. The Attorney General* [1975] 109 I.L.T.R. 69 at p. 90, and *Glencar Explorations Plc. v. Mayo County Council* [1993] 2 I.R. 237. I would broadly accept the principle that a decision-maker is required to consider the submissions of a participant in the process, and that obviously includes the submissions of a landowner or anyone else in the making of a development plan. But considering submissions doesn't oblige the decision-maker to regard everything put forward as being relevant, let alone decisive. By analogy, a court tries to have regard to submissions, but sometimes finds itself disregarding some of them on the grounds of irrelevance or because they are based on a false premise. That isn't unlawful, whether we are talking about courts or decision-makers.

202. Nonetheless, a matter does not become a relevant consideration which must be considered merely because an applicant so demands, albeit that there may be a sense in which the decision-maker needs to consider an applicant's submission insofar as it goes (that is, to consider the question of whether or not matters referred to in the submission should be taken into account or afforded weight).

203. A further consideration that is important in relation to the making of a development plan specifically is the situation in adjoining counties.

204. Section 9(4) of the 2000 Act provides:

"In making a development plan in accordance with this Chapter, a planning authority shall have regard to the development plans of adjoining planning authorities and shall co-ordinate the objectives in the development plan with the objectives in the plans of those authorities except where the planning authority considers it to be inappropriate or not feasible to do so."

205. To summarise:

- (i). At the broad level, relevance is a matter of law whereas weight is a matter of factual evaluation.
- (ii). That does not mean that all questions of relevance are legal questions for the court. Some considerations are lawfully required, others prohibited. In between lies a zone of evaluation where a decision-maker enjoys a discretion as to what to take into account as relevant.
- (iii). Once a decision-maker treats something as relevant or refers to it otherwise, the weight if any to be given to that something is primarily a matter for the decision-maker herself.
- (iv). A decision-maker is generally required to consider the submissions of a participant in the process.
- (v). A matter does not become a relevant consideration which must be considered merely because an applicant so demands, albeit that there may be an obligation to consider an applicant's submission insofar as it goes (that is, to consider the question of whether or not matters referred to in the submission should be taken into account or afforded weight).
- (vi). One mandatory consideration in the development plan context is to take into account, and co-ordinate insofar as appropriate and feasible with, the development plans of adjoining counties.

Application of the law to the facts

206. The applicant argues in legal submissions that:

“the entire focus of the elected members was on the suitability of the other lands adjacent to the M2 Motorway for residential zonings” (*i.e.*, the Notice Parties’ lands) (para. 95).

207. That is a somewhat artificial and selective presentation. What a decision-maker considers is not just what is stated at a meeting, but also the materials before the decision-maker. Much of the submission amounted to the hallowed applicants’ fallacy of confusing lack of narrative discussion with lack of consideration. A decision-maker normally considers what is before her even if not expressly referred to. However, here the rationale for the change of the applicant’s lands zoning *is* set out expressly in the relevant documentation.
208. Insofar as it is claimed that one or more members purported to articulate later that they did not realise that the effect of their vote of 20th September, 2021 was to change the zoning of the applicant’s lands, that cannot be a basis for regarding the matter as not properly considered. The nature of the change was expressly set out in the documentation and the Chief Executive’s report in particular. It is inherent in the nature of a collective or deliberative assembly that some members may take the time and trouble to be more attuned to the details than others, but the body overall is bound by the collective majority decision. To allow an individual member to plead culpable ignorance at a later stage is not a ground for *certiorari*. This would not just unleash complete procedural chaos, but would totally degrade the nature of the decision-making process. It would convert an objective process into one of permanently mutating and fluctuating subjective instability where self-generated lack of attention, knowledge or ability was elevated into a permanent and ongoing ground on which any decision taken could be rendered invalid at any future moment.
209. Insofar as it is claimed that no weight was given to the fact that the applicant had a live planning application in respect of the lands, this is unsubstantiated. A number of members referred to this expressly on 20th September, 2021. Weight is a separate issue from failure to have regard, and weight is primarily a matter for the decision-maker. In essence the applicant’s submissions are an attempt to have the court engage in a reassessment of the weight being attached to this factor, which is a breach of the principle of separation of powers because it gets the court involved in reassessing the merits.
210. Insofar as it is claimed that certain matters raised at the meeting of 20th September, 2021 fell outside the planning considerations required by s. 12(11) of the 2000 Act, it is equally clear on the record that the legal advice provided to members was that only planning considerations could be taken into account and that non-planning considerations were, therefore, withdrawn. No basis has been made out to suggest that relevant policy documents were not considered.
211. Insofar as it is argued that members “had acted under the misapprehension” or were “under the erroneous view” that a down-zoning of the applicant’s lands was required in order to up-zone the notice parties’ lands, that is complete speculation and involves the fallacy of attributing an unlawful motive to the decision-maker for the purposes of arguing that the decision has to be quashed.

212. Insofar as it is claimed that the applicant's submission "was wholly ignored by elected members and was only given cursory consideration by the C[hief] E[xecutive]" (para. 32 of submissions), that is a misunderstanding. It repeats the classic applicant's error of confusing failure to narratively discuss with failure to take into account. The latter cannot be inferred without more from the former.

Core ground 5 - alleged irrationality

213. Core ground 5 provides:

"The Respondent's decision to include the alterations proposed in MA08 in the Meath County Development Plan 2021–2027 is irrational and internally inconsistent with the core strategy and other policies contained in the Development Plan."

Law in relation to irrationality

214. The broad principle is that questions of law are for the courts and questions of merits are for the decision-maker. At the same time some questions of law blend into quasi-merits issues, particularly proportionality and irrationality.

215. The basic point in relation to irrationality or unreasonableness is that the decision must be open to a reasonable decision-maker, and based on material on which such a reasonable decision-maker could act: *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39.

216. Examples of irrationality include *Porter v. An Bord Pleanála* [2017] IEHC 783, [2017] 12 JIC 2108 (Unreported, High Court, O'Regan J., 21st December, 2017), *Higgins v. An Bord Pleanála* [2020] IEHC 564, [2020] 11 JIC 1301 (Unreported, High Court, 13th November, 2020).

217. However, unreasonableness isn't to be equated with the totality of judicial review of course, much as respondents might at times contend otherwise. Nor is it some kind of universal test – for example some situations like the habitats directive require a decision-maker to exclude all doubt rather than merely act reasonably. Furthermore the "reasonable" action must be on the basis of a correct factual and legal understanding, taking into account relevant matters, excluding irrelevant ones, complying with substantive law, giving reasons, and so on. *O'Keefe* is not the beginning and end of planning law, in the unlikely event that anyone still thinks that.

Application of the law to the facts

218. Unfortunately for the applicant, there isn't any basis here to contend that the council's decision exceeded the bounds of rationality. On the contrary, I agree with the council's submission that "the Applicant is impermissibly attempting to engage in a review of the merits of the decision." No aspect of the decision has been shown to be something that was not open to a reasonable decision-maker.

Order

219. For the reasons set out in the judgment the order will be as follows:

- (i). that the proceedings be dismissed;

- (ii). that the stay on the processing of any current or future planning applications for the contested lands whether by the council or the board will continue until the next mention date; and
- (iii). that the matter be listed for mention on Monday the 11th day of July, 2022 to deal with any consequential matters.