



[2024] IEHC 588

**THE HIGH COURT
PLANNING & ENVIRONMENT**

[H.JR.2023.0001047]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

**FRIENDS OF THE IRISH ENVIRONMENT COMPANY LIMITED BY GUARANTEE AND SMTW
ENVIRONMENTAL DESIGNATED ACTIVITY COMPANY**

APPLICANTS

AND

**THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE
ATTORNEY GENERAL**

RESPONDENTS

AND

**OFFICE OF THE PLANNING REGULATOR, FINGAL COUNTY COUNCIL AND DAA PUBLIC
LIMITED COMPANY**

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Thursday the 17th day of October 2024

1. The applicant challenges a ministerial direction which removes text in a development plan that postulates inadequacy of noise insulation schemes relating to Dublin Airport. The central issue is whether the applicant has demonstrated either a legal infirmity in the direction or an unreasonableness that results in the decision falling outside the zone of permissible evaluative judgement on the part of the Minister.

Geographical context

2. Dublin Airport is located in the townlands of Collinstown, Toberbunny, Commons, Cloghran, Corballis, Coultury, Portmellick, Harristown, ShanganhIII, Sandyhill, Huntstown, Pickardstown, Dunbro, Millhead, Kingstown, Barberstown, Forrest Great, Forrest Little and Rock in Co. Dublin, on a site of c. 580 ha.

3. In argument, the daa described Dublin Airport as the largest piece of infrastructure in Ireland. Self-evidently, its operation impacts on surrounding residential properties, particularly in terms of noise. A main response to such impacts has been the putting in place of noise insulation schemes for affected areas.

4. The difference of view that arises in this case is primarily about the threshold of noise which should trigger eligibility for assistance with insulation. Thus far there have been three insulation schemes proposed (helpfully summarised in public domain material at <https://www.fingal.ie/aircraftnoisceca/home-insulation>):

- (i) The Residential Noise Insulation Scheme (**RNIS**) which arose from planning condition 7 on the grant of permission for the North Runway, and has been further extended by daa to include dwellings within the predicted 63 dB LAeq 16-hour contour as defined by condition 7 of the grant of planning permission for the north parallel runway (ABP ref. PL 06F.217429; FCC ref. F04A/1755) as extended to include the predicted 63 dB LAeq 16-hour contour as revised for 2022 forecasts.
- (ii) A second scheme is available for dwellings most impacted by aircraft operations that preceded the opening of the North Runway at Dublin Airport. This is the Home Sound Insulation Programme (**HSIP**) and is defined by the 2016 63 dB LAeq 16-hour contour.
- (iii) A regulatory decision by the council as the Aircraft Noise Competent Authority (**ANCA**) in June 2022 made provision for a third home insulation scheme (Residential Sound Insulation Grant Scheme – **RSIGS**). The scheme is a condition of a planning permission (F20A/0668), which has been appealed to An Bord Pleanála (Ref PL06F.314485). The area of eligibility was defined in the permission as follows: “5. A voluntary residential sound insulation grant scheme (RSIGS) for residential dwellings shall be provided. Initial eligibility to the scheme shall apply to all residential dwellings situated within the Initial Eligibility Contour Area as shown in Figure 3.1 - regulatory decision, Third Condition. Residential Sound Insulation Grant Scheme (RSIGS) - Initial Eligibility Contour Area - June 2022. Eligibility to the scheme shall be reviewed every 2 years commencing in 2027 with residential dwellings situated in the 55 dB Lnight contour being eligible under the scheme ...”

5. The geographical scope of the schemes depends on how the noise threshold is set. A lower decibel threshold means a wider spread of homes affected. In crude summary, the elected members wanted a threshold of 40 dB rather than the 63 dB in the existing scheme or the 55 dB proposed. That would have involved a larger area of residences that would be eligible for the scheme. This

disagreement essentially pits the elected members, Friends of the Irish Environment and SMTW Environmental against daa, the Office of the Planning Regulator (**OPR**) and the Minister for Housing, Local Government and Heritage, with the council executive in the delicate position of having opposed the impugned provision in the plan debates but also having the role of defending it in the proceedings, a tightrope they have walked very valiantly.

6. A final but important contextual point to note is that the wording in the plan, where the members set out an objective of a more demanding insulation scheme, doesn't in itself do anything and nor could it bring such a scheme into existence. Given the choice between the opposing parties' characterisation of the wording as having almost apocalyptic consequences in planning terms versus the council's description of it as being purely aspirational and precatory, and even recognising that prediction is an inexact science, it seems to me that the dispute is really about a fairly symbolic wording. In itself the inclusion or exclusion of this clause doesn't make a whole lot of difference to much of anything. I appreciate that my saying that probably isn't going to entirely assuage feelings, but the really critical point is that the ministerial direction doesn't in itself remove any *actual* protection for residents living near the airport. That isn't to say that noise insulation isn't a real issue – it's just not an issue that is particularly advanced by the inclusion of this clause in the development plan.

Facts

7. The facts regarding the adoption of the plan are sufficiently complex here that it makes sense to outline them under the headings of the relevant statutory steps below rather than in a stand-alone section of this judgment.

8. However the following additional facts are of relevance.

9. Directive (EC) 2002/49/EC (the **Environmental Noise Directive**) was adopted on **25th June 2002**.

10. This was implemented in Ireland by the Environmental Noise Regulations 2006 (S.I. No. 140 of 2006).

11. In **August 2007**, the daa was granted permission by the board to build a 3.11 km long runway (**North Runway**), 1.6 km north of the pre-existing main runway at Dublin Airport.

12. Condition 7 of the 2007 permission provided for the establishment of a voluntary noise insulation scheme for dwellings predicted to fall within the contour of 63 dB LAeq, 16-hour, which required to be agreed with the council prior to the commencement of the development of the North Runway. Condition 8 of the 2007 permission provided *inter alia* that the North Runway would not be brought into operation until a noise insulation scheme approved under condition 7 was implemented.

13. Regulation (EU) No 598/2014 (the **Aircraft Noise Regulation**) was adopted on **16th April 2014**.

14. In **December 2016**, daa agreed the terms of the required voluntary noise insulation schemes for residential dwellings with the council. The RNIS scheme applies to dwellings predicted to fall within the 63 dB LAeq 16-hour contour as defined by condition 7 of the 2007 permission and revised for 2022 forecasts.

15. In addition, in **2017**, daa launched a Home Sound Insulation Programme which was put in place by daa on a voluntary basis and is designed to address the existing impact of the airport on those most affected by aircraft noise. It applies to dwellings impacted by current operations, as defined by the 2016 63 dB LAeq 16-hour contour.

16. In **December 2018**, the council made the Noise Action Plan for Dublin Airport 2019-2023 (**NAP**) under the 2006 Regulations, following consultation with the EPA. This is the first Noise Action Plan specifically prepared for the airport, and replaces the Dublin Airport section of the Dublin Agglomeration Noise Action Plan 2013-2018.

17. In **2018**, but with effect subsequent to the NAP, the domestic environmental noise regulations were revoked and replaced by the European Communities (Environmental Noise) Regulations 2018 (S.I. No. 549 of 2018), as amended by the European Communities (Environmental Noise) (Amendment) Regulations 2021 (S.I. No. 663 of 2021) (the **2018 Regulations**).

18. In **2019**, the 2014 Regulation was implemented in Ireland by the Aircraft Noise (Dublin Airport) Regulation Act 2019 (the **2019 Act**) and ss. 34A, 34B, 34C, 37R and 37S of the 2000 Act as inserted by the 2019 Act.

19. On **8th August 2022**, the council (as ANCA) granted permission to daa for development which involved varying night-time use of the airport subject to conditions which reflected certain noise mitigation measures. The development was described as follows:

"A proposed development comprising the taking of a 'relevant action' only within the meaning of Section 34C of the Planning and Development Act 2000, as amended, at Dublin Airport, Co. Dublin, in the townlands of Collinstown, Toberbunny, Commons, Cloghran, Corballis, Coultry, Portmellick, Harristown, Shanganhlll, Sandyhill, Huntstown, Pickardstown,

Dunbro, Millhead, Kingstown, Barberstown, Forrest Great, Forrest Little and Rock on a site of c. 580 ha.

The proposed relevant action relates to the night-time use of the runway system at Dublin Airport. It involves the amendment of the operating restriction set out in condition no. 3(d) and the replacement of the operating restriction in condition no. 5 of the North Runway Planning Permission (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No. PL06F.217429 as amended by Fingal County Council F19A/0023, ABP Ref. No. ABP-305289-19), as well as proposing new noise mitigation measures. Conditions no. 3(d) and 5 have not yet come into effect or operation, as the construction of the North Runway on foot of the North Runway Planning Permission is ongoing. The proposed relevant action, if permitted, would be to remove the numerical cap on the number of flights permitted between the hours of 11pm and 7am daily that is due to come into effect in accordance with the North Runway Planning Permission and to replace it with an annual night-time noise quota between the hours of 11.30pm and 6am and also to allow flights to take off from and/or land on the North Runway (Runway 10L 28R) for an additional 2 hours I.e. 2300 hrs to 2400hrs and 0600 hrs to 0700 hrs. Overall, this would allow for an increase in the number of flights taking off and/or landing at Dublin Airport between 2300 hrs and 0700 hrs over and above the number stipulated in condition no. 5 of the North Runway Planning Permission, in accordance with the annual night time noise quota.

The relevant action pursuant to Section 34C (1) (a) Is: To amend condition no. 3(d) of the North Runway Planning Permission (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No.: PL06F.217429 as amended by Fingal County Council F19A/0023, ABP Ref. No. ABP-305289-19). Condition 3(d) and the exceptions at the end of Condition 3 state the following: '3(d). Runway 10L- 28R shall not be used for take-off or landing between 2300 hours and 0700 hours except in cases of safety, maintenance considerations, exceptional air traffic conditions, adverse weather, technical faults in air traffic control systems or declared emergencies at other airports.' Permission is being sought to amend the above condition so that it reads: 'Runway 10L-28R shall not be used for take-off or landing between 0000 hours and 0559 hours except in cases of safety, maintenance considerations, exceptional air traffic conditions, adverse weather, technical faults in air traffic control systems or declared emergencies at other airports or where Runway 10L-28R length is required for a specific aircraft type.' The net effect of the proposed change, if permitted, would change the normal operating hours of the North Runway from the 0700hrs to 2300 hrs to 0600 hrs to 0000 hrs. The relevant action also is: To replace condition no. 5 of the North Runway Planning Permission (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No.: PL06F.217429 as amended by Fingal County Council F19A/0023, ABP Ref. No. ABP-305289-19) which provides as follows:

5. On completion of construction of the runway hereby permitted, the average number of night time aircraft movements at the airport shall not exceed 65/night (between 2300 hours and 0700 hours) when measured over the 92 day modelling period as set out in the reply to the further Information request received by An Bord Pleanála on the 5th day of March, 2007. Reason: To control the frequency of night flights at the airport so as to protect residential amenity having regard to the information submitted concerning future night time use of the existing parallel runway' [*sic*]. With the following: A noise quota system is proposed for night time noise at the airport. The airport shall be subject to an annual noise quota of 7990 between the hours of 2330hrs and 0600hrs. In addition to the proposed night time noise quota, the relevant action also proposes the following noise mitigation measures:

- A noise insulation grant-scheme for eligible dwellings within specific night noise contours;
- A detailed Noise Monitoring Framework to monitor the noise performance with results to be reported annually to the Aircraft Noise Competent Authority (ANCA), in compliance with the Aircraft Noise (Dublin Airport) Regulation Act 2019. The proposed relevant action does not seek any amendment of conditions of the North Runway Planning Permission governing the general operation of the runway system (i.e., conditions which are not specific to nighttime use, namely conditions no. 3 (a), 3(b), 3(c) and 4 of the North Runway Planning Permission) or any amendment of permitted annual passenger capacity of the Terminals at Dublin Airport. Condition no. 3 of the Terminal 2 Planning Permission (Fingal County Council Reg. Ref. No. F04A/1755; ABP Ref. No. PL06F.220670) and condition no. 2 of the Terminal 1 Extension Planning Permission (Fingal County Council Reg. Ref. No. F06A/1843; ABP Ref. No. PL06F.223469) provide that the combined capacity of Terminal 1 and Terminal 2 together shall not exceed 32 million passengers per annum. The planning application will be subject to an assessment by the Aircraft Noise Competent Authority in accordance with the Aircraft Noise (Dublin Airport) Regulations Act 2019 and Regulation (EU) No 598/2014. The planning application is accompanied QY information provided for the purposes of such

assessment. An Environmental Impact Assessment Report will be submitted with the planning application. The planning application and Environmental Impact Assessment Report may be inspected or purchased at a fee not exceeding the reasonable cost of making a copy, at the offices of the Planning Authority during its public opening hours of 9.30 - 16.30 (Monday - Friday) at Fingal County Council, Fingal County Hall, Main Street, Swords, Fingal, Co. Dublin."

20. This decision is now before the board.

21. The 2007 permission was implemented, and the North Runway opened on **24th August 2022.**

Procedural history

22. This case was heard with *daa plc v. Fingal County Council* [2024] IEHC 589 (Unreported, High Court, 17th October 2024) so the two judgments should be read together. Issues in the *daa* case relevant to the grounds being decided in this case are addressed in this judgment by agreement.

23. The proceedings were issued on 19th September 2023. The *ex parte* application was opened and adjourned to 9th October 2023 by O'Higgins J. on that day with liberty to issue a motion seeking to transfer the proceedings to the Planning and Environmental List.

24. The transfer motion was issued on 22nd September 2023 returnable to 16th October 2023.

25. The matter was mentioned on 2nd October 2023, and entry and leave were granted on 9th October 2023 with liberty to amend the statement of grounds.

26. The originating notice of motion was issued on 13th October 2023 and the amended statement of grounds was filed on the same day.

27. The respondents filed their statement of opposition and affidavit on 12th January 2024.

28. The first named notice party filed its statement of opposition and affidavit on 14th March 2024.

29. The second named notice party did not file a statement of opposition but filed an affidavit on 26th April 2024 exhibiting its statement of opposition in the *daa* case.

30. The third named notice party filed its statement of opposition and affidavit on 7th May 2024.

31. The third named notice party filed a supplemental affidavit on 11th June 2024.

32. The respondents filed two supplemental affidavits on 25th June 2024.

33. The applicants served their written submissions on 5th July 2024.

34. The respondents filed their written submissions on 19th July 2024.

35. The first named notice party filed its written submissions on 27th August 2024.

36. The third named notice party filed its written submissions on 9th August 2024.

37. The second named notice party filed composite written submissions on 10th September 2024.

38. The matter was listed for hearing together with the related *daa* case commencing on 23rd September 2024. The hearing concluded on 26th September 2024 when judgment was reserved.

39. As between this case and the related *daa* case I had the benefit of submissions as follows:

(i) Council – 18,618 words composite submission in both cases;

(ii) State – 18,211 words;

(iii) *daa* – 16,911 in *daa* case;

(iv) applicants in *Friends* – 16,675 words;

(v) *daa* – 11,861 words in *Friends* case; and

(vi) OPR – 8,555 words.

40. When Mick Jagger apparently claimed that his famously lived-in appearance was down to "laughter lines", the jazz singer George Melly was reputed to have responded: "Nothing's that funny". That riposte came to mind here because when presented with a grand total of 90,831 words of submissions, one's reaction has to be - nothing's that complicated.

Relief sought

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

"1. An Order of Certiorari by way of application for judicial review quashing Part 2(b) of the Planning and Development (Fingal County Development Plan 2023-2028) Direction 2023 of 28th July 2023 and associated reasons and considerations.

2. Such Declaration(s) of the legal rights and/or legal position of the Applicants and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate.

3. A Declaration that Section 31(1) of the Planning and Development Act 2000, as amended, is invalid as it is repugnant to Articles 15.2.1 and 28A of the Constitution or, in the alternative, a Declaration that Section 31(1) of the Planning and Development Act 2000, as amended, is invalid as it is repugnant to Articles 15.2.1 and 28A of the Constitution.

4. A Declaration that Section 50B of the Planning and Development Act 2000, as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011

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

5. A stay, if necessary, on the application of Part 2(b) of the Planning and Development (Fingal County Development Plan 2023-2028) Direction 2023 dated 28th July 2023 and Part 2(c) of the Draft Ministerial Direction dated 4th April 2023.

6. Further or other orders

7. Costs."

Grounds of challenge

42. The core grounds of challenge are as follows:

"Domestic Law Grounds

1. Part 2(b) and the associated reasons and considerations of the Planning and Development (Fingal County Development Plan 2022-2028) Direction 2023 dated 28th July 2023 ('the Ministerial Direction') is invalid as the both the Draft Direction and the Public Notice contained material errors and/or errors on the face of the record and/or contains material errors of fact and/or there was no or effective public participation and/or the procedure followed by the Minister does not accord with the requirements of natural and constitutional justice and fair procedures, further particulars of which are contained at Part 2 below.

2. The Ministerial Direction is invalid as the steps Fingal County Council is directed to take in relation to Part 2(b) are wrong in law, irrational and unreasonable, and/or contain material legal errors and/or is of no force or effect and/or contains errors on the face of the record, further particulars of which are contained at Part 2 below.

3. The Ministerial Direction is invalid as the CDP as adopted by Fingal County Council in relevant part is consistent with National Policy Objective 65 ('NPO 65') of the National Planning Framework ('NPF') and/or the European Communities (Environmental Noise) Regulations 2018, the Aircraft Noise Regulations 598/2014 and the Aircraft Noise (Dublin Airport) Regulation Act 2019 ('the 2019 Act') and/or the Minister's conclusion to the contrary is wrong in law, further particulars of which are contained at Part 2 below.

4. The Ministerial Direction is invalid as the Minister failed to provide adequate reasons in respect of the issues raised in the submissions made during the public participation process and/or the Ministerial Direction breached the Applicants' rights to fair procedures and natural and constitutional justice and/or the Minister's reasons are wrong in law, further particulars of which are contained at Part 2 below.

5. The Ministerial Direction is invalid because the Minister relied on section 31 of the Planning and Development Act 2000, as amended, which is invalid as it is repugnant to Articles 15.2.1 and 28A of the Constitution, further particulars of which are contained at Part 2 below.

European Ground

6. The Ministerial Direction is invalid as the Minister failed to consider whether the Ministerial Direction was required to be screened or assessed for the purposes of section 31AN of the 2000 Act and/or did not assess it as required. The Ministerial Direction has therefore not been subject to assessment for the purposes of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, further particulars of which are contained at Part 2 below.

Validity Ground

7. Section 31 of the Planning and Development Act 2000, as amended, is repugnant to Articles 15.2.1 and 28A of the Constitution, further particulars of which are contained at Part 2 below."

43. Core grounds 5 to 7 were withdrawn without prejudice to the argument that there were inadequate reasons regarding Strategic Environmental Assessment (**SEA**), so we are dealing only with core grounds 1 to 4. The last sentence of sub-ground 16 was also withdrawn.

44. I also need to note that core grounds 1 to 4 and 10 in the *daa* case overlap with the issues in this case and it was agreed that insofar as the grounds overlap, the argument on those grounds would be considered and a decision rendered in the present judgment. The core grounds in the *daa* case are as follows:

"Domestic Law

1. The making of the Fingal County Council Development Plan 2023 - 2029 ('the Development Plan') with PA CH 8.1: Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) contained therein was ultra vires the powers of the elected

members of the Respondent, Fingal County Council, pursuant to section 10 and section 12 of the Planning and Development Act, 2000 as amended as the said objective is a noise mitigation measure within the meaning of Regulation (EU) No. 598/2014, the Aircraft Noise (Dublin Airport) Regulation Act, 2019 and/or section 34A of the Planning and Development Act, 2000 as amended, the regulation of which is the subject of a specific regime established by the 2019 Act and sections 34A - 34C of the 2000 Act. The elected members of Fingal County Council have no jurisdiction to set noise mitigation measures in respect of Dublin Airport. Therefore, the inclusion of PA CFI 8.1: Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) in the Development Plan is invalid, unlawful, ultra vires, irrational and/or unreasonable.

2. PA CFI 8.1: Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) is contrary to section 3(7)(a) of the Aircraft Noise (Dublin Airport) Regulation Act, 2019.

3. The inclusion of PA CFI 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) in the Development Plan is unlawful, invalid and ultra vires Fingal County Council in that there was a failure by Fingal County Council to have any or any proper regard to the International Civil Aviation Organisation's 'A Balanced Approach to Aircraft Noise Management', to which Dublin Airport is subject, and a failure to have any or any appropriate regard to the measures which comprise the Balanced Approach. Fingal County Council (including the elected members) failed to apply the Balanced Approach as required by law.

4. The inclusion of PA CFI 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) in the Development Plan is unlawful, invalid and ultra vires as it is contrary to the European Communities (Environmental Noise) Regulations 2018 and to the Noise Action Plan for Dublin Airport 2019 - 2023. The inclusion of PA CFI 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) is invalid, unlawful and ultra vires as it is inconsistent with the Noise Action Plan for Dublin Airport 2019 - 2023 and purports to revise that plan other than in accordance with Article 12 of the European Communities (Environmental) Noise Regulations 2018. In adopting PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) and including same in the Development Plan as made, Fingal County Council failed to have any or any proper regard for the Noise Action Plan for Dublin Airport 2019 - 2023. In that regard, the adoption and inclusion of PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) breaches section 9(6) of the Planning and Development Act 2000, as amended.

5. The inclusion of PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) in the Development Plan is inconsistent with and/or different from the Aircraft Noise Competent Authority's Noise Abatement Objective for Dublin Airport and the decision to adopt same and to include it in the Development Plan was made without any or any appropriate regard being had to the Noise Abatement Objective. PA CH 8.1: Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) is therefore invalid, void, unlawful and/or ultra vires the powers of Fingal County Council.

6. PA SH 11.7: Map Sheet 11 is inconsistent with relevant national and regional policies, including the National Planning Framework and the Regional and Spatial and Economic Strategy, and its inclusion in the Development Plan is therefore ultra vires, unlawful, invalid and contrary to section 9(6), section 10(1A), section 10(2A)(a), sections 12(11) and 12(18) and/or section 27(1) of the Planning and Development Act 2000, as amended.

7. The inclusion of PA SH 11.7: Map Sheet 11 in the Development Plan is invalid, unlawful, ultra vires and in breach of section 12(11) of the Planning and Development Act, 2000 as amended as its adoption and inclusion was motivated by considerations other than that of the proper planning and sustainable development of the functional area of Fingal County Council, the statutory obligations of Fingal County Council or any relevant policies and objectives of the Government or any Minister of the Government.

8. In making the Development Plan, the elected members of Fingal County Council failed to have any or any proper regard to the submissions made on behalf of the Applicant and failed to properly address those submissions and failed to give reasons for not accepting the submissions made on behalf of the Applicant in respect of PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) and PA SH 11.7: Map Sheet 11 respectively.

9. In making the Development Plan, and in particular PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) and PA SH 11.7: Map Sheet 11, Fingal County Council failed to give any or any adequate reasons as to why it was lawful, necessary or appropriate to adopt those material alterations, or each of them, and include

those provisions in the Development Plan and failed to properly consider and/or address the recommendations made by the Office of the Planning Regulator and/or the Chief Executive. European Law

10. The making of the Development Plan with PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) contained therein was unlawful, invalid and ultra vires Fingal County Council as there was a failure to comply with Regulation (EU) No. 598/2014 on the establishment of rules and procedures with regard to the introduction of noise related operating restrictions at Union airports within a Balanced Approach and a failure to adopt a Balanced Approach prior to and/or in relation to the introduction of a noise mitigation measure.

11. The decisions to adopt PA CH 8.1 Section 8.5.7 Ensuring Environmental Protection and Sustainability (page 309) and PA SH 11.7: Map Sheet 11 and make the Development Plan with these provisions included were taken without the provisions, or each of them, having first been the subject of any or any proper environmental assessment in accordance with the requirements of Council Directive 2001/42/EC."

The standard of review

45. There is no special law for the standard of review for challenges to ministerial directions under planning law. The general law applies (a point made by Clarke J. in *Tristor Ltd v. Minister for Environment, Heritage and Local Government and Ors.* [2010] IEHC 397, [2010] 11 JIC 1103 (Unreported, High Court, 11th November 2010) at para. 5.7).

46. I endeavoured to analyse the standard of review in the judicial review context in *Four Districts Woodland Habitat Group and Others v. an Bord Pleanála and* [2023] IEHC 335, [2023] 6 JIC 2103 (Unreported, High Court, 21st June 2023) and can attempt to summarise those conclusions here. The three standards of review are as follows:

(i) **Non-deferential or *de novo* review:** Review of issues of legality or procedural impropriety is *de novo*. *O'Keefe v. An Bord Pleanála* [1992] I.L.R.M. 237, [1993] 1 I.R. 39, [1991] WJSC-SC 1137, [1991] 2 JIC 1504, Finlay C.J. only ever applied to irrationality as a ground of challenge, not legal issues. Any purely legal question of interpretation of a development plan or other legal instrument as such is a matter of law, and review of legal issues (whether by way of appeal or judicial review) is non-deferential: *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, Court of Appeal, 29th March 2021) at para. 100. Referring to this decision, Murray J. (Haughton and Barniville JJ. concurring) said in *A.K. v. U.S.* [2022] IECA 65, [2022] 3 JIC 1601 (Unreported, Court of Appeal, 16th March 2022) that "[a]t one end of the spectrum lie cases in which the appellate court simply forms its own view as to the matter in issue untrammelled by any finding that has been reached by the trial court. This is the standard applicable to findings of pure law" (para. 48). *De novo* review applies generally to the determination of all legal issues (*A.K. v. U.S.*, *Minogue*) under all headings of judicial review, but most markedly in relation to illegality and procedural impropriety. The judicial review court can in certain circumstances make *de novo* factual findings in limited and defined situations: see generally *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May 2021), particularly as regards procedural impropriety in order to establish what happened before the decision-maker, or to identify material error of fact (*Baile Éamoinn Teoranta v. An Bord Pleanála* [2020] IEHC 642, [2020] 12 JIC 0405 (Unreported, Barr J., 4th December 2020) at para. 82). The approach to new factual findings regarding jurisdictional issues depends on whether jurisdiction must be established independently of any evaluation by the decision-maker (in which case the court can receive evidence on this and determine the question of fact *de novo*) or whether, more typically, the point is one for the decision-maker to evaluate first (in which case there must be some deference – not all "jurisdictional" points can be saved for judicial review (*Reid (No. 1)*)). In terms of reasons, it will be for the court, not the decision-maker, to determine non-deferentially what were the main issues and whether the main reasons were given on those issues. Interpretation of a development plan is a question of law in this category: *Cicol Ltd v. An Bord Pleanála* [2008] IEHC 146, [2008] 5 JIC 0810 (Unreported, High Court, Irvine J., 8th May 2008), *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, Simons J., 10th March 2020) at para. 36, *Jennings and O'Connor v. An Bord Pleanála & Ors.* [2023] IEHC 14, [2023] 2 JIC 1711 (Unreported, High Court, Holland J., 17th February 2023) at para. 103.

(ii) **Somewhat deferential review:** Insofar as mixed issues of fact or law are concerned, the reviewing court must be somewhat deferential to the decision-

maker's evaluation of the factual component. Any such deference however does not extend to issues of legal interpretation. Relatedly, even if a decision-maker's view of the facts, whether on a pure question of fact or a mixed question, would otherwise fall within the realm of what the court would see as permissible, the issue of whether the decision-maker addressed herself to the correct issues and lawfully considered such issues is itself one of law for the court.

- (iii) **Highly deferential review:** Discretionary exercises of judgement or purely factual assessments by a decision-maker attract a high degree of deference: *The State (Lynch) v. Cooney* [1982] I.R. 337, [1982] I.L.R.M. 190, [1983] I.L.R.M. 89, O'Higgins C.J. The decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, [1992] I.L.R.M. 237, [1991] WJSC-SC 1137, [1991] 2 JIC 1504, Finlay C.J., remains relevant as part of the test in the negative sense that if there is no material supporting a decision, it will be quashed. But even if there is such material, a decision may still be quashed by reference to the reasonableness and proportionality standards of *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642, [1987] I.L.R.M. 202, per Henchy J. at pp. 657-658, *Radio Limerick One Limited v. I.R.T.C.* [1997] IESC 3, [1997] 2 I.R. 291, [1997] 2 I.L.R.M. 1, [1997] 1 JIC 1602, per Keane J., *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701, [2011] 2 I.L.R.M. 157, [2010] 1 JIC 2101. There is no separate watertight set of doctrines for different areas of the law – reasonableness and proportionality cover all types of judicial review insofar as there is always *some* form of right at issue (the comments of Denham J. in *Meadows* are relevant to the rationale for this), but the application of those doctrines varies with context across a spectrum. Any review of purely factual findings remains highly deferential in principle (subject to the point made above that even a finding of pure fact can be set aside if the decision-maker asks the wrong question or fails to conduct the exercise in a manner provided for by law), but there is nonetheless a range of deference within that. At one end of the spectrum, where a decision affects either constitutional or EU law rights, which are now subject to a requirement for an effective remedy generally (EU Charter of Fundamental Rights, art. 47), judicial review will be particularly attentive to that legal context. At the other end, the court will normally be slow to second-guess a purely factual decision made with special competence in an area of special knowledge. However, most planning law decisions, while made by experts, are also subject to an EU law right to an effective remedy (as in *N.M. (DRC) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217, [2018] 2 I.R. 591, [2016] 2 I.L.R.M. 369, 2016 WJSC-CA 13795, [2016] JIC 1403, Hogan J. at para. 51, *A.A.A. v. Minister for Justice* [2017] IESC 80, [2017] 12 JIC 2106 (Unreported, Supreme Court, Charleton J., 21st December 2017), *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2020] 2 I.L.R.M. 233, [2020] 7 JIC 3107, Clarke C.J. at para. 5.58), which must take priority over any national law rule, such as regarding extra deference to experts (the principle of supremacy – judgment of 15 July 1964, *Costa v ENEL*, 6/64, ECLI:EU:C:1964:66). Indeed, the CJEU has pitched the status of EU law very high for this purpose – where the court concludes that there can only be one lawful outcome, it must in an EU law context have a power and indeed a duty to bring that result about. Order 84 RSC allows this, either by *mandamus* or by directions following *certiorari*, but where a member state's law does not so provide, and the decision-maker produces an inconsistent decision following any given judgment, the national "court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application ... disapplying as necessary the national law that would prohibit it from proceeding in that way": judgment of 29 July 2019, *Alekszj Torubarov v Bevándorlási és Menekültügyi Hivatal*, C-556/17, ECLI:EU:C:2019:626 (Grand Chamber). Applied to the Irish context, that is a lot less dramatic than it sounds, because the High Court already has the required jurisdiction although it is rarely called for in practice.
47. In terms of previous cases on challenges to ministerial directions or development plans:
- (i) *Tristor Ltd v. Minister for Environment, Heritage and Local Government and Ors.* [2010] IEHC 397, [2010] 11 JIC 1103 (Unreported, High Court, Clarke J., 11th November 2010) and *Cork County Council v. Minister for Housing, Local Government, and Heritage* [2021] IEHC 683, [2022] 5 JIC 2701 (Unreported, High Court, 27th May 2022) are examples of non-deferential review on legality, specifically a correct understanding of the legal parameters of the jurisdiction of the OPR/Minister; similarly *Hickwell Ltd v. Meath County Council* [2022] IEHC 418

[2022] 7 JIC 1206 (Unreported, High Court, 12th July 2022) was a review on legality grounds as to an erroneous reason and inadequate reasons; *Protect East Meath v. Meath County Council II (No. 2)* [2023] IEHC 69, [2023] 2 JIC 1704 (Unreported, High Court 17th February 2023) was also a legality issue, in that case compliance with the requirement of consistency with mandatory as opposed to evaluative aspects of national policy in s. 10(1A) of the 2000 Act;

- (ii) *McCarthy Meats v. The Minister for Housing, Planning and Local Government* [2020] IEHC 371, [2020] 7 JIC 2707 (Unreported, High Court, Heslin J., 27th July 2020) is an example of deferential review on issues of fact or discretionary judgement.

48. At para. 179 of *McCarthy Meats*, Heslin J. comments as follows:

"Section 31(1)(a) does not say that, where a planning authority has ignored or has not taken sufficient account of the Minister's submissions, the latter may issue a Direction. Nor does s. 31(1)(c) state that, where the local area plan is not in compliance with the requirements of the 2000 Act, the Minister may make a direction. Rather, the Minister's power to issue a direction arises where the Minister 'is of the opinion' that this is so. The test under s. 31(1) is clearly a subjective, as opposed to an objective, one. The Minister's opinion must be lawfully reached and, in the present case, the Applicant submits that the Respondent's decision was, inter alia, irrational, unreasonable and based on error. Insofar as s. 31(1)(c) is concerned, the section does not require that the Local Area Plan is not in compliance with the Act, but that the Minister 'is of the opinion' that this is so."

49. Different people will have different emphases about how to phrase any given point, but the basic conclusion is consistent, namely that whether a conclusion is lawfully reached is for the court, and whether an evaluative conclusion is correct (what Heslin J. refers to as the "subjective" aspect), is for the Minister subject in particular to reasonableness review. Heslin J. was dealing with mixed questions of fact and law, so the subjective, evaluative element was a live issue and his comments have to be read in that context. If (a situation not addressed in *McCarthy Meats*) the question ("X") is genuinely a purely legal issue, then the court would have to decide that, and putting the words "of opinion that" before X doesn't render subjective that which is inherently objective. Where X is at least partly evaluative, then the decision-maker's assessment is subjective to that extent, within a zone of reasonableness.

Stages of a development plan

50. The flow-chart for the final making of a development plan is quite labyrinthine due to inherently complex procedures overlain with OPR and ministerial supervision. It isn't possible to intelligibly set out a completely comprehensive flow-chart within a reasonable word limit but what I can do is to identify the basic series of steps that are relevant here, acknowledging that there are sub-strands and possible variations that may arise in particular situations, but we don't need to devote space to them for present purposes.

Step 1 – review of development plan and issues paper

51. Section 11(1) to (3) of the 2000 Act provides for the preparation and notification of an intention to review a development plan:

"11.—(1) (a) Not later than 4 years after the making of a development plan, a planning authority shall, subject to paragraph (b), give notice of its intention to review its existing development plan and to prepare a new development plan for its area.

(aa) Subject to paragraph (b) and notwithstanding paragraph (a), the council of the city of Cork shall, not later than 4 years (or such longer period, not exceeding 5 years, as the Minister may specify by order) after the making of a development plan, give notice of its intention to review its existing development plan and to prepare a new development plan for its area.

(ab) Subject to paragraph (b) and notwithstanding paragraph (a), the council of the county of Cork shall, not later than 4 years (or such longer period, not exceeding 5 years, as the Minister may specify by order) after the making of a development plan, give notice of its intention to review its existing development plan and to prepare a new development plan for its area.

(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.

(2) A notice under subsection (1) shall be given to the Minister, the Office of the Planning Regulator, any prescribed authorities, any adjoining planning authorities, the Board, any relevant regional assembly and any local community development committee within the functional area of the local authority and shall be published in one or more newspapers circulating in the area to which the development plan relates and shall—

(a) state that the planning authority intends to review the existing development plan and to prepare a new development plan,

(b) indicate that submissions or observations regarding objectives and policies to deliver an overall strategy for the proper planning and sustainable development of the area of the development plan may be made in writing to the planning authority within a specified period (which shall not be less than 8 weeks),

(bb) indicate that children, or groups or associations representing the interests of children, are entitled to make submissions or observations under paragraph (b),

(bc) state that the planning authority intends to review the zoning of the area of the development plan for the purposes referred to in subsection (1A)(a) and (b) and indicate that requests or proposals for zoning of particular land for any purpose shall not be considered at this stage.

(c) indicate the time during which and the place or places where any background papers or draft proposals (if any) regarding the review of the existing plan and the preparation of the new development plan may be inspected.

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

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

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

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

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

52. The process that led to the making and adoption of the development plan began with the council publishing a strategic issues paper, dated **March 2021**.

Step 2 – submissions including by OPR on intention to review development plan

53. Section 31AM(1) to (3) provides:

"31AM.—(1) The Office shall evaluate and assess, at least at a strategic level—

- (a) a notice given under subsection (2) of section 11 by a planning authority to the Office for the purposes of that section of the intention of the planning authority to review its existing development plan,
 - (b) a notice and a copy of the draft development plan sent to the Office under subsection (1)(a) of section 12 by the planning authority concerned for the purpose of that section,
 - (c) a notice given under section 12(5)(aa) by the planning authority concerned to the Office in respect of a draft development plan,
 - (d) a notice given to the Office by a planning authority under section 12(7)(a), together with the proposed amendment that would, if made, be a material alteration of the draft development plan concerned,
 - (e) a notice sent together with the copy of any proposed variation of the development plan concerned sent to the Office under subsection (2)(a) of section 13 by the planning authority concerned for the purpose of that section,
 - (f) a notice given under section 13(5)(aa) by the planning authority concerned to the Office in respect of a proposed variation of a development plan,
- and the Office may make such observations or submissions for the purposes of the relevant provision.
- (2) In assessing and evaluating any requirement to which subsection (1) relates, the Office shall endeavour to ensure that, where appropriate, it addresses the legislative and policy matters relating to development plans as follows:
- (a) matters generally within the scope of section 10 and, in particular, subsection (2)(n) of that section in relation to climate change;
 - (b) consistency of the development plan with the National Planning Framework (or, where appropriate, the National Spatial Strategy) and the National Marine Planning Framework and regional spatial and economic strategies;
 - (c) relevant guidelines for planning authorities made under section 28, including the consistency of development plans with any specific planning policy requirements specified in those guidelines;
 - (d) policy directives issued under section 29;
 - (e) such other legislative and policy matters as the Minister may communicate to the Office in writing, the effect of which shall be published on the website of the Office.
- (3) In making observations or submissions for the purposes of the provisions referred to in subsection (1), or observations or submissions in respect of any evaluation or assessment to which subsection (2) relates, the Office shall—
- (a) make to the relevant planning authority such recommendations in relation to the Office's evaluation and assessments as it considers necessary to ensure effective co-ordination of national, regional and local planning requirements by the relevant planning authority in the discharge of its development planning functions, and
 - (b) send to the Minister a copy of any such observations or submissions, together with any recommendations made."

54. The OPR made a submission on **12th May 2021**.

Step 3 – report of chief executive on issues

- 55.** Section 11(4) provides for a report of the chief executive (**CE**) in relation to the issues:
- "(4) (a) Not later than 16 weeks after giving notice under subsection (1), the chief executive of a planning authority shall prepare a report on any submissions or observations received under subsection (2) or (3) and the matters arising out of any consultations under subsection (3).
- (aa) A chief executive's report prepared for the purposes of paragraph (a) shall be published on the website of the planning authority concerned as soon as practicable following its preparation.
- (b) A report under paragraph (a) shall—
- (i) list the persons or bodies who made submissions or observations under this section as well as any persons or bodies consulted by the authority,
 - (ii) summarise the issues raised in the submissions and during the consultations, where appropriate, but shall not refer to a submission relating to a request or proposal for zoning of particular land for any purpose.
 - (iii) give the opinion of the chief executive to the issues raised, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area, and any relevant policies or objectives for the time being of the Government or of any Minister of the Government, and
 - (iv) state the chief executive's recommendations on the policies to be included in the draft development plan.

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

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

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

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

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

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

56. Section 31AM(4) provides:

"(4) The report of the chief executive of the planning authority prepared for the elected members under—

(a) section 11(4), in respect of the preparation of a new development plan,

(b) subsection (4) or (8) of section 12 in respect of a draft development plan, or

(c) section 13(4) in respect of a variation of a development plan,

shall—

(i) summarise the issues raised in the observations or submissions, including recommendations, made by the Office in relation to the Office's evaluation and assessments under subsection (1),

(ii) outline the recommendations of the chief executive in relation to the manner in which those issues and recommendations should be addressed, taking account of the proper planning and sustainable development of the area, and

(iii) make the report available on the website of the planning authority as soon as practicable following submission to the members of the authority."

57. The CE's report on the pre-draft consultation, dated **2nd July 2021**, was published together with appendices.

Step 4 – members' motions on chief executive report

58. As noted above, the members had power to propose motions giving directions to the CE on foot of the report on issues.

59. In the present matter, various motions were received in relation to the CE's report on the submissions on the strategic issues paper. These motions included: motion AI068101; motion AI068207; motion AI068289; motion AI067790; motion AI068056; motion AI067989; motion AI068253; and motion AI067995. These were followed by the CE's responses and final decisions as appropriate by the members.

Step 5 – preparation of draft development plan

60. Section 11(5) provides:

"(5) (a) The chief executive shall, not later than 12 weeks following the receipt of any directions under subsection (4)(d), prepare a draft development plan and submit it to the members of the planning authority for their consideration.

(b) The members of a planning authority shall, as soon as may be, consider the draft development plan submitted by the chief executive in accordance with paragraph (a).

(c) Where the draft development plan has been considered in accordance with paragraph (b), it shall be deemed to be the draft development plan, unless, within 8 weeks of the submission of the draft development plan under paragraph (a), the planning authority, by resolution, amends that draft development plan."

61. Section 12(1) and (2) go on to provide for notification of the draft:

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

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

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

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

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

62. The CE's draft Fingal development plan was then prepared dated **3rd December 2021**.

Step 6 – members' amendment of draft and publication of draft

63. Section 11(5) provides:

"(5) (a) The chief executive shall, not later than 12 weeks following the receipt of any directions under subsection (4)(d), prepare a draft development plan and submit it to the members of the planning authority for their consideration.

(b) The members of a planning authority shall, as soon as may be, consider the draft development plan submitted by the chief executive in accordance with paragraph (a).

(c) Where the draft development plan has been considered in accordance with paragraph (b), it shall be deemed to be the draft development plan, unless, within 8 weeks of the submission of the draft development plan under paragraph (a), the planning authority, by resolution, amends that draft development plan."

64. Six motions were then received by elected members on the draft development plan which related to, *inter alia*, the airport and noise. These motions included: item 244 – motion AI074473; item 245 – motion AI074471; item 246 – motion AI074244; item 478 – motion AI073882; item 479 – motion AI074142; and item 481 – motion AI073988. A motion was also received relating to ALSAA – Ref.AI073781.

65. Council meetings were then held to discuss the draft and motions up to February 2022 and the draft development plan was then published on **24th February 2022**.

Step 7 – comments of OPR on draft development plan

66. As noted above, s. 31AM allows comment by the OPR on the draft development plan.

67. The OPR made a submission on the draft plan on 12th May 2022 along with other submissions from interested parties.

Step 8 – report of chief executive on submissions on draft

68. Section 12(4) provides:

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

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

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

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

(ii) provide a summary of—

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

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

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

(iii) give the response of the chief executive to the issues raised, taking account of any directions of the members of the authority or the committee under section 11(4), the proper planning and sustainable development of the area, the statutory

obligations of any local authority in the area and any relevant policies or objectives of the Government or of any Minister of the Government and, if appropriate, any observations made by the Minister for Arts, Heritage, Gaeltacht and the Islands under subsection (3)(b)(iv).

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

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

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

69. Again s. 31AM provides for the OPR's comments to be addressed by the CE by report on the draft plan.

70. The CE's report on submissions on the draft development plan was then published on **28th July 2022.**

Step 9 – material amendment of draft plan and notification of amendments

71. Section 12(5) to (7) provide:

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) a copy of the proposed amendment of the draft development plan may be inspected at a stated place and at stated times during a stated period of not less than 4 weeks (and the copy shall be kept available for inspection accordingly), and
(ii) written submissions or observations with respect to the proposed amendment of the draft made to the planning authority within the stated period shall be taken into consideration before the making of any amendment.”

72. Four relevant motions were received: item 196 – CE CH 8.1: amend objective DAO13; item 204 – motion AI082296; item 205 – motion AI082439; and item 206 – motion AI082441

73. The CE's report was considered by the elected members at special council meetings held in September and October 2022. The elected members resolved to amend the draft development plan by way of, *inter alia*, material alteration PA CH 8.1: Section 8.57 as follows:

“Include the following text as a final paragraph on page 309:

That the Development Plan recognises the inadequacy of the proposed noise insulation scheme to protect the health of those affected by aircraft noise and that in view of the increasing knowledge and scientific evidence of the serious health impact of aircraft noise on the physical health of Fingal residents that is an objective to take measures including the expansion of noise insulation to ensure noise levels produced by aircraft during night time are reduced to below 40 Dbl night as night-time aircraft noise above this level is associated with adverse effects including increased mortality, stress, high blood pressure and a deterioration in cardiovascular health.”

74. Thereafter, proposed material alterations, including material alteration PA CH 8.1 and material alteration PA SH 11.7, were published on **11th November 2022**.

Step 10 – OPR and other submissions on material amendments

75. As noted above, s. 31AM allows the OPR to make “recommendations”, not requirements, regarding material amendments. The text bears repeating in this context:

“76. Section 31AM(1) to (3) provides:

31AM.—(1) The Office shall evaluate and assess, at least at a strategic level—

(a) a notice given under subsection (2) of section 11 by a planning authority to the Office for the purposes of that section of the intention of the planning authority to review its existing development plan,

(b) a notice and a copy of the draft development plan sent to the Office under subsection (1)(a) of section 12 by the planning authority concerned for the purpose of that section,

(c) a notice given under section 12(5)(aa) by the planning authority concerned to the Office in respect of a draft development plan,

(d) a notice given to the Office by a planning authority under section 12(7)(a), together with the proposed amendment that would, if made, be a material alteration of the draft development plan concerned,

(e) a notice sent together with the copy of any proposed variation of the development plan concerned sent to the Office under subsection (2)(a) of section 13 by the planning authority concerned for the purpose of that section,

(f) a notice given under section 13(5)(aa) by the planning authority concerned to the Office in respect of a proposed variation of a development plan,
and the Office may make such observations or submissions for the purposes of the relevant provision.

(2) In assessing and evaluating any requirement to which subsection (1) relates, the Office shall endeavour to ensure that, where appropriate, it addresses the legislative and policy matters relating to development plans as follows:

(a) matters generally within the scope of section 10 and, in particular, subsection (2)(n) of that section in relation to climate change;

(b) consistency of the development plan with the National Planning Framework (or, where appropriate, the National Spatial Strategy) and the National Marine Planning Framework and regional spatial and economic strategies;

(c) relevant guidelines for planning authorities made under section 28, including the consistency of development plans with any specific planning policy requirements specified in those guidelines;

(d) policy directives issued under section 29;

(e) such other legislative and policy matters as the Minister may communicate to the Office in writing, the effect of which shall be published on the website of the Office.

(3) In making observations or submissions for the purposes of the provisions referred to in subsection (1), or observations or submissions in respect of any evaluation or assessment to which subsection (2) relates, the Office shall—

(a) make to the relevant planning authority such recommendations in relation to the Office's evaluation and assessments as it considers necessary to ensure effective co-ordination of national, regional and local planning requirements by the relevant planning authority in the discharge of its development planning functions, and

(b) send to the Minister a copy of any such observations or submissions, together with any recommendations made."

76. Comments were then made on the material amendments. In respect of proposed material alteration PA CH 8.1, some 20 submissions were received.

77. The OPR made a submission on the proposed material alterations on 22nd December 2022.

78. On 22nd December 2022, the OPR submission on the proposed amendments to the draft development plan under section 31AM(1)(d) made a recommendation that the planning authority make the development plan without the original PA CH 8.1, having regard to section 10(2)(d) of the 2000 Act and NPO 65. The OPR's comment was as follows:

"5.1 Dublin Airport Section 8.5.7 of the draft Plan seeks to ensure environmental protection and sustainability and the Aircraft Noise Zones are set out in Table 8.1. It is stated that these standards have been developed in compliance with relevant standards and guidance from a range of sources that includes ProPG: Planning and Noise and ICAO guidance on land-use planning and management. Further, Policy DAP5 supports the actions of any update of the noise action plan and Objective DAO15 commits to a review of the operation of noise zones in line with the legislative framework of the area whilst Policy DAP6 sets out to protect residents affected by noise aviation 'particularly night-time noise' and DAO11, DAO13, DAO16 and DAO21 set out a clear policy approach for noise monitoring and management. As such the Office considers that PA CH 8.1 which seeks to include additional text on noise level standards for night time has the potential to cause a policy conflict and/or confusion within the Plan. In addition, it is unclear what evidence supports the inclusion or the requirement for additional standards.

MA Recommendation 6 - Noise Standards

Having regard [*sic*] section 10(2)(d) of the of Planning and Development Act 2000, as amended, and NPO 65 to promote pro-active management of noise and to support the Noise Action Plans, the planning authority is required [*sic* -there is no power to *require* given to the OPR] to make the Plan without PA CH 8.1."

Step 11 – report on comments on material amendments

79. Section 12(8) and (8A) provide:

"(8) (a) Not later than 8 weeks after giving notice under subsection (7), the chief executive of a planning authority shall prepare a report on any submissions or observations received under that subsection and submit the report to the members of the authority for their consideration.

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

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

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

(ii) provide a summary of—

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

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

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

(iii) give the response of the chief executive to the issues raised, taking account of the directions of the members of the authority or the committee under section 11(4), the proper planning and sustainable development of the area, the statutory

obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

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

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

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

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

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

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

80. The CE’s report on submissions on proposed material alterations is dated **15th January 2023**. In the report, the CE agreed with recommendation MA6 and recommended that the planning authority make the development plan without the original PA CH 8.1, noting the separate role of ANCA for addressing noise in relation to Dublin Airport and the fact that the noise insulation scheme had been established in response to condition 7 to the North Runway permission and hence was not a matter for the plan.

Step 12 – further amendment of draft and adoption and notification of plan

81. Section 12(9) to (12) provides:

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

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

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

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

(c) A further modification to the alteration—

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

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

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

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

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

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

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

(c) In addition to the requirements of paragraphs (a) and (b), a planning authority shall send a copy of the development plan to the Minister, the Office of the Planning Regulator,

the prescribed authorities, any adjoining planning authorities, the Board, and any local community development committee within its area.”

82. The next stage was further amendment of the draft. Motions were received on the, *inter alia*, proposed material alteration PA CH 8.1, including: item 81 – PROPOSED AMENDMENT CH 8.1; item 85 – PROPOSED AMENDMENT CH 8.2; item 86 – PROPOSED AMENDMENT CH 8.3; item 82 – motion AI087956; item 83 – motion AI087935; item 84 – motion AI087943; and item 87 – motion AI087942.

83. In addition to the foregoing, the proposed material alterations were also subject to the requirements arising in respect of SEA.

84. The elected members of the council held a meeting on 15th February 2023, and voted by 34 to 1 to pass a motion (item 84 – motion AI087943) proposed by Cllr Graves to replace the text at the final paragraph of page 309 with the text proposed in the motion, as follows:

“That the Development Plan recognises the inadequacy of the proposed noise insulation scheme to protect the health of those affected by aircraft noise and that in view of the increasing knowledge and scientific evidence of the serious health impact of aircraft noise on the physical health of Fingal residents that it is an objective to take measures including the expansion of noise insulation schemes operated by DAA to include all areas exposed to 40dB Lnight or higher as produced by aircraft during night time. The insulation schemes should be designed to ensure that internal noise levels are in keeping with BSI Standards Publication BS 8233:2014 Guidance on sound insulation and noise reduction for buildings, table 4: Indoor ambient noise levels for dwellings, as referenced in Chapter 14: Development Management Standards of the Development Plan 2023 - 2029. This approach is in response to the knowledge that night-time aircraft noise above this level is associated with adverse effects including increased mortality, stress, high blood pressure and a deterioration in cardiovascular health.”

85. The development plan was made on **22nd February 2023** with the adopted amendments. On **1st March 2023**, the CE issued a notice to the OPR in accordance with s. 31AM(6) of the 2000 Act which included notice that the development plan had not been adopted in accordance with the OPR’s recommendation, including recommendation 6 – Noise Standards. In the s. 31AM(6) notice issued on 1st March 2023, the planning authority’s stated reasons for non-compliance with recommendation MA6 as follows:

“OPR Recommendation 6 – Noise Standards

Planning Reason for Decision:

This alteration ensures that both this text and PA CH 8.3: Section 8.5.7 Objective DA013 agree and meet the objectives of the Development Plan.

In addition to the reason given for including PA CH 8.1 above, it should be noted that the reason for including PA CH 8.3 is that health issues are a matter of importance for inclusion in the Development Plan. This modification ensures that both this and PA CH 8.1 Section 8.5.7 agree and meet the objectives of the Development Plan.”

86. The plan came into effect on **5th April 2023**. An errata document, not relevant to the issues here, was subsequently published correcting a number of typographical/editing errors in the development plan.

Step 13 – OPR notice following adoption of development plan

87. Section 31AM(6) to (9) of the 2000 Act provides:

“(6) A planning authority shall notify the Office within 5 working days of the making of a development plan or a variation to a development plan and send a copy of the written statement and maps as duly made and where the planning authority—

(a) decides not to comply with any recommendations made in the relevant report of the Office, or

(b) otherwise make the plan in such a manner as to be inconsistent with any recommendation made by the Office,

then the chief executive shall inform the Office accordingly in writing, which notice shall state reasons for the decision of the planning authority.

(7) Where paragraph (a) or (b) of subsection (6) applies, the Office shall consider whether or not the development plan as made, or the variation of it, by the planning authority is, in the Office’s opinion, consistent with any recommendations made by the Office.

(8) Where subsequent to any consideration for the purposes of subsection (7), the Office is of the opinion that—

(a) the development plan or the variation of it, as the case may be, has not been made in a manner consistent with the recommendations of the Office,

(b) that the decision of the planning authority concerned results in the making of a development plan, or its variation, in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned, and

(c) as a consequence of paragraphs (a) and (b), the use by the Minister of his or her functions to issue a direction under section 31 would be merited, then the Office shall issue, no later than 4 weeks after the development plan or the variation to the development plan is made, a notice to the Minister containing—

(i) recommendations that the Minister exercise his or her function to take such steps as to rectify the matter in a manner that, in the opinion of the Office, will ensure that the development plan, or the development plan as varied by the planning authority, sets out an overall strategy for proper planning and sustainable development, and

(ii) a proposed draft of a direction to which paragraph (c) would relate.

(9) A copy of the notice issued to the Minister under subsection (8) shall be made available by the Office on its website.”

88. On **22nd March 2023**, the OPR issued a notice to the council pursuant to s. 31AM(8) of the 2000 Act.

89. Some of the wording in the OPR’s s. 31AM(8) recommendation is erroneous insofar as it drew wording from the original PA CH 8.1 instead of PA CH 8.1 as modified.

90. The wording of the operative part of the proposed draft direction is as follows:

“DRAFT DIRECTION IN THE MATTER OF SECTION 31

OF THE PLANNING AND DEVELOPMENT ACT 2000 (as amended)

Fingal Development Plan 2023 -2029

‘Development Plan’ means the Fingal Development Plan 2023 -2029

‘Planning Authority’ means Fingal County Council

The Minister of State at the Department of Housing, Local Government and Heritage in exercise of the powers conferred on him by section 31 of the Planning and Development Act 2000 (No.30 of 2000) and the Housing, Local Government and Heritage (Delegation of Ministerial Functions) Order 2023 (S.I. No. 116 of 2023), and consequent to a recommendation made to him by the Office of the Planning Regulator, hereby directs as follows:

1. This Direction may be cited as the Planning and Development (Fingal Development Plan 2023-2029) Direction 2023.

2. The Planning Authority is hereby directed to take the following steps with regard to the Development Plan:

...

(c) Delete the amended and additional text inserted under PA CH 8.1 as modified, consistent with the recommendation of the chief executive’s report dated 15th January 2023.

STATEMENT OF REASONS

...

IV. The Development Plan as made includes provisions that recognises the inadequacy of the proposed noise insulation scheme to protect the health of those affected by aircraft noise and that it is an objective to take measures including the expansion of noise insulation to ensure noise levels produced by aircraft during night time are reduced to below 40DbL Night, which matters are subject to a separate statutory code which includes the designation of a separate action planning authority, the Aircraft Noise Competent Authority, and the preparation of a Noise Action Plan. The inclusion of matters which should be determined through the appropriate statutory process, including the Noise Action Plan, is therefore inconsistent with NPO 65.

V. No adequate reasons nor explanations relating to the proper planning and sustainable development of the area have been provided to explain why lands have been zoned in such a way and how this approach (involving a failure to demonstrate a strategic rationale to underpin the zoning of further land for employment purposes zone lands and to a failure to have regard to the Development Plan Guidelines and to satisfy the criteria for development at national road interchanges or junctions) is consistent with an overall strategy for the proper and sustainable development of the area.

VI The Development Plan has not been made in a manner consistent with, and has failed to implement, the recommendations of the Office of the Planning Regulator under Section 31 AM of the Act.

VII In light of the matters set out at I-VI above, the Minister is of the opinion that the Development Plan as made fails to set out an overall strategy for the proper planning and sustainable development of the area.

VIII In light of the matters set out at I to VI, above, the Development Plan is not in compliance with the requirements of the Act.

GIVEN under my hand,

Minister for Housing, Local Government and Heritage

day of Month, year.”

Step 14 – draft ministerial direction

91. Section 31AN(1) to (3) of the 2000 Act provides:

“31AN.—(1) The Minister shall consider the recommendations of the Office in the notice issued under section 31AM and—

(a) where the Minister agrees with that notice, then the Minister shall proceed, pursuant to section 31, to issue a notice for the purposes of subsections (3) and (4) of that section having taken account of the proposed draft direction submitted by the Office, or

(b) where the Minister does not so agree with the Office, then the Minister shall—

(i) prepare a statement in writing of his or her reasons for not agreeing,

(ii) cause that statement to be laid before each House of the Oireachtas, and

(iii) as soon as practicable, make that statement available on the website of the Department of Housing, Planning and Local Government.

(2) As soon as practicable after a statement has been prepared under subsection (1)(b), the Minister shall cause a copy of it to be sent to the Office, the planning authority concerned and, where relevant, the regional assembly concerned and the Office and that authority shall, as soon as practicable thereafter, make it available on their respective websites.

(3) Where the Minister issues a notice under section 31 for the purposes of subsections (3) and (4) of that section—

(a) the notice shall specify that the report of the chief executive on the submissions on the draft direction shall be made to the Office, and

(b) the chief executive shall act accordingly.”

92. Section 31(3) of the 2000 Act provides:

“(3) Before he or she issues a direction under this section, the Minister shall, no later than 6 weeks after a plan is made, issue a notice in writing to a planning authority consequent on a recommendation being made to him or her by the Office of the Planning Regulator under section 31AM(8) or 31AO(7), as the case may be.

(4) The notice referred to in subsection (3) shall, for stated reasons, inform the planning authority of—

(a) the forming of the opinion referred to in subsection (1),

(b) the intention of the Minister to issue a direction (a draft of which shall be contained in the notice) to the planning authority to take certain measures specified in the notice in order to ensure that the plan is in compliance with the requirements of this Act and sets out an overall strategy for the proper planning and sustainable development of the area,

(c) those parts of the plan that by virtue of the issuing of the notice under this subsection shall be taken not to have come into effect, been made or amended under subsection (6), and

(d) if applicable, requiring the planning authority to take measures specified in the notice to ensure that the plan is in compliance with the transport strategy of the Dublin Transport Authority.

(5) The Minister shall furnish a copy of the notice referred to in subsection (3)—

(a) to the chief executive and to the Cathaoirleach of the planning authority concerned,

(b) where there is a regional spatial and economic strategy in force for the area of the planning authority, to the director of the regional assembly concerned,

(c) where it concerns any matter to which Part IIB relates, to the Office of the Planning Regulator, and

(d) where relevant, to the National Transport Authority.”

93. The Minister issued a draft direction on **4th April 2023**.

94. This includes the same wording in the OPR’s s. 31AM(8) recommendation, whereby it cites the original PA CH 8.1 instead of PA CH 8.1 as modified.

Step 15 – advertisement and submissions on draft direction

95. Section 31(7) of the 2000 Act provides:

“(7) No later than 2 weeks after receipt of the notice issued by the Minister under subsection (3), the chief executive of the planning authority shall publish notice of the draft direction in at least one newspaper circulating in the area of the development plan or local area plan, as the case may be, which shall state—

(a) the reasons for the draft direction,

(b) that a copy of the draft direction may be inspected at such place or places as are specified in the notice during such period as may be so stated (being a period of not more than 2 weeks), and

(c) that written submissions or observations in respect of the draft direction may be made to the planning authority during such period and shall be taken into consideration by the

Office of the Planning Regulator before it makes a recommendation to the Minister on the matter.”

96. The council issued a public notice on **18th April 2023** inviting comments on the draft ministerial direction between 18th April 2023 and 2nd May 2023. The wording of the notice was effectively determined by the Minister so to the extent that the wording also reflected the confusion in the process, that isn't on the council.

97. Friends of the Irish Environment made a submission on 28th April 2023. SMTW Environmental DAC made a submission on 2nd May 2023 and daa plc made a submission on 1st May 2023.

98. The HSE made a submission on 2nd May 2023.

Step 16 - chief executive report on draft direction

99. Section 31(8) and (9) provides:

“(8) No later than 4 weeks after the expiry of the period referred to in subsection (7)(b), the chief executive shall prepare a report on any submissions or observations received under subsection (7)(c) which shall be furnished to the elected members of the planning authority, the Office of the Planning Regulator, the Minister and, where relevant, the regional assembly concerned.

(9) The report referred to in subsection (8) shall—

(a) summarise the views of any person who made submissions or observations to the planning authority,

(b) summarise the views of and recommendations (if any) made by the elected members of the planning authority,

(c) summarise the views of and recommendations (if any) made by the regional assembly,

(d) make recommendations in relation to the best manner in which to give effect to the draft direction.

(10) In relation to the notice issued by the Minister under subsection (3), the elected members of the planning authority—

(a) may make a submission to the Office of the Planning Regulator at any time up to the expiry of the period of time referred to in subsection (7)(b), and

(b) where so submitted, shall send a copy of it to the Minister.”

100. The chief executive of the council issued a report on the consultation on **30th May 2023**.

Step 17 – OPR recommendation on direction

101. Section 31AN(4) provides:

“(4) The Office shall consider the report of the chief executive on the submissions, together with any submission made under section 31(10), and shall, no later than 3 weeks after receipt of that report—

(a) recommend to the Minister that he or she issue the direction with or without minor amendments, or

(b) for stated reasons, where the Office is of the opinion that—

(i) a material amendment to the draft direction may be required,

(ii) further investigation is necessary in order to clarify any aspect of the report furnished or submissions made, or

(iii) it is necessary for any other reason,

appoint a person to be an inspector.”

102. On **19th June 2023**, the OPR issued a notice to the Minister pursuant to s. 31AN(4) of the 2000 Act.

Step 18 – ministerial direction

103. Section 31AN(5) and (6) provides:

“(4A) The Minister shall consider a recommendation of the Office under subsection (4)(a) that he or she issue a direction with or without minor amendments and—

(a) where the Minister agrees with the recommendation, the Minister shall, no later than 6 weeks after receipt of the recommendation, subject to subsection (16), issue the direction under section 31 with or without minor amendments, or

(b) where the Minister does not so agree with the recommendation, then the Minister shall—

(i) prepare a statement in writing of his or her reasons for not agreeing,

(ii) cause that statement to be laid before each House of the Oireachtas, and

(iii) as soon as practicable, make that statement available on the website of the Department of Housing, Local Government and Heritage.

(4B) As soon as practicable after a statement has been prepared under subsection (4A)(b), the Minister shall cause a copy of it to be sent to the Office, the planning authority concerned and, where relevant, the regional assembly concerned and the Office and that authority shall, as soon as practicable thereafter, make it available on their respective websites.”

104. Section 31(1) and (2) provides:

“31.—(1) Where the Minister is of the opinion that—

(a) a planning authority, in making a development plan, a variation of a development plan, a local area plan or an amendment to a local area plan (in this section referred to as a "plan") has failed to—

(i) implement a recommendation made to the planning authority by—

(I) the Minister under section 12, 13 or 20, or

(II) the Office of the Planning Regulator under section 31AM or 31AO,

or

(ii) take account of any submission or observation made to the planning authority by—

(I) the Minister under section 12, 13 or 20, or

(II) the Office of the Planning Regulator under section 31AM or 31AO,

(b) in the case of a plan, the plan fails to set out an overall strategy for the proper planning and sustainable development of the area,

(ba) a plan is not consistent with—

(i) the national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy,

(ia) the National Marine Planning Framework, or

(ii) specific planning policy requirements specified in guidelines issued by the Minister under subsection (1) of section 28,

(c) the plan is not in compliance with the requirements of this Act, or

(d) if applicable, having received a submission prepared under section 31C or 31D (inserted by section 95 of the Act of 2008) that a plan of a planning authority in the Greater Dublin Area (GDA) is not consistent with the transport strategy of the National Transport Authority, then, subject to compliance with the relevant provisions of sections 31AM and 31AN or sections 31AO and 31AP, as the case may be, the Minister may in accordance with this section, for stated reasons, direct a planning authority to take such specified measures as he or she may require in relation to that plan.

(2) Where the Minister issues a direction under this section the planning authority, notwithstanding anything contained in Chapter I or II of this Part, shall comply with that direction and the chief executive or elected members shall not exercise a power or perform a function conferred on them by this Act in a manner that contravenes the direction so issued.”

105. On **28th July 2023**, a final ministerial direction was issued pursuant to s. 31 of the 2000 Act, cited as “the Planning and Development (Fingal Development Plan 2023-2029) Direction 2023”. The operative part of the covering letter is as follows:

“28th July 2023

For the Attention of: Ms. AnnMarie Farrelly, Chief Executive

Fingal County Council County Hall

Main Street

Swords

County Dublin K67 X8Y2

Section 31 of the Planning and Development Act 2000 (as amended) Decision to Issue a Direction to Fingal County Council regarding the Fingal Development Plan 2023 - 2029

Dear AnnMarie,

I am writing to inform you of the following in relation to the section 31 draft Direction that issued to Fingal County Council on 4th April 2023, and the subsequent consideration by the Office of the Planning Regulator (‘the Office’) of your report and the submissions made directly to the Office in connection with the Fingal Development Plan 2023-2029, as adopted by the elected members of Fingal County Council on 22nd February 2023.

The Office notified the Minister pursuant to section 31AN(4) of the Planning and Development Act 2000 (‘the Act’) on 19th June 2023 and recommended that I, as Minister, issue the Direction as attached to the Notice of Intention to Issue a Direction, with minor amendments. The draft Direction can be summarised as follows:

- Part 2(a) - delete four (4) zoning objectives from the adopted Plan: i.e. the subject land is unzoned.
- Part 2(b) - reinstate one (1) zoning objective consistent with the recommendation of the chief executive's report dated 15th January 2023.
- Part 2(c) - delete the amended and additional text inserted under PA CH 8.1 as modified, consistent with the recommendation of the chief executive's report of 15th January 2023.

A copy of the notice letter and proposed final Direction was submitted to the Minister by the Office along with supporting documentation, which included the following:

- Fingal County Council Chief Executive's Report issued under section 31(8) of the Act;
- A copy of submissions received by the Office pursuant to section 31(10) of the Act.

Having reviewed and considered the Office of the Planning Regulator's notification letter under section 31AN(4), your report on the draft Direction and submissions received, and the submissions made directly by elected members of the Council to the Office, I am of the opinion that the Direction should be issued in line with the recommendations of the Office. In the above regard, I refer you to the Statement of Reasons set out in the enclosed Direction, inclusive of specified inconsistencies with National Policy Objectives of the National Planning Framework.

Please note the Direction includes minor renumbering to effect the omission of Part 2(b) of the draft Direction previously issued, subsequent to the clarification provided in your report with respect to the GB zoning objective pertaining to lands at Newtown in the adopted plan.

...

In relation to material alteration PA CH 8.1, as modified, I note from page 33 of your report in respect of the draft Direction that some submissions received by your authority contended that requirements arising out of various planning permissions related to the airport have not been adhered to and it has been asserted that this is resulting in an overall increase in levels of aircraft noise in the vicinity.

As set out below, the Aircraft Noise Competent Authority (ANCA) has statutory responsibility for aircraft noise regulation. In addition, in accordance with Section 23 of the 2019 Act, ANCA as the competent authority has specific enforcement powers including the power to address failures to comply with a relevant provision, which can include a provision of a noise mitigation measure or operating restriction which is not included in a planning permission granted under section 34 of the Act of 2000, or a provision of the 2019 Act.

Fingal County Council, in its capacity as planning authority, has separate planning enforcement powers under Part VIII of the 2000 Act, which empower it to investigate potential breaches of planning legislation, including compliance with the conditions attached to a grant of planning permission. Pursuant to section 30 of the Act, I am specifically precluded from exercising any power or control in relation to any particular case with which a planning authority is or may be concerned. This includes matters pertaining to planning enforcement.

I wish to highlight that notwithstanding the specific reference to section 34B and 34C of the Aircraft Noise (Dublin Airport) Regulation Act 2019 at page 17 of the Office of the Planning Regulator's section 31AN(4) notice letter, I am cognisant that these sections are provisions of the Planning and Development Act 2000 (as amended), as inserted by the 2019 Act.

Notwithstanding the foregoing, I agree with the Office of the Planning Regulator that the regulation of noise is governed by separate statutory provisions and processes and that the material alteration included in the adopted plan is not consistent with National Policy Objective 65 of the National Planning Framework.

I note the provisions of the European Communities (Environmental Noise) Regulations 2018, as amended, designates Fingal County Council as the action planning authority for the purpose of making and approving a noise action plan for Dublin Airport.

The Regulations provide for noise action plans and revised noise action plans to be made available to the general public. They also provide for public consultation on proposed noise action plans and the review of noise action plans, and for the results of public consultation to be taken into account in finalising such plans. I note under the provisions of the above Regulations, as amended, that current Noise Action Plans are due to be reviewed no later than 18th July 2024.

The adoption of the Fingal Development Plan with the material alteration in question conflicts with this statutory process and is not consistent with NPO 65. You will be aware that Fingal County Council has a statutory obligation under section 12(11) of the 2000 Act to ensure that its Development Plan is consistent with the objectives of the National Planning Framework.

Furthermore, I note the exclusive statutory role conferred on Fingal County Council under the Aircraft Noise (Dublin Airport) Regulation Act 2019 and for these purposes now called the Aircraft Noise Competent Authority (ANCA). Accordingly, ANCA is now the competent authority for the purposes of the Aircraft Noise Regulation and the Act of 2019. The functions of the competent authority are to be exercised by the Chief Executive of the Council. ANCA is therefore the competent authority, inter alia, in respect of noise mitigation measures, noise related activities and operating restrictions.

The stated objective of PA CH 8.1 (material alteration of the Development Plan) as made constitutes a noise mitigation measure and a noise related activity or, in the alternative, is

an operating restriction which can only be considered, assessed and imposed by the competent authority.

The inclusion of this particular objective is not in compliance with the provisions of the Planning and Development Act, 2000 (as amended) and the Aircraft Noise (Dublin Airport) Regulation Act 2019 and the exclusive jurisdiction conferred on ANCA and the Chief Executive under the 2019 Act in respect of the subject matter of the objective. There is a conflict with section 15 of the Planning and Development Act, 2000, whereby it is a general duty of the planning authority to secure the objectives of the development plan, and with section 3 of the Act of 2019 having regard to obligations of independence, influence and direction contained therein.

Section 9(1) of the Act of 2019 confers on the competent authority the jurisdiction to assess the noise situation at the airport and pursuant to subsections (2) and (3), it is required to comply with the specified criteria before adopting noise related actions or operating restrictions.

Section 9(7) of the 2019 Act requires that measures or a combination of measures taken in accordance with the Aircraft Noise Regulation, the 2019 Act and the Act of 2000 for the airport shall not be more restrictive than is necessary in order to achieve the noise abatement objective. It is noted that ANCA included provisions relating to a noise insulation scheme as one of the conditions of a recent regulatory decision.

By including an objective in the Development Plan to expand noise insulation schemes operated by DAA to include all areas exposed to 40 dB Lnight or higher as produced by aircraft during night time, it is considered that the plan has included matters upon which statutory competence has been conferred on ANCA under the 2019 Act. I further note that section 4 of the 2019 Act relates to ANCA's role in this regard. Further, in adopting the material alteration, neither the Balanced Approach nor the other criteria required under the 2019 Act have been applied before adopting such a measure. Competence with respect to noise insulation schemes is granted to the competent authority under the 2019 Act.

In carefully considering the recommendation of the Office, I am cognisant that you, as Chief Executive of the planning authority, advised the elected members against making the plan with this material alteration (in both its original and adopted modified form), and it is clear that the Office of the Planning Regulator concur with your position on the matter.

...

Accordingly, Fingal County Council should TAKE NOTICE that on 28th day of July, 2023 I have issued a Direction pursuant to section 31 of the Planning and Development Act 2000 (as amended). Pursuant to section 31(17) of the Act, this Direction is deemed to have immediate effect and its terms are considered to be incorporated into the plan. A copy of this Direction is enclosed.

In light of the foregoing, Fingal County Council is required, pursuant to section 31(2) of the Planning and Development Act, 2000 (as amended) to comply with this Direction so as to rectify the matter in a manner that, in my opinion, will ensure that the Fingal Development Plan 2023- 2029 sets out an overall strategy for proper planning and sustainable development and meets the requirements of the Act.

The Council should ensure that the Direction is available for inspection at its offices and on its website.

My officials remain available to assist you, as necessary, in complying with the foregoing process.

Yours sincerely,

Kieran O'Donnell TD

Minister of State for Local Government and Planning"

106. The text of the attached direction is in material part as follows:

"DIRECTION IN THE MATTER OF SECTION 31

OF THE PLANNING AND DEVELOPMENT ACT 2000 (as amended)

Fingal Development Plan 2023-2029

'Development Plan' means the Fingal Development Plan 2023-2029

'Planning Authority' means Fingal County Council

'RSES' means Regional Spatial and Economic Strategy for the Eastern and Midland Region

The Minister of State at the Department of Housing, Local Government and Heritage in exercise of the powers conferred on him by section 31 of the Planning and Development Act 2000 (No.30 of 2000) and the Housing, Local Government and Heritage (Delegation of Ministerial Functions) Order 2023 (S.I. No. 116 of 2023), and consequent to a recommendation made to him by the Office of the Planning Regulator under section 31AN(4) of the Act, hereby directs as follows:

(1) This Direction may be cited as the Planning and Development (Fingal Development Plan 2023-2029) Direction 2023.

(2) The Planning Authority is hereby directed to take the following steps with regard to the Development Plan:

(a) Delete the following zoning objectives from the adopted Plan i.e. the subject land is unzoned:

(i) Land zoned General Employment in the adopted Plan to the east of Junction 2 on the M2 at St. Margaret's which was zoned Greenbelt in the Fingal Development Plan 2017-2023.

(ii) Land zoned Food Park in the adopted Plan south of Coolquay village.

(iii) Land zoned Rural Business in the adopted Plan to the south of Coolquay village.

(iv) Land zoned General Employment in the adopted Plan to the south east of Junction 5 on the M1 at Hedgestown, Courtlough, which was zoned Rural in the Fingal Development Plan 2017-2023.

(b) Delete the amended and additional text inserted under PA CH 8.1 as modified, consistent with the recommendation of the chief executive's report dated 15th January 2023.

STATEMENT OF REASONS

...

V. The Development Plan as made includes provisions that state that the proposed noise insulation scheme to protect the health of those affected by aircraft noise is inadequate and that it is an objective to take measures including the expansion of noise insulation schemes operated by DAA to include all areas exposed to 40dB Lnight or higher as produced by aircraft during night time which matters are subject to separate statutory provisions and processes including the European Communities (Environmental Noise) Regulations 2018, the Aircraft Noise Regulation 598/2014 and the Aircraft Noise (Dublin Airport) Regulation Act 2019. This includes the designation of separate action planning authorities under the 2018 Regulations for the purpose of preparing Noise Action Plans, while the 2019 Act designated Fingal County Council as competent authority for the purposes of Aircraft Noise Regulation 598/2014 and that 2019 Act, which is statutorily independent of the planning authority. The inclusion of an objective in the Development Plan, which conflicts with and undermines these separate statutory provisions and processes, including the Noise Action Plan, is therefore inconsistent with National Policy Objective 65 of the National Planning Framework.

The inclusion of this particular objective is not in compliance with the provisions of the Planning and Development Act, 2000 (as amended) and the Aircraft Noise (Dublin Airport) Regulation Act 2019 and the exclusive jurisdiction conferred on ANCA and the Chief Executive under the 2019 Act in respect of the subject matter of the objective. There is a conflict with section 15 of the Planning and Development Act, 2000 whereby it is a general duty of the planning authority to secure the objectives of the development plan, and with section 3 of the Act of 2019 having regard to obligations of independence, influence and direction contained therein.

In particular, the inclusion of an objective in respect of a noise insulation scheme in the Development Plan is a noise mitigation measure and noise related action, or in the alternative an operating restriction, without having complied with the provisions of the Balanced Approach or the other requirements of the Aircraft Noise Regulation or the Act of 2019.

VI. The making of the material alteration to the Development Plan by way of the additional text inserted under PA CH 8.1 and by reason of the matters set out in Vis not in compliance with the provisions of section 10(2A)(a), section 12(11) and section 15(1) of the Planning and Development Act 2000. It is also not in compliance with the provisions of sections 3(1) to (5) inclusive and section 3(7), section 4, sections 9(1), (2)(a), (b), (c), (3)(a) to (d), (7)(a), (11) and (15) and sections 20 and 21 of the Aircraft Noise (Dublin Airport) Regulation Act 2019. By reason thereof it is also not in compliance with the provisions of Articles 3(1) and (2), 5(1), (2) and (3) and 6 of the Aircraft Noise Regulation 598/2014.

VII. The Development Plan has not been made in a manner consistent with, and has failed to implement, the recommendations of the Office of the Planning Regulator under Section 31AM of the Act.

VIII. In light of the matters set out at I-VII above, the Minister is of the opinion that the Development Plan as made fails to set out an overall strategy for the proper planning and sustainable development of the area.

IX. In light of the matters set out at I and V above, the Development Plan is not consistent with the national development objectives set out in the National Planning Framework.

X. In light of the matters set out at I to IX above, the Development Plan is not in compliance with the requirements of the Planning and Development Act 2000.

GIVEN under my hand,
Minister of State for Local Government and Planning
28 July 2023”

Step 19 – publication of the plan as modified by direction

107. The plan then took effect subject to the direction, and has been duly published by the council (<https://www.fingal.ie/development-plan-2023-2029>).

108. The full wording of the section on environmental impacts of Dublin Airport now reads as follows:

“8.5.7 Ensuring Environmental Protection and Sustainability

An overriding theme of the Plan is the need to protect the environment throughout the County. In terms of Dublin Airport, the LAP considers the likely direct and indirect effects of the future development of Dublin Airport on the local environment, including the communities surrounding the Airport. Noise, flood risk management, sustainable urban drainage, foul drainage and water supply, surface water quality, ground water and air quality are dealt with in the LAP, each with its own specific objectives. In addition, the built and natural heritage including archaeology and architectural heritage are examined in the context of Dublin Airport, with specific objectives relating to the protection of same. The Plan supports the objectives relating the environmental issues, referred to above, as indicated in the Dublin Airport LAP.

Noise is discussed separately below as the noise zones were subject to Variation no. 1 of the Fingal Development Plan 2017–2023 and as such will be included in this Plan.

i. Airport Noise

Noise zones relating to Dublin Airport have been in place for many years to aid land use planning. Previous noise zones dated back to 2005 and as such it was considered appropriate to update the noise zones for Dublin Airport to allow for more effective land use planning for development within airport noise zones.

In addition, the Noise Action Plan for Dublin Airport 2019–2023 (NAP) was prepared under the Environmental Noise Regulations 2006 and was adopted in December 2018. The Noise Action Plan is designed to manage noise issues and effects associated with existing operations at Dublin Airport and sets out a number of actions to address such issues.

Fingal County Council has been designated as the Aircraft Noise ‘Competent Authority’ (ANCA) for the purposes of monitoring Aircraft Noise levels at Dublin Airport. As such, all planning applications at Dublin Airport are referred to the Competent Authority by the Planning Authority for assessment. In assessing a planning application, ANCA must determine whether the proposals have the potential to cause a noise problem. The assessment role includes an examination of planning applications by the Competent Authority to ascertain whether they could have aircraft noise implications which require mitigation.

The noise zones relating to Dublin Airport were updated in 2019 in order to allow for more effective land use planning for development within airport noise zones. The updated policies relating to development in noise zones are set out in Variation no. 1 of the Fingal Development Plan 2017–2023 and these will apply in the Plan.

Noise Zones have been prepared in relation to aircraft noise associated with Dublin Airport as outlined in Table 8.1 below and supported by the following objectives. The approach taken in preparing these noise zones is considered to be supportive of National Policy Objective 65 set out in the Department of Housing Planning and Local Government (DHPLG) National Planning Framework 2040, February 2018, to:

‘Promote the pro-active management of noise where it is likely to have significant adverse impacts on health and quality of life and support the aims of the Environmental Noise Regulations through national planning guidance and Noise Action Plans.’

This approach also has regard for land use planning which is a component of the ICAO Balanced Approach to Aircraft Noise Management, as set out under EU Regulation 598/2014. This approach is therefore considered also to align with the key objective set out in the Dublin Airport Noise Action Plan 2019, which is:

‘to avoid, prevent and reduce, where necessary, on a prioritised basis the effects due to long term exposure to aircraft noise, including health and quality of life through implementation of the International Civil Aviation Organisation’s ‘Balanced Approach’ to the management of aircraft noise as set out under EU Regulation 598/2014’.

There is a need to minimise the adverse impact of noise without placing unreasonable restrictions on development and to avoid future conflicts between the community and the operation of the Airport. Three noise zones are shown in the Development Plan maps, Zones B and C within which the Council will continue to restrict inappropriate development, and Zone A within which new provisions for residential development and other noise sensitive uses will be actively resisted. An additional assessment zone, Zone D exists to identify any larger residential developments in the vicinity of the flight paths serving the Airport in order to promote appropriate land use and to identify encroachment.

Table 8.1 presents the four aircraft noise zones and the associated objective of each zone along with an indication of the potential noise exposure from operations at Dublin Airport. The zones are based on potential noise exposure levels due to the Airport using either the new northern or existing southern runway for arrivals or departures.

The noise zoning system has been developed with the overarching objective to balance the potential impact of aircraft noise from the Airport on both external and internal noise amenity. This allows larger development which may be brought forward in the vicinity of the Airport's flight paths to be identified and considered as part of the planning process. The focus of the noise zones is to ensure compatibility of residential development and ensuring compatibility with pertinent standards and guidance in relation to planning and noise, namely:

- National Planning Framework 2040, DHPLG, February 2018;
- ProPG: Planning & Noise – New Residential Development, May 2017;
- British Standard BS8233:2014 'Guidance on sound insulation and noise reduction for buildings'; and
- ICAO guidance on Land-use Planning and Management in Annex 16, Volume I, Part IV and in the ICAO Doc 9184, Airport Planning Manual, Part 2 – Land Use and Environmental Control.

Where development includes other non-residential noise sensitive receptors, alternative design guidance will need to be considered by the developer. Non-residential buildings and uses which are viewed as being noise sensitive within the functional area of FCC include hospitals, residential care facilities and schools."

109. The plan includes a table of noise insulation:

"Table 8.1: Aircraft Noise Zones

| Zone | Indication of Potential Noise Exposure during Airport Operations | Objective |
|------|--|--|
| D | ≥ 50 and < 54 dB LAeq, 16hr and ≥ 40 and < 48 dB Lnight | To identify noise sensitive developments which could potentially be affected by aircraft noise and to identify any larger residential developments in the vicinity of the flight paths serving the Airport in order to promote appropriate land use and to identify encroachment. All noise sensitive development within this zone is likely to be acceptable from a noise perspective. An associated application would not normally be refused on noise grounds, however where the development is residential-led and comprises non-residential noise sensitive uses, or comprises 50 residential units or more, it may be necessary for the applicant to demonstrate that a good acoustic design has been followed. Applicants are advised to seek expert advice |
| C | ≥ 54 and < 63 dB LAeq, 16hr and ≥ 48 and < 55 dB Lnight | To manage noise sensitive development in areas where aircraft noise may give rise to annoyance and sleep disturbance, and to ensure, where appropriate, noise insulation is incorporated within the development Noise sensitive development in this zone is less suitable from a noise perspective than in Zone D. A noise assessment must be undertaken in order to demonstrate good acoustic design has been followed. The noise assessment must demonstrate that relevant internal noise guidelines will be met. This may require noise insulation measures. An external amenity area noise assessment must be |

| | | |
|---|--|---|
| | | undertaken where external amenity space is intrinsic to the development's design. This assessment should make specific consideration of the acoustic environment within those spaces as required so that they can be enjoyed as intended. Ideally, noise levels in external amenity spaces should be designed to achieve the lowest practicable noise levels. Applicants are strongly advised to seek expert advice. |
| B | ≥ 54 and < 63 dB LAeq, 16hr and ≥ 55 dB Lnight | To manage noise sensitive development in areas where aircraft noise may give rise to annoyance and sleep disturbance, and to ensure noise insulation is incorporated within the development. Noise sensitive development in this zone is less suitable from a noise perspective than in Zone C. A noise assessment must be undertaken in order to demonstrate good acoustic design has been followed. Appropriate well-designed noise insulation measures must be incorporated into the development in order to meet relevant internal noise guidelines. An external amenity area noise assessment must be undertaken where external amenity space is intrinsic to the developments design. This assessment should make specific consideration of the acoustic environment within those spaces as required so that they can be enjoyed as intended. Ideally, noise levels in external amenity spaces should be designed to achieve the lowest practicable noise levels. Applicants must seek expert advice. |
| A | ≥ 63 dB LAeq, 16hr and/or ≥ 55 dB Lnight | To resist new provision for residential development and other noise sensitive uses. All noise sensitive developments within this zone may potentially be exposed to high levels of aircraft noise, which may be harmful to health or otherwise unacceptable. The provision of new noise sensitive developments will be resisted. |

Notes: > 'Good Acoustic Design' means following the principles of assessment and design as described in ProPG: Planning & Noise – New Residential Development, May 2017;
 > Internal and External Amenity and the design of noise insulation measures should follow the guidance provided in British Standard BS8233:2014 'Guidance on sound insulation and noise reduction for buildings'"

110. The plan then goes on to set out certain policies and objectives:

"Policy DAP5 – Noise

Support the actions contained within the Noise Action Plan for Dublin Airport 2019–23, or any subsequent plan or extension of same.

Policy DAP6 – Health of Residents and Aviation Noise Protect the health of residents affected by aviation noise, particularly night-time noise.

Objective DAO11 – Requirement for Noise Insulation

Strictly control inappropriate development and require noise insulation where appropriate in accordance with Table 8.1 above within Noise Zone B and Noise Zone C and where necessary in Assessment Zone D, and actively resist new provision for residential development and other noise sensitive uses within Noise Zone A, as shown on the Development Plan maps, while recognising the housing needs of established families farming in the zone. To accept that time based operational restrictions on usage of the runways are not unreasonable to minimise the adverse impact of noise on existing housing within the inner and outer noise zone.

Objective DAO12 – Noise Zones and New Housing for Farming Families

Notwithstanding Objective DAO11, apply the provisions with regard to New Housing for Farming Families only, as set out in Chapter 3 Sustainable Placemaking and Quality Homes, within the Inner Noise Zone subject to the following restrictions:

- Under no circumstances shall any dwelling be permitted within the predicted 69 dB LAeq 16 hours noise contour,

- Comprehensive noise insulation shall be required for any house permitted under this objective,
- Any planning application shall be accompanied by a noise assessment report produced by a specialist in noise assessment which shall specify all proposed noise mitigation measures together with a declaration of acceptance of the applicant with regard to the result of the noise assessment report.

Objective DAO13 – Aircraft Operations and Noise

Ensure that aircraft-related development and operation procedures proposed and existing at the Airport consider the requirements of the Aircraft Noise Regulations, the Noise Abatement Objective (NAO) for Dublin Airport, the Noise Action Plan, Health Issues and all measures necessary to mitigate against the potential negative impact of noise from aircraft operations (such as engine testing, taxiing, taking off and landing), on existing established residential communities, while not placing unreasonable, but allowing reasonable restrictions on airport development to prevent detrimental effects on local communities, taking into account the EU Regulation 598/2014 (or any future superseding EU regulation applicable) having regard to the 'Balanced Approach' and the involvement of communities in ensuring a collaborative approach to mitigating against noise pollution.

Objective DAO14 – Aircraft Movements and Development

Restrict development which would give rise to conflicts with aircraft movements on environmental or safety grounds on lands in the vicinity of the Airport and on the main flight paths serving the Airport, and in particular restrict residential development in areas likely to be affected by levels of noise inappropriate to residential use.

Objective DAO15 – Ongoing Review of Operation of Noise Zones

Review the operation of the Noise Zones on an ongoing basis in line with the most up to date legislative frameworks in the area, the ongoing programme of noise monitoring in the vicinity of the Airport flight paths, and the availability of improved noise forecasts.

Objective DAO16 – Introduction of a Noise Quota System

To encourage and promote the introduction of a noise quota system at Dublin Airport to encourage Airlines to use quieter aircraft so as to prevent and reduce, where necessary, on a prioritised basis the effects due to long term exposure to aircraft noise.

Objective DAO17 – Crosswind Runway

Restrict the Crosswind Runway to essential occasional use on completion of the second east-west runway. 'Essential' use shall be interpreted as use when required by international regulations for safety reasons.

Policy DAP7 – Align with Local Area Plan Objectives

Ensure that all development within the Dublin Airport Local Area Plan lands will comply with the following Objectives of the Dublin Airport Local Area Plan, 2020, or any subsequent plan or extension of same. These include;

- > Flood Risk Management Objectives
- > Air Quality Objectives
- > Sustainable Urban Drainage Objectives
- > Archaeology Objectives
- > Water Supply Objectives
- > Architectural Heritage Objectives
- > Surface Water Quality Objectives
- > Natural Heritage Objectives
- > Ground Water Objectives"

Domestic law issues

Core ground 1 – errors in the process

111. Core ground 1 is:

"1. Part 2(b) and the associated reasons and considerations of the Planning and Development (Fingal County Development Plan 2022-2028) Direction 2023 dated 28th July 2023 ('the Ministerial Direction') is invalid as the both the Draft Direction and the Public Notice contained material errors and/or errors on the face of the record and/or contains material errors of fact and/or there was no or effective public participation and/or the procedure followed by the Minister does not accord with the requirements of natural and constitutional justice and fair procedures, further particulars of which are contained at Part 2 below."

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

"Core Grounds 1 and 2 – error in the public notice and Ministerial Direction

Applicants

Both the public notices published on 18 April 2023 and the draft Ministerial Direction of 4 April 2023 erroneously referred to an earlier version of relevant text of the CDP which had

been replaced by motion of the Council passed on 15 February 2023. This deprived the Minister of the jurisdiction to make the Direction and/or constitutes an error on the face of the record. The consequence of this error is (a) the Direction was based on erroneous facts; and/or (b) the Direction took into account an irrelevant consideration; and/or (c) there was no effective public participation.

Respondents

It is accepted that there was a clerical error in the public notice published by the Chief Executive of the Council on 18 April 2023 and in Paragraph IV of the Statement of Reasons in the Draft Direction of 4 April 2023, in that the original text of PA CH 8.1, instead of the text of PA CH 8.1 as modified, is referenced. However, when the Draft Direction is read as a whole, and together with the Notice of Intention to which it is annexed, it is clear that it relates to PA CH 8.1 as modified, and the error in the Draft Direction was corrected in the Ministerial Direction of 28 July 2023. The Minister was aware of the text of the of PA CH 8.1 as modified. The Applicants were not in any way misled or prejudiced by the error. That clerical error did not deprive the Minister of the jurisdiction to make the Ministerial Direction, or constitute an error on the face of the record. The Ministerial Direction was not based on erroneous facts, did not take into account an irrelevant consideration and did not lack effective public participation.

OPR

The OPR's position is that Core Grounds 1 and 2 do not constitute a basis for certiorari or any other relief. As regards Core Ground 1, the Applicants place outsized reliance on the inclusion of the words 'to ensure noise levels produced by aircraft during night time are reduced to below 40 dB Lnight', in Point IV of the Statement of Reasons in the Draft Direction and the Public Notice, being words that were in the text of the original material amendment PA CH 8.1, but not material amendment PA CH 8.1 as modified. Contrary to the interpretation proffered by the Applicants, when the Draft Direction is read as a whole and in a way that makes sense and is valid, it is clear that the Draft Direction and the Public Notice relate to PA CH 8.1 as modified. This is evident from Part 2(c) of the Draft Direction, which states an intention to direct the Council to remove 'the amended and additional text inserted under PA CH 8.1 as modified' and from the express reference in point IV of the Statement of Reasons to the Plan 'as made'. Further, the Applicants were not misled nor inhibited from making a submission in relation to the Draft Direction at all and in fact as regards the observations made by the Applicants on the Draft Direction it is clear from same that the Applicants were aware of the alleged error about which complaint is now made, and both observations contain substantive submissions on the additional and amended text of PA CH 8.1 as modified. The Applicants were not misled by reason of the alleged error in the Draft Direction and/or the Public Notice and there is no evidence that anyone else was. As regards Core Ground 2, nothing turns on the fact that the Council's CE Report dated 15th January 2023 refers to the original wording of PA CH 8.1 where the amendment of the wording of PA CH 8.1 (to the 'as modified' text) occurred subsequently on 15th February 2023. The CE Report dated 15th January 2023 was not 'adopted' in the manner the Applicants contend in their pleaded case, nor does the Ministerial Direction refer to the wrong text of the Development Plan. Correctly interpreted, the fact that the Direction states that the deletion of PA CH 8.1 as modified is 'consistent with' the recommendation of the Council's Chief Executive, does not have the effect of importing reference to the original PA CH 8.1 into the Direction, and/or displacing the express reference to PA CH 8.1 as modified in the Direction.

DAA

daa respectfully endorses and adopts the arguments made by the Minister in respect of Core Grounds No. 1 and 2. In addition, and without prejudice to the forgoing, in the event that the Applicant is unsuccessful in respect of Core Ground No. 3, but the Court considers that any of the issues pleaded in respect of Core Ground No. 1 or 2 is merited, daa submits that the Court should exercise its discretion to refuse certiorari of the Direction. The alleged errors are not ones which otherwise affect the integrity of the decision. Further, the Direction remedies a breach of EU and domestic law, and the Court should decline to quash it in order to ensure that proper effect is given to EU law.

FCC

Core Grounds 1 & 2 in respect of errors in the public notice and Draft Direction are primarily matters for the Respondent and the OPR to respond to."

113. There certainly are some drafting errors in the material from the OPR and Minister towards the latter stages of the process (step 10 onwards above). And the council's advertisement reflected that, but the council can't be blamed because they were required to publish the Minister's text.

114. However, the basic problem for the applicants is that to the extent that the material from the OPR and Minister was erroneous, the errors were immaterial to the Minister's central concern. The essential thrust of the original and modified wordings was insufficiently different in its essentials to make the errors in the notice, draft decision and decision particularly relevant or material. The substance of the OPR and ministerial objections applied equally to both versions of the contested section of the draft plan. There is no real doubt as to the provision which the Minister wanted deleted. The problem unfortunately comes under the heading of harmless error. It would be an improvident exercise of the discretionary power of judicial review to quash the decision on such a basis.

Core ground 2 – steps to be taken are erroneous

115. Core ground 2 is:

"2. The Ministerial Direction is invalid as the steps Fingal County Council is directed to take in relation to Part 2(b) are wrong in law, irrational and unreasonable, and/or contain material legal errors and/or is of no force or effect and/or contains errors on the face of the record, further particulars of which are contained at Part 2 below."

116. The parties' positions as recorded in the statement of case are as set out under core ground 1.

117. While closely related to core ground 1, this core ground is conceptually separate.

118. The operative demand to the council was that:

"(b) Delete the amended and additional text inserted under PA CH 8.1 as modified, consistent with the recommendation of the chief executive's report dated 15th January 2023."

119. The wording is sub-optimal in that it refers to the original CE report rather than the report on the amendment ultimately adopted. The applicants say this couldn't have been put into operation. But the problem for the applicants here is that they read the words "consistent with the recommendation ... dated 15th January 2023" in a sense that renders the decision invalid rather than valid. The latter reading is preferable if reasonably available, and it is available here because while technically incorrect, the CE's report of January 2023 is basically consistent with the later report on the material amendments. So the operative part of the direction can be read as meaning simply that the contested wording be deleted.

Core ground 3 – lack of infirmity in the adopted plan

120. Core ground 3 is:

"3. The Ministerial Direction is invalid as the CDP as adopted by Fingal County Council in relevant part is consistent with National Policy Objective 65 ('NPO 65') of the National Planning Framework ('NPF') and/or the European Communities (Environmental Noise) Regulations 2018, the Aircraft Noise Regulations 598/2014 and the Aircraft Noise (Dublin Airport) Regulation Act 2019 ('the 2019 Act') and/or the Minister's conclusion to the contrary is wrong in law, further particulars of which are contained at Part 2 below."

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

"Core Ground 3 – Invalidity of the Ministerial Direction

Applicants

The Ministerial Direction is invalid because it erred in treating the modified version of PA CH 8.1 as coming within the exclusive jurisdiction of the Chief Executive of the Council as the Aircraft Noise Competent Authority to the exclusion of the elected members. The Minister also erred in concluding without explanation that certain sections of the Aircraft Noise (Dublin Airport) Regulation Act 2019 were contravened by the relevant text of §8.5.7 of the adopted Fingal Development Plan 2023 to 2027.

Respondents

The Minister had reasonably concluded that jurisdiction with respect to the subject matter of PA CH 8.1 as modified is conferred on the Chief Executive of the Council to the exclusion of the elected members. The Minister reasonably concluded that the inclusion of PA CH 8.1 as modified in the CDP was inconsistent with the legal framework regulating noise at the Airport, including certain sections of the Aircraft Noise (Dublin Airport) Regulation Act 2019, and the reasons for that conclusion are clearly stated in the Ministerial Direction. The Minister's conclusion was consistent with that of the Chief Executive and the OPR.

OPR

The OPR's position is that Core Ground 3 has not been made out by the Applicants. The OPR's views in relation to the deletion of the amended and additional text inserted under material amendment PA CH 8.1 as modified are set out at pages 16 to 20 of the OPR's s.31AN(4) Notice letter dated 19th June 2023 and in the earlier s.31AM(8) Notice letter dated 22nd March 2023 (see pages 23 to 35 of same). The text of material amendment PA CH 8.1 as modified contains an express formal recognition that (i) the 'proposed noise insulation scheme' is inadequate, and (ii) the 'noise insulation schemes operated by DAA'

should be expanded in a particular manner. The noise insulations schemes operated by DAA referred to in the text of material amendment PA CH 8.1 as modified are noise mitigation measures within the meaning of the Aircraft Noise (Dublin Airport) Regulation Act 2019 ('the 2019 Act') which implements Regulation (EU) No. 598/2014, and are subject to regulation and change by reference to the legislative regime established by the 2019 Act, including by way of applications for a Relevant Action (to the Chief Executive of the Council as the Aircraft Noise Competent Authority (ANCA) in the first instance and to An Bord Pleanála on appeal) and other applications pursuant to section 34A to 34C of the 2000 Act. On a correct interpretation of the legislation, the Elected Members of the Council are precluded from including text of that nature in the Development Plan in circumstances where the legislation is such that there is no role for Elected Members (in the context of the making of a Development Plan under s.10 to s.12 of the 2000 Act) to purport to identify and set parameters in same in respect of any noise mitigation measures to be implemented by DAA to address the effects of noise from aircraft at Dublin Airport. Further, NPO 65 of the National Planning Framework (NPF) seeks to promote the proactive management of noise through the mechanism of Noise Action Plans. The insertion into the Development Plan of an objective in the terms of PA CH 8.1 as modified is inconsistent with NPO 65 in that regard. Further, the relevant text of PA CH 8.1 as modified is inconsistent with and/or undermines the key aim of the relevant Noise Action Plan that aircraft noise at Dublin Airport should be addressed through the implementation of the ICAO Balanced Approach and the EU Regulation 598/2014 and accordingly in accordance with the requirements of the 2019 Act.

DAA

PA CH 8.1 concerns the parameters of a noise mitigation measure, something which falls within the jurisdiction of ANCA (and the Board on appeal) in accordance with the 2019 Act and outside the jurisdiction of the Elected Members. The Minister correctly concluded that the inclusion of PA CH 8.1 was inconsistent with the 2019 Act.

FCC

Ground 3 of the within proceedings raises issues/matters which are common to and/or relevant to the issues/matters in dispute in the related Development Plan proceedings (daa v Fingal County Council 2023/383JR). These issues include the interpretation of the text of the Material Alteration PA CH 8.1, the meaning of a 'noise mitigation measure', the legal framework regulating noise at the Airport, the interpretation of certain sections of the Aircraft Noise (Dublin Airport) Regulation Act 2019 as relevant to the functions of the Elected Members in performing functions under the PDA including making the Development Plan, the role of the Chief Executive of FCC as Aircraft Noise Competent Authority (ANCA) and the Noise Action Plan for Dublin Airport. The Council's position on these matters is set out in the Statement of Case prepared for the Development Plan proceedings which will be shared with the parties to these proceedings."

122. As a general principle, if any *independent* ground for the direction can be upheld that is sufficient to sustain the direction, then the court should normally order accordingly: *McCarthy Meats*. The critical point however is that the sustained ground has to be independent. While the State at one point seemed to be defensively asserting in effect that *all* of the grounds were free-standing, such a postulation has not been established.

123. To assess the claim that the reasons for the direction were invalid, we need to look at what exactly those reasons were (essential reasons in bold):

"STATEMENT OF REASONS

...

V. The Development Plan as made includes provisions that state that the proposed noise insulation scheme to protect the health of those affected by aircraft noise is inadequate and that it is an objective to take measures including the expansion of noise insulation schemes operated by DAA to include all areas exposed to 40dB Lnight or higher as produced by aircraft during night time which matters are subject to separate statutory provisions and processes including the European Communities (Environmental Noise) Regulations 2018, the Aircraft Noise Regulation 598/2014 and the Aircraft Noise (Dublin Airport) Regulation Act 2019. This includes the designation of separate action planning authorities under the 2018 Regulations for the purpose of preparing Noise Action Plans, while the 2019 Act designated Fingal County Council as competent authority for the purposes of Aircraft Noise Regulation 598/2014 and that 2019 Act, which is statutorily independent of the planning authority. **The inclusion of an objective in the Development Plan, which conflicts with and undermines these separate statutory provisions and processes, including the Noise Action Plan, is therefore inconsistent with National Policy Objective 65 of the National Planning Framework.**

The inclusion of this particular objective is not in compliance with the provisions of the Planning and Development Act, 2000 (as amended) and the Aircraft Noise (Dublin Airport) Regulation Act 2019 and the exclusive jurisdiction conferred on ANCA and the Chief Executive under the 2019 Act in respect of the subject matter of the objective. There is a conflict with section 15 of the Planning and Development Act, 2000 whereby it is a general duty of the planning authority to secure the objectives of the development plan, **and with section 3 of the Act of 2019 having regard to obligations of independence, influence and direction contained therein.**

In particular, the inclusion of an objective in respect of a noise insulation scheme in the Development Plan **is a noise mitigation measure and noise related action, or in the alternative an operating restriction, without having complied with the provisions of the Balanced Approach or the other requirements of the Aircraft Noise Regulation or the Act of 2019.**

VI. The making of the material alteration to the Development Plan by way of the additional text inserted under PA CH 8.1 and by reason of the matters set out in V is not in compliance with the provisions of section 10(2A)(a), section 12(11) and section 15(1) of the Planning and Development Act 2000. It is also not in compliance with the provisions of sections 3(1) to (5) inclusive and section 3(7), section 4, sections 9(1), (2)(a), (b), (c), (3)(a) to (d), (7)(a), (11) and (15) and sections 20 and 21 of the Aircraft Noise (Dublin Airport) Regulation Act 2019. By reason thereof it is also not in compliance with the provisions of Articles 3(1) and (2), 5(1), (2) and (3) and 6 of the Aircraft Noise Regulation 598/2014.

VII. The Development Plan has not been made in a manner consistent with, and has failed to implement, the recommendations of the Office of the Planning Regulator under Section 31AM of the Act.

VIII. In light of the matters set out at I-VII above, the Minister is of the opinion that the Development Plan as made fails to set out an overall strategy for the proper planning and sustainable development of the area.

IX. In light of the matters set out at I and V above, the Development Plan is not consistent with the national development objectives set out in the National Planning Framework.

X. In light of the matters set out at I to IX above, the Development Plan is not in compliance with the requirements of the Planning and Development Act 2000."

124. The direction is not phrased in terms of particular paragraphs of the legislation. The risk of omitting a full recitation, linkage or pathway to precise statutory references is that it could give rise to conceptual confusion and a sort of subtle creep of objection to more generalised complaints without trying to tie those complaints to the terms of the statute. As the Minister is to an extent operating in the EU law field in this area, the principles of good public administration (EU Charter of Fundamental Rights art. 41) are relevant. But that isn't pleaded so I don't need to consider it further.

125. While the statutory detail has changed since the decision in *Tristor* it hasn't changed so much that the basic point made by Clarke J. there no longer applies, namely that the Minister has to do more than simply disagree with the council as to what is the most desirable provision to make:

"7.19 It seems to me, therefore, that the Minister asked himself the wrong question. It is clear from the submissions made to the Court that the Minister considered that s. 31 permitted him to impose, by direction, his own views on the proper planning and development of an area over those of the elected local representatives. For the reasons which I have sought to analyse, it does not seem to me that the Act entitles the Minister to do that. Rather, the Minister must ask himself whether there is a significant failure to comply with provisions of the 2000 Act other than s. 10 or, in the context of s. 10, must ask himself whether the plan actually has a strategy which is set out in it and which complies with the mandatory obligations provided for in s. 10(2) which apply to such plans. If the Oireachtas wishes the Minister to have a wider power to interfere with draft development plans formulated by local authorities, then it seems to me to be incumbent on the Oireachtas to set out precisely how and in what circumstances such a power can be exercised."

126. The logic of that approach is that the OPR (and the Minister in role of acting on OPR recommendations) is in effect a law enforcer, not a lawgiver. The OPR doesn't have jurisdiction to create new planning rules, policies or decisions. The role is to police the implementation of existing planning law and binding policy. So we need to be clear as to whether the reasons properly come within the statute.

127. The jurisdictional basis to issue the direction is in s. 31(1) (elements particularly relied on by the State are in bold):

"31.—(1) Where the Minister is of the opinion that—

(a) a planning authority, in making a development plan, a variation of a development plan, a local area plan or an amendment to a local area plan (in this section referred to as a "plan") has failed to—

(i) implement a recommendation made to the planning authority by—

(I) the Minister under section 12, 13 or 20, or

(II) the Office of the Planning Regulator under section 31AM or 31AO,

or

(ii) take account of any submission or observation made to the planning authority by—

(I) the Minister under section 12, 13 or 20, or

(II) the Office of the Planning Regulator under section 31AM or 31AO,

(b) in the case of a plan, the plan fails to set out an overall strategy for the proper planning and sustainable development of the area,

(ba) a plan is not consistent with—

(i) the national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy,

(ia) the National Marine Planning Framework, or

(ii) specific planning policy requirements specified in guidelines issued by the Minister under subsection (1) of section 28,

(c) the plan is not in compliance with the requirements of this Act, or

(d) if applicable, having received a submission prepared under section 31C or 31D (inserted by section 95 of the Act of 2008) that a plan of a planning authority in the Greater Dublin Area (GDA) is not consistent with the transport strategy of the National Transport Authority, then, subject to compliance with the relevant provisions of sections 31AM and 31AN or sections 31AO and 31AP, as the case may be, the Minister may in accordance with this section, for stated reasons, direct a planning authority to take such specified measures as he or she may require in relation to that plan."

128. For the OPR, the centre of gravity of the objection was breach of the NPF (s. 31(1)(ba)). Much else follows from that – for example that was the basis of the OPR view that there was not an overall strategy for proper planning and sustainable development. So it makes sense to look at that first and foremost. That is an independent ground, so if the OPR and Minister are right on that, we don't need to go further.

129. National Planning Framework objective NPO 65 and its supporting rationale (not part of the objective but useful background) is as follows:

"Noise Quality

Noise is unwanted sound but is an inevitable consequence of everyday life, arising from environmental noise (created by human activity outdoors such as transport, construction and industry), with different tolerance levels varying from person to person. It becomes a problem when it occurs in the incorrect place or at the incorrect time or on a frequent or recurring basis.

As we seek to promote more compact and efficient forms of development within our settlements, it is important to more proactively manage noise. In addressing these issues the NPF will support:

○ Noise Management and Action Planning

Measures to avoid, mitigate, and minimise or promote the pro-active management of noise, where it is likely to have significant adverse impacts on health and quality of life, through strategic noise mapping, noise action plans and suitable planning conditions.

○ Noise, Amenity and Privacy

This includes but is not limited to, good acoustic design in new developments, in particular residential development, through a variety of measures such as setbacks and separation between noise sources and receptors, good acoustic design of buildings, building orientation, layout, building materials and noise barriers and buffer zones between various uses and thoroughfares.

○ Quiet Areas

The further enjoyment of natural resources, such as our green spaces and sea frontage, through the preservation of low sound levels or a reduction in undesirably high sound levels, is particularly important for providing respite from high levels of urban noise. As part of noise action plans, an extra value placed on these areas, in terms of environmental quality and the consequential positive impact on quality of life and health, due to low sound levels and the absence of noise, can assist in achieving this.

National Policy Objective 65

Promote the pro-active management of noise where it is likely to have significant adverse impacts on health and quality of life and support the aims of the Environmental Noise Regulations through national planning guidance and Noise Action Plans.”

130. This is cast in general terms and not specific to airports, but it does embody the concept of “promoting ... management of noise ... and support[ing] the aims of the Environmental Noise Regulations through ... Noise Action Plans”.

131. As noted above, Directive (EC) 2002/49/EC was implemented in Ireland by the Environmental Noise Regulations 2006 and more recently the European Communities (Environmental Noise) Regulations 2018 as amended by the European Communities (Environmental Noise) (Amendment) Regulations 2021.

132. The 2006 regulations required that a noise action plan be put in place for, *inter alia*, Dublin Airport. The council is the competent action planning authority in that regard under reg. 7(f). As noted above, in December 2018, the council adopted the Noise Action Plan for Dublin Airport 2019-2023.

133. The OPR says that to the “immense credit” of the council, when making the 2018 NAP they didn’t work off just the general environmental noise regime but looked at EU law in a joined-up way by also addressing the regime for regulating airport noise.

134. The NAP clearly maps noise exposure levels and specifies in the plan what actions are to be taken on foot of that.

135. The current noise action plan, the Noise Action Plan for Dublin Airport 2019 – 2023, sets out the following key aim specific to the airport (section 1.1):

“to avoid, prevent and reduce, where necessary, on a prioritised basis the effects due to long term exposure to aircraft noise, including health and quality of life through implementation of the International Civil Aviation Organisation’s ‘Balanced Approach’ to the management of aircraft noise as set out under EU Regulation 598/2014”.

136. It is therefore an aim of the NAP to effect aircraft noise management through the balanced approach as set out in the Aircraft Noise Regulation and, it follows, in accordance with the requirements of the 2019 Act, which implements that Regulation.

137. Joining these provisions together, the requirement in NPF Objective NPO 65 to support the environmental noise regulations through noise action plans itself has the consequence of supporting the contents of the current Dublin Airport NAP, which sets out mechanisms for addressing airport noise particularly via Regulation 598/2014 and the mechanisms in transposing legislation, specifically the 2019 Act. Thus it is reasonably open to a decision-maker to conclude that inclusion in a development plan of an objective to take measures that are premised on the inadequacy of existing noise mitigation measures is not consistent with the division of functions envisaged by the 2019 Act, and thus is not consistent with the current noise action plan, and is therefore not consistent with the requirement to support the environmental noise directive through noise action plans as embodied in objectives of the NPF, and is therefore a valid basis for a finding of inconsistency with s. 10(1A) of the 2000 Act, and is therefore also a valid basis for a finding of a lack of an overall strategy for the proper planning and sustainable development of the area concerned, and thus ultimately a lawful basis for a notice by the OPR, a draft direction and a final direction.

138. *Tristor* remains good law insofar as concerns the central holding that “[i]t does not seem to me that that language implies an entitlement on the part of the Minister simply to disagree with the strategy contained within the development plan” (para. 6.14). Clarke J. says in the same paragraph that “[p]rovided that there is a strategy set out, and that it is reasonably described as an overall strategy for the proper planning and sustainable development of the relevant area, then it does not seem to me that the Minister is entitled to impose an alternative strategy simply because the Minister may prefer it”. But we need to pay close attention to the language being used there. What this says, and what it means, is that central government can’t impose another strategy “simply because the Minister may prefer it”. What this does *not* mean is that the test is simply whether there is anything that can reasonably be described as an overall strategy. Nor does it mean that the Minister can’t intervene if the question of compliance is a mixed question of fact and law which involves evaluative judgement rather than either mere preference at one end of the scale (where intervention isn’t permitted) or clear illegality at the other (which obviously does warrant a direction). The present case falls within that intermediate zone where there is a scope for evaluative judgement as to compliance with binding national policies, so in principle the Minister has a legitimate role.

139. Admittedly, Clarke J. does make an expressly *obiter* comment as follows at para. 7.18: “even if, contrary to the reasons which I have already set out, the Minister had a basis for forming the view that the elected representatives had failed to have regard to the Retail Planning Guidelines, I do not see that those matters of themselves justify the Minister in reaching a conclusion that an overall qualifying strategy has not been set out”. That isn’t quite as straightforward as might appear. Clarke J. said at para. 7.11 that the Minister hadn’t alleged in the direction any failure to have regard to the guidelines. Rather the ministerial complaint seems to be of lack of “adequate” regard to non-

binding guidelines, which as in *Cork County Council* is not a valid legal basis a direction because there is no legal breach involved in merely having regard to non-binding guidelines as opposed to "adequate" regard in the sense advocated by the State. So the question of lack of regard *at all* didn't actually arise in *Tristor*. Had it arisen, and had there been a duty to have regard to the guidelines in question (which wasn't necessarily obvious in *Tristor*) that would have been a legal breach which would have more than amply justified a direction. So when Clarke J. refers at para. 7.18 to lack of regard not justifying a direction, in context (especially by reference to para. 7.11) this can only mean lack of regard to guidelines to which the council is not required to have regard, or alternatively lack of *adequate* regard to guidelines to which it did have *actual* regard.

140. I think the word "overall" needs a little bit of unpicking in this context. "Overall" has two dimensions. Firstly, the plan being overall horizontally – that is geographically joining up to make sense for the whole area. Secondly, however, the plan has to be overall in a more vertical sense, that it covers all policy areas and engages seamlessly with all relevant pieces of binding statutory architecture in different fields of policy and provision. Thus while the plan made by the council was, I think on balance, "overall" in the horizontal, geographical, sense, it was open to the OPR and Minister to lawfully form the view that it was not "overall" in the vertical, engagement-with-all-binding-areas-of-relevant-policy sense. The absence of a seamless integration with the mandatory elements of legislative and policy framework enabled such a conclusion, which is a mixed question of fact and law and thus partly evaluative, attracting somewhat deferential review, rather than being purely legal. What a binding standard (such as a requirement to have regard to ministerial policy) means is a question of law. Whether that standard, if correctly interpreted, has been correctly applied in a given case is frequently a mixed question of law and fact. So it's too simplistic to reduce all issues as to whether there has been a breach of the standards safeguarded by s. 31 to being matters of law for the court.

141. Thus, ultimately the conclusion that "[t]he inclusion of an objective in the Development Plan, which conflicts with and undermines these separate statutory provisions and processes, including the Noise Action Plan, is therefore inconsistent with National Policy Objective 65 of the National Planning Framework" is not based on an error of law. Insofar as it constitutes an evaluative judgment as to the application of NPO 65, that, on the facts, hasn't been shown to fall outside the zone of legitimate planning judgement by the Minister.

Core ground 4 - reasons

142. Core ground 4 is:

"4. The Ministerial Direction is invalid as the Minister failed to provide adequate reasons in respect of the issues raised in the submissions made during the public participation process and/or the Ministerial Direction breached the Applicants' rights to fair procedures and natural and constitutional justice and/or the Minister's reasons are wrong in law, further particulars of which are contained at Part 2 below."

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

"Core Ground 4 – Reasons

Applicants

The Minister failed to give the main reasons on the main issues when making the Direction notwithstanding that 167 of the 168 submissions (including those of the Applicants) asked the Minister not to make the Direction in relation to PA CH 8.1.

Respondent

The Minister did not fail to give the main reasons on the main issues when making the Ministerial Direction. Those reasons are clear from the text of the Direction and the cover letter to the Ministerial Direction, read in light of the balance of the relevant documentation before the Minister when the decision was made.

OPR

Core Ground 4 has not been made out. Correctly interpreted, it is clear that the Minister has set out his considerations and also the reasons for his decision to issue a Direction pursuant to s.31 of the 2000 Act. As regards relevant documentation that was before the Minister, it is, inter alia, apparent from the text of the OPR's s.31AN(4) Notice letter, that adequate consideration was given to the issues raised by the Applicants and clear reasons set out as to why the text of PA CH 8.1 as modified should be omitted from the Development Plan.

DAA

daa respectfully endorses and adopts the arguments made by the Minister in respect of Core Ground No. 4. In addition, and without prejudice to the forgoing, in the event that the Applicant is unsuccessful in respect of Core Ground No. 3, but the Court considers that any of the issues pleaded in respect of Core Ground No. 4 is merited, daa submits that the Court should exercise its discretion to refuse certiorari of the Direction. The alleged errors are not ones which otherwise affect the integrity of the decision. Further, the Direction remedies a

breach of EU and domestic law and the Court should decline to quash it in order to ensure that proper effect is given to EU law.

FCC

The reasons argument in respect of whether the Minister failed to provide adequate reasons in respect of the issues raised in submissions made during the public participation process and/or that the Minister breached the applicant's right to fair procedures and natural and constitutional justice is principally a matter for the Respondents."

144. Broadly speaking, the main reasons for the direction are discernible from the Minister's covering letter and the reasoning in the direction itself.

145. As regards the objection that no reasons were given as to rejecting legal points (errors in the process, or the lack of SEA), the real problem here for the applicants is that legalistic objections in principle to the effect that a decision was made in excess of jurisdiction aren't the sort of objections that require a reasoned response to the extent that a decision can be invalidated for failure to provide such reasons even if the decision was not in fact in excess of jurisdiction.

146. The spurious logic is that even though there was no underlying illegality, if an applicant puts forward a baseless argument asserting such illegality, and the decision-maker doesn't provide a fully reasoned rejection of the meritless complaint, then an otherwise valid and lawful decision becomes invalid and lawful. Talk about a jurisprudential Indian rope trick.

147. Such a conclusion is consistent with the view of Mulcahy J. in *Ironborn v. Dun Laoghaire-Rathdown County Council* [2023] IEHC 477, [2023] 7 JIC 3108 (Unreported, High Court, 31st July 2023) para. 107:

"Since I have concluded that the Council was in error in relation to its conclusion under section 42(8), it is not necessary for me to consider Ironborn's subsidiary argument that the Council failed to give reasons for rejecting its submissions on the proper interpretation of that section. I would, however, observe that if a decision-maker correctly interprets and applies the law and thus, necessarily, rejects an argument based on an incorrect interpretation of the law, it is difficult to see how there could be an onus on that decision-maker for providing reasons for so doing, still less for quashing its decision by reason of a failure so to do."

148. Insofar as the applicant raised the issue of procedural flaws, that is addressed in earlier grounds. Calling it a reasons complaint adds nothing. Insofar as the applicant complained of a lack of SEA, it isn't now arguing that the decision is substantively invalid by reference to SEA – that point has been dropped. So it would be bordering on the absurd to quash a decision that is valid in that respect on the grounds that, in response to a legalistic objection, the Minister didn't explain at the time why it was so valid.

149. For the avoidance of doubt, that certainly doesn't mean that an applicant whose own legal rights are affected by a proposed decision isn't entitled to main reasons on main issues. But there is a distinction between an issue causing individual prejudice or otherwise requiring evaluation by the decision-maker and a legalistic complaint such as an objection in principle to the procedure. An extreme example – if a lay litigant says she cannot be proceeded against in an administrative or judicial process on the farcical ground that she has not consented to the process, that is not an objection that requires a reasoned response by anybody, the court included.

Summary

150. For clarification in concluding, by upholding the direction I amn't endorsing the concept that members' freedom of expression should be curtailed, still less the viewpoint that the existing insulation schemes couldn't be improved upon. Again the context – the councillors' wording doesn't change anything in itself and looks almost completely symbolic. It would be a pity if a rather technical issue about allocation of highly specific statutory powers were to become unduly overheated. In one sense the statutory architecture whereby differences of view between the OPR and Minister on the one hand and councils on the other are addressed by way of exchange of legally operative written instruments isn't automatically calculated to resolve problems in a mutually agreeable way. Whether there could be a role, with or without statutory amendment, for some slightly more human and direct form of dialogue, one rather feels that some common ground might be capable of being hammered out in at least some cases. Nothing in the judgment affects the fact that members have a constitutional role under Article 28A "in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities". The State didn't dispute that members can, if they so wish, enhance the development plan insofar as it relates to development standards such as sound insulation for new residential development. And the State didn't seem to disagree that members retain their freedom of expression subject only to the statutory code, including making submissions to ANCA and discussing noise insulation schemes or other noise mitigation measures. The State didn't seem to disagree either with the position that this included articulation of views at council meetings. The State thought that passing motions at council meetings

would fall foul of the rule against influencing the ANCA process, a proposition that is not necessarily obvious because that might depend on the wording. That's an issue I don't need to decide, although appropriate disclaimers in relation to influence on the ANCA process may be worth thinking about in the event of such articulation. That's all a matter for another day. The punchline for present purposes is that members are perfectly entitled to maintain the view that existing noise insulation schemes are inadequate, and are perfectly entitled to articulate that view in various ways. What is being decided by the present judgment is that the grounds alleged in these proceedings are not sufficient to constitute a basis to quash the Minister's decision that such views should be articulated in some way other than the specific wording here inserted in a development plan context. At the risk of stating the obvious, the fact that the Minister's decision is being upheld isn't equivalent to agreeing with it – my views on the merits are irrelevant, but if forced to take a position I would return to the perspective that, especially given the separation of powers between ANCA and the members, the inclusion or exclusion of this particular wording in a development plan doesn't seem to change anything very much of anything. That doesn't take from the importance of the underlying issue – it just highlights that that underlying issue isn't going to be solved by the inclusion of the contested wording in the development plan.

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

- (i) While there were errors on the part of the OPR and Minister in the wording of statutory documentation, they were insufficiently material to call the validity of the process into question. The core objections of the OPR and Minister applied to both the original and amended version of the contested amendment.
- (ii) While the operative part of the direction as to the steps to be taken is sub-optimally worded, its effect is clear and the direction can be read in a manner that renders it valid.
- (iii) The reason given, that "[t]he inclusion of an objective in the Development Plan, which conflicts with and undermines these separate statutory provisions and processes, including the Noise Action Plan, is therefore inconsistent with National Policy Objective 65 of the National Planning Framework", is not based on an error of law and insofar as it constitutes an evaluative judgement as to the application of NPO 65, which on the facts hasn't been shown to fall outside the zone of legitimate planning judgement and evaluation by the Minister, and is a valid basis for the direction independently of any other reason.
- (iv) An otherwise lawful decision isn't invalid because a decision-maker fails to give reasons for impliedly rejecting incorrect arguments about its invalidity.

Order

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

- (i) the proceedings be dismissed;
- (ii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs; and
- (iii) the matter be listed on Monday 4th November 2024 to confirm the foregoing.