THE HIGH COURT
PLANNING & ENVIRONMENT

[2024] IEHC 669
Record No: H.JR.2024 / 1142

BETWEEN:

GRASSRIDGE LIMITED

Applicant

-and-

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Respondent

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 25 NOVEMBER 2024

Contents

INTRODUCTION & THE FACTS

1. The Applicant ("Grassridge") seeks certiorari quashing the Respondent's refusal, dated 27th August 2024,[1] to extend the duration of a planning permission ("the Impugned Decision"). These proceedings came to trial on 19 November 2024 under the expedited procedure in the Planning & Environment List for which Practice Direction HC126 provides.

2. In 2018, Grassridge, the owner and developer of the former Dalkey Lodge Nursing Home, Ardburgh Road, Dalkey, County Dublin ("the Site") applied to the Respondent planning authority for planning permission to demolish a nursing home and construct 15 dwellings and associated works on the Site. The Respondent ("DLRCC") refused permission on 11th September 2018, but permission was granted on appeal by An Bord Pleanála on 28th May 2019 ("the Permission").[2] By s.40 PDA 2000,[3] the duration of a planning permission is ordinarily termed its "appropriate period". The appropriate period of the Permission was due to expire on 7th September 2024.

3. For reasons not here relevant, commencement of works on foot of the Permission was delayed.[4] Construction of nine units started in April 2024.[5]

4. Meanwhile, Grassridge had paid to DLRCC rates in respect of the lands, application fees for a Fire Safety Certificate and a 7-Day Commencement Notice and a cash bond of €75,700 on foot of condition 18 of the Permission. On 22 April 2024, the Department of Housing, Local Government and Heritage made a payment of €196,252.50 to DLRCC following an application by Grassridge under the Development Contribution Waiver Scheme for residential development.[6] The Scheme approval stipulated completion of all works by 31 December 2025, failing which the contributions would be payable by Grassridge.

5. On 2nd July 2024, Grassridge applied to DLRCC, pursuant to s.42 PDA 2000, for a 2-year extension of the duration of the Permission ("the First Extension Application"). This application was refused in the Impugned Decision. The First Extension Application included a detailed submission and appendices by McGill Planning (including the appendices, "the McGill Submission"). The appendices included a letter dated 1 July 2024[7] from Grassridge[8] to DLRCC which sought the extension and set out a history of the matter explaining why the need for the extension had arisen. *Inter alia*, the McGill Submission,

- outlined the extent and the monetary value of the works which would be completed within the "appropriate period" – i.e. by expiry of the Permission.

[1] Bearing Decision Order number P/1507/24.
[2] Register References D18A/0700 & (ABP-302718-18). An amending permission D21A/1012 of January 2022 does not affect any issues I must decide.
[3] Planning and Development Act 2000, as amended.
[4] As a result, inter alia, of the Covid-19 pandemic and the responses to the initial construction tender coming in significantly higher than had been budgeted for by the Applicant. See in the affidavits of Mark Elliott and Trevor Sadler.
[5] Number of units and date taken from Commencement Notice dated 3/4/24.
[6] As introduced by Government Circular PL 04/2023 as a temporary housing support measure to boost new housing supply.
[7] Appendix E to the McGill Submission.
[8] Apparently sub nom "the Greenleaf Group".

- cited multiple, though in brief form, precedent extension of duration decisions by planning authorities in which the durations of permissions had been extended and in which the works done were considered substantial within the meaning of s.42(1), though (Grassridge contends) they were less substantial and less valuable than the works which would be completed on the Site by expiry of the Permission.

6. Counsel for Grassridge, in his able arguments, did not entirely abandon reliance on the allegation that DLRCC, by not addressing them explicitly, must be taken to have failed to have regard to those precedents. But he did agree that they in no way bound DLRCC, which must decide the matter on the particular facts and circumstances of the case. He fairly and wisely said they were not central to his case. In my view this is an instance of which it can be said that absence of explicit evidence of regard is not evidence of absence of regard on what can, on any view, have only been a side-issue. I place no weight of any consequence on the issue and will consider it no further.

Works Contemplated and Done

7. Grassridge's averments[9] as follows are not disputed:

- The overall construction budget for the development is around €7.4 million.[10]
- The Site is "*incredibly challenging from a construction engineering perspective*".
- In particular, since commencing works April 2024, Grassridge, by way of Site preparation and levelling, has demolished the nursing home and has excavated and removed over 5,000m^3 - 650 truckloads or 1,818 to 1,887 tonnes[11] - of solid granite bedrock. The works and their scale are illustrated, at least in appreciable part, by photographs supplied by Grassridge to DLRCC with its application to extend the duration of the Permission and were verified by DLRCC on a site visit.
- The value of the works done is about €1.125 million.
- Those works were works within the meaning of s.2 PDA 2000.[12]

8. The McGill Submission gave a bullet-pointed list of the works done by 2 July 2024 as follows:[13]

- Enabling works.
- Demolition works.
- Rock Breaking / Deletion Works.
- Site investigations and surveys.
- Discharge of conditions.

Of some note, DLRCC's Planner, in reporting to the decision-maker in the Extension Application, copied this bullet-pointed list verbatim.[14]

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[9] By affidavits sworn by Mark Elliott, Development Manager of the Applicant, and Trevor Sadler, planning consultant of McGill Planning. DCC replied by the Affidavit of Mr. Miguel Sarabia, Senior Planner of DLRCC.
[10] €7,386,441.89. The expected cost is set out in an exhibited quantity surveyor's report.
[11] Based on the commonly applied standard of 2.65 – 2.75 m^3 of granite per tonne.
[12] Section 2 PDA 2000 defines "works" as follows: ""works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure."
[13] At p5.
[14] DLRCC Planner's Report 27/8/24 p7.

9. McGill's Submission also provided a more detailed list of the works expected to be completed by the expiry of the Permission as follows:

> *"Phase 1*
> *As set out above, the following works will be completed by 2nd August 2024.*
> - Enabling works
> - Rock Breaking/Deletion Works
> - Establish Site Compound/Welfare / Temp Connections
> - Demolition works
> - All buildings have been removed
> - All waste has been removed from site
> - Site Investigations and Surveys
> - All underground surveys have been completed
> - A full topographical and site investigation survey has been completed
>
> *This will result in the completion of all Phase 1 works for this development.*
> *The value of the above works completed by 2nd August is €309,265.81. This is significant expenditure and represents a substantial commitment to the project by the applicant.*
> *…*
>
> *Phase 2*
> *Phase 2 of the Development will commence in August before the expiry of the permission and will comprise the construction of Block A.*
> *It is expected that by the 5th of September 2024[15] (the date the permission ceases to have effect) that the following will be in place for Block A:*
> • *The Foundation Casting*
> • *The Foundation for Retaining Walls including waterproofing*
> • *Rising Blocks / RC Walls*
> • *Backfill & Compact*
> • *Below Slab Drainage*
> *The applicant's quantity surveyor CMB has costed the works to be completed up to the expiry of the planning permission on 5th September 2024, based on the contractors cashflow which will total an additional €816,062.22.*
> *Therefore the cumulative expenditure on the carrying out of the permitted development before the expiry of the appropriate period will be approx. €1,125,328.03."*

10. The Phase 2 works in fact completed pursuant to the Permission by its expiry fell somewhat short of those expectations: Trevor Sadler of McGill Planning deposes that the following works were completed:

> *"Phase 1:*
> *Enabling works*

[15] In fact 7 September – but nothing turns on that.

- *Rock Breaking/Deletion Works. Over 5,000m^3 of rock or 650 loads of rock and other excavations have been removed from the site*
- *Establish Site Compound/Welfare/Temporary Connections*

Demolition Works
- *All buildings removed*
- *All demolition waste removed from site*

Site Investigations and Surveys
- *All underground surveys completed*
- *A full topographical and site investigation survey completed*

<u>Phase 2:</u>
- *The foundations have been excavated for Block A*
- *The foundations for the retaining walls have been excavated.*
- *Foul Sewer trenching 70% excavated for terrace B*
- *Central Access Road excavations completed*
- *Surface Water and Foul Sewer trenching in main access road is 80% completed."*

It will be seen from the foregoing that, generally, the works had not progressed beyond excavations for foundations and services.

11. As to the relationship of the works completed to those contemplated by way of completion of the permitted development, at least some further insight is gleaned from the Project Programme[16] submitted by Grassridge to DLRCC in the Extension Application. It is a 25-page document listing each item of work and ascribing expected starting and finishing dates to it, from the start of works in April 2024 to expected full completion of 15 units in September 2025. No doubt, line items of work are far from equivalent in terms of substance, time required and cost and it is clear that, in this case, site excavation was a particularly large line item. That said, it is at least notable that the figure below is an extract of a little more than half of the first of the 25 pages. I have highlighted some text in yellow. It will be seen that in the construction phase for houses #1 and #2, completion of four line items of work was programmed to 4 September 2024 – three days before the Permission expiry date. The first is "Foundation casting". I bear in mind that the foundations were in fact excavated for the entire of Block A and that, as Block A includes additional houses, the Foundation Casting line item reappears as to those houses later in the 25-page document so it is not strictly correct to suggest, as counsel for DLRC suggested, that Grassridge had not completed any works beyond the first half of the first of 25 pages. That said, it will have been seen above that no foundations were cast by 7 September. In my view, the essential point remains that the best that can be said for Grassridge in this regard is that, in excavating foundations, Grassridge had moved from the Enabling Works just – but only just - into the Construction Works.

[16] Appendix C to the McGill Submission.

Dalkey Lodge		375	15-Apr-24	19-Sep-25
Key Project Milestone		0	15-Apr-24	15-Apr-24
A2590	Start on Site	0	15-Apr-24	
A2610	Completion Date	0		15-Apr-24
Enabling Works		79	15-Apr-24	02-Aug-24
A2630	Rock Breaking/ Deletion Works	65	15-Apr-24	15-Jul-24
A2640	Establish Site Compound /Welfare /Temp Connections	7	16-Jul-24	24-Jul-24
A2650	Form Temp Acess Routes for Bulk Excavation	7	16-Jul-24	24-Jul-24
A2660	Locate /Identify /Make Safe Existing Services	7	16-Jul-24	24-Jul-24
A2670	Initial Site Clearnace	7	25-Jul-24	02-Aug-24
Construction		276	12-Aug-24	19-Sep-25
Block A		233	12-Aug-24	15-Jul-25
1-2 Houses		227	12-Aug-24	07-Jul-25
Sub Structure Works		28	12-Aug-24	18-Sep-24
A6170	Foundation Casting	4	12-Aug-24	15-Aug-24
A6180	Foundation for Retaining Walls including lean/Waterproofing	4	16-Aug-24	21-Aug-24
A6230	Rising Blocks/RC Walls	6	22-Aug-24	29-Aug-24
A6190	Backfill & Compact	6	28-Aug-24	04-Sep-24
A6200	Below Slab Drainage	4	05-Sep-24	10-Sep-24
A6210	Tanking and Radon	4	11-Sep-24	16-Sep-24
A6220	Pour Ground Floor Slab	2	17-Sep-24	18-Sep-24

Figure: Extract from Project Programme p1/25

S.42(1) PDA 2000

12. S.42(1) PDA 2000, as relevant, provides as follows:

"On application to it in that behalf, … a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:

(a) (i) the authority is satisfied that—

(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,

(II) [Repealed]

(III) substantial works were carried out pursuant to the permission during that period, and

(IV) the development will be completed within a reasonable time,

……".

13. Some brief, if dissociated, comments on s.42 may assist at this point:

- Inasmuch as earlier caselaw considered the equivalent section of earlier legislation – s.4(1)(c)(ii) of the 1982 Act[17] - the parties agree that s.42(1) is materially no different.

- **Merriman**,[18] **Garden Village**[19] and **SWRSCPA**[20] indicate that s.42 represents the desire of the Oireachtas to enable the development to which the permission relates to be completed within a reasonable time where a developer has carried out substantial works. Indeed that is so even if, since permission was granted, planning policy has evolved such that permission might not still be granted if again sought. Where the statutory criteria are met an extension must ensue. However, it must be added that there is a counterpoint: where the statutory criteria are not met an extension may not ensue.

- **Lackagh Quarries**[21] records **McCoy**[22] as emphasising that the onus is on an applicant seeking an extension to the life of a planning permission to satisfy the planning authority that each of the statutory criteria was met.

- The outcome of an extension application depends on whether the planning authority is "*satisfied*" that each of the statutory criteria is met.

- No appeal lies against a decision of a planning authority to refuse an extension.

Impugned Decision & DLRCC Planner's Report

14. On 27th August 2024, DLRCC refused to extend the duration of the Permission on the recommendation of the report of Miguel Sarabia, Senior Planner of DLRCC, ("the Planner" and "the Planner's Report"). He had advised that "*this application for extension of duration of permission approved under D18A/0700 cannot be granted as substantial works were not carried out pursuant to the permission. Therefore, this application is not considered to comply with the criteria set out"* in s.42 PDA 2000. The recorded reason for the Impugned Decision is:

> *"1. The Planning Authority is not satisfied that substantial works were carried out pursuant to the permission during the appropriate period. Therefore, the criteria set by Clause III of section 42(1)(a)* [PDA 2000] *is not considered to be met."*

The Impugned Decision also states:

> *"For the avoidance of doubt the reasons and recommendations set out in the planners report were generally adopted as set out in the Executive Order, this can be viewed at the Council Offices or the Council website."*

[17] Local Government (Planning and Development) Act, 1982.
[18] Merriman v Fingal County Council & Ors [2017] IEHC 695.
[19] Garden Village Construction Company Limited v Wicklow County Council [1994] 3 IR 413, 433 (Blayney J).
[20] South-West Regional Shopping Centre Promotion Association Limited and Stapleyside Company v An Bord Pleanála [2016] IEHC 84.
[21] Lackagh Quarries v Galway County Council [2010] IEHC 479.
[22] State (McCoy) v Dun Laoghaire Corporation [1985] ILRM 533.

15. The Planner's recommendation was explicitly based on:

- his consideration of the Site photos submitted and confirmation of their content by his Site visit on 22 August 2024.

- **Frenchurch**[23] in which it was held that:

  "it is a matter for the Planning Authority bona fide using its own expertise and judgement to whether or not substantial works were carried out pursuant to the permission."

- his view that *"in ascertaining or justifying substantial works … a holistic perspective should be employed, whereby completed works should be observed and considered within the context and relative to the permitted scheme as a whole."*

- his observation that *"Regard is had to the programme of works submitted by the Applicant, which suggested that works would be at a more advanced stage at the time of making the decision, however, that extent of works was not evident at the time of the Site Inspection. The Planning Authority in considering this matter has regard to all the information and associated evidence submitted by the Applicant and also the information gathered during the Site Inspection."*

- in that context, his description of the works (the results of which he had personally observed as done) under bullet-pointed headings taken verbatim from the Extension Application as follows:
  - Enabling works.
  - Demolition works.
  - Rock Breaking/Deletion works.
  - Site Investigations and surveys.
  - Discharge of conditions.

- his view, accordingly that *"in this instance that the demolition works and the excavation/rock breaking works do not constitute substantial works towards the permitted development, namely: demolition of the existing nursing home; and construction of a 2 no. terraces of 2-3 storeys with a total of 15 no. dwelling units (total residential gross floor parking, bin stores, open space, revised vehicular/pedestrian access (including separate access to 1 no. unit), landscaping and boundary treatment works."*

16. All works stopped on expiry of the Permission on 7th September 2024. Grassridge asserts in general terms that the Impugned Decision this will cause it very substantial commercial prejudice, such as to put the financing of the scheme in jeopardy and imperil its completion. That was not disputed - save by the general observation that Grassridge may still reapply for planning permission for the Site.

17. On 2nd September 2024, Grassridge made a second application for an extension of duration of the Permission. DLRCC rejected it in a decision dated 23rd October 2024 – again for lack of substantial works. While

[23] Frenchurch Properties Ltd v Wexford County Council [1992] 2 IR 268.

Grassridge has also sought leave to challenge that decision,[24] it says that the decision of these proceedings will likely largely, but perhaps not entirely, determine those proceedings. I have adjourned the leave application in those proceedings pending delivery of this judgment – with Grassridge having liberty to apply in those proceeding should any urgency arise therein either before or after delivery of this judgment.

18. Grassridge seeks *certiorari* quashing the Impugned Decision on the basis that in making it DLRCC

- fundamentally erred in law,
- fundamentally erred in fact,
- failed to adequately consider Grassridge's McGill Submission,
- failed to give adequate reasons for the Impugned Decision,
- made it contrary to the requirements of fair procedures.

Grassridge also alleges that the decision was irrational and/or made in breach of the principle of proportionality.

GROUNDS, DISCUSSION & DECISION

Consequences of Refusal to Extend

19. It assists to dispose at this early point of a consideration which I consider ultimately irrelevant to the issue I must decide. Clearly, Grassridge's decision to start works at all must have been taken conscious of the Permission expiry date of September 2024, the necessity to have substantial works done by then to trigger a right to an extension of the duration of the Permission, and of the fact that whether works done were substantial would be a matter for the bona fide evaluative planning judgment of DLRCC on the particular facts of the case rather than by reference to any predetermined formula or 'rule of thumb'. In that respect, the undoubted sympathy I do have for the likely financial and other consequences to Grassridge of DLRCC's refusal to extend the duration of its Permission is counterbalanced, at least in appreciable degree, by the observation that it was for Grassridge as a commercial enterprise to take its own informed view, as I infer it did, as to the risks of starting on the works a mere five months before the expiry of the Permission. I must infer that it calculated and decided to take those risks. However, save possibly as to an argument as to proportionality,[25] these considerations to not appear to me to bear on the central question whether the works done were substantial within the statutory meaning.

General Observations – Lawfulness not Merits & Onus of Proof

20. In my view and as a general proposition, the observation made in **Jones**[26] applies here that *"The applicants' point is simply a merits-based disagreement dressed up in legal language".* In this case, various

[24] In proceedings JR2024/1418.
[25] See below.
[26] Jones v South Dublin County Council [2024] IEHC 301.

legal-looking outfits are draped over that disagreement but fail to conceal the reality of a merits-based challenge. Short of irrationality of the decision, merits-based challenges are impermissible in judicial review. Of the many judgments to that effect, **Sweeney**[27] states that "*judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged."* As was said in **Meadows**,[28] the decision impugned in judicial review *"is that of the responsible administrative authority to which it is entrusted by law and not of the court, whose function is limited to control of the limits of administrative power."* Irvine J in **Lackagh Quarries**[29] (a case about s.42 PDA 2000) said:

> *"As Lord Brightman stated in Chief Constable of the North Wales Police v. Evans[30]:- "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power… Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.""*

21. The position just described is illustrated by an extension of duration case involving **John A Wood,**[31] in which Smyth J said:

> *"In the context of the J.R. proceedings it is not the function of the Court to act as an appellate tribunal, or to usurp the function of the planning authority. If it were to be a matter of appeal I would be inclined to the view that the extraction of quantities, such as are stated in the Company's application … represented substantial works - but is not a matter of appeal."*

22. Given the presumption of validity of public law decisions, the onus of proof of illegality of the Impugned Decision rests on Grassridge. Humphreys J in **Sherwin**[32] cites **Meadows**[33] for the proposition that *"It is a fundamental principle of judicial review that the onus of proof remains on the applicant at all times"* and states, citing **MRRA**,[34] *"Another way of making the same point is that a decision has a presumption of validity, and it is up to the applicant to prove otherwise. If anything has been a fixed feature of judicial review it is this principle".*

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[27] Sweeney v District Judge Fahy [2014] IESC 50. See also the list of cases cited in Nagle View Turbine Aware Group v An Bord Pleanála [2024] IEHC 6 §89.
[28] Meadows v Minister for Justice [2010] IESC 3, [2010] 2 IR 701; [2011] 2 ILRM 157.
[29] Lackagh Quarries Ltd v Galway City Council [2010] IEHC 479.
[30] [1982] 1 WLR 1155 at pp. 1171 and 1174.
[31] John A. Wood Ltd. v Kerry County Council [1997] IEHC 168.
[32] Sherwin v An Bord Pleanála [2023] IEHC 26.
[33] Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701, [2011] 2 ILRM 157 at 743.
[34] Monkstown Road Residents Association v An Bord Pleanála [2022] IEHC 318 §96.

Error of Law – Interpretation of s. 42 PDA 2000

Grassridge's Position

23. Grassridge asserts errors of law in that:

a. DLRCC erroneously interpreted ss. 42 and 2 PDA 2000 where it is evident that *substantial works* have been carried out pursuant to the Permission. Instead of giving the words their ordinary meaning, DLRCC interpreted and applied the phrase "substantial works" as a term of art to the effect that the question whether substantial works have been completed must be assessed holistically "*whereby completed works should be observed and considered within the context and relative to the permitted scheme as a whole".*

b. The notion that substantial works have to be assessed "*relative to the permitted scheme as a whole*" implies into the section a threshold of completion that is absent from it. The section merely requires a developer to carry out "substantial works". It does not require the developer to complete a certain minimum portion or percentage of the "permitted scheme as a whole".

DLRCC's Position

24. DLRCC denies errors of law in that

a. Grassridge's argument is misconceived as based on assessing the work on a standalone basis, viewed *in vacuo*, and not through the lens of the Permission which it sought to extend and pursuant to which the works were carried out.

b. DLRCC's Planner approached the issue in accordance with law on the basis that *"a holistic perspective should be employed, whereby completed works should be observed and considered within the context and relative to the permitted scheme as a whole."*

c. Based on the material before it, DLRCC was not satisfied that substantial works had been carried out pursuant to the Permission. DLRCC's conclusion that it was not so satisfied that substantial works was a matter for it using its expertise and judgement and within its discretion having regard to the material which was before it.

d. Grassridge may not review the merits of the Impugned Decision in these proceedings.

Substantial Works – The Law

Satisfaction

25. The first point of consequence is that s.42 provides that, as to whether the statutory criteria for extension were met, the question is whether DLRCC was "*satisfied*". There are many cases as to what such a statutory prescription means. I need only mention some. Recently, in **Re MMcD**[35] Hogan J, for the Supreme Court, said:

> *"…. s. 23F(7)[36] provides that where "the Child and Family Agency is satisfied that there is reasonable cause to believe that the child requires special care it shall make a determination as to whether the child requires special care." The phraseology of the sub-section contains familiar statutory terms ("satisfied", "reasonable cause to believe"). Thus, the use of the term "satisfied" in this context connotes a state of affairs such that the decision-maker must form a view which is bona fide, factually sustainable and not unreasonable: see, e.g., the seminal judgments to this effect of O'Higgins C.J. in The State (Lynch) v. Cooney[37] and that of Blayney J. in Kiberd v. Hamilton[38]."*

In the planning context **- Waltham Abbey**[39] - the same judge cited the same cases to the same effect:

> *"It is long established that the use of the statutory formula whereby a decision maker is required to be "satisfied" of a certain state of affairs connotes a requirement that the donee of that statutory power must discharge those powers in a manner which is bona fide, factually sustainable and not unreasonable."*

These decisions are understood to the effect that decisions required by statute to be based on the satisfaction or opinion of the decision-maker are susceptible to judicial review as to legality in the ordinary way and are reviewable as to merit not for the correctness of the opinion but only for its rationality. The court cannot merely substitute its opinion or satisfaction for that of the decision-maker.

Substantial works

26. Grassridge's central argument in this case is that DLRCC misinterpreted and hence misapplied to the facts, the word "substantial" in "substantial works". As to the meaning of "substantial works" for purposes of considering applications to extend the duration of planning permissions, in my view it is unnecessary to review all the cases. The following appear to me to suffice to state the relevant principles – both as to the interpretation of s.42 and as to the standard of review of decisions whether works done were substantial within the meaning of s.42.

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[35] [2024] IESC 6.
[36] Child Care Act 1991 (as amended).
[37] [1982] IR 337 at 361.
[38] [1992] 2 IR 257 at 265.
[39] Waltham Abbey Residents Association v An Bord Pleanála & O'Flynn Construction [2022] IESC 30 ([2022] 2 ILRM417. See also, recently, Sweetman v The Environmental Protection Agency [2024] IEHC 55.

Frenchurch 1994

27. DLRCC's Planner's Report cited **Frenchurch**[40] to the effect that:

> *"it is a matter for the Planning Authority bona fide using its own expertise and judgement to whether or not substantial works were carried out pursuant to the permission."*

28. Grassridge criticises that citation of Frenchurch as selective absent its context. That context appears as follows in the "Conclusions" section of the judgment:

> *"The planning authority is entitled to have basic views and policies regarding planning matters. It is not a valid objection that the planning authority holds a view that, in a general sense, "substantial work" would connote a substantial proportion of the authorised development and perhaps as much as 40% to 50% of that development provided that the planning authority decide each case on its own merits. Perhaps in a small development "substantial works" would require a substantial proportion of the development and even 40% to 50% to be carried out if an extension of the life of the planning permission were to be granted. On the other hand it may well be that in a very large development "substantial works" might have been carried out even though a much lesser proportion than 40% to 50% of the development might have been completed before the expiration of the planning permission. It is a matter for the planning authority bona fide using its own expertise and judgment to decide whether or not substantial works were carried out pursuant to the permission.*
>
> *I am satisfied that the respondent in this case did keep an open mind and did decide the application for an extension on its own merits and therefore the case against the respondent's decision to refuse the application on the grounds of alleged preconceived views or rule of thumb fails.*
> *…*
> *There can be no question of the respondent's decision in this case being so unreasonable as to be at variance with or in the teeth of plain reason or commonsense and accordingly the attack on the decision on the grounds of unreasonableness also fails."*[41]

29. I do not share Grassridge's criticism of DLRCC's Planner in this respect. It seems to me that he identified a central principle which is no less valid or complete shorn of the context set out above. He acknowledges that the decision must not merely be made bona fide - it must be grounded bona fide in the exercise of the planning authority's "*own expertise and judgement*". Whatever about compliance with the requirement, it is inconceivable that a planner in a planning authority or a decisionmaker reading his report would be ignorant of the requirement of rational, lawful decision-making which such a phrase implies.

[40] Frenchurch Properties Ltd v Wexford County Council [1992] 2 IR 268.
[41] Emphases added.

30. Indeed the context is notable, to Grassridge's disadvantage on the arguments it made, for the observation that *"It is not a valid objection that the planning authority holds a view that, in a general sense, "substantial work" would connote a substantial proportion of the authorised development"* provided each case is decided on its own merits. It also emphasises that DLRCC's decision is reviewable as to merit only for irrationality – whether it *"is so unreasonable as to be at variance with or in the teeth of plain reason or commonsense."*

Garden Village 1994

31. **Garden Village**[42] was largely concerned with a question not at issue in the present case: whether works done other than pursuant to the relevant planning permission could be included in assessing, for the purpose of considering extension of the duration of that planning permission, whether substantial works had been done.[43] Geoghegan J. in the High Court indicated, obiter, his view of the meaning of the expression "substantial works". He said the expression *"should not be given some rigid meaning when the Act itself does not define it. In the context of this case it would be wholly inappropriate to apply some mathematical formula as to either quantity of work or of expenditure. "Substantial" should be given the meaning which it has in ordinary English which is the opposite to "insubstantial" and not some special meaning."*

32. As to mathematical formulae, this passage seems to me in accordance with the proscription in Frenchurch of preconceived views or rules of thumb. I confess that I would prefer to contrast the word "substantial" with "non-substantial" rather than "insubstantial" lest the latter word be understood to connote, by contrast, an exaggeratedly minimal view of what works would suffice to require an extension of duration of permission. But I doubt the semantic difference would make a practical difference in many cases.

Littondale 1996

33. **Littondale**[44] seems to me the most important case for present purposes. Littondale impugned the refusal to extend duration as irrational, based on irrelevant considerations, as the result of a process lacking fair procedures and as based on the application of the wrong test by the county manager in determining whether the works done were substantial.

34. As to the nature of the decision to be made, Laffoy J held, as relevant here, that where the cumulative statutory conditions were satisfied, the council must extend the duration of the permission; conversely where any are not satisfied the council may not extend the duration of the permission.[45] Yet, as

[42] Garden Village Construction Company Limited v Wicklow County Council, [1994] 3 IR 413.
[43] Geoghegan J in the High Court considered that "As the respondent did not consider whether any works had been carried out outside the red boundary line which could constitute "substantial works" carried out pursuant to permission reference number 1793/85, the applicant is prima facie entitled to certiorari." An appeal to the Supreme Court succeeded on that issue. But the Supreme Court decision is not here relevant.
[44] Littondale Ltd v Wicklow County Council [1996] 2 ILRM 519.
[45] S.4 of the 1982 Act included the words "if but only if". S.42 PDA 2000 says "provided that each of the following requirements is complied with". The parties agree, and so do I, that as to this aspect there is no substantive difference between s.4 of the 1982 and s.42 PDA 2000.

to whether the condition as to substantial works was satisfied, the council's decision was reviewable as to the merit only for irrationality.

35. Various descriptions have been used of the nature of this decision. Laffoy J helpfully observed that the section is expressed in mandatory terms bearing both positive and negative aspects.[46] The correct but compendious phrase "limited discretion" has been used in the cases – for example in **Merriman**.[47] I suggest that it may be helpful to conceptually separate the two elements and say that:

- the question whether substantial works have been done is a matter for the evaluative judgment of the planning authority; and

- once that question has been answered, the planning authority has no discretion as to the decision whether to extend the duration of the permission.

This conceptual separation seems to me to allow clarity to say that the evaluative judgment whether substantial works have been done is reviewable as to merit only for irrationality. On the other hand, the resultant and distinct decision whether to extend the duration of the permission is reviewable for correctness as a matter of law. So, if the council held that substantial works had been done (and the other conditions were also satisfied), but yet refused an extension, the decision could be quashed on judicial review as in error of law.

36. Returning to Littondale, Laffoy J addressed both the meaning of "substantial" and, crucially, the context in which it is to be considered. She said, in applying Frenchurch and Garden Village*:*

> *"In my view, the epithet 'substantial', which qualifies the word 'works' in s. 4(1)(c)(ii), must be given its natural or ordinary meaning in the context of the 1982 Act and of s. 4 thereof in particular. There are many dictionary meanings of the word 'substantial' but, in my view, that which most closely reflects the intention of the legislature in using it to qualify the word 'works' as so defined is: 'Of ample or considerable amount, quantity, or dimensions…'. …….*
>
> *The context indicates that whether works are 'substantial' is to be considered <u>not in vacuo but having regard to the nature and extent of the works permitted</u>[48] under the particular permission which it is sought to extend under s. 4.*
>
> *In each case, whether 'substantial works' have been carried out must be determined by the planning authority on the basis of the particular facts of the case and not by reference to any predetermined formula or 'rule of thumb'."*

It will be clearly seen from the foregoing that whether works are substantial with in the statutory meaning is largely a relative rather than an absolute concept – relative, that is, to the works consisting in the entire

[46] Citing State (McCoy) v Dun Laoghaire Corporation [1985] ILRM 533 at p.535.
[47] Merriman v Fingal County Council [2017] IEHC 695.
[48] Emphasis added.

completed development.

37. As to the standard of judicial review of the planning authority's determination whether the works done were substantial, Laffoy J held[49] that,

- the question for the court was not whether the council's determination that the works carried out were not 'substantial works' within s. 4(1)(c)(ii) of the 1982 Act was correct. The question was whether that determination was irrational – i.e. flew in the face of reason and common sense.

- in assessing whether the determination was irrational, it was not the court's function to determine on the merits whether the works done were substantial. The court's function was, rather, to review for rationality, having regard to the material before the council when making its decision, the manner in which the council concluded that substantial works had not been done.

Lackagh Quarries

38. Specifically as to s.42 PDA 2000, Irvine J in **Lackagh Quarries**[50] said:

> *"Laffoy J. in Littondale and Smyth J. in John A. Wood both made strong statements to the effect that affidavits introduced by the respective parties, engaging upon issues such as the extent of the works which had been carried out prior to the application for an extension of the life of a planning permission, were generally irrelevant to the court's considerations once it[51] had evidence upon which it could make its decision. They stressed that it was for the court to review the manner in which the planning authority reached its decision on each of the relevant issues. It was not for the court to determine whether the decision made by the planning authority was correct as the proceedings were not in appeal against the relevant decision."*

Irvine J then cited Lord Brightman in Chief Constable of the North Wales Police v Evans,[52] as set out earlier in in this judgment, and continued:

> *"The court may only intervene in relation to a decision of an administrative officer or a Tribunal if the decision is unreasonable or irrational, or if it had before it no relevant material which could support its decision."*

[49] Applying O'Keeffe v An Bord Pleanála [1993] 1 IR 39; State (Keegan) v Stardust Victims' Compensation Tribunal [1986] IR 642.
[50] Lackagh Quarries Ltd v Galway City Council [2010] IEHC 479.
[51] I consider that the "it" here is the planning authority/decision-maker – not the court.
[52] [1982] 1 WLR 1155 at pp. 1171 and 1174

Error of Law – Interpretation of s. 42 PDA 2000 - Decision

39. As has been seen, the Planner reported on the basis that "*in ascertaining or justifying substantial works … a holistic perspective should be employed, whereby completed works should be observed and considered within the context and relative to the permitted scheme as a whole."* Grassridge asserts that thereby he applied an erroneous test. But I agree with DLRCC that the Planner's description of his approach, reading his report on **XJS** principles,[53] straightforwardly,[54] not as if it were a statute and, where reasonably possible, with a view to its validity not its invalidity,[55] accords closely and entirely adequately with the approach required by **Littondale** – which is that "*whether works are 'substantial' is to be considered not in vacuo but having regard to the nature and extent of the works permitted under the … permission*". My rejection of this allegation of misinterpretation of s.42 by the Planner accords also with the observation in **Frenchurch** that *"It is not a valid objection that the planning authority holds a view that, in a general sense, "substantial work" would connote a substantial proportion of the authorised development …"* – an observation which clearly places the concept of substantial works in the context of the entire permitted development. In that light, Grassridge's criticism of the word "holistic" is, in my view, entirely insubstantial.

40. For these reasons, I reject the allegation of error of law.

<u>Error of Fact</u>

Grassridge's Position

41. Grassridge asserts error of fact amounting to error of law in that

a. DLRCC's assertion that the demolition of a nursing home and the rock breaking and excavation of circa 5,000m^3 of granite, valued at in excess of €1 million, are not substantial works is a fundamentally erroneous finding of fact and the decision to the contrary is not sustainable on the facts,

b. DLRCC misinterpreted the meaning of substantial works and misapplied that meaning to the undisputed facts of demolition, excavation and removal, which are not disputed.

DLRCC's Position

42. DLRCC denies errors of law in that

[53] In re XJS Investments Ltd [1986] IR 750.
[54] IDA v The Information Commissioner [2024] IEHC 649 §120 citing Deerland Construction Ltd v Aquaculture Licences Appeals Board [2009] IEHC 289, [2009] 1 IR 673, in turn citing with approval South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953, to the effect that: " … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."
[55] For example, O'Donnell & Ors v An Bord Pleanála [2023] IEHC 381 §54; St. Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 [2024] 2 JIC 2003; Mulloy v An Bord Pleanála & Knockrabo [2024] IEHC 86 §81; Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §119; Duffy v An Bord Pleanála [2024] IEHC 558 §42.

a. whether "*substantial works*" have been carried out is a matter of judgement and discretion for the planning authority.

b. Grassridge has not pointed to any verifiable fact, material to its conclusion that "*substantial works*" were not done, which DLRCC mistook or to any finding of fact or inference from the facts which is perverse or irrational or there was no evidence to support it.

c. Grassridge's argument is misconceived as the question whether the works are substantial is determined not *in vacuo* but in the context of the Permission pursuant to which the works done.

Error of Fact - Decision

43. While the jurisdiction exists to quash an impugned decision by reason of an error of fact so material (for example, as a precondition to the jurisdiction of the decision-maker) as to amount to an error of law, considerable care must be taken to ensure that the exercise of that jurisdiction does not degenerate into impermissible review of the merits of the decision. As Humphreys J put it, strikingly, in **Holohan,**[56] in judicial review, the court can't quash for unreasonableness merely if it considers that the decision, on its merits was, even, *"clearly wrong":*

> *" … the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights.*
> *The underlying reason why a court should not be permitted to find that an administrative or executive decision is wrong, or even clearly wrong, is the separation of powers. To do so the court would, as Lord Brightman said, "be itself guilty of usurping power".*

44. In this light it is unsurprising that Barr J found in **Baile Eamoinn**,[57] in acknowledging that in certain contexts a material error of fact may yield relief in judicial review, said that relief for material error of fact will require each of the following:

- a mistake as to a fact existing at the time of the decision.
- that the fact is uncontentious and objectively verifiable.
- that the mistake occurred other than by the fault of the claimant or his advisers.
- that the mistake played a material part in the decision maker's reasoning.

45. In the present case, when asked to identify the fact as to which an error was allegedly made, counsel for Grassridge identified the allegedly erroneous conclusion that the works Grassridge had done were not significant. To that, the obvious response is that, as the product of an evaluative expert judgment and the subject of DLRCC's statutory satisfaction, that conclusion was by way of opinion. It was not either

[56] Holohan v An Bord Pleanála [2017] IEHC 268 citing Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155. Cited to this effect in Fernleigh v ABP & Ironborn [2023] IEHC 525 and in SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421 §16.
[57] Baile Eamoinn Teoranta v An Bord Pleanála [2020] IEHC 642.

uncontentious (indeed it is the very bone of contention) or objectively verifiable. In my view, this observation suffices to require rejection of the allegation of error of fact. In truth, it is an impermissible attack on the merits of the Impugned Decision.

46. For these reasons, I reject the allegation of error of fact.

Fair Procedures/Proportionality

Grassridge's Position

47. Grassridge asserts disproportionality of the Impugned Decision in that:

a. The decision is disproportionate as DLRCC, qua planning authority, accepted a 7-day notice of commencement, and significant sums of money arising from the particular permission, when it knew, or was on notice of, the expiry date. Grassridge has been put to significant expense and inconvenience in this respect.

b. Further, based on the acceptance of the funds and commencement notice in April 2024, Grassridge had a legitimate expectation that DLRCC was satisfied with Grassridge's declared intention to commence works, notwithstanding that the Permission was due to expire in September 2024. However, Grassridge at trial, correctly in my view, abandoned reliance on legitimate expectation.

Respondent's Position

48. DLRCC denies disproportionality of the Impugned Decision in that:

a. DLRCC's obligations under the Building Control Acts and Building Control Regulations are separate to the planning code. Whether it was possible to undertake substantial works before the Permission was due to expire and/or whether there was sufficient duration left in the o Permission to undertake substantial works was not a matter DLRCC was required to, or did, consider in its consideration and determinations in respect of the 7 Day Notice or the Applicant's lodgement of sums in compliance with conditions of the Permission or collecting local authority Rates.

b. DLRCC's acceptance of the Commencement Notice did not fetter its discretion in making the Impugned Decision.

c. The Impugned Decision was made in the exercise of a limited statutory discretion. Where DLRCC was not satisfied that substantial works had been carried out, it was obliged to refuse to extend the duration of the Permission. DLRCC had no residual discretion to grant the extension for some other reason – including disproportionality.

d. Legitimate expectation is not pleaded.

Fair Procedures/Proportionality - Decision

49. In truth, there was little in the fair procedures point bar proportionality. There was no allegation of breach of the classic fair procedures principles of nemo iudex in causa sua or audi alteram partem. While they may not be exhaustive of fair procedures, there was no other criticism of DLRCC's process as opposed to of its substantive decision-making. And proportionality is not a fair procedures issue – it relates to the substance of an impugned decision. In **AAA,**[58] Charleton J cited **Meadows**[59] to the effect that *"the concept of proportionality was held to operate within the confines of the irrationality test".*[60]

50. I reject as all but unstateable the argument that DLRCC's registration in April 2024, qua Building Control Authority, of Grassridge's' Commencement Notice for the purposes of the Building Control Regulations, in any way inhibited or even bears upon, in terms of fair procedures or otherwise, the exercise of DLRCC's later evaluative judgment in the Extension Application of whether the works done on foot of the Permission were substantial. DLRCC's role and obligations under the Building Control Acts and Building Control Regulations are separate from and irrelevant to its role and obligations under the planning code. In any event, there is simply no basis in law for the assertion, necessarily implicit in Grassridge's case on this issue, that every time a Building Control Authority registers a Commencement Notice it must undertake the considerable burden of forming a judgement whether the relevant planning permission has duration left in it sufficient to allow completion of substantial works on foot of that permission. Such a position would also impose a considerable – not to say novel - burden on applicants for registration of Commencement Notices to submit the information required to enable the building control authority to form such a judgement. One can readily imagine the valid complaint of an applicant refused registration of a Commencement Notice on the basis of a judgement by the building control authority that the relevant planning permission had insufficient duration left. Such an applicant would make the obvious point that there is no basis in the Building Control Acts and Building Control Regulations for such a refusal and that it is entitled to start works in reliance on the permission at its own risk as to completion of substantial works before its expiry – which is what, in my view, Grassridge did here. Nor, for similar reasons, is there any basis in law for the assertion of unfairness deriving from Grassridge's lodgement of monies in compliance with conditions of the Permission, DLRCC's issue of a Fire Safety certificate or DLRCC's collection of rates on the property. Neither do I see substance in the point made as to the non-statutory Temporary Development Contribution Waiver Scheme – leaving aside that it was not developed in written or oral submission.

51. For these reasons, I reject the allegation of want of fair procedures.

[58] AAA v Minister for Justice [2017] IESC 80, [2017] 12 JIC 2106 §22.
[59] Meadows v Minister for Justice [2010] 2 IR 701.
[60] Emphasis added.

Adequacy of Consideration of Submissions/Adequacy of Reasons

Grassridge's Position

52. Grassridge asserts errors of law in that:

a. Grassridge (McGill) made detailed submissions as to
   - the extent of the works on the site, including the valuation of those works presented by its quantity surveyor.
   - identified precedent decisions where less significant works had been deemed to constitute substantial works for the purposes of s.42.

b. **Balz**[61] states the duty of a public law decision-maker to not merely note but to consider submissions.

c. The Planner rejected those detailed submissions *in limine* and stating conclusionary reasons only, without discernible explanation or identifiable premise. He failed to note or address
   - the significant monetary value of the works done, or
   - the precedent planning decisions cited by the Applicant.

d. DLRCC
   - in simply concluding that substantial works had not been done, in the teeth of the evidence to the contrary, and
   - in not explaining how any assessment led to that conclusion
   - failed to give adequate reasons for rejecting Grassridge's submission that the works done were substantial.

e. The Planner's report presages this conclusion by citing case law to the effect that DLRCC is effectively at large as to that issue.

f. The only reason even implied by DLRCC is that substantial works must be measured against the extent of works required to complete the entire development. If the reason it is an error of law.

g. Grassridge is unable, therefore, to discern from the reasons offered (such as they are), the reasons for the decision, and in particular why works of such extent and value were deemed insubstantial and why the content of its submissions was rejected.

DLRCC's Position

53. DLRCC denies want of consideration of submissions and want of reasons in that:

[61] Balz v An Bord Pleanála [2019] IESC 90, §57, O'Donnell J.

a. It had regard to all material submitted for Grassridge - including the McGill Submission. Grassridge has adduced no evidence to the contrary.

b. The McGill Submission set out the value of the works and planning precedents it considered relevant. While DLRCC considered these precedents, they are not binding, and a planning authority must decide each individual application on its own merits and whether "*substantial works*" have been done must be determined on the basis of the particular facts of the case.

c. There is no evidence that Grassridge's McGill Submission was rejected *in limine*.

d. Grassridge was entitled to the main reasons on the main issues. There is no obligation to address points on a submission-by-submission basis and "*there is no obligation to engage in a discursive, narrative analysis*" of each submission.

e. The limited and prescribed discretion involved in making a decision under s.42 PDA 2000 Act brings with it a less exacting duty to give reasons. Reasons for its refusal may consist in a statement that a precondition of s.42 was not fulfilled - in this case that the DLRCC was not satisfied that substantial works had been carried out.

f. DLRCC's letter dated 27 August 2024 was a notification of the Impugned Decision, gave the main reason for refusing to extend the duration of the Permission and stated that "*[f]or the avoidance of doubt the reasons and recommendations set out in the planners report were generally adopted as set out in the Executive Order, this can be viewed at the Council Offices or the Council website*."

g. Grassridge's complaint that the only reason even implied by DLRCC is that substantial works must be measured against the extent of works required to complete the entire development and that such a reason constitutes an error of law, is not a complaint about lack of reasons, but is an argument about the lawfulness of how the decision was made (which argument DLRCC rejects).

Consideration of Submissions and Reasons - Decision

54. **Balz,**[62] as to the duty of a public law decision-maker to not merely note but to consider submissions, reads as follows:

> *"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."*

[62] Balz v An Bord Pleanála [2019] IESC 90, §57, O'Donnell J.

55. Grassridge correctly cites **Sliabh Luachra**[63] to the effect that it is crucial that the points made in submissions be addressed.[64] Building on **Balz**, MacMenamin J in **NECI**[65] articulates the function of reasons in disclosing that submissions to the decision-maker have been considered and "truly" engaged with. In **McEvoy**,[66] the Court of Appeal said that *"it must be apparent from a decision that a submission, … has been considered and addressed, and, where applicable, rejected, for stated reasons. It is not enough merely to say that it has been considered."* However, the court in McEvoy also cited Hogan J in **Flynn**[67] as allowing that it may suffice that *"the essential rationale of the decision"* is *"capable of being inferred from its terms and its context."* – one must add, capable of being inferred by a knowledgeable, intelligent participant in the process. The critical presumption is recorded by Hardiman J in **GK,**[68] and by Humphreys J in **Jones**[69] and **Cork County Council**,[70] that material has been considered if the impugned decision says so and so the applicant for judicial review bears the onus of rebutting that presumption by evidence. Here the Planner explicitly records "*regard to all the information and associated evidence submitted by the Applicant and also the information gathered during the Site Inspection."* Indeed, counsel for Grassridge disavowed an allegation of lack of such regard.

56. For good measure and in particular, the Planner illustrated such regard by citing:

- McGill's "cover letter". For the avoidance of doubt, I should say that this was not merely a brief cover letter enclosing a separate substantive submission. It was a lengthy latter and constituted the McGill Submission;

- the photos and commencement notices supplied by McGill;

- by reference, content of the "documentation received";

- verbatim, McGill's assertion that *"substantial works have been on site prior to the submission of the extension of duration";*[71]

- Verbatim, McGill's bullet-pointed list of the headings under which the works had been done. He also recorded that he had verified those works by a Site visit.

57. I see no basis, either in reading the Planner's report or in evidence adduced by Grassridge in discharge of its onus as just described, for any conclusion that the Planner failed to have adequate regard to

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[63] Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 88.
[64] But Grassridge cites it incorrectly to the effect that *"there should be complete, precise and definitive findings and conclusions regarding any identified potential effects on the qualifying interests of any European site."* – as that requirement is particular to the very specific context of Appropriate Assessment under the Habitats Directive 92/43/EEC.
[65] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, [2021] IESC 36, [2021] 2 ILRM 1.
[66] McEvoy v Preliminary Proceedings Committee [2022] IECA 174.
[67] Flynn v Medical Council [2012] 3 IR 236.
[68] GK v Minister for Justice, Equality and Law Reform [2002] 2 IR 418.
[69] Jones v South Dublin County Council [2024] IEHC 301.
[70] Cork County Council v Minister for Local Government [2021] IEHC 683 §43.
[71] sic.

or to adequately consider the nature, extent, quantum or value of the works done as recorded in the McGill Submission.

58. In my view, there is no basis on any sensible reading of the Planner's Report, for the assertion that he dismissed Grassridge's McGill Submission in limine.

59. As to reasons, it is true that the Planners' Report is somewhat conclusionary: "*in this instance that the demolition works and the excavation/rock breaking works do not constitute substantial works towards the permitted development".* Merely conclusionary reasoning may well be inadequate: for example, see **GOCE**.[72] However,

- reasons must be read objectively as if by an intelligent knowledgeable participant in the process and to assess their adequacy, as the "*main reasons on the main issues*", to allow the applicant for an extension to understand why the decision was reached.

- And importantly, the adequacy of reasons is context-specific. The following recently was said in **Duffy**[73]

> *"Adequacy of reasons is case- and context-specific – **MRRA**[74] and **FC**.[75] In the latter case, Ní Raifeartaigh J thought the adequacy of reasons case-specific "in the sense that the issue turns on the specific language used in communicating the particular decision in the context of the hearing which has gone before, including the evidence adduced and the submissions made". Charleton J said in **Marques**[76] that reasons must be "adequate to the situation". Humphreys J in **Carrownagowan**[77] recently said that "the inspector says she has considered the issues and the applicants haven't proved otherwise. Lack of narrative detail sufficient to satisfy an applicant (an impossible standard anyway) does not constitute a failure in substantive consideration." It can fairly be said that, as Barr J has recently said,[78] as to a submission that the authorities are in some tension regarding the requirement for reasons, differences of judicial emphasis or phraseology between judges need not amount to conflict in the authorities. One may add that this may especially so as to a requirement which is case- and context-specific. And as Ní Raifeartaigh J said: "there is a balance to be struck. It is of course ultimately a question of substance and not form, and there must be an element of common sense and practicality in approaching the question of adequacy of reasons." One must also and importantly remember that the underlying objective of reasons is fairness in the process – **Mallak**.[79]*
>
> *Recently in **Roache**,[80] Phelan J reviewed the caselaw and said that "[i]f it is broadly clear why a view is preferred in arriving at a decision, the requirement for reasons identified in Connelly and applied in case law since then is satisfied." She also considered it "beyond question that a decision maker is*

[72] GOCE v An Bord Pleanála [2024] IEHC 554.
[73] Duffy v An Bord Pleanála [2024] IEHC 558.
[74] MRRA v An Bord Pleanála & Lulani [2022] IEHC 318 §64.
[75] FC v Mental Health Tribunal [2022] IECA 290.
[76] Marques v Minister for Justice and Equality [2019] IESC 16.
[77] Carrownagowan Concern Group v An Bord Pleanála & Futureenergy [2024] IEHC 300 at §167.
[78] Graymount House Action group v An Bord Pleanála & Trafalgar Capital [2024] IEHC 542.
[79] Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 59, [2021] 3 IR 297.
[80] Roache v An Bord Pleanála and others [2024] IEHC 311.

entitled to prefer one item of evidence over another, provided the basis for preference is understood and is sustainable". Also, as was said by Clarke CJ in ***Connelly***[81] *and Fennelly J* ***Mallak****, it may be that reasons are obvious from the context of the decision, or in some other fashion. As was also said by Clarke CJ in* ***Connelly***[82] *and as applies mutatis mutandis here:*

> *"the Decision and any other materials which are either expressly referred to in it or can be taken by necessary implication to form part of the reasoning, provide adequate information to enable any interested party to assess whether an appropriate EIA has been carried out."*

60. If reasons need not be given where they are obvious, it follows that in such cases the decision may be expressed in conclusionary terms. This seems to me to be such a case. At very least it seems to me that "*the essential rationale"* of DLRCC's Impugned Decision is *"capable of being inferred from its terms and its context."* Having articulated the test or method of comparing the works done with the works consisting in the entire development, the parameters of each being readily apparent on the papers, and given also the proscription of reasoning by way of rule of thumb, it is difficult to see what more DLRCC could have usefully said by way of reasons than it did.

61. The knowledgeable participant in the Extension Application knows, both from the Planner's Report and from the Extension Application:

- the content of the Extension Application – including both the McGill Submission and the Programme of Works appended to it;
- that the Planner had adequate regard to and had adequately considered the Extension Application including all enclosures therewith;
- the nature, extent, quantum and value of the works done;
- that the Planner had inspected those works;
- in broad terms, the nature, extent, quantum and value of the entire permitted development namely: demolition of the existing nursing home; and construction of a 2 no. terraces of 2-3 storeys with a total of 15 no. dwelling units (total residential gross floor parking, bin stores, open space, revised vehicular/pedestrian access (including separate access to 1 no. unit), landscaping and boundary treatment works";
- the nature and extent of the entire development in such detail as is set out in the Programme of Works;
- that, in the knowledge of the foregoing, the Planner had compared the nature, extent, quantum and value of the works done with those consisting of the entire permitted development and in comparing them had considered the proportion they bore to each other;
- that the Planner's recommendation, adopted by DLRCC, that extension of duration of the Permission be refused for want of substantial works, was based on that comparison.

62. In my view, in the specific context of this case on its facts and given the nature of the decision to be made, the reasons were "*adequate to the situation*".[83] There was little more to be said by way of reasons

[81] Connelly v An Bord Pleanála [2018] IESC 31, [2018] 2 ILRM 453, [2021] 2 IR 752, [2018] 7 JIC 1701 §7.5.
[82] §14.2.
[83] Marques v Minister for Justice and Equality [2019] IESC 16.

than to state, as is readily to be seen in the Planner's report, that the comparison had been made and yielded the evaluative judgement that the works done were not substantial in the largely relative sense required by s.42. That sufficed to allow Grassridge to understand in "*broad*" terms[84] and "*with reasonable clarity*"[85] why the decision went against it.

63. Counsel for Grassridge, a little ironically given the complaint of failure to have regard to the McGill Submission, took particular exception to the recitation in the Planner's Report that

> *"Regard is had to the programme of works submitted by the Applicant, which suggested that works would be at a more advanced stage at the time of making the decision, however, that extent of works was not evident at the time of the Site Inspection."*

The McGill Submission had stated that:

> *"……. the second phase of works has now commenced on site as set out in the Construction Programme timetable[86] submitted with this application. The details of which are as follows:*
> *o All Groundworks will be completed by the 2nd August 2024*
> *o Sub structure works for Block A will be completed by 18th August 2024*
> *o Sub structure works for Block B will be completed by 12th November 2024*
> *o The external finishes, landscaping etc will be completed by the 11th September 2025*
> *o BCAR and Practical Completion will be on the 19th September 2025".*

64. Irony aside, I confess that I am not entirely clear as to the gravamen of the complaint. Taken as a simple complaint that the Planner should not have had regard to Grassridge's McGill Submission, it is untenable. It seems to have been, rather, a complaint that the Planner was not entitled to hold it against Grassridge that it had fallen short of its own expectations, recorded in the Programme of Works, as to the extent of the works to be completed by the expiry of the Permission. But there is no evidence or reason to infer that the Planner did hold that against Grassridge – at least not in any sense that could be legally objectionable. The Extension Application, which (inevitably) preceded the expiry of the Permission, necessarily and properly asked DLRCC to decide in its favour on the basis of a projection as to the state of the works on the expiry of the Permission. It was DLRCC's duty to consider whether substantial works had actually been done as at the expiry of the Permission. That required it to assess the actual state of those works at that date - whereas the Extension Application had been based on their projected state. It was therefore entirely proper of the Planner to point out that, in some degree, the projection had not been realised. That was not a matter of criticising Grassridge or holding the shortfall against it in some pejorative way. It was merely a matter of clarifying that, in some degree, the Extension Application – the McGill Submission - must be reinterpreted and assessed by reference to the actual outcome by way of works done rather than the projection. In my view, Grassridge's complaint in this respect was a misconceived attempt – and by a strained reading at that – to read the Planner's report as invalid when a reasonable, indeed the reasonable, interpretation supported its validity.

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[84] O'Donnell v An Bord Pleanála [2023] IEHC 381.
[85] Connelly v An Bord Pleanála, & Clare County Council [2021] 2 IR 752.
[86] Appendix C to the McGill Submission of 2 July 2024.

65. Grassridge submits that *"the only reason even implied by the Respondent, quoted above at para.16, is the notion that substantial works must be measured against the extent of works required to complete the entire development. Insofar as this is offered as a reason at all, it constitutes an error of law."* First, in my view and subject to my third observation, it is indeed the reason proffered by DLRCC. Second it is not an error or law: on the contrary it is what Fenchurch and Littondale require. Third, and though I do not see it as making any difference in this case, it seems that the proper comparator to the works done is not the extent of outstanding works required to complete the entire development but the extent of works constituting the entire development (i.e. including those already done).

66. Finally, and returning to the issue of engagement with the submissions and accepting, as I must and gladly do, the law as stated in **Balz, Sliabh Luachra** and **NECI** in that regard, it remains, as Charleton J put it in **Marques**,[87] that reasons must be "*adequate to the situation*" and, as O'Donnell J said in **Murphy v SIPO**,[88] reasons suffice if they *"allow the applicant to understand in general terms why the decision was made*". Very importantly, adequacy of reasons is context-specific and is to be considered, as Ní Raifeartaigh J said in **FC**,[89] as a question of substance, not form, and applying an element of common sense and practicality. Read in that light and taken in the round, in my view, Grassridge has no reason to believe its submissions were ignored or that DLRCC's engagement with them was lacking. Nor is it in any relevant degree left in the dark as to why the decision went against it. Doubtless it vehemently disagrees with the decision. But it is entitled to DLRCC's reasons – not to reasons with which it agrees or by which it is convinced.

67. For the avoidance of doubt, it follows that I reject as unpleaded, and in any event as unsound, Grassridge's submission that, for want of reasons, it must be inferred that DLRCC applied a mathematical formula or rule of thumb – impermissibly in light of **Garden Village**. In any event, even assuming its premise, such reasoning by Grassridge is logically flawed.

68. Finally, I note Grassridge's submission that *"where (by any reasonable standard) the Applicant has carried out substantial demolition and excavation, it is <u>axiomatic</u>*[90] *that the Applicant has therefore carried out "substantial works" for the purposes of s.42."* The submission errs in considering the works done *in vacuo.* That apart, it is here ironic in an argument as to reasons as proposing that the answer to the question whether the works done were substantial within s.42 was axiomatic: i.e. self-evident or should be accepted as if true without proof –capable of satisfactory answer without reasons.

69. For these reasons, I reject the allegations of inadequacy of consideration of Grassridge's submissions and inadequacy of reasons.

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[87] Marques v Minister for Justice and Equality [2019] IESC 16.
[88] Murphy v The Standards in Public Office Commission [2024] IEHC 374.
[89] FC v Mental Health Tribunal [2022] IECA 290.
[90] Emphasis added.

Irrationality

Grassridge's Position

70. Grassridge asserts irrationality of the Impugned Decision and hence that it is *ultra vires* in that

a. The determination that the works were not "substantial" is one that no reasonable planning authority could make.

b. The court has jurisdiction to reach this conclusion on the evidence before it.

Respondent's Position

71. DLRCC denies the alleged irrationality of the Impugned Decision or that it is *ultra vires* in that

a. The Impugned Decision is presumed valid. Grassridge may not in these proceedings impugn the merits of the Impugned Decision. The Court may not determine the merits of whether "*substantial works*" were done or of the Impugned Decision.

b. The Court may not quash the Impugned Decision on the grounds that it is satisfied that (a) on the facts it would have raised different inferences and conclusions, or (b) the case on the merits against the Impugned Decision was much stronger than that for it.

c. Grassridge's position as to irrationality is based on the erroneous argument that it is unlawful to assesses "*substantial works*" against the permitted development as a whole.

Irrationality - Decision

72. While the precise boundaries and articulation of the doctrine of irrationality are evolving at least somewhat,[91] it is clear that **Keegan**[92] is good law to the effect that, to be irrational, an impugned decision must be "*fundamentally at variance with reason and common sense*". For that to be the case "*something overwhelming*" is required – see for example, **Keegan** and **Littondale**. And as Simons J said in **St Audeon's**,[93] the threshold is "*extremely high and is almost never met in practice*".

73. As was said in **SWI v ALAB**:[94]

[91] See for example Jennings v An Bord Pleanála [2023] IEHC 14, §15 et seq.
[92] The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642.
[93] The Board of Management of St. Audoen's National School v An Bord Pleanála [2021] IEHC 453.
[94] SWI, IFI, Sweetman & Ors v ALAB [2024] IEHC 421.

*"That reasonable people can properly – indeed will often – differ in their views of the significance of and inferences to be drawn from a given set of facts is a commonplace of the law. Most notably, it is the bedrock of the law of irrationality of public law decisions – to the extent that any reasonable basis for a decision will suffice (**Weston**[95]). If any reasonable basis is shown, the decision will be deemed rational even if the Court is satisfied that the case against the decision was much stronger than the case for it (**O'Keeffe**[96]) and would itself have made a different (and, inferentially, also reasonable) decision. ……. In other words, there may be multiple reasonable views of the significance of a given set of facts."*

74. As to my general observation above about merit-based challenge, it respectfully seems to me that in this case, and as to the plea of irrationality, the dressing up is at its most threadbare. It simply cannot be said, by reference to the relative comparison of, and concept of proportionality between, the works done and the works consisting of the entire development, that a conclusion that the former are not substantial within the meaning of s.42 is irrational where the works have not got beyond excavating for, and have not reached laying, the foundations for the 15 residential units at the core of the proposed development. In making this observation, I seek to illustrate the rationality of the decision rather than articulate it in detail. I am not to be understood as applying, or as finding that DLRCC applied, a rule of thumb or the like. Conscious that considerable excavation of bedrock was done and that the works done are valued in excess of €1 million, I do not find, or rule out, that the contrary view was open to DLRCC as a matter of its evaluative judgement. The point is, however, that it was a matter for DLRCC, not the Court, to make that judgement.

75. I accept that there is a strong case for saying that, considered *in vacuo*, the works done must be considered substantial. Had that been the criterion it is very possible that my decision would be different. But it is not the criterion, as Littondale establishes.

76. The issue of the proportionality of the decision was pleaded – albeit erroneously as a matter of fair procedures rather than as a matter of irrationality – which it is. Ignoring the pleading issue, I should say that it does not appear to me that the Impugned Decision can be quashed as irrational for disproportionality. As was observed in **Jennings**,[97] in 2010 the Supreme Court in **Meadows**[98] introduced the concept of proportionality to the analysis of irrationality. As to whether, and if so in what manner or degree, that concept significantly altered the law of irrationality, the majority[99] in Meadows asserted it did not. The minority[100] dissented precisely because it did. In 2017 in **AAA**,[101] Charleton J had echoed the majority view in Meadows to the effect that *"the concept of proportionality was held to operate <u>within the confines</u> of the irrationality test"*.[102] Notably, in **Burke**[103] the Supreme Court in 2022 found the ratio in Meadows difficult to discern. However, and importantly, Meadows is clear that proportionality is not a back door to review on the

[95] Weston v An Bord Pleanála [2010] IEHC 255.
[96] O'Keeffe v An Bord Pleanála [1993] 1 IR 39.
[97] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14.
[98] Meadows v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General [2010] 2 IR 701.
[99] Murray CJ, Denham and Fennelly JJ.
[100] Kearns P and Hardiman J.
[101] AAA v Minister for Justice [2017] IESC 80, [2017] 12 JIC 2106 §22.
[102] Emphasis added.
[103] Burke v Minister for Education and Skills [2022] IESC 1; [2022] 1 IILRM 73, infra.

merits: Murray CJ said that "*In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken*." And "*judicial review permits the courts to place limits on the exercise of executive or legislative power not to exercise it themselves*".[104] Denham J, while supporting proportionality as a tool of analysis of rationality, considered Keegan to be the fundamental source[105] of the relevant "*broad principles*" and "*the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense*".

77. The alleged disproportion here, distilling the point somewhat, consists in the expenditure of over €1 million on foot of the Permission and the imperilling of the financial viability of the proposed development. But disproportion is inherently a relative concept. As O'Donnell CJ said in **Burke**[106] *"In the case of proportionality, the question is whether a means adopted to achieve a legitimate end is matched to it, so that it intrudes no more than is necessary on a protected right."* The Applicant did not clearly identify the matter which the detriment of Grassridge's loss would be disproportionate.

78. Here I think we return to the two-step analysis of the Impugned Decision. There is no discretion but to refuse or grant an extension as appropriate once it has been decided whether substantial works have been done. Clearly, at that later point in the decision process proportionality has no role as there is no discretion. So proportionality has a role, if any, only in the evaluative judgement whether substantial works have been done. That is a judgement related to the nature, quantum and value of the works – all of which parameters are relevant to the judgement. However, it is a judgement as to the substance of the works. It is difficult to see that, having considered the value of the works as relevant to that judgement, the distinct prospect of the loss of that value, and indeed other losses, are relevant as a matter of proportionality to the judgement as to the substance of the works. It seems to me that the true role of proportionality in that evaluative judgement is that identified in Frenchurch: a planning authority is entitled to a general view that "substantial work" connotes a substantial proportion of the authorised development – that is a concept grounded in the works.

79. Lest I am wrong in the view of proportionality applicable in this case as set out in the paragraphs above, I will consider the issue a little further. Every assessment of proportionality of a public law decision with a view to determining its rationality, is an assessment whether the decision is "*so lacking in proportion*"[107] as to be irrational and is a fact-specific assessment. And, as proportionality is assessed "*within the confines of the irrationality test"* - **AAA**[108] - it follows that the relative disproportion must be "*something overwhelming*".[109] It seems to me that assuming, for argument's sake, Grassridge's premise that the distinct prospect of loss of value is relevant to the assessment whether the works done were substantial, any analysis of disproportionality by reference to the financial considerations Grassridge invokes would accord appreciable

[104] Citing T.D. v Minister for Education [2001] 4 IR 259.
[105] §142.
[106] Burke v Minister for Education and Skills [2022] IESC 1; [2022] 1 ILRM 73.
[107] Emphasis added.
[108] AAA v Minister for Justice [2017] IESC 80, [2017] 12 JIC 2106 §22.
[109] See above.

weight to the fact that Grassridge started development a mere five months before the expiry of the Permission. And it did so on a Site which, I must infer, was known by it to require very considerable excavation of solid granite bedrock. My attention was not drawn to any suggestion – as doubtless there would have been had it been the case – that the ground conditions came as a surprise to Grassridge once work started. Particularly in that light but in any event, to start work, knowing that an extension of the Permission would be required and depended on DLRCC finding, as a matter of its evaluative judgement, that substantial works had been done by expiry of the Permission, was a commercial decision by Grassridge made at its commercial risk. It is difficult to regard as evidence of disproportionality of an impugned decision the eventuation of a risk which Grassridge decided to take and which, one must infer, it did not, when deciding to take it, consider to be a risk disproportionate to its interests – of which interests it is, at least in the first instance, the proper judge.

80. In short, whether analysed via the prism of rationality or that of proportionality as a form of rationality, it does not seem to me that there is, on the facts of this case, anything "overwhelming" in the merits of the Impugned Decision to raise Grassridge's case above a merits-based challenge.

OVERALL CONCLUSION

81. For the reasons set out above, albeit not without appreciable sympathy for Grassridge's position,[110] these proceedings must be dismissed. They will be listed on 16 December 2024 for final orders.

DAVID HOLLAND
25/11/24

[110] Which, I appreciate, it will find cold comfort.