

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 683
[2021 No. 189 JR]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND

**(BY ORDER) THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

THE OFFICE OF THE PLANNING REGULATOR

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 5th day of November, 2021

“[M]inisterial guidelines are what they are described to be, namely guidelines, and while they cannot by statute be ignored, and indeed while the obligation to have regard to them is one stated in positive terms, they are not prescriptive or mandatory in the sense in which a development plan is, in the language of McKechnie J. in *Byrne v. Fingal County Council* [[2001] IEHC 141, [2001] 4 I.R. 565], ‘a representation in solemn form’ binding on the local authority and in respect of which it is not merely mandated as a matter of law, but also required as a matter of both public and private law, to frame its deliberations.” (Baker J. in *Brophy v. An Bord Pleanála* [2015] IEHC 433, [2015] 7 JIC 0306 (Unreported, High Court, 3rd July, 2015), para. 36).

“[I]t appears to me to be entirely proper and necessary to construe the terms of such legislation carefully ... While it is within the competence of the Oireachtas to amend the [Planning and Development Act 2000] so as to confer on the Minister additional powers that impact on existing planning structures and processes, it should do so clearly and precisely and the courts should avoid giving such legislation effect beyond what is clearly provided for. It is essential that the respective competencies of all of the actors involved – Minister, planning authorities and [An Bord Pleanála] – should be clearly delineated ... I agree with the High Court Judge that any such power needs to be conferred by clear statutory language.” (Collins J. (Costello and Donnelly JJ. concurring) in *Spencer Place Development Company Ltd. v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0202 (Unreported, Court of Appeal, 2nd October, 2020), para. 28).

“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 [of the Planning and Development Act 2000] 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." (Clarke J. in *Tristor Ltd. v. Minister for Environment, Heritage and Local Government* [2010] IEHC 397, [2010] 11 JIC 1103 (Unreported, High Court, 11th November, 2010), para. 7.19).

1. In January 2012, the respondent Minister's predecessor issued the Spatial Planning and National Road Guidelines under s. 28 of the Planning and Development Act 2000. They were followed by the Retail Planning Guidelines in April 2012, again under s. 28 of the 2000 Act.
2. The Cork County Development Plan 2014 was adopted by the elected members of Cork County Council on 8th December, 2014.
3. The county council and Cork City Council jointly prepared the Metropolitan Cork Joint Retail Strategy 2015. This did not deal specifically with retail outlet centres.
4. On 12th February, 2018, the elected members of the council adopted variation No. 1 of the development plan, which provides for the inclusion of a reference to retail outlet centres and to a proposal for detailed evidence-based assessment to confirm the need for such developments and to identify potentially suitable locations. That variation was not challenged by either the Office of the Planning Regulator (OPR) or the respondent Minister.
5. On 12th December, 2018, the city council withdrew from a joint study into the requirement for a retail outlet centre in the Cork Metropolitan Area on the basis of a policy reassessment that would have a different focus from outlet centres, based on the migration of retail online, among other factors. It was clearly understood at the time that the county council would continue with the study and that the city council would be a consultee.
6. The study did indeed continue and a report was issued in October 2019: *Study on the Requirement for Retail Outlet Centre(s) in the Cork Metropolitan Area*. That was informed among other things by the Retail Planning Guidelines 2012 and the Cork Joint Retail Strategy 2015 and identified capacity for an additional retail outlet centre.
7. On 14th November, 2019, the council published notice of a proposed variation No. 2 to outline the council's vision regarding retail outlet centres consistent with the study. It determined that there was capacity for a retail outlet centre in the Cork Metropolitan Area and proposed that the most appropriate location for such a centre was in the NE-2 sub-catchment (N25). The variation proposed the inclusion of a new objective TCR 10-2 Retail Outlet Centre supporting the provision of a retail outlet centre in that area, although no specific location was identified.
8. On 21st November, 2019, the OPR made a submission to the council stating that the matter had been considered under s. 31AM(1) and (2) of the 2000 Act. The submissions stated that the joint strategy "required" under the 2012 retail guidelines "have (*sic*) not been updated to address policy and locational aspects of planning for retail outlets". The

submission said that the preferred sub-catchment was insufficiently specific. The punchline was that the OPR was not satisfied that the variation had taken "sufficient account" of the retail guidelines and that its adoption would be "premature pending emerging and proposed strategies and plans". For those reasons it was said that a recommendation was proposed, although it does not fully follow the language of the reasons. The recommendation was that the variation "is *not consistent* with the Retail Planning Guidelines", which is clearly much stronger than the submission, which stated that it failed to take *sufficient account* of the guidelines as well as being otherwise premature to the finalisation of wider policies.

9. The Chief Executive reported on the submissions on 20th December, 2019 and responded to the OPR's points, expressing the view that variation No. 2 was not inconsistent with relevant guidelines.
10. On 27th January, 2020, the elected members adopted variation No. 2 having considered the Chief Executive's report.
11. The outcome was notified to the OPR by the Chief Executive on 30th January, 2020.
12. The OPR then issued a recommendation to the Minister under s. 31AM(8) of the 2000 Act on 21st February, 2020 which is for present purposes the first critical legal step. This is a 25-page letter which included a draft direction that, if ultimately adopted, would have the effect of cancelling the variation under s. 31 of the 2000 Act. The letter states that variation No. 2 fails to have "sufficient regard" to relevant key principles. It concluded that variation No. 2 had not been made in a manner consistent with the OPR recommendation, which was stated as having been that the variation should not be made prior to the preparation of an updated joint retail strategy for the Cork Metropolitan Area, as required by the Guidelines on Retail Planning published by the Minister under s. 28 of the 2000 Act, and that the variation was premature and results in the making of a development plan, as varied, in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned, in breach of the 2000 Act.
13. The first reason seems to me to somewhat reword the original recommendation. While it purports to restate that original recommendation (through the use of the words "which was that" implying that the original recommendation is thereby being repeated), it firstly includes, as part of the operative reasons, the allegation that variation No. 2 should not be made prior to the preparation of an updated joint retail strategy specifically, as opposed to wider policies more generally, which was how the previous recommendation had been worded, but also secondly that an updated joint retail strategy is "required" by the Guidelines on Retail Planning.
14. On 5th March, 2020, the Minister issued a draft direction to the council based on the recommendation of the OPR. The statement of reasons essentially offered two reasons: firstly that the variation "has not been made in a manner consistent with the recommendations of the Office of the Planning Regulator"; and secondly, that the plan as varied by the variation purports to identify a preferred location for a retail outlet centre in advance of the preparation of a joint retail strategy "as required under the Guidelines on

Retail Planning” and “is inconsistent with the Guidelines on Spatial Planning and National Roads” and “therefore fails to set out an overall strategy”.

15. Under s. 31(6)(a) of the 2000 Act, the issue of the draft direction and accompanying notice has the legal consequence that the variation in question ceases to have effect.
16. The council published a newspaper notice regarding the draft direction on 19th March, 2020 and invited written submissions in accordance with s. 31(7) of the 2000 Act.
17. A public consultation took place between 19th March, 2020 and 27th May, 2020.
18. On 24th June, 2020, the Chief Executive published a report on submissions which expressed the view that the process and recommendations of the OPR were fundamentally flawed and accordingly, the draft direction should not be given effect.
19. The elected members of the council also made a submission to the effect that the draft direction should not be given effect.
20. On 14th July, 2020, the OPR wrote to the Minister under s. 31(AN)(4) recommending that the Minister issue a formal direction. This amended the previous wording to state that the preparation of “an updated” joint retail strategy was “in the opinion of the Minister ... required under in (*sic*) the circumstances, to ensure consistency with the Guidelines on Retail Planning”.
21. In the meantime, in August 2020 the council and the city council were cooperating on a further study with a view to a new joint strategy, and a request for tenders was published.
22. The final direction was issued by the Minister on 23rd December, 2020. The statement of reasons was different again, the first one being that “[t]he Office of the Planning Regulator is of the opinion that Variation No. 2 has not been made in a manner consistent with its recommendations, that the Cork County Development Plan 2014 as varied by Variation No. 2 fails to set out an overall strategy for the proper planning and sustainable development of the area”; and secondly, that the plan as varied by the variation purports to identify a preferred location in advance of “an updated Joint Retail Strategy, as, in the opinion of the Minister, is required in the circumstances, to ensure consistency with the Guidelines on Retail Planning” and “therefore fails to set out an overall strategy for the proper planning and sustainable development of the area.”
23. Leave in the present proceedings was granted on 15th March, 2021, the primary relief being an order of *certiorari* of the direction of 23rd December, 2020. The applicant also sought general declaratory relief and a declaration that s. 21(c) and para. 28 of schedule 1 of the Planning and Development (Amendment) Act 2018 are unconstitutional, and that the Planning and Development (Amendment) Act 2018 (Commencement) Order 2019 (S.I. No. 133 of 2019) was invalid.
24. The proceedings as instituted named the Junior Minister as the first respondent as he had signed the direction, but it seemed to me that the legal entity at all times in respect of

delegated functions is the Senior Minister, so that the legally correct respondent was the Minister for Housing, Local Government and Heritage. I made an order to that effect by consent on the basis that it would not prejudice the applicant's legal position. On 1st November, 2021 I gave leave to amend the statement of grounds regarding a consequential declaration and also gave leave to amend the statement of opposition of the respondents to address that and to deal with the claim of unconstitutionality. Neither of those matters affect the present judgment as will become apparent.

25. It is probably worth mentioning for completeness that there is a separate set of proceedings in being: *Cork County Council v. Minister for Housing, Local Government and Heritage* [2021 No. 631 JR] which challenges a subsequent direction by the Minister under s. 9(7) of the 2000 Act to require the county and city councils to prepare a joint approach to retail strategy. A stay on that direction was refused in *Cork County Council v. Minister for Housing, Local Government and Heritage* [2021] IEHC 617, [2021] 9 JIC 0701 (Unreported, High Court, Hyland J., 7th September, 2021). That has been appealed to the Court of Appeal [2021 No. 240]. The council has indicated an intention to apply for an order admitting that case into the Commercial List.

Issues related to the first step in the process

26. While every step in the process of the s. 31 direction was challenged by the council, it may be sufficient to focus initially on the first domino. If that falls, the need for consideration of the subsequent dominoes does not arise.
27. The first legally critical step is the recommendation by the OPR to the Minister for the issue of a draft direction. In that regard four problems were identified:
- (i). incorrectly proceeding on the basis that an updated joint retail strategy is "required" by the retail planning guidelines;
 - (ii). incorrectly proceeding on the basis of a read-across from a view of non-compliance with the guidelines to a conclusion of lack of an overall strategy;
 - (iii). a misapplication of the concept of an overall strategy by reference to considering a wider area than the functional area of the council concerned; and
 - (iv). having regard to irrelevant considerations.
28. First, however, there was a preliminary objection that was somewhat faintly advanced by the OPR, but nonetheless needs to be dealt with for completeness.

Preliminary point regarding complaints about intermediate steps

29. Notwithstanding that it has been made clear in caselaw that an applicant is not required to challenge intermediate steps in the process, a principle that may have exceptional contours, but that certainly applies here, the OPR sought to take jurisprudence back to groundhog day by making the somewhat deflating point at para. 28 of written submissions that: "[t]he fact that there is no challenge to the validity of the OPR's recommendation in these proceedings is also relevant here."

30. Unfortunately, that is fundamentally misconceived. The State (and due credit to them) is not taking any issue under this heading. The gist of the OPR's erroneous submission seems to be that where s. 31 envisages the Minister acting on foot of a "recommendation" of the OPR, that means merely a purported recommendation, with the consequences that not challenging the recommendation means that one cannot contend later that it is not valid for the purposes of knocking out the subsequent and operative decision. That is of course incorrect.
31. Where any statute refers to a particular step, including as here a "recommendation", that means a valid step and here a valid recommendation. Just as "in accordance with law" under the Constitution means in accordance with a valid law. Validity is implied. An applicant does not have to challenge a recommendation in order to preserve its position and can wait for the final decision. It is possibly slightly tiresome to have to repeat this point, but had the applicant sought to challenge the recommendation it would have been firmly told by the court that such a challenge was premature: see *Ryanair Ltd. v. Flynn* [2000] IEHC 36, [2000] 3 I.R. 240, *Cintra Infraestructuras Internacional Slu v. Revenue Commissioners* [2016] IEHC 349, [2016] 2 I.R. 314.
32. The analogy is with an inspector's report - any infirmity in which can be raised in the context of a challenge to the final decision. As Clarke J. said (at para. 5.7) in *Ballyedmund v. Commission for Energy Regulation* [2006] IEHC 206, [2006] 6 JIC 2201 (Unreported, High Court, 22nd June, 2006), "[t]he Inspector's report is not, therefore, a stand alone report which is an end in itself. It is merely a step in a process. Either that process, taken as a whole, is sustainable, or it is not. It should also be added that it is a step in the process where the conclusions of the Inspector conducting that step have no formal effect on the process at all".
33. Crucially in *Spencer Place v. Dublin City Council* [2020] IECA 268, Costello J. for the Court of Appeal upheld and applied this logic referring to the decision in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 1)* [2016] IEHC 300, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), in which the rationale for the rule that you don't have to challenge the intermediate steps is explained at length. Unfortunately, acknowledgement of this caselaw doesn't seem to have prominently featured in the OPR's analysis of this topic, which possibly explains the slightly side-stepping, willing-to-wound-and-yet-afraid-to-strike phrasing of the contention that the interim decision is "relevant". If the caselaw had been engaged with, the untenability of the point would have become apparent.
34. The problem is that legal actors are just too used to everything being a matter of degree, a balancing act, a weighing of factors, a generalisation with exceptions. Comfortingly vague qualifiers come unbidden to the mind in virtually every situation - "not necessarily", "normally", "presumptively", "in general", "absent exceptional circumstances". It is too easy to fall into the trap of thinking that everything is a matter of degree. But incredibly, some things actually are either/or - like the proverbial degrees of pregnancy. Whether an applicant has to challenge an intermediate step to fully preserve its legal position falls

squarely into the either/or category, which is obvious if you think about the consequences of that not being the case. If an applicant's legal position is *in any way* damaged by not challenging an intermediate step (or if, as the OPR puts it, failure to challenge such a step is *in any way* "relevant"), then applicants and their advisers will be professionally and forensically obliged to challenge all such intermediate steps, with all of the adverse consequences and waste of time, resources and energy that were outlined in *North East Pylon* and *Spencer Place* and also discussed in *North Westmeath Turbine v. An Bord Pleanála* [2020] IEHC 505, [2020] 10 JIC 2205 (Unreported, High Court, 22nd October, 2020). All those cases and the points made in them are operative and indeed determinative, but if the notice party's point here was to be entertained, you might as well forget about the doctrine altogether. It only works if there are *no* adverse consequences for not challenging an intermediate step, or in other words if "failure" to do so (really, a correct abstaining from premature action) is not *in any way* relevant to the subsequent action challenging the final decision.

35. With that matter out of the way, I turn now to the four headings of challenge under which it is said the process went wrong at its conception.

Incorrectly proceeding on the basis that an updated joint retail strategy is "required"

36. The misunderstanding that permeates the approach of the OPR and the Minister is unfortunately fundamental. SPPRs contained in s. 28 guidelines are mandatory, but otherwise the duty in respect of s. 28 guidelines is to have regard to them, not to comply with them. I go back to the quotations which commence this judgment. As Baker J. said in *Brophy v. An Bord Pleanála*, guidelines are guidelines, not prescriptive or mandatory instruments. (We will leave aside the assault on language created by the peculiar statutory terminology of mandatory "guidelines" if SPPRs are included, which doesn't apply here.) It is axiomatic that rigid compliance is not required: see *Glencar Exploration PLC v. Mayo County Council* [2001] IESC 64, [2002] 1 I.R. 84 at 142 *per* Keane C.J. But reference to rigid or slavish compliance not being required don't imply that non-rigid or non-slavish compliance is mandatory. No kind of compliance is required by a have-regard obligation, merely regard.
37. Considerable emphasis was placed on *McEvoy v. Meath County Council* [2003] IEHC 31, [2003] 1 I.R. 208, but that case does not set the bar very high. Even "limited and somewhat unsatisfactory consideration" (p. 226) did not give rise to an entitlement to *certiorari*. The State in particular sought to pump a lot of gas into the *McEvoy* decision, but in my view their submission fundamentally mischaracterised and misdescribed it.
38. The crucial paragraph is at p. 224 of the report: "Whilst reason and good sense would dictate that it is in the main desirable that planning authorities should, when making and adopting development plans, seek to accommodate the objectives and policies contained in relevant regional planning guidelines, they are not bound to comply with the guidelines and may depart from them for *bona fide* reasons consistent with the proper planning and development of the areas for which they have planning responsibility."

39. That is a very light bar. The reference to the council acting *bona fide* adds nothing to baseline administrative law duties that exist independently of the duty to have regard. Of course public authorities cannot act *mala fide*. The reference to departing for reasons consistent with proper planning and development is again simply a statement of the basic - every public body must have reasons for what it does. *McEvoy* is about *having* reasons, not articulating them, and there is nothing in *McEvoy* about those reasons being expressed at all, and certainly not to any particular degree of detail different to any other administrative law situation. The requirements that reasons be consistent with proper planning and development is again merely an expression of the baseline public law duty to act for a proper purpose, a duty which also exists independently of a duty to have regard and is not in itself derived from that duty.
40. In short, there is nothing in *McEvoy* to elevate the duties on any council that is departing from a guideline to any heightened level that does not apply to public law decision-making generally. I do not accept that *McEvoy* requires the giving of an explanation for not following guidelines. The 2000 Act *does* have such a provision in the context of the development plan (see s. 28(1B)), but that does not appear to apply to a variation and certainly it has not been contended here that it applies to a variation. (Maybe that's an omission for the Oireachtas to consider.) Even if reasons were required, there is nothing in *McEvoy* to require a detailed explanation or particularised reasons, but in any event lack of reasons was not the basis of the OPR proposal or ministerial action. The basis of their approach was that an updated joint retail strategy was "required".
41. The really fundamental point under this heading is that not only is a joint retail strategy not "required", but the council did not fail to have regard to the content of the guidelines. It is true that the guidelines phrase themselves in mandatory terms to the effect that certain things should or shall be done and so forth. However, all that has to be seen through the prism of the legal status of the guidelines, which in this instance is something that the council has to have regard to rather than be "required" to follow. While it sounds slightly metaphysical, the duty therefore, is to have regard to the Minister's view that certain things should be done. That is fundamentally different from a duty to do those things. The basic problem for the OPR and the Minister here is that the council did not fail to consider and have regard to the Minister's views as set out in the guidelines. The process simply collapsed the distinction between a requirement to have regard to the Minister's views as to the need for a joint strategy and a requirement to have a joint strategy, a legal misunderstanding that contaminated everything thereafter.
42. The only case mentioned in relation to the phrase "have regard to" in Murdoch and Hunt's *Dictionary of Irish Law*, 6th ed. (Dublin, Bloomsbury, 2016) at p. 788, is in fact *McEvoy*. Another useful case that might be worth including under this heading is *G.K. v. Minister for Justice, Equality and Law Reform* [2001] IESC 205, [2002] 2 I.R. 418, which addressed the terms of s. 3(6) of the Immigration Act 1999. That provision says that "[i]n determining whether to make a deportation order in relation to a person, the Minister shall have regard to" a list of various factors. In *G.K.*, having regard was treated as a synonym for "considering" such factors, and ultimately a fairly formulaic statement of reasons to the

effect that the interests of public policy and the common good outweigh such features of the case as might tend to support leave to remain was held sufficient by the Supreme Court. Indeed, insofar as the applicant alleged that factors under s. 3(6) of the 1999 Act in particular representations “were not considered”, Hardiman J. (Denham and Geoghegan JJ. concurring) said “[t]here is simply no evidence whatever for this proposition.”

43. The approach taken by the Supreme Court in *G.K.* was essentially that where the decision-maker says that it has had regard to certain matters there is an evidential onus to be overcome to displace that. Such an onus had not been satisfied there and it most certainly has not been satisfied here either. In fact, the council did vastly more than the Minister did in *G.K.* and did demonstrably more than simply assert that it had taken the guidelines into account. Nor indeed did it adopt a formulaic decision or reasoning. Considerable detail is set out in the Chief Executive’s report and the letter to the OPR as to how the council engaged with the guidelines. The council passed the *G.K.* test with flying colours, and *McEvoy* doesn’t set a different test.
44. Indeed it would undermine the rule of law if words had a different meaning depending on who is relying on them. U.S. Attorney General Merrick Garland (formerly Garland J.) recently made the point that “[t]he essence of the rule of law is that like cases are treated alike. That there not be ... one rule for friends, another for foes” (Statement of Merrick B. Garland, Attorney General of the United States, Before the United States House Committee on the Judiciary, at a Hearing entitled ‘Oversight of the United States Department of Justice’, Presented October 21, 2021). For the State’s sake, let’s hope that the immigration bar doesn’t find out that the executive is arguing here that a duty to “have regard to” something imposes an obligation to give adequate reasons for disagreeing with that something, an obligation that can’t be met even by detailed reasons of the type given here and that is enhanced by the use of strident, mandatory language in the something to which regard is to be had. The inevitable volcano of judicial reviews will presumably eventually smoke out the admission that the only way to reconcile the State’s position here with the jurisprudence is that “have regard to” means something light when the State has to have regard to somebody else’s views, but something exacting when somebody else has to have regard to the State’s views. That would be a double standard that couldn’t be accepted and that would undermine the necessary objectivity of language inherent in legal governance through the written word.
45. Fragmentation and inconsistency is a constant potential feature of the common law system insofar as cases are decided in principle on an atomised individual basis. Nonetheless, courts probably should strive for overarching and consistent jurisprudence and aim towards that highly desirable goal identified by Ronald Dworkin for law to be a seamless web, and for joined-up thinking and consistency to apply across the various different silos into which law tends to operate. The fundamental point under this heading is that have-regard-to-type guidelines do not become mandatory just because the Minister puts mandatory words in them, any more than (for example) an illegally resident non-national’s submission to the Minister for Justice would have a more impactful status merely by being worded in an imperious or demanding manner. There is a clear analogy here with the decision in *Tristor*.

Clarke J. in that case noted (at para. 7.6) that the Dublin retail strategy “has no formal legal status”, although I suppose in fairness here it can be pointed out that joint retail strategies have the limited legal status of being provided for within a document, namely the s. 28 guidelines, that itself has a legal status. That minor quibble may be a semantic issue, but obviously I agree with Clarke J.’s point as applied in the present context, that any joint retail strategy for Cork would not have the status of being in itself binding.

46. The really crucial point is that the Minister in *Tristor* made an error quite similar to the one here. Clarke J. said at para. 7.11 that: “The first point that needs to be noted is that the Minister, in making the Direction, did not indicate that Dún Laoghaire[-]Rathdown Council did not “have regard” to the guidelines. Rather, the Minister’s stated reasons were to the effect that the Draft Development Plan was contrary to the specified paragraphs of the Retail Planning Guidelines. On that ground alone it would be difficult to conclude that the Minister had properly considered the position under the Guidelines”.
47. Clarke J. went on the say at para. 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.”
48. A similar logic applies here. The OPR and the Minister essentially asked the wrong question and based that question on the incorrect premise that an updated joint retail strategy was “required”. An updated joint retail strategy is certainly *envisaged* by the retail planning guidelines; and moreover envisaged in mandatory language used by the Minister, but that does not make it mandatory or “required”. The only “requirement” is to have regard to the Minister’s views, including the view that such an updated joint retail strategy should be put in place.
49. That which is not mandatory does not become mandatory merely because it purports to use mandatory language. Nor does the use of mandatory language put a higher onus on the council to explain its departure from the guidelines. Nor indeed was the OPR recommendation or any ministerial subsequent decision premised on this argument or indeed more generally on the argument that the council had not explained or adequately explained its departure from the guidelines. That argument was inventively introduced after the event. Ultimately the use of mandatory language within any individual non-binding guidelines cannot, as the council put it in oral submissions, “pull them up by the

bootstraps” into mandatory guidelines. Apart from that being illogical, it would contradict the statutory scheme.

50. A fall-back argument advanced by the State was that mandatory obligations arose from s. 9(6) of the 2000 Act. Obviously, that was not a reason relied on by the OPR or indeed the Minister in any of the recommendations or decisions, so it can’t be relied on now. In any event as a proposition it does not stack up in any way.
51. Section 9(6) provides: “A development plan shall in so far as is practicable be consistent with such national plans, policies or strategies as the Minister determines relate to proper planning and sustainable development.” Firstly, this only applies to “plans, policies or strategies”, not to guidelines.
52. Secondly, the guidelines are envisaged under a separate legislative provision in s. 28. Obviously if s. 9(6) did apply to s. 28 guidelines it would fundamentally contradict s. 28 which does not make such guidelines mandatory except where there are SPPRs. An argument that creates such an obvious statutory contradiction is itself untenable. No anomaly is created by s. 9(6) not covering s. 28 guidelines, because the Minister can make s. 28 guidelines mandatory in effect through the inclusion of SPPRs.
53. Thirdly, in any event it is clear that s. 9(6) cannot be self-executing. It requires some positive determination by the Minister which should be duly promulgated in an accessible and clear manner in order to have the effect that any plans, policies or strategies would become binding under this heading. It is an extremely practically important matter for any council to be faced with a situation where there is a mandatory obligation to comply with a particular plan, policy or strategy. Such an obligation cannot simply arise automatically simply because some form of plan, policy or strategy that has some possible relationship with the wide concepts of proper planning and sustainable development is produced without fanfare in some faraway corner of government. There must be some kind of accessible and explicit determination under the section (“*such national plans, policies or strategies as the Minister determines ...*”) to provide clarity as to what the obligations of councils are – in line with the point made by Collins J. in *Spencer Place*.
54. To impose mandatory legal obligations on an automatic basis with no formality, procedure or promulgation of a direction would create an ever-changing, ever-shifting kaleidoscope of possible requirements from multiple sources which a council would be in considerable difficulty in identifying let alone keeping up with, but which nonetheless would become legally binding insofar as practicable in the context of the adoption of a development plan. That would create intolerable uncertainty in the law for all actors concerned, not just councils. The legal consequences that flow from a ministerial determination that a particular plan, policy or strategy should be covered by s. 9(6) militate in favour of such a determination being made in a formal rather than an informal manner. There is a clear analogy here with the point I made (at para. 33) in *Dixon v. Lehane* [2021] IEHC 658, [2021] 10 JIC 2102 (Unreported, High Court, 21st October, 2021), that the formality and legal consequences flowing from the taking of a particular legal step require more certainty and clarity as to whether a statutory power is being invoked than would be provided by an

informal statement. A similar logic applies here. Any determination that would make a plan or policy subject to the application of s. 9(6) would have to be expressly articulated and transparently available, not just for the benefit of the council, but also for any other possible stakeholder in the process.

55. Independently of all that, the statements of opposition don't plead reliance on s. 9(6) which certainly doesn't help this argument.
56. A final fall-back argument was launched which would in effect lead to the implication that the OPR was entitled to make a recommendation mandating something that would not otherwise be mandatory in planning law. I do not accept that for a host of reasons, not least because it would give the OPR a substantive policy-making role that would fundamentally recalibrate the balance of functions within the planning system. As Collins J. said in *Spencer Place*, any such change would need to be expressly articulated. This is particularly so where it would involve such a major inroad into the jurisdiction and powers of local authorities.

What does "have regard to" mean?

57. To come back to the most central point of the foregoing, I would attempt to summarise the answer to the question, what does "have regard to" mean, as follows:

- (i). Expressions like consider, take into account and have regard to all mean the same thing.
- (ii). It is inherent in the objectivity of language that in principle that meaning is the same whether it is the State that is having regard to something, or that is seeking to have regard had by someone else to its views. The latter context does not impose a different or more exacting meaning on the term "have regard to".
- (iii). Having regard implies looking at the matter concerned, and factoring in its relevance, if any, and weight, if any, as those matters appear to the decision-maker.
- (iv). Hence if the decision-maker fails to even look at the documents or matters to which it is to have regard, or if the evidence doesn't demonstrate that it has done so, then a ground for *certiorari* arises (*B.C. (Zimbabwe) v. International Protection Appeals Tribunal* [2019] IEHC 488, [2019] 7 JIC 0207 (Unreported, High Court, 2nd July, 2019), *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021)).
- (v). If the decision states that regard was had to something, then the onus is on the party challenging that to prove otherwise by evidence.
- (vi). Like the exercise of any public law duty, the process of having regard has to be carried out *bona fide* and in accordance with the statutory purpose and with all other administrative law duties. But those requirements are independent of, and not created by, the requirement to have regard.

- (vii). Once the decision-maker has looked at the matter, its determination as to relevance if any is subject to review for legality, and its determination as to weight if any is normally subject to review for unreasonableness only. The weight to be attached to a particular piece of material is peculiarly one for the decision-maker (*per* Birmingham J. in *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) at para. 27.
- (viii). There is no necessary obligation for the consideration to be lengthy or ponderous. By analogy, a court has regard to all submissions made, although some are rejected *in limine* on the grounds of invincible incomprehensibility, patent irrelevance or patent error, such as for example if a personal litigant citizen disputes the court's jurisdiction on the grounds that she has not consented to submit to it (see *Meads v. Meads* [2012] ABQB 571 *per* Rooke C.J.). Immediate rejection of a patently incomprehensible, irrelevant or erroneous matter is not a failure to have regard. It is decision-making in action – the decision-maker has looked at everything and is trying to sort the wheat (if any) from the chaff. This reflects the point that the degree of weight and consideration to be given to something depends in significant measure on that something, not on some completely dry, academic and disembodied conceptualisation of elaborate legal process in the abstract.
- (ix). The use of mandatory, strident, peremptory or any other sort of language in a document to which regard is being had doesn't elevate the duty to have regard to the document into any sort of enhanced level or require additional reasons. That would be a self-evidently bootstrapping conceit. If any possible enhanced duty exists in a particular situation, it has to come externally from the document itself, such as from the statute or the legal context, and can't be created out of whole cloth by the entity seeking to have regard had to its views.
- (x). The duty to have regard to something doesn't automatically create a duty to give reasons for not giving that matter more weight. That follows from the entitlement of the decision-maker to assess the weight to be given to the various matters which it is considering. An enhanced duty may be created expressly, as in s. 28(1B)(b) of the 2000 Act, or impliedly by virtue of the particular legal context (such as where the nature of the process is that a detailed discussion is carried out at a sub-level, such as by an inspector, so that when a more summary operative decision is being made, such as by the board, there would be a gap in reasoning if the board didn't give express and adequate reasons for disagreeing with the inspector, or where providing reasons is required under the principle of giving the main reasons for the main issues).
- (xi). However, if the provision concerned (external to the document being considered) uses an intensifier such as to have "due" regard to something (*e.g.*, Article 16.2.4^o of the Constitution), or "appropriate and reasonable regard" (as in the SPPR considered in *Atlantic Diamond v. An Bord Pleanála*) then that generally connotes an additional degree of weight to be given to the matter to which regard is to be had,

with a general enhancement of the level of reasons that have to be given for not affording such weight. Here, the OPR erroneously criticised the council for not giving “sufficient” regard to the guidelines, whereas in fact the statute only requires “regard”. Intensifiers can’t simply be read into the statute by sleight of hand. They significantly change the meaning of the concept.

Incorrectly proceeding on a read-across from a view of non-compliance with s. 28 guidelines to a conclusion of lack of overall strategy

58. The OPR’s reasoning at p. 6 of its letter to the Minister is that the variation was premature and inconsistent with ministerial guidelines “and therefore” the plan as varied, fails to set out an overall strategy. If language means anything, the words “and therefore” involve an assertion that the non-compliance with the guidelines in itself leads to a conclusion of a lack of overall strategy. Thus, the assertion of inconsistency or non-compliance is premised on an incorrect assumption that the council is required act consistently with or to comply with the guidelines, but as noted above they are by their very nature something just to be taken into account and considered. Insofar as they use mandatory language, what is to be considered and taken into account is the Minister’s view that certain things should be done. The OPR also confoundingly uses an alternative contradictory formula, which is that the council failed to have “sufficient regard” to the spatial planning guidelines. But as identified above, the statutory duty is to have “regard” not “sufficient regard”, which, while related, is a conceptually distinct matter which suggests the prospect of a more merits-based review rather than the relatively light duty to take a matter into account.
59. The problem for the OPR and Minister under this heading is that the view that there was a lack of an overall strategy in breach of s. 10 of the 2000 Act was formed in material part as a result of a read-across from what was viewed as non-compliance with s. 28 guidelines. That was sought to be dressed up at a much later stage, in the course of these proceedings, as merely using non-compliance as being “evidence” of a lack of an overall strategy. But the OPR or Minister never made that point in the draft direction or at all prior to the proceedings. The concept that the OPR was just using the non-conformity with guidelines as “evidence” of a lack of an overall strategy emerged for the first time in the defence of the action. What the OPR actually said was the variation was inconsistent with guidelines “and therefore” failed to set out an overall strategy. That’s very different to forming a conclusion after a wide *tour d’horizon*, in which conformity with the guidelines is merely one piece of evidence among a host of others (even assuming that such a process were permissible in this type of context, which I don’t think it is, because it is effectively indistinguishable from a merits-based review of the council’s planning judgement). We are reviewing the actual decision here, not writing a new one.
60. Even if one were to be taken with the concept of breach-as-evidence, which I amn’t, it is clear that significant reliance was placed on what was viewed as non-compliance with the guidelines in forming a view as to the lack of an overall strategy. The fundamental defect with that approach is that, because the statutory provision is absolutely clear that in the absence of an SPPR, s. 28 only imposes a “have regard to” obligation not a “compliance” obligation, non-compliance (assuming such were the case) cannot have the effect that it in effect, directly or indirectly, puts the council in breach of the 2000 Act.

61. Measured against the clear statutory provision regarding the extent of duties under s. 28, to assert that non-compliance evidences or creates a breach of s. 10 of the 2000 Act is a re-writing of the statute into a different form. The express requirement as to the status of the obligation being a "have regard to" obligation impliedly excludes any possibility that one can read across from failure to follow the guidelines to breach of the statute.
62. The attempt by the OPR and the Minister to turbo-charge non-binding guidelines by drawing the conclusion that non-compliance contributed to a conclusion that the council was in breach of s. 10(1) is unfortunately a rewriting of the Act. It would not be that difficult for the Minister to impose actually binding requirements either by SPPRs or through the use of other powers under the Act. Instead the OPR and the Minister are trying to shoehorn the circumstances here into the s. 31 process even though the council *did not* fail to comply with any requirement that was actually binding on it. That is in effect a shortcut and a failure to do the necessary groundwork, a point to which I will return.
63. The fundamental point here is very similar to that discussed by Clarke J. in *Tristor* at para. 6.14. The concept of a lack of an overall strategy does not envisage a merits-based disagreement. The situation has to be one where the council did not have a strategy that could qualify as an overall strategy (see para. 6.15).
64. The OPR here says there was no strategy at all for the purposes of retail outlet centres. That conclusion can't be deduced from the absence of a more recent updated joint retail strategy or the absence of references to retail outlet centres within the previous joint retail strategy. Nor do the lack of such matters mean that the plan as varied by variation No. 2 doesn't have an overall strategy for the area. The OPR seemed to think that failure to comply with clear and relevant provisions of the guidelines was clear evidence of a lack of an overall strategy and was something the OPR was entitled to take into account. That sounds very plausible, but it has exactly the same effect as treating the guidelines as mandatory. It transmogrifies the guidelines into something contravention of which leads or contributes to a conclusion of breach of the statutory duty to have an overall strategy. That is just not consistent with the clear statutory imperative that the s. 28 guidelines are not binding absent SPPRs.
65. As David Browne B.L. puts it in *Simons on Planning Law*, 3rd ed. (Dublin, Round Hall, 2021), at paras. 1-468 and 1-469, a "planning authority ... is merely required to have regard to them" and guidelines "cannot alter or displace established or substantive law" or alter the meaning of legislation: see *Sherwin v. An Bord Pleanála* [2007] IEHC 227, [2008] 1 I.R. 561 *per* Edwards J. To treat non-conformity with non-binding guidelines as amount to, or evidence of, breach of legislation, without a clear statutory basis to do so, would be in effect to alter the meaning of legislation.
66. Cregan J. noted in *Buckley v. An Bord Pleanála* [2015] IEHC 590, [2015] 9 JIC 1601 (Unreported, High Court, 16th September, 2015), that guidelines are simply that.
67. In particular, as far as the OPR's "evidence of no overall strategy" argument is concerned, the ministerial guidelines do not say that certain things like the lack of a joint retail strategy

can be taken as evidence of non-compliance with the requirement for an overall strategy. That conception is one that the OPR itself has come up with (and come up with after the event), and it finds no articulated support in the guidelines themselves. Even if the guidelines had said that, it might have had to be backed up by an SPPR to be effective, although I don't have to decide that.

68. Ultimately, to use the guidelines in this fashion either by proceeding on the basis that the council is "required" to take certain steps or on the basis that the council has not done what the guidelines envisage "and therefore" has failed to set out an overall strategy, as it is put in the draft direction proposed by the OPR, or both (as here), involves a fundamental confusion and an elevation of the guidelines into a status that the statute makes clear they do not have.
69. Insofar as the Minister and OPR offer other defences under this or any other heading that I have dealt with elsewhere in the judgment, I would dismiss them here also for similar reasons. Fundamentally, non-mandatory guidelines cannot be turned into mandatory guidelines in effect merely by the OPR opining that they should be followed. That is so whether that is reconfigured as the claim that lack of compliance with the guidelines amounts to evidence of the lack of an overall plan or in any other way under this heading. But of course the OPR did not use the language of non-compliance being mere evidence. There is a bald assertion that an updated joint retail strategy is "required". It is not required. The only requirement is for the council to have regard to the Minister's view that there should be an update of joint retail strategies in advance of development plans. To allow the OPR to go beyond existing legal obligations imposed by statute on councils would be a material expansion of its role that is nowhere expressly provided for in the legislation.
70. In line with the vogue of trying to collapse questions of legality into the black box of an unreasonableness challenge, the OPR predictably sought to characterise this as a planning judgement matter on the basis that it had some sort of discretion under the statute to form an opinion that there was a lack of overall strategy and had not formed that opinion unreasonably. Unfortunately, that rather oversimplifies the legal issues involved. A decision-maker is not entitled to simply form an opinion subject to review for reasonableness. There are other grounds for judicial review. Among them is the requirement that the opinion must be based on correct understanding of the law, which was lacking here.

Misapplication of the concept that the overall strategy relates to the council's functional area only

71. While the OPR in fairness to it did use the language of there being a lack of an overall strategy for the functional area concerned, it is clear that, by requiring an updated joint retail strategy, in reality and in substance it was taking into account the lack of a strategy for the Cork Metropolitan Area overall. That was central to its approach. But it is not what the legislation envisages when it refers to the requirement for an overall strategy for the area concerned. The area means the functional area of the local authority.

72. Maybe one could argue that s. 10 in an ideal world should be amended to require that a development plan not only set out an overall strategy for the area of the development plan, but also contributes to an overall strategy for the wider region, or the State as a whole, assuming that some mechanism can be put in place to ensure that this is a definable and workable obligation. But in the absence of such a provision, the only requirement on the council in relation to s. 10(1) is to set out “an overall strategy for the proper planning and sustainable development of the area of the development plan ... indicating the development objectives for the area in question”.
73. Thus, in substance and reality, the OPR did not consider or apply the statute correctly. In alleging that the council had breached s. 10(1) of the 2000 Act, the OPR should have confined the question of whether there was an overall strategy to whether there was such a strategy for the Cork County Council area only and not by reference to the Cork Metropolitan Area more generally.
74. Insofar as it was suggested that perhaps the one retail outlet centre envisaged could have been situated in the city council’s functional area, I note in passing that the city council submission on draft variation No. 2 did not suggest that. Maybe that could make a certain amount of sense to the extent that these types of developments may be more out-of-town centres than anything else, if the suggested analogy of Kildare Village is anything to go by. But leaving that possible question aside, it seems to me that while using the correct language under this heading the substance of the OPR’s approach was in reality flawed and not in compliance with what the statute envisages.

Irrelevant considerations

75. Much of the discussion by the OPR in respect of the foregoing headings, and the ministerial action consequent thereon, could be characterised alternatively on the basis of irrelevant considerations. But one additional matter also stands out, which is the statement at p. 10 of the letter to the Minister enclosing the draft direction which says, “having regard to (i) to (xiii) above and ss. 10(1), 10(1A), 10(2A)(e), 28.1 of the Act, the making a variation no. 2 is premature and inconsistent with ministerial guidelines issued under s. 28 of the Act, specifically the Retail Planning Guidelines for Planning Authorities (2012) and Spatial Planning and National Roads Guidelines for Planning Authorities (2012).”
76. Unfortunately for the OPR, this kitchen-sink approach of referencing a medley of statutory provisions is legally inappropriate. The reference to s. 10(1A) has absolutely no relevance whatsoever here because it only applies to guidelines that include specific planning policy requirements (SPPRs), and neither of the guidelines to which this paragraph refers contain such SPPRs. This is not a minor issue because it is too tied into the erroneous misunderstanding that the guidelines imposed requirements on the council, so I view this as a distinct ground for *certiorari*.
77. The State response to this point is that even if this is an irrelevant consideration, there is separate provision for the guidelines to be mandatory by reference to s. 9(6) of the 2000 Act, but that is not correct for reasons explained elsewhere in this judgment. But even if it was, that provision is not referred to or relied on by the OPR and we are in the process

of reviewing what the respondent and notice party actually said, not fashioning a new process or a new recommendation or decision. The OPR now inventively points out that s. 10(1A) could be relevant to the Regional Spatial and Economic Strategy for the South Eastern Region, but again unfortunately that is a *post hoc* reconstruction of the decision and not what the OPR said. There is no reference whatsoever in the paragraph concerned to that strategy. On the contrary the point is squarely tied in to the ministerial guidelines, not any other document.

Effect of flaws *ab initio*

78. I regard each of the four points above as separate and independent grounds for *certiorari* and I would grant that order under any one of those headings and certainly under all four collectively. *Certiorari* follows because the ultimate making of the direction is premised on the necessary prerequisite of a valid proposed draft direction by the OPR. In the absence of a valid proposal the ultimate decision must fall. That would be the case anyway; but for good measure it is made express by the terms of s. 31(1), which says that the direction can be made "subject to compliance with the relevant provisions of sections 31AM and 31AN or sections 31AO and 31AP, as the case may be".
79. Hence, an invalid recommendation does invalidate the ultimate decision and indeed in fairness the State expressly accepted that. Under those circumstances, I think that for the purposes of the present judgment at least, and subject to any further submissions that may be made subsequently, I do not need to get into the issues regarding any other alleged errors contended for by the council, particularly the problems it says crept into the process at a later stage of the fairly complicated process for ministerial directions, or the issue relating to the constitutional challenge to the legislation concerned.
80. On that latter point however it is perhaps worthwhile recording that it emerged during the hearing that the reason that two inconsistent provisions were included in the Planning and Development (Amendment) Act 2018 (namely s. 21(c) and para. 28 of schedule 1) was simply down to a drafting error, which is considerably more reassuring than if such a contradiction was enacted deliberately (which surprisingly was the State's initial position as erroneously reflected in its statement of opposition and verifying affidavit). The only way to avoid errors is not to do anything, so one shouldn't criticise the drafters. Play-it-safe drafting and excessive over-thinking just creates a runaway process of ever-increasing legal conservatism, caution, complexity and delay. A certain level of inevitable drafting error is worth accepting as part of the price tag for significant legislative output. Of course that doesn't mean that the end product of error has to be upheld as valid – I just didn't get to that point as of now. However the drafting error here does highlight the possible downside of the vogue of putting substantive provisions in schedules (albeit that the British also do that). It also illustrates the downside of constant amendment rather than repeal and re-enactment, which is far clearer. But if it has to be amendment, if one were to take the approach of amending previous legislation by way of substantive sections, with each section or schedule being amended addressed in ascending chronological order, and within that, in ascending numerical order, on the basis of drafting one substantive amending section per section or schedule being amended, problems such as those here wouldn't arise. My own

view for what it's worth is that that sort of formulaically structured drafting of amendments of previous legislation also tends to be clearer, all things being equal. One can compare that idea with how the 2018 Act was structured, where amendments began with the 2000 Act and then to an amending Act of 2016 (Part 3), followed by amendments to miscellaneous legislation from 1990 to 2015 (Part 4), then amendments to ss. 11 to 31A of the 2000 Act (sch. 1), amendments to ss. 2 to 238 of the 2000 Act (sch. 2), amendments to ss. 10 to 177T of the 2000 Act and to other Acts from 2007 to 2013 (sch. 3), culminating in amendments to ss. 9 to 20 of the 2000 Act (sch. 4). While this sort of legislative spaghetti junction may be thought administratively convenient in terms of anticipating sequential commencement for example, or to facilitate the mechanics of drafting by theme, or even to deflect parliamentary scrutiny through the use of schedules and technical amending wording (which no doubt wasn't the motivation here but has in the past been thought to be a factor in certain situations), convenience shouldn't erode the structural integrity of the statute book. One would have to be a very committed fan of administrative convenience indeed to think that the way in which amendments of previous legislation are set out in the 2018 Act is a thing of beauty that enhances the enduring structural clarity, accessibility, robustness and resilience of the statute book. And while one can inevitably make an *ad hoc* case for such techniques in any one measure, one has to multiply that by the number of Acts per year, and quickly the problem scales up to one of real friction and impenetrability in the statute book overall.

A more transparent alternative to the procedure adopted here

81. The aphorism that "the opposite of every great truth is also a great truth", or variants of that phrase, is associated in roughly chronological order with Herman Hesse (see "Variations on a Theme by William Schäfer" (1919) in *My Belief* (Triad/ Panther, London, 1978) p. 96), Niels Bohr (c. 1920s, no direct source but that precise phrase is quoted, unsourced, in Larry Chang, *Wisdom for the Soul* (Gnosophia, Washington, 2006) p. 723) and Thomas Mann (*Essay on Freud*, 16th May, 1929).
82. It is not a sentiment normally associated with contested litigation. But in the present case one can see where both sides are coming from. The Minister and the OPR think that an updated joint retail strategy should be prepared prior to settling on the most appropriate general location for a retail outlet centre in the Cork Metropolitan Area, which on one view doesn't sound totally unreasonable. The council on the other hand say that they have had regard to the relevant ministerial guidelines, which is what they are required to do, and I agree as explained earlier.
83. While one can understand the position of the Minister and the OPR, the vast bulk of their argument was dependent on an implicit premise that there was an entitlement to form a view of breach of the requirement for an overall strategy by taking into account that the council had not followed elements contained in non-binding guidelines that the Minister and OPR thought were particularly relevant, and had not explained how the council's action did not follow such elements of the non-binding guidelines to the satisfaction of the Minister and the OPR. I just don't think that such an analysis sits correctly within the precise and technical terms of the legislative scheme.

84. Indeed not only that, but the precise way in which the position of the Minister and OPR is now phrased does not sit easily with how the complaint against the council was launched originally as set out in the draft direction formulated by the OPR. The council has a valid point that the complaint has mutated at every hand's turn. No two iterations of the case against it seem to be worded in precisely the same way, and that case continued to evolve right into the hearing.
85. Ultimately, the practical functioning of local government must draw a clear and workable distinction between matters that local authorities are required to have regard to and matters that are mandatory, and indeed the same applies by analogy in any other area of public law. That echoes the point very clearly made by Collins J. in *Spencer Place*.
86. In the case of the dispute between the council and central government here, that line has been blurred by the OPR and Minister, albeit for perhaps understandable policy reasons. Nonetheless, the court cannot allow "have regard to" obligations to be elevated by stealth or in effect, directly or indirectly, into what would amount in practice to mandatory obligations, because to do so would undermine a distinction central to the orderly functioning of the planning code.
87. The more legally correct and transparent way of achieving the sort of result that the Minister and OPR are endeavouring to arrive at here is firstly to ensure that there is a publicly transparent statement of the distinction between what guidance is mandatory and what is not, secondly where necessary to review the suite of guidance as to which should fall into which category and thirdly if necessary to amend the guidance so as to amend the legal effect resulting from it if that is thought desirable.
88. There seem to be five categories of policy or guidance that may arise:
- (i). Mandatory criteria where consistency is required. This category includes the National Planning Framework and the Regional Spatial and Economic Strategy under s. 10(1A) in the development plan context, s. 28 SPPRs or s. 29 policy directives that are binding generally.
 - (ii). Policies determined under s. 9(6) in the Development Plan context where compliance is required as far as practicable. As noted above, ministerial environmental policies do not automatically become policies for the purposes of s. 9(6). There must be an accessible, explicit ministerial determination to that effect. This cannot in any event include s. 28 guidelines because that would cut across primary legislation.
 - (iii). Section 28 guidelines which do not include SPPRs. There the obligation is only to have regard to the guidelines generally, as well as to give reasons where the guidelines are departed from in the context of the adoption of a development plan, although not in the variation context.

- (iv). Other policies and guidance from central government to which councils must have regard in the review of the development plan under s. 11(1A), 12(11) and 13(7); and
 - (v). Other standards and guidance not emanating from central government where a council can have regard to such matters, but is not obliged to do so (unless obliged indirectly under one of the foregoing headings, such as *via* an SPPR, as in *Atlantic Diamond*).
89. Under the heading of "Planning guidelines/standards" the Government website (gov.ie) helpfully lists 76 guidance documents issued over the past 26 years. The list is set out in reverse chronological order as follows:
- (i). Regulation of Commercial Institutional Investment in Housing – Guidelines for Planning Authorities (May 2021).
 - (ii). Ministerial Letter to Local Authorities - Updated Apartment Guidelines to give effect to restrictions on Co-living Development (Dec 2020).
 - (iii). Ministerial Letter to Local Authorities - Structural Housing Demand in Ireland and Housing Supply Targets (Dec 2020).
 - (iv). Section 28 Guidelines for Planning Authorities - Enforcement of certain planning conditions during the Coronavirus (COVID-19) outbreak.
 - (v). Guidance Note for Local Authorities for Regulating Short Term Letting.
 - (vi). Urban Development and Building Height Guidelines for Planning Authorities.
 - (vii). Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (August 2018).
 - (viii). Urban Development and Building Heights – Guidelines for Planning Authorities – Consultation Draft.
 - (ix). Design Standards for New Apartments (DSFNA) (2018).
 - (x). Design Standards for New Apartments - Guidelines for Planning Authorities - Draft Update (Dec. 2017).
 - (xi). Design Standards for New Apartments - Guidelines for Planning Authorities (Dec. 2015).
 - (xii). Design Standards for New Apartments - Information Note Current.
 - (xiii). Tree Preservation Guidelines.
 - (xiv). Funfair guidance.

- (xv). Guidance Notes – General.
- (xvi). Part II - Plans & Guidelines.
- (xvii). Part V - Housing Supply.
- (xviii). Part IX - Strategic Development Zones.
- (xix). Part XVIII – Miscellaneous.
- (xx). Part XIX - Commencement, Repeals and Continuance.
- (xxi). Framework for Co-operation Spatial Strategies of Northern Ireland and the Republic of Ireland.
- (xxii). Local Area Plans - Guidelines for Planning Authorities (June 2013).
- (xxiii). Local Area Plans Manual (June 2013).
- (xxiv). Guidelines for Planning Authorities & An Bord Pleanala on carrying out Environmental Impact Assessments (March 2013).
- (xxv). Design Manual for Urban Roads and Streets - 2019 (Low Res).
- (xxvi). Development Contribution Guidelines - January 2013.
- (xxvii). A Guide to Planning Enforcement in Ireland.
- (xxviii). INSPIRE Protected Sites Pilot Report.
- (xxix). Draft Environmental Impact Assessment Guidelines (July 2012).
- (xxx). Section 261A of Planning and Development Act, 2000 Supplementary Guidelines (July 2012).
- (xxxi). Development Contributions - Draft Guidelines for Planning Authorities.
- (xxxii). LAP Draft Guidelines - June 2012.
- (xxxiii). LAP Draft Manual - June 2012.
- (xxxiv). Retail Planning Guidelines (April 2012).
- (xxxv). Retail Design Manual April 2012.
- (xxxvi). Section 261A of Planning & Development Act 2000 - Guidelines (January 2012).
- (xxxvii). Spatial Planning and National Roads Guidelines (Jan 2012).

- (xxxviii). Guidance for Planning Authorities on Drainage and Reclamation of Wetlands - consultation draft.
- (xxxix). Implementing INSPIRE Regulations in Public Bodies.
- (xl). Collaborative Spatial Framework.
- (xli). Implementing Regional Planning Guidelines-Best Practice Guidelines.
- (xlii). The Planning System and Flood Risk Management - Guidelines for Planning Authorities - Technical Appendices (Nov 2009).
- (xliii). The Planning System and Flood Risk Management - Guidelines for Planning Authorities - Technical Appendices (Nov 2009).
- (xliv). The Planning System and Flood Risk Management - Guidelines for Planning Authorities (Nov 2009).
- (xlv). Sustainable Residential Developments in Urban Areas-Guidelines for Planning Authorities (May 2009).
- (xlvi). Best Practice Urban Design Manual (May 2009) Part 2.
- (xlvii). Best Practice Urban Design Manual (May 2009) Part 1.
- (xlviii). The Provision of Schools and the Planning System - Code of Practice for Planning Authorities.
- (xlix). Development Management Guidelines.
- (l). Development Plan Guidelines.
- (li). Extension of Tax Relief Schemes - Certification Guidelines for Local Authorities.
- (lii). Redevelopment of Certain Lands in the Dublin area.
- (liii). Wind Energy Development Guidelines (2006).
- (liv). Sustainable Rural Housing Development Guidelines.
- (lv). Strategic Environmental Assessment (SEA) Guidelines.
- (lvi). Revised Certification Guidelines.
- (lvii). Quarries and Ancillary Activities.
- (lviii). Architectural Heritage Protection for Places of Public Worship.
- (lix). Guidance for Consent Authorities regarding Sub-Threshold Development.

- (Ix). Further Guidelines on Part V of the Planning and Development Acts 2000 - 2002 - Circular HMS 9/03.
 - (Ixi). Further Guidelines on Part V of the Planning and Development Act 2000-2002 – Guidelines.
 - (Ixii). Further Guidelines Part V of the Planning and Development Acts 2000-2002.
 - (Ixiii). URS Consolidated Certification Guidelines.
 - (Ixiv). TRS Monitoring Guidelines.
 - (Ixv). LOTS Monitoring Guidelines.
 - (Ixvi). Implementation Manual Part V of Planning and Development Act 2000.
 - (Ixvii). Part V of the Planning and Development Act, 2000 - Implementation Issues.
 - (Ixviii). LOTS Certification Guidelines.
 - (Ixix). Certification Guidelines (Commercial Industrial).
 - (Ixx). Childcare Facilities Guidelines.
 - (Ixxi). Guidelines for Planning Authorities - Part V of the Planning and Development Act 2000.
 - (Ixxii). Landscape and Landscape Assessment.
 - (Ixxiii). Town Renewal Scheme guidelines.
 - (Ixxiv). Urban Renewal Scheme 1999 Monitoring Guidelines.
 - (Ixxv). Telecommunications Antennae and Support Structures 1996.
 - (Ixxvi). Guidelines on Residential Developments in Urban Renewal Designated Tax Incentive Areas 1995.
90. Local authorities in particular and other stakeholders and interested parties more generally do need to have clarity as to whether any individual guideline or policy document is subject to a "have regard to" obligation or a mandatory obligation, or in other words which of the five categories of guidance mentioned above is the relevant one in each case. I hope I could be forgiven for respectfully suggesting that perhaps, as well as publishing a chronological list of policies, consideration might be given to providing a classified list broken down by reference to legal status in terms of the five categories above.
91. That would facilitate a further stage, namely to review the existing guidance to ensure that anything that should be mandatory, in the opinion of the Minister perhaps with guidance from other stakeholders, but is not, can be reissued in a form that would make it

appropriately mandatory. That does not require primary legislation or any kind of legislation. It requires the operation of purely ministerial or administrative powers. Nor does it involve any major delay. Guidance can be reissued in a new form if thought necessary or desirable without any particularly elaborate procedure.

92. As the council put it in oral submissions, the power to issue mandatory policies or guidelines, if thought appropriate, is a better approach than for the respondent or notice party to “inventively” utilise the guidelines in the way that they have done here, which does not comport with the very precise terms of the statutory scheme.
93. That alternative approach also seems to me to be a much more transparent way to address such matters than the procedure adopted here. For the avoidance of doubt, however, the possibility that the Minister can advance the sort of concerns expressed by the OPR here through such an alternative mechanism is something worth referring to and considering, but it is not in any way a basis for the order being made.
94. Presumably, however, if there is to be a re-examination of any legal status of any particular guidelines, that can be an open and collaborative process without unduly delaying it, and the views of councils as important stakeholders would no doubt be sought and listened to in such an exercise. The whole planning area does not particularly lend itself to unilateral actions, and councils are a key part of that dialogue.
95. On that note, while of course one generally likes to see litigants (and that includes public bodies) resolving their issues, ultimately it follows from the principle of separate corporate legal personality, a principle which is absolutely fundamental to the law (see *Scallon v. Independent News and Media PLC* [2020] IEHC 472, [2020] 7 JIC 0802 (Unreported, High Court, 8th July, 2020)), that if parties that have legal personality and are independent of each other disagree, they are perfectly entitled to litigate, even if they are public bodies.
96. Other jurisdictions are very relaxed about that, and, beyond encouraging people generally to work together, I don’t think there is anything particularly unacceptable about public bodies suing each other that doesn’t apply to litigation more generally. It is simply a logical consequence of their legally separate status, independence and corporate personality. If you acknowledge the premise you have to acknowledge the conclusion. Public law actors should not be applicant-shamed any more than private law actors (see *An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021) and *Save Cork City Community Association CLG v. An Bord Pleanála* [2021] IEHC 509 [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021)). That should be so even if they win.
97. That said, one can understand the suggestion of Hyland J. in the companion case to this one that it’s better for adjacent local authorities to work together where possible, but one can’t generalise that into a broad criticism of public bodies for suing other public bodies. Indeed one has to be careful what one wishes for, because condemning such a possibility would withdraw an important tranche of public law from judicial supervision at all, and is unlikely to favour the weaker party in an in-house dispute within the State sector.

Order

98. For the reasons stated above the order will be as follows:

- (i). there will be an order in terms of para. 1 of the statement of grounds, namely *certiorari* of the final ministerial direction; and
- (ii). I will adjourn all other reliefs or consequential orders for further submissions including the question of any possible consequential relief by reference to s. 31(6) of the 2000 Act or otherwise.