THE HIGH COURT

COMMERCIAL

[2022] IEHC 394

[2021 No. 964 JR]

[2022 No. 5 COM]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

MCGARRELL REILLY HOMES LIMITED AND

ALCOVE IRELAND EIGHT LIMITED

APPLICANTS

AND

MEATH COUNTY COUNCIL

RESPONDENT

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

1. The applicants challenge the adoption of the Meath County Development Plan 2021- 2027, which affected the zoning of certain of their lands at Kilcock and Stamullen, County Meath. The factual background to the plan is set out in *Killegland Estates Limited v. Meath County Council* [2022] IEHC 393 (Unreported, High Court, 1st July, 2022), and that discussion can be incorporated by reference here, but the following points are additionally relevant to these applicants.

2. The Development Plan 2013-2019 was amended by Variation No. 2 in 2014 to create a phasing process whereby some A2 lands were listed as A2 post 2019 (phase II) rather than for immediate housing developments (phase I). Variation No. 2 to the Meath County Development Plan has already been considered by McDonald J. in *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, 2nd December, 2020). McDonald J. noted (at paras 19-23) that Variation No. 2 was based on there being an excess of lands zoned for housing in County Meath and thus there being a need to introduce an order of priority as to the sequence in which residential development would be permitted on individual parcels of lands.

3. At para. 42 McDonald J. said "when para. (ii) of SP 1 speaks of land not being available for residential development "within the life" of the County Development Plan, that seems to me to plainly prohibit the use of such lands for residential development for the duration of the Plan and I believe that this is the way in which the words used would be read by the ordinary and reasonably informed member of the public."

4. All of the applicants' lands in the present case were changed in this way in 2014. The effect of McDonald J.'s judgment is that none of the applicants' lands can be deemed to have been zoned for residential use under the previous plan as it stood prior to the plan as now adopted. The four lands in question are as follows:

(i). A 27.6 ha site in Kilcock which was zoned A2 residential post 2019 under Meath County Development Plan 2013 - 2019. This was zoned A2 (Phase II) post 2027 under new Development Plan;

(ii). A 3.44 ha site called Crowe's land in Stamullen zoned A2 residential post 2019 under Meath County Development Plan 2013 -2019. This was zoned 'G1' Community Infrastructure under the new Development Plan;

(iii). A 5.26 ha site called Silverstream lands in Stamullen zoned A2 residential post 2019 under Meath County Development Plan 2013 - 2019. This was zoned 'RA' Rural lands under the new Development Plan; and

(iv). A 9.39 ha site called Haran's lands in Stamullen zoned A2 residential post 2019 under Meath County Development Plan 2013 - 2019. This was zoned 'E3' Warehouse and Distribution under the new Development Plan.

5. In March 2020, the applicants made submissions on the draft plan regarding the proposed zoning of their lands.

6. The statement of grounds was filed on 11th November, 2021.

7. On 24th November, 2021, Meenan J. directed leave on notice.

8. On 17th January, 2022, McDonald J. admitted the case into the Commercial List and it was then transferred to the Commercial Planning and Strategic Infrastructure Development List.

9. On 31st January, 2022, I granted leave. A statement of opposition was filed on 24th March, 2022. A hearing date was then assigned of 31st May, 2022.

General considerations

10. I set out a number of general considerations in *Killegland*. That discussion can be incorporated by reference here.

Core ground 1 – National Planning Framework

11. Core ground 1 states as follows:

"The decision to zone the Applicants' Lands as part of the making of the Development Plan, was made in a manner inconsistent with the National Planning Framework Objectives 72a, 72b and 72c, and Appendix 3 insofar as the Respondent failed to adopt a tiered approach to zoning, and in that regard failed provide and publish a Written Infrastructural Assessment Report both at draft and adoption stage which was required to inform such zoning determination. The Respondent therefore acted contrary to sections 10(1A) and 12(11) and 12(18) of the Planning and Development Act 2000, as amended ('the 2000 Act') and so its decision was ultra vires and without jurisdiction. Further, the Respondent failed to conduct any or any valid infrastructure assessment and/or in the alternative, failed to provide reasons and/or adequate reasons for any Infrastructural Assessment in making such zoning decision."

Law in relation to the National Planning Framework

12. The law in relation to the extent of the need for compliance with the National Planning Framework is set out in *Killegland* and that discussion can be incorporated here by reference.

Application of the law to the facts

13. I note that the only objectives in the National Planning Framework that are pleaded here relate to objectives 72a-c. The objectives at No. 73 are not pleaded.

14. The council objected that the applicants should not be allowed complain about the lack of an infrastructure assessment report because they didn't make that point in submissions on the draft plan. However, I would reject that objection. Whether a development plan is consistent with the NPF as required by s. 12(18) of the 2000 Act is either a matter going to jurisdiction or a matter that a party can legitimately look to the decision-maker to address. Thus, failure to raise it in the process doesn't preclude reliance on the point in judicial review: see *Reid v. An Bord Pleanála* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021). That doesn't mean that the infrastructure assessment report is indeed a requirement here, just that the applicants can make this point.

15. The issue of the application of the law to the facts in respect of breach of the NPF as set out in *Killegland* also applies here, and the general points made in that discussion can be incorporated by reference here.

16. The allocations based on population and household distribution are set out in the core strategy at Table 2.12. The strategy then identifies certain settlements for additional housing based on a clear identified hierarchy.

17. Section 2.10.1 identifies Kilcock and Stamullen as what it calls self-sustaining towns which take a mid-ranking position in the hierarchy of settlements.

18. Essentially there are two fundamental problems for the applicants.

19. Firstly, the zonings of their lands in the current development plan do not envisage housing and new development uses during the lifetime of the plan. Thus, they are not "zoned" land for the purposes of Appendix 3 of the NPF (see *Killegland*). Hence the need for an infrastructure assessment report or any other compliance with Appendix 3 doesn't arise in relation to these lands.

20. And secondly, in accordance with the NPF, the distribution of new housing is required to be in accordance with a core strategy that forms a coherent whole when looking at all parts of the county. That strategy must be formed in the context of the regional and national housing hierarchy of provision, and so no individual piece of land can be looked at in isolation. The fundamental problem for the applicants is that a challenge to an individual zoning of a particular piece of land in isolation from the overall hierarchy and distribution of housing provision for the entire county is not a permissible exercise. The ultimate objective of quashing the zoning with a view to a different zoning being given would not achieve anything

because it would result in a breach of the core strategy by virtue of an excess of lands being zoned for residential development. The problem for the applicants which is that additional housing on their lands would breach the sequential approach set out in the core strategy. The applicants have not engaged with that, either in their submissions to the council or in the relief sought in these proceedings. One can contrast that with a submission on behalf of another landowner, submission reference no. MH-C5-627 on behalf of Glenvel GP (Jersey) Ltd., which proposed not just a rezoning of lands to A2 but also an addition to the core strategy (see Chief Executive's report, p. 152). The proposal went on to say that if the allocation was not increased then the lands should be listed in a sequential manner. That submission at least acknowledges the fundamental dynamic of the process and the need for each individual piece of land to find its place in an overall jigsaw. But there cannot validly be a process whereby a particular piece of land is simply to be added to the pile for housing. The size and distribution of the pile overall has to be addressed.

Core ground 2 – consistency with regional strategy

21. Core ground 2 states as follows:

> "In dezoning the Applicant's lands in Stamullen, the Council misconstrued Section 4.3 of the Regional Spatial and Economic Strategy ('RSES') and/or failed to act in a manner consistent with the RSES for the Eastern and Midlands in breach of its statutory obligations under sections 10(2A), 12(11) and 12(18) of the 2000 Act."

Law in relation to consistency with the regional strategy

22. The law in relation to the requirement for consistency with the regional spatial and economic strategy is set out in *Killegland* and that discussion can be incorporated here by reference.

Application of the law to the facts

23. The core strategy acknowledges at s. 2.4.3 the requirement of a consistent planning hierarchy as between national, regional and local plans. Thus, the requirement that the plan be consistent as far as practicable with the objective set out in the Regional Spatial and Economic Strategy (RSES) is set out. Further statements to the effect that the plan is informed by an approach of seeking consistency are included in s. 2.7 of the core strategy.

24. The applicants claim that the council have acted inconsistently with s. 4.3 of the RSES and either misconstrued or breached that strategy in relation to the lands at Stamullen. As regards the claim of misconstruction, as noted above there is copious reference to the RSES in the development plan. Some criticisms were made of s. 2.8.1 of the core strategy, but I don't think that it does too much violence to the RSES as a summary. It seems to me that the statements in the core strategy objected to are basically consistent with s. 4.3 of the RSES insofar as it says that "[c]ore strategies may apply prioritisation measures and/or de-zoning of land where a surplus of land is identified in plans with regard to the NPF Implementation Roadmap up to 2031."

25. As regards non-compliance with the RSES, the discussion in *Killegland* applies and can be incorporated by reference here.

26. Insofar as the RSES states that "[l]ocal authorities, in the preparation of their core strategies should … carefully consider the phasing of development lands to ensure that towns grow at a sustainable level appropriate to their position in the hierarchy", the council did not differ from that.

27. Section 2.8.1 of the core strategy states that "the prioritisation/phasing of residential lands will only be utilised in the larger settlements where population growth is to be concentrated i.e. Regional Growth Centre, Key Town, or Self-Sustaining Growth Towns". Yes from one perspective, the council did something slightly different from what the RSES envisages in the sense that the RSES would suggest that where a land zoned for housing are not going to be required now they should not be downzoned, but should be zoned for housing at some later date, not necessarily in the life of the plan.

28. Strictly speaking however, the approach specified in the RSES is not legally sound and indeed would not be sound in relation to the lands at issue here for the simple reason that, as emphasised by McDonald J. in *Highlands Residents,* any given plan can only deal with uses during the lifetime of the plan itself. Thus, anything that is stated to happen after the end of the plan is aspirational at best. Indeed, given the obvious fact that the statutory framework has priority over strategies and guidelines adopted under it, it seems to me that the RSES on any interpretation could not oblige councils to provide for something outside of the lifetime of any given plan. Thus, where the RSES says or implies that lands not required for housing during the lifetime of a plan should not be downzoned but should be earmarked for housing at a later date after the lifetime of the plan concerned, that cannot be translated into a legal requirement. Accordingly, a council cannot be held to have invalidly made a plan by reason of not carrying out such exercise.

29. All that said, the council did attempt to stagger the commencement of housing provision rather than engage in downzoning, but with a qualification that such phasing only applied to the top tiers of the settlement strategy. Thus, the plan envisages that additional lands will be available for residential development after 2027 in Dunboyne, Navan, Dunshaughlin and Kilcock.

30. The council did not adopt that approach in relation to Stamullen, but it was not required to because not doing so did not conflict with an objective in the RSES. Again, it must be remembered that, as set out in *Killegland*, "objective" is a term of art and cannot be conflated with the narrative in the body of the document. Each objective is very specifically identified in the RSES. In any event, having regard to *Highlands Residents* there is no functional difference between downzoning lands and phasing them for residential development after the lifetime of the plan because on neither scenario would residential development be allowed under the plan itself. If there is a case for making such a provision during the life of a subsequent plan that can be considered at that point.

Core ground 3 –relevant and irrelevant considerations and legitimate expectations

31. Core ground 3 states as follows:

"The decision of the Respondent in zoning the Applicants' lands failed to provide any adequate reasons for such zoning and/or took into account irrelevant considerations and/or failed to take into relevant considerations, including the prior commitment in the context of Variation No. 2 of the previous development plan regarding future zoning. The Respondent, in purporting to apply the sequential approach to zoning of lands, erred in law and/or made material errors of fact and/or failed to take into account relevant considerations and failed to act consistently with the Regional and Spatial and Economic Strategy of the Eastern and Midlands which does not require the dezoning of land and failed to act consistently with the National Planning Framework which requires a consideration of other planning matters."

Law in relation to reasons, irrelevant and relevant considerations and legitimate expectations

32. The law in relation to reasons and relevant or irrelevant considerations has been set out in *Killegland* and can be incorporated by reference here.

33. In relation to legitimate expectations, the applicant relies on a number of authorities including the following *United Policyholders Group v. Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383, where at 37-38 Lord Neuberger said that "[i]n the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do … something, a person who has reasonably relied on that statement should, absent good reasons, be entitled to rely on the statement and enforce it through the courts"; see also *R (Bibi) v. Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, *per* Schiemann L.J. at para. 59, *R (RD) (A Child) v. Worcestershire County Council* [2019] EWHC 448, *R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38, *R v. Department for Education and Employment, ex p. Begbie* [2000] 1 WLR 1115, *R v. The Liverpool Corporation ex-party Liverpool Taxi Fleet Operators Association* (1972) 2 Q.B. 299 and *Re Finucane's application for judicial review* [2019] UKSC 7.

34. The main problem with these authorities is that they have very little relevance to the facts here and the crucially important process of environmental protection represented by the development plan. In the language of art. 3 TEU, a critical policy goal is "the sustainable development of Europe ... and a high level of protection and improvement of the quality of the environment". The long-term, inter-generational, overriding importance of the environment engages objective considerations which well transcend any expectations that individual landowners may have.

35. McDonald J. found as follows in *Highlands Residents* (paras. 40-42) in relation to the provisions of the previous development plan with which we are concerned here:

"40. Paragraph 3.3 of the introduction and explanatory document explains very clearly that the purpose of Table 2.4 is to identify, in respect of each town and village in County Meath, a household allocation or target to be delivered over the period of the plan together with the available zoned land which is available to achieve the relevant household allocation and also the excess or shortfall (as the case might be) of appropriately zoned land required to meet

the relevant household allocation. Importantly, the same document records that Table 2.4 " demonstrates that there is presently an excess of residentially zoned land contained in most of the towns and villages in Meath for which Local Area Plans had been prepared. The County Development Plan, as varied by Variation No. 2, presents a strategy to deal with the excess of residentially zoned land as it applies to the urban centre. In order to address the level of over provision of zoned residential lands, phasing of land in the form of an Order of Priority is detailed in the accompanying written statements and land use zoning objectives maps which are incorporated into the Development Plan in Volume 5".

41. While this paragraph refers to the " phasing of land in the form of an Order of Priority", it is clear from the paragraph, read as a whole, that the purpose of Variation No. 2 was to present a strategy to deal with the excess of residentially zoned land as identified in Table 2.4.

42. The language in para. 3.3 of the introduction and explanatory document is repeated in the terms of the relevant part of Variation No. 2 namely SP 1. The terms of SP 1 have already been quoted at para. 22 above. As noted in para. 23, counsel for the applicants, stressed the use of the words in para. (ii) of SP 1 namely that the lands now qualified by the " Residential Phase II (Post 2019)" designation " are not available for residential development within the life of this Development Plan" (emphasis added). Those words must, in my view, be read against the relevant legislative backdrop. It is clear from s. 9 of the 2000 Act that a development plan is intended to have a limited lifetime. Section 9 (1) requires every planning authority to make a development plan every six years. Furthermore, under s. 11 (1) (a), a planning authority, not later than four years after the making of a development plan, must give notice of its intention to review its existing development plan and to prepare a new development plan for its area. Thus, when para. (ii) of SP 1 speaks of land not being available for residential development " within the life" of the County Development Plan, that seems to me to plainly prohibit the use of such lands for residential development for the duration of the Plan and I believe that this is the way in which the words used would be read by the ordinary and reasonably informed member of the public. This conclusion is strongly reinforced by a consideration of the terms of Variation No. 2 quoted in para. 23 above. The language used is unequivocal. It plainly states that there is " no justification for the release of any additional lands over and above those specified in Table 8 and illustrated on the land use zoning objectives map for Drogheda Southern Environs". The same paragraph also states that: "the requirement for any further release of residential zoned land in the Southern Environs of Drogheda will be assessed following the making of the next County Development Plan in line with the population projections contained therein" (emphasis added). In my view, this makes very clear that the lands which are hatched with diagonal lines on the land use zoning objectives map for Drogheda Southern Environs are not available during the currency of the current County Development Plan for residential use. The variation effected by Variation No. 2 has, in substance, put those lands beyond use for residential purposes for the duration of the Development Plan. I believe that this is the conclusion which an ordinary and reasonably informed member of the public would reach on an objective consideration of the terms of the

County Development Plan (as varied). I believe that such a person would discount the notion that the lands in question have been zoned for residential use but that such use has simply been postponed, by reference to an order of priority. That conclusion might well make sense if the development plan was intended to subsist for more than six years and in particular was intended to subsist beyond 2019. That is, however, plainly not the case. The final year of the duration of the current Development Plan is 2019. Thus, the designation on the land use zoning objectives map of " Residential Phase II (Post 2019)" means, in substance, that the lands cannot be used for residential purposes during the currency of the 2013-2019 Plan. This is stated in stark terms in the passage quoted above which makes it clear that any further release of land for residential purposes will be assessed following the making of the next County Development Plan. Furthermore, while para. 3.3 of the introduction and explanatory document states that the inclusion of lands in Phase II " does infer a prior commitment … regarding their future zoning … during the preparation of a new … Plan…", any new development plan would have to undergo the procedures outlined in ss. 11 and 12 of the 2000 Act and would have to comply with the requirements of s. 10 of that Act. Thus, there is no guarantee that Phase II would allow residential use in the future once the 2013-2019 Plan expires."

36. Zoning is not some kind of private arrangement between a council and a landowner. It is fundamental to protection of the environment in a way that engages and affects the whole community, not just in the present generation, but for however long any development thereby permitted continues in place - possibly indefinitely. One cannot sacrifice any aspect of that community interest on the altar of some sort of private law transactional model of legitimate expectations with its conceptual and intellectual roots in the enclosed, privatised, economic logic of 19th century contract law or its more modern evolutions.

Application of the law to the facts

37. Insofar as breach of the NPF or RSES was also argued under this heading, similar reasons apply to those dealt with above as to why the applicants are not entitled to relief.

38. Insofar as reasons are concerned, the applicants did receive the main reasons for the main issues. An applicant is not entitled to dictate the form or content of a decision-maker's outputs. Much of the applicants' submission amounted to taking sentences out of context from the Chief Executive's report. Looking at the whole document, there is much contextual material that helps illuminate the rationale for the zoning decisions, particularly the overall hierarchy of settlements and the distribution of allocation of housing provision having regard to that hierarchy.

39. Insofar as relevant and irrelevant considerations are concerned, the council clearly had regard to all mandatory statutory guidelines and all other mandatory considerations.

40. In relation to evaluative considerations, the council did not exceed the margin of discretion as assessed to an unreasonableness standard.

41. Insofar as its claimed that the council failed to take into account the applicants' positive record of development, that was a personal factor that should not have been considered. However, if I am wrong about that, it was at best an evaluative factor rather than a mandatory one, and moreover not a point that really was pertinent to the actual basis of the council's decision. It thus wouldn't have made any difference given the wider reasoning on which the council lawfully approached the matter.

42. Insofar as it was argued that there were no reasons given for not continuing an A2 zoning for the lands, that point does not add anything to the applicants' general reasons argument. It seems to me that the applicants did get the main reasons on this issue.

43. Insofar as it is alleged the council failed to even address the alleged prior commitment to the concept that zoning for residential purposes would come into effect or that that was departed from without any rationale, it is obvious that the council did consider the previous development plan. That is inherent in the whole development plan review exercise anyway and reading the Chief Executive's report in full does provide reasons for the zonings in each individual case.

44. Unlike *Christian v. Dublin City Council* [2012] IEHC 309, [2012] 7 JIC 2704 (Unreported, High Court, Clarke J., 27th June, 2012), this is not a case where the members went beyond the Chief Executive's recommendations and thus might have had to have a reason for doing so. There can be no legitimate expectation that lands will not be downzoned, even if you want to call this downzoning (which technically it isn't because the previous zoning didn't apply during the previous development plan). Thus, while it was certainly envisaged that a housing provision would come into effect after the end of the previous development plan, that did not amount to a legally binding representation or give rise to a legitimate expectation.

45. That is reinforced by an express qualification in the previous development plan to the effect that "[a]ny subsequent decision will be considered within the framework of regional population targets applicable at that time, the Core Strategy and the proper planning and sustainable development of Count Meath." The variation effecting the applicant's lands predated both the NPF and the RSES and consequently the council's statutory obligations to factor in those strategies only arose after the previous decision.

46. The applicants make a related point that the council allegedly made mistakes of fact relying on *Begum v. Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 WLR 388, *R (Manydown Ltd.) v. Basingstoke and Deane Borough Council* [2012] EWHC 977 (Admin), *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2019] EWCA Civ 1010, *R v. Camden LBC ex parte H* [1996] ELR 360, R (*A.S.K.) v. Secretary of State for the Home Department* [2019] EWCA 1239. In that regard it is suggested that there was a failure to consider the proximity of the applicants' lands to the town centre and to transport links. But it is implausible to suggest that the council was not aware of geographical factors of that nature given the maps that were part of the development plan.

47. It is claimed that the council purported to invoke a concept in the guidelines of the sequential approach, and that such a purported application does not make sense when one looks at the maps which show some of the applicant's lands close to the centre as not being zoned for residential purposes. But that mischaracterises the Chief Executive's report and takes the reference to the sequential approach out of context as an isolated sliver. If one looks at the whole report, it is clear the Chief Executive explains what she means.

48. Insofar as the report relates to the Silverstream lands, while she says that the lands are not sequentially preferable, she explains that by reference to their outer peripheral location. That is an adequate reason (see p. 140 of the Chief Executive's report).

49. The Crowe's lands are also stated to be not sequentially preferable, but that is explained not in terms of direct geography but by reference to those lands being a proposed site for a playground (see p. 142 of Chief Executive's report). Thus, the reference to the sequential approach in that particular context is not a denial or a mischaracterisation of the location of the lands relative to the centre, but impliedly a reference to there being objective reasons for departing from a purely distanced-based approach.

50. In relation to Haran's lands, the report (at p. 143) refers to them being located on the outer periphery of the settlement.

51. In relation to the Kilcock lands, the rationale for not designating them for pre-2027 development refers to inconsistency with the core strategy and the approach in the NPF and RSES and what are referred to as the Development Plan Guidelines 2020-2027. The applicants might view this as being a bit formulaic, but it is clear in context that it means that there is only so much housing allocation going around at the moment in accordance with the core strategy.

52. The reference to the Development Plan Guidelines 2020-2027 seems to be a reference to the draft new Development Plan Guidelines. If so, that is not quite the correct title, but that doesn't matter. I do not see any legal objection to a council referring to draft guidelines purely for guidance. Ultimately, the applicants' reading breaks off phrases in the Chief Executive's report from their complete context; and when one looks at these statements in context, reasons were provided in each case.

53. Insofar as it is asserted that there is no reference to certain lands being located within Kildare County or a failure to coordinate with Kildare County Council under s. 9(4) of the 2000 Act or otherwise, that has not been made out. There is specific reference in the plan to cooperation with Kildare County Council. The land use strategy for Kilcock refers to the areas within the development plan jurisdiction as being "the Meath environs of Kilcock" which implies that most of Kilcock is not in Meath. In any event, especially having regard to the maps included in the development plan, it is implausible to suggest that the council did not have regard to its own boundaries. Kildare County Council made a submission at the draft plan stage which doesn't indicate any inconsistency with what Meath County Council decided to do in this regard.

54. Insofar as it is claimed that there was a lack of proper regard to whether the Kilcock lands were suitable for housing, the suggestion is made that the council should not have raised a flooding concern. It seems to me that that again is within the realm of evaluative considerations where the council enjoys a margin of appreciation on a reasonableness standard. At the meeting of 6th February, 2021 the issue of the need for the council to address flood-related issues was raised and a requirement for further information was articulated. While the applicants contend that such further information had been provided, no such information was given as of the date of the special meeting of 6th February, 2021. The applicants may have been confused by a typographical error in the minutes which stated incorrectly that the meeting was held on 6th June, 2021 instead of 6th February, 2021. Ultimately the flooding argument like much of the applicants' argument is really a disguised complaint on the merits, dressed up as a complaint that the council did not take into account the applicants' contrary arguments.

Core ground 4 – SEA of Development Plan

55. Core ground 4 states as follows:

> "The Respondent erred in law and contravened the requirements of the Strategic Environmental Assessment (SEA) Directive (Council Directive 2001/42/EC), and national implementing legislation, in failing to carry out a complete Strategic Environmental Assessment of the Development Plan in circumstances where the Environmental Report contained lacunae and did not provide information on the likely significant effects on material assets due to the absence of an Infrastructural Assessment Report relevant to land use zoning and/or, due to the failure to produce the said Report and information on an Infrastructural Assessment, failed to provide effective public consultation in the manner envisaged by the SEA Directive."

Law in relation to SEA of Development Plan

56. Article 3 of the SEA directive states in pertinent part:

> "Article 3
> Scope
> 1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public."

57. Article 4 states:

"Article 4
General obligations
1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

2. The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3)."

58. Article 5 of the SEA directive provides as follows:

"Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I."

59. Article 6 provides:

"Consultations

1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

60. Articles 8 to 10 provide:

"Article 8

Decision making

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

Article 9
Information on the decision
1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States.

Article 10
Monitoring
1. Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

2. In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring."

61. Annex 1 of the Directive provides:

"Information referred to in Article 5(1)
The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects(1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;

(j) a non-technical summary of the information provided under the above headings."

62. SEA in the context of making the development plan is implemented *inter alia* in regs. 13A to 13R of the Planning and Development Regulations 2001 as inserted by the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011 (S.I. No. 201 of 2011).

63. Regulation 13C requires a draft Development Plan to be accompanied by an environmental report.

64. Regulation 13E prescribes the content of the environmental report. Paragraph (1) requires the information in Schedule 2B to the 2001 regulations. Regulation 13H requires regard being had to the environmental report and submissions made during the process of adopting the development plan.

65. Under reg. 13I, when the council gives notice of making of the development plan under s. 12(12) of the 2000 Act, it is required to issue a statement which is in essence the culmination of the SEA process summarising the following:

"(a) how environmental considerations have been integrated into the plan,

(b) how

(i) the environmental report prepared pursuant to article 13C,

(ii) submissions and observations made to the planning authority in response to a notice under section 12(1) or (7) of the Act, and

(iii) any consultations under article 13F.

have been taken into account during the preparation of the plan.

(c) the reasons for choosing the plan, as adopted, in the light of the other reasonable alternatives dealt with,

and

(d) the measures decided upon to monitor, in accordance with article 13J, the significant environmental effects of implementation of the plan."

66. Regulation 13J requires monitoring of the significant environmental effects of the plan.

67. Schedule 2B of the 2001 regulations sets out the required contents of the environmental report:

"Information to be contained in an environmental report
Articles 13E, 13N, 14D, 15D and 179C
The following information shall be included in an environmental report—

(a) an outline of the contents and main objectives of the plan or programme and relationship with other relevant plans;

(b) the relevant aspects of the current state of the environment and the likely evolution

thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to the Birds Directive or Habitats Directive;

(e) the environmental protection objectives, established at international, European Union or national level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets,

cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring of the significant environmental effects of implementation of the plan or programme;

(j) a non-technical summary of the information provided under the above headings."

68. As appears from this list, the matters to be addressed include the question of alternatives.

69. There is a somewhat more explicit obligation regarding alternatives under the SEA directive than was provided for under the 2011 EIA directive: see *Holohan v. An Bord Pleanála* [2017] IEHC 268, [2017] 5 JIC 0403 (Unreported, High Court, 4th May, 2017), Lord Carnwath in *R. (HS2 Action Alliance Ltd.) v. Secretary for State for Transport* [2014] UKSC 3 (at para. 44).

70. The European Commission document, *Implementation of directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment* states as follows:

"Alternatives
5.11. The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12. In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the drafted plan or programme and for the alternatives. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they not are considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I (b) on the likely evolution of the current state of the environment without the implementation of the alternative. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.

5.13. The text of the Directive does not say what is meant by a reasonable alternative to a plan or programme. The first consideration in deciding on possible reasonable alternatives should be to take into account the objectives and the geographical scope of the plan or programme. The text does not specify whether alternative plans or programmes are meant, or different alternatives within a plan or programme. In practice, different alternatives within a plan will usually be assessed (e.g. different means of waste disposal within a waste management plan, or different ways of developing an area within a land use plan). An alternative can thus be a different way of fulfilling the objectives of the plan or programme. For land use plans, or town and country planning plans, obvious alternatives are different uses of areas designated for specific activities or purposes, and alternative areas for such activities. For plans or programmes covering long time frames, especially those covering the very distant future, alternative scenario development is a way of exploring alternatives and their effects. As an example, the Regional Development Plans for the county of Stockholm have for a long time been elaborated on such a scenario model.

5.14. The alternatives chosen should be realistic. Part of the reason for studying alternatives, is to find ways of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. Ideally, though the Directive does not require that, the final draft plan or programme would be the one which best contributes to the objectives set out in Article 1. A deliberate selection of alternatives for assessment, which had much more adverse effects, in order to promote the draft plan or programme would not be appropriate for the fulfilment of the purpose of this paragraph. To be genuine, alternatives must also fall within the legal and geographical competence of the authority concerned. An outline of the reasons for selecting the alternatives dealt with is required by Annex I (h)."

71. The Court of Appeal recently noted in *Friends of the Irish Environment CLG v. Government of Ireland* [2021] IECA 317, [2021] 11 JIC 2603 (Unreported, Court of Appeal, Costello J. (Haughton and Murray JJ. concurring), 26th November, 2021), at para. 171, that the information to be given in the SEA report is that referred to in Annex 1 which may reasonably be required.

72. Costello J. went on to say that "[i]t is a question of degree as to the level of detail which must be provided. The Commission Guidance document notes at para. 5.16:- "The reference to 'contents and level of detail in the plan or programme' is a recognition that, in the environmental report for a broad-brush plan or programme, very detailed information and analysis may not be necessary, (for example, a plan or programme at the top of a hierarchy which descends from the general to the particular); whereas much more detail would be expected for a plan or programme that itself contained a higher level of detail. All that is absolutely required by the Directive is that the information be that identified in Annex I."

73. Neither the directive itself nor Irish implementing legislation specifically require an infrastructure assessment report. The purpose of SEA is the assessment of the likely significant effects on the environment of implementing a proposed plan or programme and its

reasonable alternatives. While "effects" includes effects on material assets, that does not require complete survey of all elements of the material assets of the lands in question whether been changed by the plan or not. Indeed, a specific assessment of all land holding subject to zoning in the plan would contradict the "strategic" nature of the assessment.

Application of law to the facts

74. Insofar as there is no micro-specific survey of the infrastructure in any particular piece of land, that is not required by the SEA directive. Insofar as more broadly it is claimed that the lack of assessment of effects on material assets in particular due to the lack of an infrastructure assessment report amounted to a breach of the directive or implementing legislation, the situation is that material assets are dealt with in detail in the SEA report, in particular in s. 5.7, Table 6.1, Table 7.3, Table 8.1, Table 8.4, s. 8.7, Table 8.5 and s. 9.8.6.

75. In all the circumstances there was no failure on the part of the council to comply with its obligations under the SEA directive including in relation to the requirement for public participation.

Remedies

76. Even if, counterfactually, the council's decision here was flawed, there would be a particular problem related to the grant of *certiorari* here, which is that the applicants have only sought *certiorari* of the particular part of the plan that relates to their own lands, thus leaving unchallenged the core strategy which ensures compliance with national and regional policy by providing an allocation of residential provision and a hierarchy for distributing that throughout the county. Granting the relief sought would still leave the rest of the plan in place including housing allocations which have already been spoken for. That would not achieve anything. That is what one could call a *Bush v. Gore* 531 US 98 (2000) problem. It is not appropriate to cherry-pick parts of a process that suit you to challenge, leaving other parts conveniently unchallenged, if that creates a problem in terms of the process hanging together as a holistic totality. A court should not be tempted down that road merely by the possibility (which doesn't arise here) that some individual part of the process has gone wrong. If that is to be corrected, an applicant must face up to, and factor in, the ramifications that correcting that part would have on the rest of the process and the entire procedure overall. These applicants haven't done that.

Order

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

(i). that the proceedings be dismissed;

(ii). that the matter be listed for mention on Monday the 11th day of of July, 2022 to deal with any consequential matters.