THE HIGH COURT

PLANNING AND ENVIRONMENT

[2024] IEHC 186

Record No. 2022/148 JR

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN:

PAUL MURPHY, CONNOR RICHARDSON, BARBARA SCULLY, ANN LEHANE, ANNE MARIE KEADY, JAMES HEDDERMAN, COLIN RIORDAN, TED MCENERY, RONNIE HAY, HARRY CROWE

Applicants

AND

AN BORD PLEANÁLA

Respondent

AND

CLONKEEN INVESTMENTS DAC

Notice Party

Judgment of Ms. Justice Emily Farrell delivered the 30th day of August 2024:

INTRODUCTION

1. The Applicants seek an order of *certiorari* quashing the decision of An Bord Pleanála dated 23rd December 2021 (ABP Ref. 311329) granting planning permission to the Notice Party, Clonkeen Investments DAC ('the developer') in respect of 299 residential units, comprising 60 duplex units and 239 apartments, and a separate single storey childcare facility, together with associated works, on a site adjoining Clonkeen College, Blackrock, Co. Dublin. The site is owned by the Congregation of Christian Brothers but is subject to a contract for sale to the developer, the completion of which is contingent on the grant of planning permission. The application site is irregular in shape and has a stated area of over 3 hectares.

2. The application for permission was made by the developer on 8th September 2021 with the consent of the Congregation of Christian Brothers. Clonkeen College continues to occupy and use the remainder of the lands owned by the Congregation of Christian Brothers. The application was made and determined under the Strategic Housing Development procedure, which has since been repealed.

3. Ninety-two observations were received, including from each of the Applicants and the Department of Education, which made certain recommendations in the event that the Board granted permission. The Chief Executive of Dun-Laoghaire Rathdown County Council, the relevant planning authority, recommended refusal of the application.

4. The Board's Inspector recommended that the permission be granted, subject to 25 conditions. The Board did not disagree with any part of the Inspector's Report, and expressly noted and agreed with the Inspector's findings that the proposed development would not give rise to a material contravention of the Development Plan in respect of height, carparking, dual aspect, density or institutional lands. As appears from the Board Direction dated 20th December 2021 and the Board Order dated 23rd December 2021, the Board granted permission for the development the subject matter of these proceedings, generally in accordance with the Inspector's recommendation. The Board granted permission subject to the substantially the same conditions as those recommended by the Inspector; proposed condition 25 was omitted and conditions 5 and 11 had not been recommended by the Inspector. The Inspector, and the Board, did not accept the recommendation of the Department of Education that part of the development should be stepped back further from the school. The application was determined by the Board on 23rd December 2021 under the Dun Laoghaire Rathdown County Development Plan 2016 – 2022, which was in effect at that time.

The Issues

5. The Applicants rely on eight core grounds, which are particularised in the Amended Statement of Grounds filed the 1st March 2022. Statements of Opposition and written submissions were filed by both the Board and the developer, but the developer did not take part in the hearing.

6. The Core Grounds can be summarised as follows:
   - **Core Ground 1:** Alleged material contravention of Policy SIC8, Section 8.2.12.4 & Zoning Objective A of the Development Plan;
   - **Core Ground 2:** Alleged material contravention of Policy OSR 11 and Policy RES5/ Institutional and Sport Grounds Policies;

- **Core Ground 3:** Alleged material contravention relating to car parking;
- **Core Ground 4:** Alleged material contravention in relation to residential density and/or misinterpreted the Apartment Guidelines 2018 and/or the Sustainable Development in Urban Areas Planning Guidelines 2009;
- **Core Ground 5:** Alleged material contravention relating to building height;
- **Core Ground 6:** Alleged material contravention in relation to unit mix;
- **Core Ground 7:** Alleged breach of Article 301(3) of the 2001 Regulations and
- **Core Ground 8:** Challenge to the Appropriate Assessment, in particular relating to the adequacy of the NIS and consideration of the Chief Executive's Report.

7. As the issues relating to Institutional Lands, the INST symbol or designation on the Maps and Policy OSR11 have the potential to affect my decision in relation to other Core Grounds, I shall address Core Ground 2 first.

CORE GROUND 2 - Institutional Lands / INST designation and Policy OSR11

8. The Board accepted the Inspector's findings and concluded that the permission granted did not materially contravene the Development Plan in relation to institutional lands and that Policy RES5 did not apply as the lands were not subject to the INST designation on the zoning map. It was also found that, as the community use of the lands had ceased a number of years prior to the determination of the application, OSR11 did not apply.

9. The Applicant contends that the proposed development materially contravenes the objectives of the Development Plan, in particular RES5: Institutional Lands and OSR11 and that the Board's decision failed to provide reasons, or adequate reasons, for concluding that the proposed development did not materially contravene the Development Plan in relation to Policy RES5 and OSR11. The Board states, in its Statement of Opposition, that the development site is not zoned for institutional use, nor does it contain an institutional or INST Designation under the Development Plan.

10. The dates which are relevant to determining the existing use of the lands in order to consider whether the policies in the Development Plan apply are the following:
    - Development Plan made – 17th February 2016
    - Development Plan came into effect – 16th March 2016
    - Intention to sell the site disclosed publicly – May 2017

- Fence erected between the site and the lands which remain in use as playing fields for Clonkeen College – August 2019
- SHD application submitted to An Bord Pleanála – 8th September 2021
- Inspector's Report – 17th December 2021
- Order made by An Bord Pleanála – 23rd December 2021

Importance of INST Designation

11. The lands are within an area marked on the Map as having Zoning Objective A – "*To protect and-or improve residential amenity*." (Zoning is considered further below, under Core Ground 1.) The key to Map 7, which includes the site in issue, states that "INST" signifies means "*To protect and/or provide for Institutional Use in open lands*". This is included in the list of Other Objectives rather than Use Zoning Objectives. This symbol is not used on Map 7 on any part of the lands owned by the Congregation of Christian Brothers the subject of these proceedings.

12. As the Board noted, in its Statement of Opposition, it would have been open to the Planning Authority to have zoned the site Zone F – "*To preserve and provide for open space with ancillary active recreational amenities*." However, this was not done.

13. The Written Statement provides, at Section 1.1.4.3, that where any potential conflicts arise between the Written Statement and County Maps "*the Written Statement shall prevail*".

14. Unlike zoning, neither Policy RES5 nor Section 8.2.3.4 of the Written Statement refer to the Maps generally, nor to the INST symbol or designation. In contrast, Section 8.3.1, which provides for Zoning, incorporates both the letter of the zone and respective colour on the Map into the Written Statement. The Written Statement requires the Maps to be examined to ascertain what is the zoning objective of lands. Section 8.3.1 provides:

    "*8.3.1 Purpose of Use Zoning Objectives*

    The purpose of land use zoning is to indicate the planning control objectives of the Council for all lands in its administrative area. Eighteen such zones are indicated in this Plan…. They are identified by letter and colour on the Development Plan Maps…."

15. Policy RES5 is set out at Section 2.1.3.5 of the Development Plan, as follows:

"*2.1.3.5* ***Policy RES5: Institutional Lands***

Where distinct parcels of land are in institutional use (such as education, residential or other such uses) and are proposed for redevelopment, it is Council policy to retain the open character and/or recreational amenity of these lands wherever possible, subject to the context of the quantity of provision of existing open space in the general environs.

It is recognised that many institutions in Dún Laoghaire-Rathdown are undergoing change for various reasons. Protecting and facilitating the open and landscaped 'parkland' settings and the activities of these institutions is encouraged. Where a well-established institution plans to close, rationalise or relocate, the Council will endeavour to reserve the use of the lands for other institutional uses, especially if the site has an open and landscaped setting and recreational amenities are provided. Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the zoning objectives of the area and the open character of the lands being retained. … In cases of rationalisation of an existing institutional use, as opposed to the complete cessation of that use, the possible need for the future provision of additional facilities related to the residual retained institutional use retained on site may require to be taken into account. (This particularly applies to schools where a portion of the site has been disposed of but a school use remains on the residual part of the site.)"

16. At Section 8.2.3.4 (ix), under the heading "*Additional Accommodation in Existing Built-up Areas*", the Plan refers to Institutional Lands, which are not defined by reference to the INST designation on the Maps or otherwise. It states:

"*Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the area's zoning objectives and the open character of the lands being retained. There are still a number of large institutions in the established suburbs of the County which may be subject to redevelopment pressures in the coming years. The principal aims of any eventual redevelopment of these lands will be to achieve a sustainable amount of development while ensuring the essential setting of the lands and the integrity of the main buildings are retained. In order to promote a high standard of development a comprehensive masterplan should accompany a planning application for institutional sites. …*

In addition to the provision of adequate open space, on Institutional Lands where existing school uses will be retained, any proposed residential development shall have regard to the future needs of the school and allow sufficient space to be retained adjacent to the school for possible future school expansion/ redevelopment."

17. Institutional Lands are also considered at Section 8.2.8.2 under the headings "Public /Communal Open Space – Quantity." and (i) Residential /Housing Developments":

"*... It is Council Policy to retain the open space context of Institutional Lands which incorporate significant established recreational or amenity uses, as far as is practicable. In the event of permission for development being granted on these lands, open space provision in excess of the normal standards will be required to maintain the open character of such parts of the land as are considered necessary by the Council. For this purpose a minimum open space provision of 25% of the total site area - or a population-based provision in accordance with the above occupancy criteria – will be required, whichever is the greater. There may also be a requirement to provide open space in excess of the 25% if an established school use is to be retained on site in order to facilitate the future needs of the school (refer also to Section 8.2.3.4(xi)).*"

18. The Inspector noted, at para. 12.2.11 of her Report that "*policy RES5: Institutional Lands and section 8.2.3.4 in the Development Plan refer to parcels of land in institutional use, rather than lands with an institutional objective*." She placed reliance on the Report of the Chief Executive which considered the application under Section 8.2.3.4 (vii) Infill rather than (xi) Institutional Lands. The Chief Executive did not consider Policy RES5 8.2.3.4(xi).

19. The Inspector concluded:

"*In my view, the policies applicable to Institutional lands apply to those lands with an INST (institutional lands) objective under the Development Plan. It is clear that the site formally had such an objective under historical plans, and this was intentionally removed under the current Development Plan.*" (Section 12.2.11)

20. The Board has exhibited the Map 7 of the previous development plan, which includes the INST symbol on the relevant lands. However, as Simons J. held in *Redmond v. An Bord*

Pleanála [2020] IEHC 151, it is not appropriate to have regard to an earlier development plan in interpreting the applicable development plan.

21. The Inspector also considered this issue at Section 12.9, in which she assessed whether there was a material contravention of the Development Plan by reference to Institutional Lands. The Inspector noted that the developer had acknowledged that the previous active use of the lands was institutional in nature and that a potential material contravention arose. The Inspector found that there was no such material contravention, stating that "*the designation of the INST objective over a site is fundamental to the application of policies and objectives under the Development Plan regarding institutional lands and this is supported by the approach taken by the Planning Authority. However, I acknowledge that policy RES5 relates to lands in institutional 'use', specifically educational use.*"

22. At para. 12.9.23 she stated:

> "*The objective for INST lands is 'to protect and provide for Institutional Use in open lands'. Which reflects the same reference to 'use' as in policy RES5. Therefore, in my view, it is not necessarily the case that the wording in policy RES5 is intended to apply to any building or site in what might be considered an institutional use, but that the reference to institutional use relates back to the wording of the objective for the INST designation under the plan. The reference to 'use' in the policy wording however does give rise to ambiguity in my view, as to whether the policy applies solely to a site's use or to sites with an INST objective. Institutional uses are not defined under the plan, and if application was to be expanded beyond areas with an INST objective, this could lead to further ambiguity in my view, for those sites/ buildings that do not neatly fit the idea of 'institutional' (given this is an undefined term in the plan) particularly in relation to the different kinds of residential uses that might be considered institutional residential uses.*"

23. In so concluding, the Inspector has given greater weight to the absence of the INST symbol on the Map than the actual use of the lands at the time the Development Plan was made. A conclusion that the RES5 applies only to lands which have the INST designation on the map is not supported by the terms of the Written Statement and is incompatible with Section 1.1.4.3 of the Written Statement which provides that it takes precedence over the Maps where there is an inconsistency.

24. This is also evident from *Redmond v. An Bord Pleanála*, which related to the institutional use of lands under the same Development Plan. At para. 36, Simons J. held, referring to the INST symbol:

> "*… The stated objective is to protect and/or provide for institutional use in open lands. This is underscored by the relevant provisions of the written statement of the development plan, in particular at §2.1.3.5 (Policy RES5: Institutional Lands) and §8.2.3.4 (xi) (Institutional Lands), which expressly refer to the "open character" of the lands. It is the stated policy of the planning authority to retain the open character and/or recreational amenity of institutional lands wherever possible. It would be entirely inconsistent with these objectives to interpret Map 1 as confining the designation to the depicted buildings or structures within the immediate vicinity of the "INST" symbol. To do so would exclude the open lands, which are the very thing to which the development plan objectives and policies are directed."*

25. I am not persuaded by the Board's argument that Simons J. found that the INST designation on the Map to be the trigger for the policy relating to lands in institutional use. The question whether the absence of an INST symbol on the Map is critical to the application of the policies in the Written Statement was not in issue in *Redmond*, nor was it determined in *Jennings v. An Bord Pleanála* [2023] IEHC 14.

26. The judgment in *Redmond* does not support the contention by the Board and the developer in this case, that as the INST symbol is not included on the lands in Map 7, the provisions of the Development Plan which relate to lands in institutional use, including Policy RES5 and Section 8.2.8.2, do not apply to the site.

27. Simons J. found that the starting point for determining whether the site the subject of the application is subject to the institutional lands designation is the Written Statement (para. 30). The policies and objectives are those which apply to lands in "institutional use" or "institutional lands". Simons J. held that the intelligent reader would *subsequently* turn to the Maps which set out a graphic representation of zoning and other objectives contained in the Written Statement. He noted that there was a slight difference in the language used in the Written Statement and the legend to the Map. The legend states "*To protect and/or provide for Institutional Use in open lands*" for INST. Simons J. considered whether the

INST designation, and protection conferred by the policies and objectives relating to lands in institutional use, applied to the entire site. He found that it would be illogical to exclude the "open lands" to the south-west of the site which remained in the ownership of the religious congregation when the development plan came into effect as the "open character" of the lands was "*the very thing to which the objectives and policies are directed*". (para. 46(2). He also found that, given the way the INST symbol varies throughout the map, an intelligent reader would assume that the precise location of the symbol within an overall landholding was not intended to be determinative. (para. 46(3).) It does not follow that the absence of INST in a particular landholding overrides the policies and objectives in the Written Statement which apply to "*parcels of land in institutional use (such as education, residential or other such uses)*". The interpretation of the development plan in relation to lands which are in institutional use, but which are not marked with "INST" on the Map was not raised in *Redmond*, nor was it considered in *Jennings v. An Bord Pleanála* [2023] IEHC 14, in which case Holland J. also considered lands in institutional use and the INST designation in relation to the Dun Laoghaire Rathdown County Development Plan 2016 - 2022.

28. I am satisfied that a reasonably informed intelligent person with no particular expertise in law or town planning would conclude that the lack of the INST symbol on the Map over lands which were actually in institutional use when the Plan was made does not disapply the policies in the Development Plan which apply to lands in institutional use, including Policy RES5. As already noted, the Written Statement explicitly provides that it shall prevail if there is a conflict between it and the Maps. Whilst such a person might expect to see INST marked on lands which were in institutional use when the Plan was made, its absence does not render the objectives and policies in respect of such lands inapplicable.

29. The Applicants rely on *Redmond v. An Bord Pleanála* [2020] IEHC 151, *Clonres v. An Bord Pleanála* [2021] IEHC 303 and *Jennings v. An Bord Pleanála* [2023] IEHC 14 and submit that the relevant date for assessing the use of the lands was the date of the making of the Development Plan i.e. 17th February 2016. The Plan entered into effect on 16th March 2016. The Board submits that the principles in *Jennings*, *Redmond* and *Clonres* apply only to specific designation or zoning in a Development Plan and it is the use at the time of the application or decision which is relevant where there has been a change of use on the ground between the coming into force of the Plan and the making of the application for permission,

or its determination. Nothing of significance to the proceedings occurred between the adoption and coming into force of the Development Plan or whilst the application was before the Board.

30. There is no dispute regarding the use of the lands prior to the erection of the fence in August 2019. When the Development Plan was made and came into effect, the lands were used as sports fields by both the school and the community, and they continued being used for those purposes until the fence was erected. It is therefore not in dispute that the lands were actually in institutional use when the Development Plan came into effect on 16th March 2016, although it is equally clear that they were no longer used for those purposes when the application was made.

31. It was accepted by the developer that "*the previous active use of the lands was institutional in nature*" and the policies and objectives in relation to institutional lands are considered in the Material Contravention Statement on that basis. In the Material Contravention Statement, which is dated September 2021, it is stated that the site was "*currently vacant*" and was inaccessible by the general public.

32. The Statement of Consistency states:

> "*We note that the previous* Development Plan *(2010-2016) included a formal 'INST' objective at the subject lands. This formal 'INST' designation was removed under the current* Development Plan. *However the former use of the lands were institutional in nature and are considered in the event that the Board may consider that it does in fact apply, out of an abundance of caution. We note that the site, which is currently vacant, is not accessible to the general public.*"

33. In the instant case, the site the subject of the application ceased to be available for sports use connected with the school, and by the community more generally, upon the erection of the fence in August 2019. The SHD application was made in 2021.

34. In *Redmond,* Simons J. considered the date at which the use of the lands must be assessed. He rejected the argument that the extent of the lands subject to the institutional lands designation should be determined by reference to the use of the lands on the date of the application for permission. As in this case, the lands were in institutional use when the

Development Plan came into effect in March 2016. In *Redmond,* the Congregation subsequently sold the lands to the notice party who applied for permission to develop the site. It was argued by the developer that the lands were no longer available for institutional use once they had been sold. The Board had made a more nuanced argument – contending that the cessation of institutional use arose by reason of the relocation of the primary school and the alleged cessation of use of the hockey pitch.

35. In interpreting and applying the Development Plan, the relevant use is the use of the lands on the date on which it was made. In *Redmond,* Simons J. held that the policies and objectives in the Development Plan cannot be by-passed by the simple expedient of the sale of the lands and transfer of the ownership of the lands subject to the institutional lands designation from the religious congregation to the developer in October 2017. Holland J. confirmed, in *Jennings,* that for the purposes of any planning application considered under the 2016 Development Plan, the established use of the site (which was not the subject of a separate planning permission) was for sports and recreation. He also held that the Plan speaks of the lands in their condition at the time it took effect. As the Board acknowledges in its written submissions, Holland J. found in *Jennings* that a change in the '*on the ground*' use of the lands post the making of the development plan could not displace the application of specific policies.

36. As Simons J. held, at para. 56,

> "*This established use and designation is not lost by dint of a transfer of ownership. Rather, it remains until such time as planning permission is granted for an alternative use, such as, for example, residential use. The relevant development plan policies are precisely intended to regulate the circumstances in which such a change in use might be authorised. It is illogical to say that those policies did not bite on the planning application in the present case, an application which sought planning permission to do the very thing which the development objectives are designed to regulate, i.e. to change the authorised use from institutional use to residential use.*"

37. In *Jennings,* Holland J. held that the error identified in *Redmond* had been repeated; the Inspector had deemed events which occurred after the Development Plan had been made as relevant to the designation, character and status of the lands in planning policy as identified in the Development Plan. Holland J. stated:

"*Subsequently created "facts on the ground" can be recognised in planning decisions by appropriate means (for example, by material contravention procedures). Possibly (I do not so decide) such "facts on the ground" may also affect the weight to be given to objectives and designations set out in a development plan. But they cannot alter the interpretation of the Development Plan and its application to lands designated by it – any more than did the sale to the developer. That would be a recipe for evasion of the Development Plan*." (para. 168)

38. The site, which was attached to the school and was part of its grounds, was used as playing fields when the Development Plan was made and that use continued until the fence was erected in August 2019. There is no dispute regarding the open character of the lands or the recreational amenity of the lands at the time the Development Plan was made, nor as to the extent of the planning unit; no finding was made on those issues by the Inspector or the Board.

39. In its written submissions, the developer refers to para. 59 of *Redmond,* in which Simons J. noted that it remains open to the new owner of a site to apply to the planning authority to have the status of the lands changed as part of the new development plan cycle. There is no evidence to suggest that this occurred in this case.

40. A development plan is not to be interpreted by reference to a previous plan. This is clear from *Redmond v. An Bord Pleanála* [2020] IEHC 151 and accords with section 10(8) of the 2000 Act. In *Redmond* Simons J. found, and I agree, that a development plan cannot be interpreted by reference to an earlier development plan or documents leading to the making of that plan. As a development plan must interpreted as it would be interpreted by a reasonably intelligent informed lay person, it is unreasonable to presume knowledge of a previous development plan. I also agree with Simons J. that to require the public to study previous plans to identify current planning policy would be inconsistent with the right to effective public participation, as required by EU and national law. The Inspector was not entitled to rely on the fact that the INST designation appeared on the previous development plan to find that it had been intentionally removed from the applicable plan. The existence of the INST designation in the previous plan and its absence in the applicable plan does not support a conclusion that the policies in the Written Statement which apply to lands in

institutional use apply only to lands which have the INST designation on the maps. Such a conclusion fails to give the priority which Section 1.1.4.3 of the 2016 Plan affords the Written Statement where a conflict exists between it and the County Maps. I do not regard the absence of INST on the site on the Map to be sufficient to take the lands outside the scope of RES5 and Section 8.2.3.4(xi) of the Development Plan.

41. The fact that lands were zoned A, '*To protect and/or improve residential amenity'*, in the 2016 Development Plan did not alter the established or authorised use of the lands. The A-zoning indicates that residential use and open space, among other uses, are permitted in principle. Zoning does not operate in the same manner as a permission granted. This is clear from the authorities, including *Redmond* and *Clonres v. An Bord Pleanála* [2021] IEHC 303.

42. The facts in *Clonres* were somewhat different from the instant case; not only did a different development plan apply, but the change of ownership of the site from the religious congregation who had owned St. Paul's school and the separation of the site from the school grounds had occurred prior to the making of the relevant development plan. However, Humphreys J. found that the fact that the change of ownership had occurred prior to the development plan being made was irrelevant. He also found that interpreting the word "use" in the development plan as meaning the *de facto* existing use on the ground is incorrect. I agree with the finding of Humphreys J. that "*There is a fundamental distinction between cessation of a use in practice at a particular time and the formal abandonment of a use on a permanent basis, which in a situation like this would normally arise where planning permission for some inconsistent use or development was granted*.". (para.37)

43. I find that the Inspector, and the Board have erred in law in relying on the fact that the lands were no longer being used for reasons related to the school when the SHD application was made, rather than considering the established use of the lands at the time the policies and objectives were set out in the Development Plan. The Inspector and the Board were not entitled to rely on the *de facto* situation on the ground instead of the established use which use enures for the benefit of the lands, in applying the policies and objectives of the Development Plan.

44. In this case, for the purposes of considering the Development Plan and the application of the policies contained therein, the established use at the time the Plan was made was recreational and community use, ancillary to the school. Therefore, I consider that these lands were in institutional use, and as previously noted, the fact that they were open lands was not in issue.

45. The Inspector noted that other lands which were currently in institutional use and which were also zoned residential had an INST designation on the map, at para. 12.2.24. However, for the reasons set out above, I do not consider that the absence of the INST symbol on the site is indicative of a decision by the planning authority not to apply the policies contained in particular in RES5 to the lands. The Inspector also had regard to the absence of PS or PPS designation on the Map, and found that this, together with the absence of INST on the map indicates that the planning authority did not highlight a need to preserve the school site or its grounds. As the index clearly states, PS and PPS designation applies to proposed schools – "*To provide for a Primary School*" and "*To provide for a Post-Primary School or other Institution*". This is considered further at para. 94 below. There is nothing in the Development Plan to indicate that the planning authority has identified or reserved any portion of the lands owned by the Congregation of Christian Brothers a potential school sites for new schools. There is no conflict between the Map and the Written Statement in that regard.

46. Whilst the Inspector found that there was no material contravention with respect to institutional lands for the reasons set out in her Report, specifically the lack of INST symbol over the site, she also stated, at para. 12.9.24, that if the Board disagreed and found that there was a material contravention in that respect, it could be justified. As the Board expressly agreed with the Inspector's conclusion that the proposed development would not be a material contravention of the Development Plan in respect of institutional lands, the Inspector's justification is not relevant to the proceedings.

47. When the Development Plan was made the site the subject of this application was part of the site used by Clonkeen College for educational and ancillary sporting uses. Accordingly,

I am satisfied that the entire site was in institutional use when the Plan was made, and that it continues to have that use for planning purposes. As is clear from *Redmond* and *Jennings*, neither a change in ownership nor, the cessation of actual use of the lands subsequently, and in this case the erection of the fence, after the Plan was made is relevant to the interpretation of the Development Plan. The Board was not entitled to rely on the *de facto* situation on the ground rather than the established use which continues to apply to the lands when applying the policies in the Development Plan until permission is granted for an alternative use. The fact that the Map did not contain the INST designation did not undermine or alter the existing use of the lands for planning purposes. The Board erred in finding that the policies in the Development Plan applicable to lands in institutional use, in particular RES5 and Section 8.2.3.4(xi), were not relevant to the application.

Policy OSR11

48. The Applicants contend that the Board erred in disapplying Policy OSR11 on the grounds that in planning terms, the use of the lands retained a community use despite the *de facto* cessation of that use in August 2019 when a fence was erected to separate the application site from the remainder of the lands at Clonkeen College. The lands were used by local sports clubs with the consent of the school.

49. The local planning policies identified under the General Heading of "*Relevant Planning Policy*" at para. 6 of the Inspector's Report identified OSR11. Policies regarding Open Space and Recreation are set out at Section 4 of the Written Statement, which policies include Policy OSR11 at section 4.2.2.10.

50. Section 4.2.2.10 provides:

> "4.2.2.10 Policy OSR11: Protection of Sports Grounds/Facilities
>
> ***It is Council policy to ensure that adequate playing fields for formal active recreation are provided for in new development areas and that existing sports facilities and grounds within the established urban area are protected, retained and enhanced – all in accordance with the outputs and recommendations from the Open Space Strategy 2012-2015.***

... Within the established urban areas of the County, however, the lack of available sites means that new opportunities for recreational facilities (i.e. large playing pitches) are extremely limited. It is therefore necessary to seek to retain facilities in their current locations where they are of most value and accessible to the community being served. There will be a general presumption against proposals involving development of playing fields unless:

> *• The proposed development is ancillary to the use of the site as a playing field (e.g. new changing rooms) or caretakers accommodation and does not adversely affect the quantity or quality of pitches and their use. Plan*
>
> *• The proposed development only affects land which is incapable of forming a playing pitch (or part of one).*
>
> *• The playing fields that would be lost as a result of the proposed development would be replaced by a playing field or fields of equivalent or better quantity and quality and in a suitable location.*
>
> *• The proposed development is for an outdoor or indoor sports facility of sufficient benefit to the development of sport to outweigh the loss of the playing field(s).*

Given the Council's policy to ensure that existing sports facilities and grounds within the established urban area are protected, retained and enhanced, it is recognised that development in the immediate environs of these facilities and grounds may have adverse implications for the achievement of this policy objective. Where, therefore, development is proposed within 10m of such a facility/grounds there will be an obligation on the developer to undertake such protective measures, as are deemed necessary by the Council, to ensure that the subject development will not interfere with the operational capacity of the sports facility/sports grounds to fulfil it's recreational/amenity function."

51. While Policy OSR11 was not specifically identified in the submissions made to the Board, the submission by the sixth Applicant included details of the nature of the pitches which were accommodated on the site, and the local sports clubs which used the site prior to August 2019. It was also submitted that:

"*Representatives of the above-mentioned sports clubs and others will attest that there is a chronic shortage of playing pitches in the Dun-Laoghaire-Rathdown area. The high cost of land in South Dublin precludes the acquisition of additional playing pitches by sports clubs and clubs have been forced to travel to venues as far afield as Abbottstown for training and matches. At current growth rates clubs may have to place a cap on youth membership…. The development of this land will deprive the local community of vital sporting infrastructure.*"

52. Similar submissions were made by the fifth Applicant and her husband, who also submitted a photograph of the school sports day in 2017. Therefore, it is clear that the use of the lands for community sports use was in issue before the Board.

53. The Inspector considered Policy OSR11 and stated that, prior to the segregation of the subject site from the wider Clonkeen College lands, it was in use as part of the sports grounds for the school, which were made available for wider community use. In accepting the Inspector's Report, the Board also accepted that the lands had been in community use prior to August 2019 when they were separated from the remainder of the lands at Clonkeen College by a fence.

54. At para. 12.2.35 of her Report, the Inspector decided that Policy OSR11 did not apply, stating:

"*The site is not in formal community use, and as set out above, the proposed residential and creche use on the site is in conformity with the land use zoning. Therefore, policy OSR11 does not apply in my opinion, as the subject site has not been in community use for a number of years. While the previous use of the site included community use of the sports pitches, this has ceased for an extended period, the site is zoned residential use and it is not subject to an institutional land objective. The adjacent school site also retains a sports pitch, albeit reduced in size*."

55. At para. 12.11.13, the Inspector noted the concerns of the third parties regarding the loss of the sports pitches to the school and the wider community. She stated:

"*the subject site is zoned for residential development and there is no planning policy framework to require recreational or community use of the site. I also note that the subject site has ceased use as a sports pitch for a number of years prior to the*

submission of this application. There is clearly a desire from third parties that the Board respond to the morality of the loss of the subject site from the school and as a community asset in terms of recreational use; however, the assessment of this application is confined to a planning policy framework and there is no policy that secures that former use of the site."

56. For that reason, neither the Inspector, nor the Board assessed whether the proposed development was one which should be permitted notwithstanding the Policy OSR11, and particularly whether the general presumption referred to therein applied or was rebutted.

57. The autonomous duty of the Board to consider whether there is a material contravention of a development plan presupposes an obligation to interpret the development plan in accordance with law. The Chief Executive did not contend that Policy OSR11 applied, interpretation of the Development Plan is a matter of law – therefore, whilst the opinion of the Chief Executive is one to which the Board must have regard and which the court may consider, deference is not due to the planning authority on issues of law. An appellate court does not defer to a first instance court on questions of law: *Minogue v. Clare County Council* [2021] IECA 98, para. 100. In judicial review, as on appeal, the court makes its own decision on issues of law – deference is not due to administrative decision-makers, even those with particular expertise, on questions of law.

58. For the reasons set out above, at paras. 35-47 I find that the relevant use is the established use of the lands at the time the Development Plan was made and came into effect – in this case, use as playing fields, by the school and the community. That use enures for the benefit of the lands and could not be altered by the erection of the fence, and/or the agreement to sell the lands to the developer.

59. The Board has advanced the argument based on Chapter 6 of the Open Space Strategy that, as the lands were not zoned F, Policy OSR11 does not apply. The Board's Statement of Opposition quoted Policy OSR11, Zoning Objective F and paras. 12.2.34-35 of the Inspector's Report and stated, "*The Inspector and the Board properly considered and interpreted the aforesaid policies and provisions of the Development Plan and no legal error, as alleged by the Applicants, arises.*"

60. The Board's Statement of Opposition has been verified by an affidavit sworn on its behalf on 14th October 2022. The verifying affidavit exhibited a number of policy documents which were stated to be relevant to these proceedings, but Chapter 6 of the Open Space Strategy, which has been relied upon in the submissions, was neither exhibited nor referred to in the opposition papers.

61. In its Statement of Opposition, the developer contends that the Inspector correctly considered that Policy OSR11 did not apply "*because as at the date of the planning application, the subject site was not an existing sports facility.*" The fact that its use as sports pitches had "*ceased for an extended period*" was noted. The developer submits, in written submissions, that the Applicant invites the Court to ignore the zoning of the lands with Zoning Objective A and that the Development Plan did not confer Zoning Objective F on the lands. On that basis, the developer contends that the Inspector was correct in finding that Policy OSR11 does not apply at para. 12.2.35 of her Report.

62. Whilst it is conceded on behalf of the Board that the Inspector (and the Board) did not refer to the Open Space Strategy in her Report, reliance was placed on the reference to zoning and Development Plan objectives or designation at para. 12.2.35.

63. The basis on which the Inspector, and the Board, found that Policy OSR11 was not applicable, by reason of the cessation of use of the lands as playing fields, is entirely separate and distinct from the arguments advanced in submissions based on Chapter 6 of the Open Space Strategy. If the fact that the lands were not zoned F had the effect of disapplying Policy OSR11, as contended for by the Board and developer, the fact that the site had not been used as playing pitches since August 2019 would have no potential relevance.

64. The Board cannot rely on an *ex post facto* explanation for its decision, and indeed it does not do so in its opposition papers. However, that does not preclude the Board from raising an issue which goes to jurisdiction in opposition papers, even if that did not form the basis of its decision – an error on the part of a decision maker cannot alter its jurisdiction. This is a corollary of the principle that an applicant may advance an argument which goes to jurisdiction in judicial review proceedings without having raised that issue before the decisionmaker: *Reid v. An Bord Pleanála* [2021] IEHC 230.

65. Chapter 6 of the Open Space Strategy has been included in the Book of Authorities but has not been exhibited by the Board, who relies on it. In response to the Applicants' objection to reliance being placed on the Open Space Strategy, the Board submits that, as it is referred to in the Development Plan, it is of relevance.

66. In *Ballyboden v. An Bord Pleanála* [2022] IEHC 7 Holland J. stated:

> *"That relevant elements of the Development Plan are expressed in terms of accordance with ministerial guidelines necessitates that the intelligent layperson, in interpreting those elements of the Development Plan, will also have to interpret the correspondingly relevant elements of those guidelines. That is not, and should not be confused with, the attribution of any more general planning expertise or knowledge to the intelligent layperson*."

67. As the Open Space Strategy is referred to in the Development Plan and is a publicly available document, I consider that I may take judicial notice of it and that it appropriate for me to have regard to it. As Lavan J. stated in *Greene v Minister for Defence* [1998] 4 IR 464:

> *"Judicial notice refers to facts which a Judge can be called upon to receive, and to act upon, either from his general knowledge of them, or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer … Judicial notice is therefore a means of establishing rather than providing a fact… The Court is entitled to act upon such facts as if they were given in evidence before the Court by a competent witness in the ordinary way.*"

68. Undoubtedly it was open to the planning authority to zone the lands Zone F, or to tie Policy OSR11 to lands which are zoned F in the Development Plan, but neither was done. However, the fact that the lands have been given Zoning Objective A simply means that residential development is permitted in principle subject to the policies and objectives in the Development Plan. Open space is another use which is expressly permitted in principle in lands zoned A. As Simons J. stated in *Redmond*, "*Residential development may in principle be permissible, but the D Plan seeks to regulate the circumstances in which residential*

development might be authorised and the conditions, for example, in respect of open space, which might be attached to a grant." (para. 68)

69. It is far from clear that the effect of the Open Space Strategy 2012 - 2015, or Chapter 6 thereof, is such that Policy OSR11 only applies to lands which are covered by with Zoning Objective F.

70. The Open Space Strategy 2012-2105 is referred to at Section 4.4.2.1 of the Development Plan as follows:

"*Policy OSR2: Open Space Strategy 2012-2015*

In 2009 the Council prepared a comprehensive audit of the existing and proposed open space provision in Dún Laoghaire-Rathdown. This culminated in the publication of the Open Space Strategy for the County, for the period 2012-2015. The actions and recommendations detailed in the Strategy will be implemented as appropriate and as resources allow. The Open Space Strategy examines open space resources in existing communities, how well the needs of communities are being met and identifies any changes needed to improve access to quality open spaces. The Strategy takes account of the quality, community value and use of existing open space - not merely the quantum of provision. The Strategy identifies where deficiencies exist in terms of overall provision and where established parks may need to be upgraded in response to the development of new growth nodes.

In conjunction with the existing Parks Master Plan Programme, the Open Space Strategy will enable proper planning of projects and infrastructural improvements into the future. The Strategy will help safeguard valued open space and guide the allocation of resources for future investment. In areas where deficiencies are identified it is the intention of the Council to acquire land - as opportunities arise and resources permit - to remedy such deficiencies. The Open Space Strategy will also inform the Green Infrastructure Strategy" (emphasis added)

71. I do not consider that a reasonably intelligent member of the public would interpret Policy OSR11, or para. 4.2.2.10, which contains Policy OSR11, as applying only to lands which have Zoning Objective 'F'. Section 4.4.2.1 and 4.2.2.10, which contains Policy OSR11, do

not require the Development Plan to be interpreted in light of the Open Space Strategy. Neither the Board nor the developer have relied on any extract of the Development Plan to that effect. Clearly the Strategy cannot overrule the Development Plan which is the "*environmental contract between the planning authority … and the community*", per McCarthy J. in *McGarry v. Sligo County Council* [1991] 1 IR 99.

72. Accordingly, the Board was required to apply Policy OSR11 in interpreting the Development Plan, particularly in considering whether the proposed development would materially contravene the Plan. The Development Plan provides that "*There will be a general presumption against proposals involving development of playing fields*" unless certain circumstances arise. The Board has not considered whether any of those circumstances arise, nor has a finding been made that the presumption is rebutted.

73. The Board erred in finding that the policies in the Development Plan applicable to lands in institutional use, in particular RES5 and Section 8.2.3.4(xi), were not relevant to the application. Similarly, the Board was not entitled to disapply OSR11 on the basis that the fence had been erected in 2019 and that the site was no longer had a community use since then. For these reasons, the conclusion that the permission sought did not materially contravene the Development Plan in these respects is invalid.

CORE GROUND 1 – Schools and Zoning

74. Under Core Ground 1, the Applicants raise a number of issues relating to the zoning of the site, and the fact that the site was part of a larger site belonging to, and used by, a school when the Development Plan was made. The Applicants argue:
    (a) That the Board misinterpreted zoning objective "A";
    (b) There is a material contravention of policy (Schools) SIC8 and section 8.2.12.4 (school development) of the Development Plan;
    (c) The Board failed to have regard to the Department of Education's objections, and thereby acted in breach of the 2000 Act, fettered its discretion and/or failed to give proper consideration to the Department's submission regarding modifications to the proposed development;

(d) The Board failed to give adequate reasons for rejecting the submission of the Department of Education.

75. The Board and the developer deny each aspect of Core Ground 1. It is not in dispute that section 9(6)(b) of the Planning and Development (Housing) and Residential Tenancies Act, 2016 Act precludes the Board from granting permission if there is a material contravention in relation to the zoning of the land. The Board contends that the Applicants misinterpret the Development Plan and that the development does not materially contravene the Plan in relation to Zoning A, SIC8 or Section 8.2.12.4 thereof. Section 9(6)(c) is not relied upon.

76. As appears from the Board Order, and its Statement of Opposition, the Board found that there was no material contravention of the objectives of the Development Plan and no findings were made in relation to the matters specified in section 37(2)(b) of the 2000 Act. The Board expressly noted and agreed with the Inspector's finding that the proposed development would not amount to a material contravention in respect of height, car parking, dual aspect, density and institutional lands.

77. While it was not expressly stated that there was no material contravention in relation to zoning, the Board Direction and Order referred to the lands as being within an area zoned for residential use under 'Objective A' with the associated land use objective 'to protect and or improve residential amenity'. The Board also stated that the proposed development would be consistent with local planning policy and would be in accordance with the proper planning and sustainable development of the area. This statement, together with the fact that the Board granted permission, is indicative of the Board having found that the proposed development did not contravene the zoning of the Plan in a material way.

78. In *Four Districts Woodland Habitats v An Bord Pleanála* [2023] IEHC 335, Humphreys J. held that there is an autonomous duty on the decision-maker to comply with the law regarding material contravention and that the Board must satisfy itself that a proposed development does not materially contravene the development plan even if that issue is not raised in observations. In order to do this, the Board must interpret the Development Plan correctly.

Zoning Objective A

79. The planning authority is required, by section 10(2)(a) of the 2000 Act to include objectives for "*the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated*". Zoning relates to the use for which lands are designated. The designation of the planning authority of an area as having been given a particular zoning or the title ''zone' or 'zoning' is not determinative: *Redmond v. An Bord Pleanála* [2020] IEHC 151, *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 and *O'Donnell v. An Bord Pleanála* [2023] IEHC 381. Description of the specific type of development permitted for a zoned use, for example the nature of a development for residential use, whether apartments or individual houses, has been found to be an issue of zoning, but ancillary detail such as density or dimensions is not an issue of zoning.

80. As the Board has not sought to invoke section 9(6)(c), it is not necessary to determine whether the material contravention asserted by the Applicants is a material contravention in relation to "zoning" within meaning of section 9(6)(b) of the 2016 Act or section 10(2) of the 2000 Act. The Board's power to grant permission in material contravention of a development plan under section 9(6) is curtailed by subsection (c).

81. The site in question is subject to Zoning Objective A, which is defined in Table 8.3.1 as "*To protect and/or improve residential amenity.*" The Applicants contend that the Inspector and the Board misinterpreted the zoning by finding that it provided for residential development. They observe that the entire site owned by the Congregation of Christian Brothers, including the school building and the playing fields (albeit part of that site is subject to a contract for sale to the developer), is covered by Zoning Objective A. The Applicants contend that Zoning Objective A relates to the protection and improvement of existing residential developments, which they say extends to ensuring that existing and future residential developments are served by adequate schools.

82. Section 8.3.1 of the Development Plan explains that the purpose of land use zoning is to indicate the planning control objectives of the Council. Eighteen land use zoning objectives

are identified within the Development Plan. These objectives are listed at Table 8.3.1 and the specific zones are identified by colour and letter on the maps. Table 8.3.2 and the following tables are expressly intended to be guidelines for the assessment of development proposals, but they relate only to land use.

83. Table 8.3.2 identifies the types of development which are 'permitted in principle' and 'open for consideration', which terms are explained at Section 8.3.3 and 8.3.4.. No other development will be permitted: Section 8.3.5.

84. Whilst the objective for lands subject to Zone A is described as "*To protect and/or improve residential amenity*", "Residential" development is permitted in principle, and "Childcare service" and "Education" are open for consideration under the terms of the Development Plan.

85. The Inspector found that as "*Residential is a permitted in principle use, and childcare is an open for consideration use for this land use zoning*" the proposed development conforms with the land use zoning for the site, namely "*to protect and/or improve residential amenity*".

86. The Applicants also complain that the Inspector did not refer to the fact that education was open for consideration in lands with Zoning Objective A. It was not necessary for the Inspector to expressly refer to the fact that education was open for consideration, despite it being one of the existing uses when the Plan was made. Inclusion of a specific land use in a development plan neither guarantees the grant of permission for development of the lands for that use, nor undermines the power of the planning authority or the Board to grant permission for other uses which are permitted in principle or open for consideration. This is so whether the existing use of the land is specified as open for consideration or permitted in principle, or not.

87. The Inspector considered it necessary to carry out a qualitative assessment to determine whether the proposed development conformed with the objective of the zoning. That qualitative assessment is stated to be carried out at sections 12.4 (Height, Scale, Mass and Design), 12.5 (Neighbouring Residential Amenity) and 12.6 (Proposed Residential Standards) of the Report. She found that there was nothing inherent in the proposed use of

the site which would be contrary to the zoning under the Development Plan which was then in force. Correctly, she declined to consider the application by reference to the proposed zoning in the Draft Development Plan (which has since come into effect) on the basis that the Draft Plan was not a material consideration under section 9 of the 2016 Act.

88. At Section 8.3.1, the Development Plan provides that "*The land use zones used and the various objectives for these areas are detailed in Table Nos. 8.3.1 to 8.3.19*". It is not possible to rely solely on the description of Zone A in Table 8.3.1, namely "*To protect and/or improve residential amenity*" to determine what types of development are permissible in specific sites within lands designated Zone A. In general terms, Zone A allows development for the uses specified as permitted in principle, but this is subject to the application of other policies, standards and requirements provided in the Development Plan. It is imperative to consider the entirety of Table 8.3.2, in particular the nature of uses which are permitted in principle i.e. which "*are, subject to compliance with the relevant policies, standards and requirements set out in this Plan, generally acceptable*" as explained by Section 8.3.3..

89. The fact that a use is included in the list of uses which are 'permitted in principle' or 'open for consideration' is not sufficient to conclude that that use is permissible. The Board must also consider other relevant policies, standards and requirements of the Development Plan before such a conclusion may be reached. It is not necessary for me to resolve the question whether any or each of the other policies, standards and requirements involves a matter of zoning within the meaning of section 9 of the 2016 Act or whether the Board could grant permission in material contravention of those policies, standards or requirements under section 9(6)(a) and (c).

90. However, as appears from paragraphs 48-73, I am satisfied that the Inspector, and the Board, were required to consider the policies for lands in institutional use and Policy OSR11 by virtue of the absence of an INST designation on the Map and the fact that the site had been fenced off and effectively sterilised since August 2019.

91. The Inspector also had regard to the Chief Executive's Report, as she was required to do. She noted that the planning authority referred to Section 8.2.3.4 (viii) Infill rather than (xi) Institutional Lands. As the interpretation of a development plan is a matter of law, deference

is not due to the planning authority in the interpretation of the Plan, which is ultimately a matter for the court rather than the planning authority, even though it is the author of the plan.

92. For the reasons set out under the heading Core Ground 2 – Institutional Lands / INST designation, I am satisfied that the lands in issue are lands in institutional use and as such, it was necessary for the Board to consider RES5 and Section 8.2.3.4(xi) of the Development Plan in deciding whether the proposed development materially contravened the Development Plan including in relation to Zoning Objective A. Whilst policy RES5 and Section 8.2.3.4(xi) leave a certain degree of latitude or planning judgement to the Board, it was not open to it to choose to disapply or fail to take account of those policies, thereby declining to exercise planning judgement.

93. Therefore, notwithstanding the fact that the Chief Executive had not relied on RES5 and Section 8.2.3.4 (xi), I find that the Inspector erred in failing to consider and apply those policies. As the uses which are permitted in principle are subject to compliance with other relevant policies set out in the Development Plan, the Board may not decline to consider policies which are relevant in deciding whether a particular use materially contravenes the development plan. To this extent, I find that the Board did misinterpret Zoning Objective A, essentially by failing to recognise that it was qualified by the other planning standards and policies in the plan, in particular RES5 and Section 8.2.3.4 (xi).

School Development

94. Section 8.2.12.4 and Policy SIC8 specifically relate to schools. For the reasons set out above, these policies inform the interpretation of Zoning Objective A and the decision whether a proposed development is compatible with zoning in some cases. The Inspector identified both these policies at paragraphs 6.3.7 and 6.3.8 and, under the heading 'Compatibility with Clonkeen College', at paragraphs 12.2.16 and 12.2.17.

95. No part of the lands owned by the Christian Brothers including the subject site, has been reserved for future development of primary or post-primary schools. The designations PS ("To provide for a Primary School") and PPS ("To provide for a Post-Primary School") do

not appear in these lands on the Maps. Notwithstanding this, the Inspector accepted the submissions of the Department of Education and the planning authority which recognised the need to assess how the proposed development might affect the future expansion of the school and its ongoing operational effectiveness. The designations PS and PPS relate to the reservation of sites for future schools and are not required to preserve the ability of an existing school to expand.

96. Section 7.1.3.4, which includes Policy SIC8, states that the Development Plan makes provision for educational facilities through the identification and reservation of potential school sites. This is consistent with the use of the PS and PPS designations for the sites reserved for new schools rather than the expansion of existing schools. Section 7.1.3.4 also provides:

    "*In addition to new school development, the Council will support the appropriate development and/or redevelopment of existing schools within the County that will enhance existing facilities - including sports facilities - on site.*"

97. Section 8.2.12.4 also relates to developments of new schools or the redevelopment or extension of existing schools. The planning authority is required to consider school developments having regard to Department of Education Guidance as set out in 'The Provision of Schools and the Planning System, A Code of Practice for Planning Authorities, the Department of Education and Science, and the Department of the Environment, Heritage and Local Government, 2008'. It is clear from Section 8.2.12.4 that the needs of the school sought to be developed, extended or redevelopment must be considered, including the future needs of that school, in particular the sufficiency of space for future expansion.

98. The proposed development in this case is neither a development or re-development of an existing school, but rather a predominantly residential development on a site which formed part of the school grounds when the Development Plan was made, but which was subsequently the subject of a contract for sale and fenced off. The Development Plan explicitly provides for developments of that type, i.e. development of lands in institutional use, at Policy RES5 and Section 8.2.3.4, which are considered above.

99. In rejecting the submissions of the Department of Education and Chief Executive, the Inspector stated that those submissions had afforded inadequate weight to the zoning of the

site for residential development and to the lack of an INST (institutional land) objective. The Inspector found that the planning authority "*has not highlighted a need to preserve this school site or its grounds.*" The Inspector placed very significant weight on the absence of the INST designation in considering the issue of schools at paragraphs 12.2.14 – 12.2.28. She referred repeatedly to its absence and found that it had been intentionally removed, by comparing the Development Plan with the previous plan. As Simons J. has found in *Redmond*, this is impermissible.

100. The cessation of the use by the school of the lands since the erection of the fence was also relied upon. The fence was erected after the Development Plan had been adopted and had come into force. It is true to say that the school is not currently using the site as playing fields, as they have been fenced off. However, the existing use for the purposes of the interpretation of the Development Plan is the use at the time the Plan was made. (See paras. 35-47). What is relevant is that the authorised use under the Development Plan remained the existing use - playing fields ancillary to the school, used by the school and by local sports clubs. The Development Plan had not been amended after the change on the ground and, significantly, permission been not granted thereby ending that existing use.

101. The development the subject of the proceedings would make it impossible to resume the then existing use, regardless of any possible change in ownership. As Clarke J. (as he then was) noted in *Christian v Dublin City Council* [2012] 2 IR 506 (para. 50) a change of use is a development in the sense in which that term is used in the 2000 Act. He also noted that a development plan is not fixed in stone forever.

102. As is clear from the authorities, the change in ownership does not have the effect of changing the existing use of lands for the purposes of the interpretation and application of the Development Plan.The finding that the zoning allows the residential development proposed was made following an incomplete assessment of the types of development which are permitted in principle, or open to consideration, under Zoning Objective A. The Board erred in its consideration of the other relevant policies in the Development Plan, particularly those relating to lands in institutional use and OSR11. That error contaminated the reasoning in relation to Clonkeen College.

103. This error in relation to institutional lands is evident at paragraphs 12.2.23 – 12.2.27. At paragraph 12.2.26, the Inspector relied on the absence of an adopted plan for the expansion of the school. On that basis, she found that it was difficult to justify the rejection of the application in principle, stating:

"*This is specifically the case given the lack of any institutional objective over the site which requires specific regard to the future expansion needs of a school. The expansion of existing schools to meet changing needs in the area in general, will require consideration of total educational provision in the area, and it is for the Department and Planning Authority to determine specific requirements in that regard. The institutional land use objective was intentionally removed under the current Development Plan and, there is no certainty in relation to expansion plans for Clonkeen College. ...*"

The Special Needs Unit

104. The Applicants also contend that the development of the site so close to its boundary will result in the remaining pitch, which is beside the Special Needs Unit, being used to such an extent that it will cause difficulties for the children within the Special Needs Unit. This issue was raised in observations by individuals who reside close to the school, but it was not raised by the Department of Education or by the school itself. No expert evidence was provided to support the contention that there would be an adverse impact on the children in the SNU. It is not necessary to resolve the question of the Board's entitlement to place weight on unsupported submissions in that regard, nor to decide if the Board was put on enquiry by the submissions made. This is particularly so as no such concerns were expressed by the owners or Board of Management of the School or by the Department of Education.

105. Albeit in the context of an Appropriate Assessment rather than a more traditional planning concern, it has been held that for the Board to be put on enquiry, credible evidence is required. O'Neill J. held in *Harrington v. An Bord Pleanála* [2014] IEHC 232:

> *"It is not sufficient for an objector to a planning permission merely to make a bald assertion, and no more, and thereby place on the respondent a duty to carry out such enquiries as would be necessary to counter that assertion. It would be unfair to applicants for planning permission if they were put to the considerable expense in*

meeting an objection to their application for planning permission, in an appeal before the respondents, of having to assemble expert evidence to counter mere assertion by an objector."

106. This *dictum* has been followed in other cases involving appropriate assessment including *Heather Hill v. An Bord Pleanála* [2022] IEHC 146.

Observations of the Department of Education

107. As the issue of lands in institutional use permeates the first two aspects of Core Ground 1, I do not consider it necessary to attempt to disentangle the findings in order to determine the arguments relating to the observations of the Department of Education under this core ground. In view of the findings which I have made in respect of Core Ground 2 and earlier in this section, the Applicants must succeed on Core Ground 1.

CORE GROUND 3 – Material Contravention relating to Carparking

108. The proposed development includes 248 car parking spaces for 299 residential units and a 353sq.m childcare facility. Four of these spaces are associated with the childcare facility. The Applicants contend that the number of carparking spaces is 40% below the number of car parking spaces required by the Development Plan (412). It is argued that provision of only 60% of the carparking spaces required by the Development Plan amounts to a material contravention.

109. In the Material Contravention Statement, the developer acknowledges that the number of car spaces proposed may amount to a material contravention of the Development Plan, but it was submitted to the Board, and argued before the Court, that no such material contravention in fact arises.

110. The Board agreed with the conclusion of the Inspector that the permitted development does not materially contravene the Development Plan in relation to carparking. Conditions 9 and 10 of the permission granted relate to carparking spaces, but these conditions do not impose an obligation to increase the number of spaces proposed.

111. Under the heading Quantitative Standards, Section 8.2.3.3 (iii) of the Development Plan provides:

"*(iii) Parking Standards*

Parking inevitably remains an integral element of overall land use and transportation policy within the County (Refer also to Section 2.2 – Sustainable Travel and Transportation). The purpose of parking standards is to ensure that a considered and appropriate level of parking is provided to serve new development. … The parking standards to be applied in new residential developments in Dún Laoghaire-Rathdown are set out in Table 8.2.3."

112. Car Parking Standards are set out at Section 8.2.4.5 of the Development Plan, which states:

"*Car parking standards provide a guide on the number of required off-street parking spaces acceptable for new developments. The principal objective of the application of car parking standards is to ensure that, in assessing development proposals, appropriate consideration is given to the accommodation of vehicles attracted to the site within the context of Smarter Travel, the Government policy aimed at promoting modal shift to more sustainable forms of transport.*

… Parking provision in excess of the maximum standards set out for non-residential land uses in Table 8.2.4 shall only be permitted in exceptional circumstances as described below.

…

Reduced car parking standards for any development (residential and non-residential) may be acceptable dependant on:

- *The location of the proposed development and specifically its proximity to Town Centres and District Centres and high density commercial/ business areas.*
- *The proximity of the proposed development to public transport.*
- *The precise nature and characteristics of the proposed development.*
- *Appropriate mix of land uses within and surrounding the proposed development.*
- *The availability of on-street parking controls in the immediate area.*
- *The implementation of a Travel Plan for the proposed development where a significant modal shift towards sustainable travel modes can be achieved.*

- *Other agreed special circumstances where it can be justified on sustainability grounds.*

Note: In some cases additional parking areas may be required in a development to provide parking for electric vehicles, car sharing clubs or servicing of vehicles. …

…

The Planning Authority may require the maximum number of car parking spaces specified in Tables 8.2.3 and 8.2.4 to be further reduced where it is considered that the surrounding road network is not sufficient to cater for the volume of traffic likely to be generated by the proposed development. … ."

113. Table 8.2.3 Residential Land Use – Car Parking Standards provides:

Land use	Standards
Residential Dwelling	1 space per 1-bed unit and per 2-bed unit 2 spaces per 3-bed unit+ (depending on design and location).
Apartments, Flats, Sheltered housing	1 space per 1-bed unit 1.5 spaces per 2-bed unit 2 spaces per 3-bed unit+ (depending on design and location)

114. After Table 8.2.3, the Development Plan continues:

"*The car parking standards set out for residential land uses in Table 8.2.3 shall be generally regarded as 'standard' parking provision. The parking standards in Table 8.2.3 include spaces for both residents and visitors and these car parking spaces shall be clearly designated. Visitor car parking, preferably grouped within communal*

parking areas, should be adequately provided for and reserved only for the use of visitors."

115. The "*Maximum Car Parking Standard*" for childcare services, is stated at Table 8.2.4 to be one space per staff member (including set down). There is a clear distinction in how residential and non-residential land use car parking standards are described in the Development Plan, at para. 8.2.4.5 and in Tables 8.2.3 and 8.2.4. The figures set out in Table 8.2.3 are to be "*generally regarded as standard parking provision*", which may be deviated from, as indicated at para. 8.2.4.5. On the other hand, the figures provided for non-residential parking are solely described as maximums.

116. The Material Contravention Statement submitted by the developer addressed the issue as "*a possible material contravention in relation to Car Parking*". It was stated that the minimum standard number of spaces, which would be required if the apartment metric in Table 8.3.2 is applied to all units, is 412 carparking. The planning authority and the applicants agree with this figure.

117. The developer submitted that the Development Plan includes contradictory provisions, by reference to Table 8.2.3 and Section 8.2.4.5. It was also contended that requiring 412 spaces to be provided would conflict with Policy ST3, at Section 2.2.6.3 of the Development Plan. Policy ST3 states:

"*It is Council policy to promote, facilitate and cooperate with other transport agencies in securing the implementation of the transportation strategy for the County and the wider Dublin Region as set out in Department of Transport's 'Smarter Travel, A Sustainable Transport Future 2009 –2020' and the NTA's 'Greater Dublin Area Draft Transport Strategy 2016-2035'. Effecting a modal shift from the private car to more sustainable modes of transport will be a paramount objective to be realised in the implementation of this policy.*"

118. It was submitted that the proposed development would contribute to the modal shift towards more sustainable modes of transport referred to in Policy ST3 and wider strategic planning policy. Three permissions granted in respect of Strategic Housing Developments in Dún Laoghaire-Rathdown were referenced, each of which had a significantly lower ratio of car parking spaces to residential units than the proposed development.

119. The Material Contravention Statement also referred to the Design Standards for New Apartments (Guidelines for Planning Authorities), December 2020 which give the following recommendation for minimum standard car parking provision in locations similar to the subject site:

> "*As a benchmark guideline for apartments in relatively peripheral or less accessible urban locations, one car parking space per unit, together with an element of visitor parking, such as one space for every three – four apartments, should generally be required.*"

120. This extract of the Apartment Guidelines is from para. 4.22 under the heading "*3) Peripheral and/or Less Accessible Urban Locations*". Applying that standard to the proposed development, 374 – 399 spaces would be required, depending on whether one visitor space is provided for every 4 or 3 units, or a mix thereof.

121. It was submitted to the Board that the provision of 0.82 spaces per residential unit (regardless of the size of the unit) was appropriate having regard to the location of the site and its proximity to public transport and local amenities. The developer also submitted that this was in line with government guidance and increased use of public transport/cycling over private car use.

122. It was also contended by the developer that the location may be defined as an intermediate urban location, having regard to the proximity of the site to the M11 (but not the Quality Bus Corridor walkband), Deansgrange village, Blackrock village, Dún Laoghaire and Dublin city centre. On that basis, it was submitted that the proposed development may benefit from a reduction in car parking spaces in accordance with para. 4.21 of the Apartment Guidelines.

123. Para. 4.21 of the Apartment Guidelines advise that "*planning authorities must consider a reduced overall car parking standard and apply an appropriate maximum car parking standard*".

124. The obligation of the Board was to have regard to the Guidelines. It was obliged to apply the Guidelines, save insofar as SPPRs applied. Para. 4.23 of the Guidelines states:

> "*For all types of location, where it is sought to eliminate or reduce car parking provision, it is necessary to ensure, where possible, the provision of an appropriate number of drop off, 25 service, visitor parking spaces and parking for the mobility impaired. Provision is also to be made for alternative mobility solutions including facilities for car sharing club vehicles and cycle parking and secure storage. It is also a requirement to demonstrate specific measures that enable car parking provision to be reduced or avoided.*
>
> *4.24 As well as showing that a site is sufficiently well located in relation to employment, amenities and services, it is important that access to a car sharing club or other non-car based modes of transport are available and/or can be provided to meet the needs of residents, whether as part of the proposed development, or otherwise. 'Car free' development is permissible and if developed, must be fully communicated as part of subsequent apartment sales and marketing processes.*"

125. However, the Apartment Guidelines are not relevant to the interpretation of the Development Plan, although they are relevant to the exercise of planning judgement when permitted by the Plan and are relevant if the Board finds, and seeks to justify, a material contravention: *Ballyboden v. An Bord Pleanála* [2022] IEHC 7 (para. 66); *Clane v. An Bord Pleanála* [2023] IEHC 467 (para. 91).

126. The observations made to the Board included the submission that there was already a shortage of car parking in the area and that there was pressure on on-street parking locally. These submissions were noted at para. 12.7.21 of the Inspector's Report.

127. The Chief Executive's Report to the Board concluded that the proposed number of car spaces was "unacceptable" and recommended that the number of car spaces be increased to one space per residential unit i.e. 299 spaces. This is 75-100 spaces fewer than the number of spaces advised at para. 4.22 of the Apartment Guidelines for developments in peripheral and/or less accessible urban locations. The Chief Executive's report did not express the opinion that the number of carparking spaces proposed amounted to a material contravention of the Development Plan, and the Report stated that some reduction in recommended

residential car parking standards provided in the Development Plan was acceptable. The Chief Executive recommended that 299 spaces be provided for the residential units, in addition to a number of spaces as required for the childcare facility by Table 8.2.4 of the Development Plan, rather than 248 spaces proposed. If the standard in Table 8.2.3. were applied without deviation based on design or location of the proposed development, 412 spaces would have been required.

128. The Board expressly noted and agreed with the Inspector's conclusion that the proposed development would not materially contravene the Development Plan in relation to car parking.

129. The Inspector's findings in relation to car parking are at paras. 12.7.21 – 12.7.25 of the Report. Para. 12.7.23 states:

> "*The proposed parking amounts to a ratio of 0.82 residential parking spaces per residential unit. The submitted Traffic and Transport Assessment gives reference to the Apartment Guidelines car parking standards for peripheral and/or less accessible urban locations, highlighting that the proposed development does not conform with the guideline of 1 space per a unit set out in the guidelines. Car parking does not form a specific planning policy requirement in the guidelines. However, as described in section 12.3 above, I consider that the proposed development is more reflective of an intermediate urban location as described under the guidelines. Section 4.21 of the guidelines state that for suburban/urban locations served by public transport or close to town centres or employment areas, particularly housing schemes more than 45 dwellings per hectare (as is the case for the current application), a reduced overall car parking standard applies. I note that the Dún Laoghaire-Rathdown Development Plan gives a car parking standard of 1 space per 1 bed unit and 1.5 spaces per 2 bed unit for apartment development. Section 8.2.4.5 specifically states that car parking standards are a 'guide on the number of required off-street parking spaces acceptable.' The principle (sic) objective of the standards is described in the plan to have appropriate consideration of government policy aimed at promoting a modal shift to more sustainable forms of transport. As the standards are expressed as a 'guide', in my opinion they do not outline a minimum requirement"* [emphasis added]

130. At para. 12.9.9 of her Report, the Inspector found that the number of car spaces did not amount to a material contravention of the Development Plan. She reiterated her finding that the standards set out in the Development Plan did not provide for a minimum number of car spaces, but were a guide. She considered the location of the site, in particular its proximity to bus routes, including high frequency bus routes, and to Deansgrange. The characteristics of the site were found to be reflective of the type of area that can support compact growth as promoted in national planning policy and where reduced car parking can be supported by the Apartment Guidelines.

131. As is evident in her Report, having considered both the Apartment Guidelines and the Development Plan, the Inspector concluded that, as the standards are expressed as a guide, they did not encompass a minimum number of carparking spaces which were required for the development. The Inspector concluded that the parking proposed by the developer was sufficient on the basis of the development's location, in particular the proximity to public transport links and Deansgrange, and she disagreed with the recommendation of the Chief Executive that the ratio of parking be increased to one space per unit. Relying on the same factors, the Inspector found that overspill of on-street parking on surrounding streets was not likely to be a significant impact of the development.

132. It is not in dispute that the number of spaces included in the permitted development is considerably fewer than the number which would be required if the number of spaces referred to in Table 8.2.3 of the Development Plan or the Apartment Guidelines, regarding peripheral and/or less accessible urban locations, were required to be provided.

133. The first question to be resolved is whether the permitted number of carparking spaces amounts to a material contravention of the Development Plan. The Apartment Guidelines are not relevant to that question. Where there is a difference between the Development Plan and the guidance in the Apartment Guidelines, the Development Plan prevails: *Brophy v. An Bord Pleanála* [2015] IEHC 433. As the Inspector noted, the SPPRs in the Apartment Guidelines do not relate to the provision of car parking spaces. Therefore, the Board was merely obliged to have regard to those Guidelines rather than to apply them.

134. It is common case that 412 spaces would be required if the Board were required to apply the formula provided in Table 8.2.3 rigidly. The Applicants submit that the requirements of

the Development Plan are similar to those in *Clane v. An Bord Pleanála* [2023] IEHC 467 and that the Plan requires the application of a "*simple, straightforward and mathematical*" formula which does not allow for the exercise of planning judgement. The Board relies on the exercise of planning judgement and contends that the decision to grant permission with 248 carparking spaces does not materially contravene the Development Plan.

135. In *O'Donnell v. An Bord Pleanála* [2023] IEHC 381 the use of the word "*generally*" in the development plan was held to have enabled the Board to exercise planning judgement. However, as Humphreys J. noted:

> "*85. A qualifier like "generally" does not confer open-ended flexibility or planning judgement. Any departures from that must themselves be limited in nature and peculiar to their own facts, and not such as can be generalised in a way that would undermine or rewrite the plan. If the basis for an exception was one that could itself be applied generally, then the plan would indeed be materially contravened. To put it another way, the word "generally" does create flexibility, but only in ball-park terms, as in* Jennings v. An Bord Pleanála *[2023] IEHC 14, [2023] 2 JIC 1711 (Unreported, Holland J., 17th February, 2023).*"

136. In *O'Donnell*, it was held that the Board had not exceeded the extent of planning judgement left open by the development plan, having regard to the substantial and site-specific features of the development, and therefore, that the decision would not undermine the requirement that matters were to be generally as defined by the plan.

137. In *Clane v. An Bord Pleanála* [2023] IEHC 467, Humphreys J. held that the finding that a significant shortfall in the number of carparking spaces was not a material deviation from the development plan was not sustainable. The applicable development plan provided a degree of flexibility in relation to parking spaces, and specific standards were set out which provided for a specified number of spaces per residential unit, including visitor parking for apartments. The development plan also provided that, other than for residential developments, parking standards were maximum standards and that the maximum numbers were not to be viewed as a target. However, as Humphreys J. held, at para. 90, the flexibility conferred on the planning authority or the Board by that development plan did not extend to residential developments, unless they were large complex developments, as provided in

the plan. It was on that basis that he held that the standard set in the development plan "*is simple, straightforward and mathematical, and doesn't confer any planning judgement.*"

138. Whilst there are certain similarities in the DLR Development Plan 2016-2022 and the Kildare County Development Plan which was considered in *Clane,* the standards set out in Table 8.2.3 expressly allow for the exercise of planning judgement. Unlike in the Kildare CDP, the Table which provides for the standards expressly allows for the exercise of planning judgement – the number of spaces required are specified "*(depending on design and location*)".

139. Humphreys J. held that there was no flexibility built into the standards set out in Table 17.9 of the Kildare CDP. He stated:

> "*The only thing flexible is the word "normally". The board tries to rely on the flexibility in the term "generally" as recognised in ([2023] IEHC 381* O'Donnell v. An Bord Pleanála, Minister for Housing, Local Government and Heritage, Ireland and the Attorney General Unreported, *High Court, 5th July, 2023). But here, the term "normally" is counterbalanced by the specific exception of residential from the general point that provision are maxima. Any fair reading of this provision is such that it doesn't confer discretion save in exceptional circumstances of the type referred to, such as very large complex developments that need to be assessed on their own circumstances.*"

140. Humphreys J. noted that the Board had not found that the development triggered the exception or that a departure from the required parking provision was warranted. He also found that there was nothing complex about the development the subject of the proceedings.

141. In this case, the terms of the Development Plan are less directive. The parking standards in Table 8.2.3 are expressed to be "*a guide*", to be applicable "*depending on design and location*" and to be "*generally regarded as 'standard' parking provision*". The stated purpose of the parking standards in the development plan is "*to ensure that a considered and appropriate level of parking is provided to serve new development*" and the principal objective identified, consistent with Policy ST3, is "*to ensure that, in assessing development proposals, appropriate consideration is given to the accommodation of vehicles attracted*

to the site within the context of Smarter Travel, the Government policy aimed at promoting modal shift to more sustainable forms of transport."

142. Reduced car parking standards for any development (residential or non-residential) may be acceptable dependant on the factors specified at Section 8.2.4.5, which include the location of the proposed development, in particular its proximity to town or district centres and high density commercial / business areas, and proximity to public transport.

143. The Inspector, and the Board, relied on the fact that the Development Plan describes the standards as a "guide" and found that they did not require a minimum number of carparking spaces. This is correct.

144. The Development Plan does not require the application of a mathematical formula for the provision of carparking spaces, which formula may only be departed from when an expressed condition is met, or exception provided for by the Plan arises. Accordingly, I am satisfied that the Board was entitled to exercise planning judgement in determining the appropriate number of spaces to be provided in the development.

145. Planning judgement must be exercised in a manner consistent with the relevant development plan, as is clear from *O'Donnell* and *Jennings.* The flexibility provided for in the Development Plan is not open-ended and must be specific to the facts of the application. As Humphreys J. held in *O'Donnell*, "*If the basis for an exception was one that could itself be applied generally, then the plan would indeed be materially contravened*."

146. It is fundamental to the lawful exercise of planning judgement allowed under the Development Plan, that the Board correctly interprets the development plan. The Inspector states that "*The principle (sic) objective of the standards is described in the plan to have appropriate consideration of government policy aimed at promoting a modal shift to more sustainable forms of transport*." In my view this does not accurately describe the stated principal objective at para. 8.2.4.5, namely:

> "*The principal objective of the application of car parking standards is to ensure that, in assessing development proposals, appropriate consideration is given to the accommodation of vehicles attracted to the site within the context of Smarter Travel,*

the Government policy aimed at promoting modal shift to more sustainable forms of transport."

147. There is a material difference in emphasis between a policy which requires the Board to consider the promotion of a shift from private cars towards more sustainable forms of transport, and one which considers the need to accommodate the vehicles which would be attracted to the development (in this case 299 residential units and a childcare facility) *within the context* of the policy of promoting the modal shift away from private cars. This amounts to a mistake of fact, and as the interpretation of a development plan is a matter of law, a mistake of law. Therefore, the Inspector, and the Board, erred in their interpretation of the Development Plan, in a respect which was material to the determination of the question whether there would be a material contravention of the Development Plan in relation to the provision of car parking spaces.

148. The Inspector found that the site is an intermediate urban site rather than a peripheral and/or less accessible site, as described in the Apartment Guidelines. The Guidelines provide that the range of locations specified are not exhaustive and that local assessment is required which considers the following and other relevant planning factors:

"• *Sites within or close to i.e. within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m), of principal town or suburban centres or employment locations, that may include hospitals and third level institutions;*

• *Sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas) or within reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency (i.e. min 10 minute peak hour frequency) urban bus services or where such services can be provided;*

• *Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) of reasonably frequent (min 15 minute peak hour frequency) urban bus services.*

The range of locations is not exhaustive and will require local assessment that further considers these and other relevant planning factors."

149. The site-specific factors which were considered by the Inspector are set out at para. 12.3.4, and para. 12.7.24 of her Report, and include the fact that the site is within a 10 minute walk to bus stops operated by Dublin Bus and GoAhead Ireland (for which the peak interval is stated in the Residential Travel Plan is 20 or 25 minutes); a 15 minute walk to high frequency routes served by bus stops on the N11 which are approximately a 15 minute walk from the subject site (the site is within this distance of one high frequency bus route according to the information provided by the developer); a 15 to 20 minute walk into Deansgrange. Having carried out a local assessment, the Inspector found at para. 12.3.6 that the location could be considered as an intermediate urban location in light of the public transport accessibility of the site and proximity to Deansgrange centre. In considering the site to be an intermediate urban location, the Inspector relied on the proximity of the site to each of the three amenities specified at para. 2.4 of the Apartment Guidelines, although the site is roughly twice the walking distances specified therein.

150. The fact that the proposed development does not meet each of the factors does not preclude the Board from considering the proximity of the proposed development to public transport and/or an urban centre either cumulatively or together with other relevant planning factors. Therefore, I reject the contention that the site cannot be regarded as an intermediate urban location on the basis that none of the criteria in para. 2.4 are met, and that no entirely new or distinct planning matters were considered by the Inspector. The Applicants submit that the Inspector erred in fact in finding that the site is an intermediate urban location. That finding was clearly material to the Board's findings in relation to the sufficiency of car parking spaces. Whilst the Inspector did not expressly state that she relied on the cumulative benefits of the proximity to bus routes, high frequency bus routes and the village / neighbourhood centre at Deansgrange, this is implicit in her conclusion, and such a finding was open to her.

151. The Inspector found that, as the site was in an intermediate urban location, she was satisfied with the proposed parking quantum and disagreed with the planning authority's recommendation that it be increased. She rejected the third-party concerns that the reduced car parking provision would result in overspill on-street parking and surrounding streets. As a consequence of the finding that the site was in an intermediate urban location, the Inspector found that "*a reduced overall car parking standard applies*" under the Apartment Guidelines.

152. It is clear from the authorities, in particular *Jennings*, that the Court should review the exercise of planning judgement by ordinary principles of judicial review rather than a full-blooded review. This is not in dispute. The ordinary principle of judicial review includes an assessment of the adequacy of the reasons provided for the conclusion reached in the exercise of planning judgement that there is no material contravention of the development plan.

153. The Applicants contend that the Board failed to have regard to relevant considerations, and specifically that it failed to consider the Section 8.2.4.5 which states that "*Reduced car parking standards for any development (residential and non-residential) may be acceptable dependent on*" the seven matters specified. The Applicant contends that these are criteria which must be applied, and that the Inspector, and the Board, erred by applying criteria in the Apartment Guidelines rather than the seven criteria in Section 8.2.4.5.

154. As stated above, the Guidelines are relevant to the way in which planning judgement, as provided for under the Plan, is exercised by the Board. Whilst the factors relied upon by the Inspector were clearly those identified in the Apartment Guidelines rather than in the Development Plan, proximity to public transport and to Town Centres and District Centres and high density commercial/ business areas are also factors identified at Section 8.2.4.5 of the Development Plan.

155. It was open to the Board to find that a reduction of the number of car spaces below the number identified in Table 8.2.3 was acceptable by reference to the proximity of the development to public transport. The flexibility provided in the Table, by the phrase "*(depending on design and location)*" should be interpreted by reference to the list of circumstances set out in Section 8.2.4.5. The Inspector referred to Deansgrange as a "*village / neighbourhood centre*", at para. 12.7.24 of her Report. I do not consider it necessary to decide whether the character of Deansgrange is such as to bring it within the list at Section 8.2.4.5, or whether the Board erred in having regard to the proximity of the proposed development to Deansgrange under this heading. None of the other criteria are referred to expressly or inferentially.

156. The Inspector has not explained why she considers that a reduction of 40% of the standard or guide number in the Development Plan is appropriate. However, having regard to the fact that 412 spaces is the number which "*shall be generally regarded as 'standard' parking provision*" per Table 8.2.3 subject to design and location, the basis on which the Board exercised its planning judgement to authorise the development with only 248 spaces is not clear. The extent of this reduction is significant. Only 0.82 spaces are provided per residential unit. It is proposed that there will be 38 3-bed units, 150 2-bed units and 111 1-bed units, and a childcare facility.

157. While the Apartment Guidelines state that, in intermediate urban locations, planning authorities must *consider* an overall car parking standard which is reduced from that provided for peripheral or less accessible urban locations (for which 374 – 399 spaces would be appropriate), the Guidelines do not provide guidance as to the appropriate size of the reduction. As noted above, the proposed development is approximately twice the indicated walking distances from bus routes, a high frequency bus route and Deansgrange – each of these are relevant to the assessment of whether the location is an intermediate urban or peripheral/less accessible urban location. The proximity to each of these amenities was relied upon by the Inspector cumulatively. As noted in the Chief Executive's Report, as there is a single entrance to the proposed development, a 550m cul de sac would be created.

158. The Inspector's Report does not contain any analysis of the extent of the reduction of the carparking standard which should apply, whether by reference to the Development Plan or the Apartment Guidelines. The reduction authorised by the grant of permission amounts to a reduction of approximately 40% of the 412 spaces specified at Table 8.2.3 (before allowing for design or location). It also amounts to a reduction of 34 - 38% of the 374 – 399 spaces recommended by the Guidelines for developments in peripheral or less accessible urban locations.

159. The reasoning of the Inspector is too opaque to enable me to assess the reasonableness or otherwise of the Board's decision to find that the provision of 248 spaces does not materially contravene the Development Plan. Not every departure from a general standard shall require a reasoned explanation by the Board, particularly where it is minor. However, where a

reduction is significant, such as the 40% reduction in this case, reasons for such a departure are necessary.

160. Therefore, I find that the decision of the Board, that the proposed development does not materially contravene the Development Plan in relation to carparking, is invalid. The Board adopted the Inspector's error in the interpreting the principal objective in relation to the provision of carparking in the Development Plan. Furthermore, no reasons were given for a very substantial departure from the number of spaces indicated in the Development Plan, subject to design and location.

CORE GROUND 4 – Density & Apartment Guidelines

161. The net density of the proposed development is 90 units per hectare. The Board agreed with the Inspector's conclusion that the density of the proposed development did not materially contravene the Development Plan. No additional or alternative reasons were provided by the Board for its decision.

162. The Applicants contend that there is a material contravention of the objectives of the Development Plan in relation to density, and/or that the Board misinterpreted the Apartment Guidelines 2018 and/or the Sustainable Residential Development Urban Area Planning Guidelines 2009. At para. 35 of the Statement of Grounds, the Applicants quote paragraphs 2.4 and 2.5 of the Apartment Guidelines 2018. They accept that the Board was simply required to have regard to the Apartment Guidelines and not to apply them. The Board is obliged to comply with the SPPRs contained therein, by virtue of section 28(1C).

163. At paragraph 6.1.2, the Inspector referred to the "*Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities (2020) (the 'Apartment Guidelines')*". The Inspector refers only to the "Apartment Guidelines", without specifying the year when considering the issue of density at para. 12.3 and following. The Board specifically referred to the 2020 Guidelines in its Direction and Order.

164. The 2020 Guidelines were issued on 23rd December 2020 under section 28 of the 2000 Act. They replicate the 2018 Guidelines but amend Section 5 which relates to Build to Rent developments and create a presumption against the granting of planning permission for co-

living developments. There is no difference between paragraphs 2.4 and 2.5 of the 2018 and 2020 versions of the Apartment Guidelines.

165. I am satisfied that the Board was required to have regard to the 2020 Guidelines, which had replaced the 2018 Guidelines by the time the decision was made. This is consistent with the judgment of Humphreys J. in *Sweetman v. An Bord Pleanála and Others* [2022] IEHC 474. I am equally satisfied that the Inspector and the Board in fact considered the 2020 Guidelines. Neither the Board nor the Notice Party raised a pleading point or argued that I did not have jurisdiction to determine this issue insofar as it relates to the Apartment Guidelines. I am satisfied that the reference to 2018 in the Statement of Grounds is an error and that the substance of the challenge relates to the application of the 2020 Guidelines, which do not differ in any material respect. I consider that it is appropriate for me to determine the issue raised by the Applicants by reference to the 2020 Guidelines.

The Development Plan

166. As the Written Statement makes clear, the Council had regard to the Sustainable Residential Development Urban Area Planning Guidelines 2009 and the Sustainable Urban Housing, Design Standards for New Apartments (DoEHLG, 2007) in setting the qualitative, quantitative and development management criteria for residential developments. The criteria to be taken into account in assessing planning applications specified at Section 8.3.2.1 of the Plan include:

> "• *Density - Higher densities should be provided in appropriate locations. Site configuration, open space requirements and the characteristics of the area will have an impact on the density levels achievable*."

167. At Section 8.2.3.2(ii), it is stated that, in general the number of dwellings provided on a site should be determined with reference to the 2009 Guidelines. Those Guidelines were considered by the Inspector and the Board. As the Inspector noted, the Development Plan states that the objective is to optimise density of development in response to the type of site, location and accessibility to public transport. However, the Development Plan also states that the overriding concern is the quality of the proposed residential environment to be created and that higher densities are acceptable if the criteria which contribute to this are satisfied. Higher residential density will not be appropriate in every circumstance and the

Development Plan states that quality-built form can sometimes be a more important determinant. Higher densities should have regard to surrounding dwellings and should be achieved in tandem with the protection of the amenity of future residents of the proposed development. Policy RES3 is referred to in this respect.

168. Section 8.2.3.2(ii) also provides more specific guidance. It states:

"*In Dún Laoghaire-Rathdown, apart from in exceptional circumstances, (e.g. where an LAP has identified sites where lower densities may be considered or in sites where mature tree coverage prevents minimum densities being achieved across the entire site) minimum residential densities should be 35 dwellings per hectare. Significant parts of the existing built-up area of the County are, however, readily accessible to public transport corridors – QBCs, Luas, DART. In these circumstances Government guidance is to provide densities at higher than 50 dwellings per hectare. The Council acknowledges the 'Kickstart' Incremental Development Approach as outlined in the DoECLG and the NTA study 'Planning and Development of Large Scale, Rail Focused Residential areas in Dublin' (2013) in relation to Sandyford, Cherrywood, Stepaside and Carrickmines. The purpose of the 'Kickstart' approach is not to be used to achieve lower densities in a scheme but rather to ensure eventual overall delivery of higher densities in order to support high capacity public transport modes (Refer also to Policy RES3, Section 2.1.3.3).*"

169. Policy RES3 provides:

"*2.1.3.3 Policy RES3: Residential Density**

It is Council policy to promote higher residential densities provided that proposals ensure a balance between the reasonable protection of existing residential amenities and the established character of areas, with the need to provide for sustainable residential development. In promoting more compact, good quality, higher density forms of residential development it is Council policy to have regard to the policies and objectives contained in the following Guidelines:

- *'Sustainable Residential Development in Urban Areas' (DoEHLG 2009).*
- *'Urban Design Manual - A Best Practice Guide' (DoEHLG 2009).*
- *'Quality Housing for Sustainable Communities' (DoEHLG 2007).*
- *'Irish Design Manual for Urban Roads and Streets' (DTTaS and DoECLG, 2013).*

• *'National Climate Change Adaptation Framework - Building Resilience to Climate Change' (DoECLG, 2013).*"

170. The housing needs identified in 'Construction 2020- A Strategy for a Renewed Construction Sector' and the need to "*balance between achieving higher densities with the retention of green spaces*" are also recognised in the Development Plan. The Plan refers, at Section 2.1.3.3, to the 2009 Guidelines and identifies the following as the general rule in relation to densities:

"*As a general rule the minimum default density for new residential developments in the County (excluding lands on zoning Objectives 'GB', 'G' and 'B') shall be 35 units per hectare. This density may not be appropriate in all instances, but will serve as a general guidance rule, particularly in relation to 'greenfield' sites or larger 'A' zoned areas. ... There may be some specific areas of the County where higher densities, which would normally be encouraged by virtue of proximity of the site to high public transport corridors, cannot realistically be achieved as a consequence of other infrastructural shortcomings – such as the capacity of the local road network. The number of such sites would, however, be limited.*"

171. The lands are subject to Objective A land use zoning – "*To protect and-or improve residential amenity.*" I have already found, in relation to Core Ground 2 and 1, that the Board ought to have considered Section 2.1.3.5, which includes RES5, as the site forms part of a distinct parcel of lands which were in institutional use when the Development Plan was made. Section 2.1.3.5 requires the exercise of planning judgement, although average density of 35 – 50 units per hectare are to be expected. It provides:

"*In the development of such lands, average net densities should be in the region of 35 - 50 units p/ha. In certain instances higher densities will be allowed where it is demonstrated that they can contribute towards the objective of retaining the open character and/or recreational amenities of the lands*."

172. *In general terms*, as the Inspector noted at para. 12.3.2 of her Report, the Development Plan supports the optimisation of density of development, but it is necessary to consider the type of the site, its location and its proximity to public transport.

The Inspector's Report and Board Decision

173. The Inspector considered whether there was a material contravention of the Development Plan in relation to density, at paras. 12.9.13-19 of her Report. She concluded that there was no material contravention but nevertheless proposed a justification by reference to the National Planning Framework and section 28 of the Guidelines in the event that the Board considered that the proposed development would materially contravene the Development Plan. As the Board found that there was no such material contravention, the proposed justification does not require consideration.

174. The Inspector noted that the general density for the County specified in the Development Plan is 35 units per hectare and that for development of institutional lands, it provides that there should be an average of 35 to 50 units per hectare. Policy RES3 and the 2009 Guidelines were also considered by the Inspector, who noted that 35 units per hectare was the minimum default density for new residential developments in the County. At paragraph 12.9.17, the Inspector found that the proposed density of 90 units per hectare *"is acceptable"* in light of the principles of compact growth and the site location, including proximity to public transport and the neighbourhood centre at Deansgrange.

175. The Inspector found that there was no material contravention of the Development Plan with respect to policy RES3, as a minimum density was not specified and that the Plan provides for flexibility in relation to the general density of 35 dwellings per hectare.

176. The issue of density was also considered at para. 12.3 of the Inspector's Report, but the question of material contravention was not considered in that part of the Report. The statement in Section 8.2.3.2 of the Development Plan, that residential density should be determined with reference to the 2009 Guidelines, with the general principle being to optimise density of development in response to the type of site, location and accessibility to public transport, was reiterated at para. 12.3.2 of the Inspector's Report.

177. It was in this context that the Inspector considered the Apartment Guidelines. The Inspector, and the Board were required to have regard to the Apartment Guidelines which were made under section 28, in determining the application. However, they are relevant to the question whether granting permission in material contravention of the Development Plan

is justified and not whether such a contravention exists: *Ballyboden v. An Bord Pleanála* [2022] IEHC 7.

178. The Applicants contend that the decision to grant permission is invalid by reason of the Inspector's finding that the site did not "conform exactly" with the description of intermediate urban locations under the Apartment Guidelines, yet she treated it as an intermediate urban location. The finding that it should be regarded as infill development is also challenged.

179. The Applicants contend that the finding of the Inspector at para. 12.3.6, that the site was in an intermediate urban location, is invalid for a number of reasons. I have already considered this issue in relation to Core Ground 3, and for the reasons set out at paragraphs 148-151 above, I find that the Board is entitled to exercise planning judgement in classifying the type of location of the site of the proposed development having regard to para. 2.4 of the Apartment Guidelines. I am satisfied that it was open to the Inspector to rely on the three factors cumulatively, in carrying out her own local assessment of the site characteristics, with a view to assessing whether the site is an intermediate urban location rather than a peripheral or less accessible urban location, and that this is what was in fact done. The Board adopted the Inspector's findings in this regard. However, the fact that the proposed development may be regarded as an intermediate urban location is not relevant to the question whether a density of 90 dph amounts to a material contravention of the Development Plan.

180. Whilst the Inspector identified policy RES5 under the heading of density, she found it to be inapplicable on the basis that the lands did not have an INST designation. I have found this to be an error. The Inspector and the Board were required to consider Section 2.1.3.5 of the Plan, including RES5, in exercising their judgement in relation to the appropriate density for the site, and specifically whether the proposed development would materially contravene the Development Plan in terms of density. The error based on the absence of an INST designation on the Map influenced, and invalidates, the decision in relation to density.

Infill Residential Development

181. At para. 12.3.5, the Inspector considered the Sustainable Residential Development in Urban Areas Planning Guidelines 2009 and Circular NRUP 02/2021 and found that the subject site can be considered infill residential development, where increased density is encouraged. Two issues arise. Firstly, whether the site can be regarded as infill residential development by reference to the 2009 Guidelines and the Circular. Secondly, whether increased density is encouraged in areas of infill residential development.

182. Para. 1.4 of the 2009 Guidelines states that "*it remains Government policy to encourage more sustainable development through the avoidance of excessive suburbanisation and through the promotion of higher densities in appropriate locations*." The issue of increased density is considered in relation to cities and larger towns at paras. 5.4 – 5.11 of the 2009 Guidelines. In general, it is stated that increased densities should be encouraged on residentially zoned lands and particularly in specified locations, including public transport corridors and inner suburban /infill sites.

183. Chapter 5 of the 2009 Guidelines deals with the issue of density in cities and large towns. At para. 5.0, the Guidelines refer to the need to encourage the provision of affordable housing, particularly in the greater Dublin area as one of the considerations which had led to the promotion of increased residential density in the 1999 Guidelines. The three considerations identified in the 2009 Guidelines are stated to remain relevant: "*It remains Government policy to promote sustainable patterns of settlement, particularly higher residential to densities in locations which are, or will be, served by public transport under the Transport 21 programme*." At para. 5.4, the Guidelines state:

> "*In general, increased densities should be encouraged and residentially zoned lands and particularly the following locations: ...*
> *(d) Inner suburban/infill*."

184. The Guidelines further provide:

> "*5.9 The provision of additional dwellings within inner suburban areas of towns or cities, proximate to existing or due to be improved public transport corridors, has the revitalising areas by utilising the capacity of existing social and physical infrastructure. Such development can be provided either by infill or by sub-division:*

(i) Infill residential development

Potential sites may range from small gap infill, unused or derelict land and backland areas, up to larger residual sites or sites assembled from a multiplicity of ownerships. In residential areas whose character is established by their density or architectural form, a balance has to be struck between the reasonable protection of the amenities and privacy of adjoining dwellings, the protection of established character and the need to provide residential infill. The local area plan should set out the planning authority's views with regard to the range of densities acceptable within the area. The design approach should be based on a recognition of the need to protect the amenities of directly adjoining neighbours and the general character of the area and its amenities, i.e. views, architectural quality, civic design etc. Local authority intervention may be needed to facilitate this type of infill development, in particular with regard to the provision of access to backlands."

185. The terms infill, or infill residential development, are not defined in the 2009 Guidelines, nor in the Development Plan.

186. While the National Planning Framework refers to infill sites, there is no definition contained therein. At para. 2.6 it is stated:

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

187. Para. 4.5 states that "*The National Planning Framework targets a significant proportion of future urban development on infill/brownfield development sites within the built footprint of existing urban areas*." National Planning Objectives 3a, 3b, 3c do not refer expressly to infill, but these objectives seek to deliver 40% of all new homes within the built-up footprint of existing settlements, at least 50% of all new homes should be within the cities and suburbs of Dublin, Cork, Limerick, Galway and Waterford, and 30% within the existing built-up footprints of other settlements. NPO35 expressly refers to infill development schemes as a means of increasing residential density in settlements.

188. The stated purpose of Circular NRUP 02/2021 is

> "*to provide clarity in relation to the interpretation and application of current statutory guidelines, in advance of issuing updated Section 28 guidelines that will address sustainable residential development in urban areas, later in 2021. It is considered important to address this matter in the context of both the need for significantly increased and more sustainable housing supply throughout Ireland, and national recovery from the Covid-19 pandemic*."

189. The Circular does not purport to amend the 2009 Guidelines, which were made under section 28 of the 2000 Act, nor could it do so. Notwithstanding this, it was appropriate that the Board would have regard to the Circular under section 143 of the 2000 Act and that it would do so in conjunction with the 2009 Guidelines.

190. The sole reference to infill sites in the Circular is the following statement which refers to the National Planning Framework and National Development Plan: "*The preferred approach is to focus on greater reuse of previously developed 'brownfield' land, consolidating infill sites, which may not have been built on before, and the development of sites in locations that are better serviced by existing facilities and public transport*." The objective of tailoring approaches to residential development is also highlighted.

191. The finding by the Inspector that the site in question could be considered to be infill, was open to her, having regard in particular to para. 5.9 of the Guidelines, and the reference in the Circular to infill sites which may not have been built on before.

192. Neither the 2009 Guidelines nor the Circular recommend specific densities for infill sites, but I am satisfied that it was open to the Inspector to find that increased density was encouraged by the Guidelines and Circular. The Circular goes no further than the 2009 Guidelines in recommending increased density, but it refers to the key National Planning Framework and National Development Plan and section 28 Guidelines, including the 2009 Guidelines, which it states need to be revised.

193. The 2009 Guidelines also provide for increased density for developable land "*in institutional use and /or ownership*", but this was not a matter considered by the Inspector or the Board. At para. 5.10 the Guidelines state that net densities at least in the range of 35-50 dwellings per hectare should apply and that concentration of increased densities in selected parts of the site, say up to 70 dph, may be appropriate in order to retain the open character of the lands. As I have already found, the Inspector and the Board were required to consider the a lands in institutional use as that was the existing use when the Development Plan was made.

194. In *Jennings v. An Bord Pleanála* [2023] IEHC 14 and *Ballyboden v. An Bord Pleanála* [2022] IEHC 7 the institutional lands provision in the 2009 Guidelines was considered. At para. 209 of *Jennings*, Holland J. stated:

> "*209: …. The words " say up to" were construed in* Ballyboden *as " a form of bureaucratic hedge-betting intended to introduce some flexibility beyond 70 dph. But even assuming flexibility, the numbers are not meaningless and do set a context and, in general terms, influence the expectations of the intelligent layperson" in interpreting §5.10 the Urban Residential Guidelines 2009. While it contains no prescribed maxima or minima in any narrow or strict numerical sense, the number 70 was presumably deliberately and carefully chosen by the drafters to convey at least some worthwhile and more or less reliable meaning. The words " up to" tend to convey a limit and " say … 70" numerically identifies, though does not precisely delineate, the ballpark of acceptability as to an exceptionally concentrated increased density which does not increase the average net density on the lands designated Institutional.*"

195. As the Inspector, and the Board, did not consider Section 2.1.3.5 of the Development Plan and RES5, or the Guidelines insofar as they referred to lands in institutional use, and no assessment was carried out to determine whether densities higher than 35 – 50 units per hectare specified therein were appropriate having regard to the objective of the retention of open character and/or recreational amenities of the lands, I find that there is a material error in the manner in which the question of material contravention on grounds of density was determined. The Inspector's finding, at para. 12.3.6 that there is nothing in the Guidelines to preclude the proposed density level on the site was clearly made without considering the lands as institutional lands.

196. Although the decision whether or not a material contravention arises is primarily a question for the court, it is clear that the Board was required to exercise planning judgement in assessing what density was permitted by the Development Plan. The court may not substitute its own view regarding the exercise of planning judgement. It is not for me to consider whether, in light of the relative proximity of the site to public transport, and Deansgrange and portion of the site which would remain open, a density of 90 dph amounts to a material contravention of the Development Plan. What is clear is that the Board did not consider that question appropriately having regard to the institutional use of the lands.

CORE GROUND 5 – Height

197. The proposed development comprises 10 blocks, of which Blocks 1 – 6 (duplexes) will be three stories in height. The remaining four apartment blocks will be six storeys tall at their highest. The lower blocks are situated closest to the boundaries of the site, beside existing two-storey residential developments. The higher parts of Blocks A2 and A4 are furthest from the nearest existing buildings. The Inspector found that the arrangement of the blocks across the site along with transitional elements appropriately reduced the overall visual impact of the blocks.

198. In the Statement of Consistency, it was stated that, on a conservative reading of the Development Plan, the proposed development is inconsistent with the provisions in relation to height and would constitute a material contravention in that regard. The developer considered that it was necessary to meet more than one upward modifier for the grant of permission and that the site may be considered under modifiers A, C, E and F. In respect of modifiers, it was accepted that the site is 178m away from the N11 and that it is not within the 100m Quality Bus Corridor walkband. It was also submitted that none of the downward modifiers apply.

199. The developer accepted, in the Material Contravention Statement, that the proposed development exceeded the recommendations in Appendix 9 of the Development Plan, which gives a maximum height of 3 – 4 storeys for the suburban areas not identified in Section 4.7.

The Material Contravention Statement concluded that the height may be regarded as acceptable by reason of compliance with several of the upward modifiers. It was stated:

> "*On balance, it is our opinion that the proposed development amounts to a material contravention of the Development Plan. Ultimately, however, it is a matter for the Board to determine whether the proposed development is in material contravention of the development plan having regard to the application of the Upward and Downward Modifiers.*"

It was submitted that, if the Board considered there to be a material contravention, the grant of permission could be justified by reference to the Building Height Guidelines.

200. The observations received by the Board include the assertion that the proposed development amounted to a material contravention of the Development Plan in terms of height. In the Chief Executive's Report, the view of the planning authority was that a higher density development could be absorbed at that location and that the residential amenity of established residences must be ensured. The elected members had also expressed concerns regarding the height of the proposed development. The planning authority considered 3 – 4 storeys as the baseline height and was satisfied that upward modifiers did apply in the case of the proposed development. Subject to compliance with appropriate conditions, the planning authority generally considered the proposed development to accord with Appendix 9 (Building Height Strategy) of the Development Plan. While the recommendation of the planning authority was to refuse permission for other reasons, it recommended that, if permission were granted, conditions should be attached to reduce the height of part of Block B6 and the depth of Blocks A1 - A4.

201. The Inspector found that the proposed development did not materially contravene the Development Plan in respect of height, and the Board agreed with that conclusion. The Inspector considered that the applicable presumptive maximum height was 3 – 4 storeys (para. 12.9.5). At paras. 12.4, 12.5 and 12.9.6, she concluded that the proposed height was acceptable having considered the upward and downward modifiers in Appendix 9 and the Building Height Guidelines. The Board Order did not provide any further reasons for its decision that the proposed development did not amount to a material contravention of the Plan in terms of height, nor did it alter or resile from the reasons given by the Inspector.

202. The Applicants maintain that the permission granted amounts to a material contravention of the objectives of the Development Plan regarding building height. In particular, the Applicants rely on Policy UD6 (Section 8.1.2.3) and Appendix 9 (Building Height Strategy) of the Development Plan and argue that the Board erred in its application of the modifiers in Appendix 9. The Applicants also contend that the Board failed to provide reasons, or adequate reasons, for its conclusions in respect of height.

203. Policy UD6 sets out the Council Policy of adhering to the recommendations and guidance contained in Appendix 9, the Building Height Strategy. It is stated, at Section 8.1.2.3 of the Development Plan, that the Building Height Strategy "*will be used in establishing building heights for individual areas and emerging new urban nodes in the County …. [and] will also influence and inform the assessment of building heights proposed in individual planning applications*."

204. The Applicants rely on Section 4.8 of the Building Height Strategy, which states:

> "*… Areas covered by this policy will include, for example, the overtly suburban areas of Kilmacud, Mount Merrion, Booterstown, Ballinteer, Foxrock and so on. A general recommended height of two storeys will apply. An additional floor of occupied roofspace above this height may also be acceptable but only within the terms laid out in this document.*
>
> *Apartment or town-house type developments or commercial developments in the established commercial core of these areas to a maximum of 3 – 4 storeys may be permitted in appropriate locations – for example on prominent corner sites, on large redevelopment sites or adjacent to key public transport nodes – providing they have no detrimental effect on existing character and residential amenity. This maximum height (3 – 4 storeys) for certain developments clearly cannot apply in every circumstance. There will be situations where a minor modification up or down in height could be considered. The factors that may allow for this are known as 'Upward or Downward Modifiers'.*
>
> *There will be occasions where the criteria for Upward and Downward Modifiers overlap and could be contradictory, for instance: when in close proximity to both a DART station yet within the Coastal Fringe. In this kind of eventuality, a development's*

height requires to be considered on its own merits on a case-by-case basis. The presumption is that any increase or decrease in height where 'Upward or Downward Modifiers' apply will normally be one floor or possibly two.

In certain exceptional circumstances, a case may be made for additional height, for example in significant commercial or employment zones such as Nutgrove or Carrickmines, which are not areas covered by a Local Area Plan but which may be subject to development proposals. Particular importance will be placed on Item 1 (opposite) on the list of downward modifiers, where it applies."

205. The upward and downward modifiers are set out at Section 4.8.1 and 4.8.2 respectively.

206. The Applicants, and the Board and Notice Party invite the court to interpret Section 4.8 in different ways. The Applicants contend that only apartments or town-house type developments which are within an established commercial core are subject to the 3 – 4 storey general maximum height, and that the recommendation of two-storeys with an additional floor of unoccupied roof space applies to sites outside the established commercial core. The Board and the Notice Party maintain that this interpretation is incorrect and that the 3 – 4 storey general maximum applies to *all* apartment or town-house developments, whether within or outside the established commercial core of the areas included in Section 4.8, as well as to commercial developments within the established commercial core.

207. The interpretation advanced by the Applicants is consistent with the opinion of the Inspector in *Jennings v. An Bord Pleanála* [2023] IEHC 14. In *Jennings*, the Inspector considered the proposed development to contravene the Development Plan as the apartment development proposed was in a suburban area but not a commercial core. The interpretation of that part of Section 4.8 was in issue in *Jennings* and accordingly, was not considered by Holland J..

208. While the Development Plan does not describe apartment buildings or town-house type developments, I am satisfied that, applying the *XJS* method of interpreting the Building Height Strategy, an intelligent informed layperson would read Section 4.8 as applying the 3 – 4 storeys general maximum to apartment or town-house type developments in appropriate

areas without limiting them to an established commercial core. The relevant paragraph of the Development Plan does not contain punctuation which might have been of assistance. However, I consider that the 3 – 4 storey general maximum applies to two separate categories of development – "apartment or town-house type developments" and "commercial developments in the established commercial core of these areas". The use of the word "or" twice, rather than listing the three types of development together, indicates to me that these are two separate categories, the first of which includes two types of development. There is no obvious logical reason why the planning authority would generally confine apartment or town-house type developments greater than two storeys to the established commercial core of the areas to which Section 4.8 applies. Furthermore, the fact that the planning authority, or the Board, is required to be satisfied that there would not be a detrimental effect on existing character and residential amenity of the area, also leans in favour of an interpretation which does not restrict the general limit of 3 – 4 storeys for apartment or town-house developments in areas outside the established commercial core of the relevant areas (subject to the application of modifiers). In my view, an intelligent informed layperson would consider a 2-storey apartment block to be exceptional or unusual rather than the norm. Townhouses are frequently, if not normally, taller than two storeys. The photographs of apartments in the Development Plan are of three storey developments or higher; this reinforces my view that the Inspector correctly applied the 3 – 4 storey general maximum.

209. The Development Plan restricts the 3 – 4 storey maximum to appropriate locations where there would be no detrimental effect on existing character and residential amenity. The appropriateness of a particular site and the question whether a 3 – 4 storey development would have a detrimental effect on the existing character and residential amenity of the area self-evidently involve the exercise of planning judgement. The Inspector considered the character of the area and amenity impact. She considered that while there would be a change to the established context of the site, that change would be acceptable having regard to the characteristics of the site and she considered that it represented an appropriate evolution of the built environment for the area.

210. The Inspector did not consider the SPPR1 and SPPR3 in the Building Height Guidelines binding, but rather she stated that the SPPRs and the Development Management Criteria under Section 3.2 of the Guidelines "*informed [her] assessment*" of the application,

alongside her consideration of other relevant national and local planning policy standards. I am satisfied that the Building Height Strategy, particularly Section 4.8 thereof, requires the application of planning judgement in a number of respects. Ministerial Guidelines are undoubtedly a legitimate factor to be considered where development plan requires the exercise of planning judgement, or when a planning authority or the Board is considering granting permission in material contravention of a development plan. It was permissible for the Inspector to allow the Guidelines and national policy inform her assessment of the application.

211. In this case, the proposed development includes four blocks which are six storeys at their highest. This amounts to an increase of two storeys over the higher of the maxima specified i.e. four storeys plus two additional storeys. The Development Plan provides that there will be situations where "*a minor modification up or down in height could be considered.*" The Development Plan specifies that the factors, which may allow for such a minor modification, are the upward or downward modifiers specified. Guidance as to what amounts to a minor modification is also provided in the Development Plan, which states that "*The presumption is that any increase or decrease in height where 'Upward or Downward Modifiers' apply will normally be one floor or possibly two.*" It is also provided that "*in certain exceptional cases, a case may be made for additional height….*"

212. Reading Section 4.8 of Appendix 9 as a whole, I consider that a reasonably informed intelligent member of the public would interpret the Development Plan as providing for a general maximum of 3 – 4 storeys, which may be amended by application of the modifiers, and that, in an exceptional case, further additional height is permissible. The location of a proposed development in significant commercial or employment zones, such as Nutgrove or Carrickmines, which are not areas covered by a Local Area Plan are given as examples. However, the Development Plan does not seek to restrict or define the 'exceptional circumstances' which might justify additional height to sites located within those areas. It is clear therefore, that the Development Plan does not limit the height of a development to a maximum height of six storeys; that this may be exceeded in exceptional circumstances. Planning judgement also applies to a consideration of exceptional circumstances. No exceptional circumstances were relied upon by the Inspector or the Board.

213. As the Inspector found, at para. 12.4.5, it was necessary to consider the modifiers in Section 4.8 because the proposed development exceeded 3 – 4 storeys. The Inspector found that Upward Modifiers A and F applied, and that no downward modifiers applied. As the Inspector, and the Board, did not find that contradiction or overlap in of upward and downward modifiers occurred, they did not carry out an assessment of the merits of the application on a case-by-case basis. On that basis, the Board was satisfied that the proposed development, which reaches 6 storeys at its height, was consistent with the Development Plan. The application of the upward and downward modifiers in Section 4.8.1 and 4.8.2 necessarily involves the application of planning judgement.

214. Modifier A was found to apply as that the proposed development is situated at the edge of the school pitch and the Inspector found that it would provide some enclosure to that green space, along with over 7000m² of new public open space within the site itself. The Applicants contend that the Inspector was not entitled to rely solely on the fact that the proposed development would enclose a green space, but rather that the enclosure of the main public or green space must give rise to an urban design benefit, and benefit the space enclosed. The Inspector has not explained how the provision of "some enclosure" to the green space, along with the provision of new public open space within the site itself would benefit the site, in particular the green space enclosed. Currently, the site of the proposed development is partially enclosed by the rear of other residential developments and is bounded by the pitches or playing fields which are still used by the school.

215. Modifier F provides: "*The size of a site, e.g. 0.5ha or more, could set its own context for development and may have potential for greater height away from boundaries with existing residential development.*" The Inspector stated "*Modifier F relates to the size of the site, being sufficient to set its own context and the subject site is sufficiently large to be considered under that criterion in my view*." The sole factor which the Inspector referred to in relation to Modifier F is the size of the site, which is clearly very significantly larger than the site size referred to in Modifier F.

216. It is appropriate to consider the Inspector's Report and Board decision in the context of the material before the Board, including the Chief Executive's Report and the Material Contravention Statement.

217. The Chief Executive had expressed the opinion that the proposed development was generally acceptable to the planning authority in terms of height, referring to the upward modifiers. In respect of Modifier A, the Chief Executive stated that communal and public open spaces have been designed to a high standard and will benefit from a good aspect and high levels of passive surveillance overall. The planning authority considers that this the proposal will satisfy this Modifier A. The planning authority also considered Modifier F applied on the basis that more substantial setbacks could be provided from the site, as proposed in the recommended conditions. It is clear from the Chief Executive's report that Modifier F is only considered to be met if the proposed conditions were imposed. As those conditions were not imposed by the Board, the finding by the planning authority that Modifier F would apply cannot be relied upon to support the Inspector's finding nor to explain her reasoning.

218. The Material Contravention Statement states:

> "*the site may be considered under Modifiers A, C, E and F due to the following reasons…*
>
> *Modifier F - The site has an area of c. 3.3 ha, which is almost 7 times the specified site area in Modifier F. The design of the proposed scheme tapers height away from existing residential areas, with proposed duplex units providing a 'buffer' from the larger apartment blocks. Further information in relation to the design rationale and approach is enclosed in the enclosed Design Statement, prepared by Scott Tallon Walker Architects*."

219. However, this statement must be considered in its context, and having regard to the fact that the Material Contravention Statement concludes that, on a conservative reading of the Development Plan, "*the proposed development is not consistent with its provisions in relation to height and that it would constitute a material contravention of the development*

plan in this respect". Neither the Inspector's Report, nor Board decision make a finding that the site sets its own context, or if that is to be implied, why that is so.

220. While I must consider the Board's decision in the context of the materials before it, it is not open to the court to supply reasons which are not implicit in the decision. That would amount to re-writing the decision.

221. In the circumstances, I am satisfied that the Board has not applied the upward modifiers appropriately and reject the argument by the Board and developer that the Applicants' challenge amounts to a merits-based attack. The Board has not had regard to all relevant factors in relation to the upward modifiers applied by it, nor have adequate reasons been provided for applying Modifier A and F. In the circumstances, I do not consider it necessary to assess the finding that downward modifiers do not apply.

222. The Inspector stated at paragraph 12.4.14, and 12.9.6 that the proposed development did not amount to a material contravention of the Development Plan in terms of height. The basis for this finding is set out in the Report, and it is clear therefrom that the Inspector relied upon the Development Plan, which sets out the local planning policy provisions. She also had regard to the Building Height Guidelines. As stated above, the Guidelines are not relevant to the question of material contravention, but I am satisfied that the Inspector did address her mind to the question whether there was a material contravention of the Development Plan itself and that her conclusions were informed by it, rather than the Guidelines. I am satisfied she is entitled to have regard to Guidelines in the exercise of planning judgement and that it was necessary to decide whether or not the proposed development amounted to a material contravention. The Board relied entirely on the Inspector's Report in this regard and found that there was no material contravention in terms of height. I am also satisfied that a development which includes four blocks of six storeys on this site materially contravenes the Plan unless upward modifiers apply. The decision whether or not they apply involves the exercise of planning judgement. However, as I am not satisfied that the Inspector had regard to all relevant matters in considering whether the upward modifiers applied, and that inadequate reasons were given for applying them, the finding that the proposed development did not materially contravene the Development Plan in terms of height was not validly made.

223. It is not necessary for me to consider whether or not a material contravention of the Development Plan could be justified, whether as proposed by the developer in the Material Contravention Statement, or in the Inspector's Report, as the Board found that no such material contravention arose. Consideration of the basis on which a material contravention may be justified is a matter for the Board in the first instance. It is not for the court to endeavour to reach a conclusion as to whether the Building Height Guidelines, or another factor, would justify the grant of permission in material contravention of the Development Plan as the Board did not attempt to do so, having found that such a contravention did not exist.

CORE GROUND 6 – Residential Mix

224. The Applicants contend that the proposed development materially contravenes the Development Plan, and that the decision of the Board is invalid as the procedure in section 9(6)(c) of the 2016 Act was not invoked. It is not in dispute that the mix of units satisfies the requirements of SPPR1 in the Apartment Guidelines.

225. Section 8.2.3.3(iii) of the Development Plan provides that "*Apartment developments should provide a mix of units to cater for different size households, such that larger schemes over 30 units should generally comprise of no more than 20% 1-bed units and a minimum of 20% of units over 80 sq.m.*". (emphasis added)

226. The issue of Residential Mix is included in SPPR1 of the Apartment Guidelines, 2020, which were in force when the Board determined this application. SPPR1, which provides that no more than 50% of the units should be 1-bed or studio apartments, is considered further below.

227. The proposed development includes 111 1-bed apartments and no studio apartments among the 299 residential units. The Applicants maintain that this amounts to a material contravention of the Development Plan, and that the Order of the Board is invalid as the Board did not invoke the procedure required by section 9(6) of the 2016 Act, even though the unit mix meets the requirements of SPPR1.

228. The number of apartments over 80sq.m. is not clear from the Board Order or Inspector's Report. This was not a matter which was considered, although the Inspector was satisfied that the units complied with SPPR3 which provides for minimum sizes of apartments. The Applicants do not contend that the proposed development fails to include a minimum of 20% apartments exceeding 80sq.m., as provided for in Section 8.2.3.3(iii) of the Development Plan. Therefore, it is not necessary for me to decide whether or not the proposed development is consistent with that part of the Development Plan.

229. I have considered the way the term "*generally*" should be interpreted in a development plan at para. 135**.** The word generally is used in section 8.2.3.3(iii) in a manner which permits the exercise of planning judgement, but as Humphreys J. held in *O'Donnell v. An Bord Pleanála* [2023] IEHC 381, it does not confer open ended flexibility or planning judgement. Departures must be limited in nature and peculiar to their own facts; they may not be generalised in a way which undermines or rewrites the plan. The stated aim of the section is to ensure a mix of residential units to cater for different size households. It states that developments which have fewer than 30 units should be assessed on a case-by-case basis, in contrast with the general approach to be applied for larger developments. Therefore, whilst 20% is not an immutable maximum, the Development Plan provides that it should generally be applied.

230. The issue of Residential Mix was raised in observations. The Chief Executive's Report states that, as 63% of the units are 2-bed or 3-bed apartments, the proposed development satisfies SPPR1. No consideration was given by the Chief Executive to the question whether there was compliance with the requirements of the Development Plan in relation to Residential Mix.

231. The Inspector's findings in relation to Residential Mix are contained at paras. 12.6.22 - 23 of the Report:

> *"12.6.22 I note third party concerns regarding the mix of units proposed in the development. SPPR 1 of the Apartment Guidelines states that up to 50% of a proposed development may comprise 1 bedroom units, with no more than 20- 25% being studio units. The Development Plan states that a variety of housing types and sizes should be provided. …*

12.6.23. The proposed development comprises 37.1% 1 beds, 50.1% 2 beds and 12.7% 3 beds, in compliance with SPPR 1. I am also satisfied that the mix of unit sizes and provision of apartment and duplex units will contribute to greater variety in terms of the overall housing mix of the area in accordance with the Development Plan".

232. The Board considered that the proposed development would be "*consistent with national and local planning policy and would be acceptable in terms of … mix…*". Neither the Board, nor the Inspector expressly considered whether the proposed development amounted to a material contravention of the Development Plan. The Inspector, whose Report was adopted by the Board, relied on SPPR1 and found that the mix of unit sizes proposed will contribute to greater variety in terms of overall housing mix in the area in accordance with the Development Plan. No reference was made to the relative proportions of unit sizes set out at section 8.2.3.3(iii) of the Development Plan.

233. If the mix of units were to be considered solely by reference to the Development Plan, I am satisfied that the inclusion of 111 1-bed apartments, i.e., 37% of the units in the proposed development, contravenes the Development Plan; the number of 1-bed apartments generally permitted (60) would be exceeded by 51 units or 85%. Such an increase on the general permitted number changes the unit mix and mix of household size, which the Development Plan seeks to achieve, to a significant degree. As Humphreys J. held in *O'Donnell*, the degree of flexibility permitted by the term "generally" is not open-ended and does not enable the Board to effectively re-write the Development Plan. Applying the test of materiality in *Roughan v. An Bord Pleanála* unreported, High Court, Barron J., 18th December 1996; *Byrnes v. Dublin City Council* [2017] IEHC 19; *Redmond v. An Bord Pleanála* [2020] IEHC 151, I am satisfied that the inclusion of 51 1-bed apartments within a scheme of 299 apartments, in addition to the 60 apartments which would generally be permitted, amounts to a material contravention of the Plan.

234. The Board, its Inspector, and the planning authority simply approached this issue on the basis of SPPR1 of the Apartment Guidelines.

235. The Apartment Guidelines were made under section 28 of the 2000 Act (as amended). Where guidelines contain specific planning policy requirements, planning authorities and the Board are required to comply with SPPRs in the performance of their functions.

Otherwise, they are simply required to have regard to those guidelines. Guidelines are relevant to the functions of the planning authority in two ways– firstly, planning authorities are required to have regard to Ministerial Guidelines in making development plans, and secondly, they are required to have regard to the Ministerial Guidelines, or comply with SPPRs contained therein, in the determination of planning applications: section 28 and 34(2)(a) of the 2000 Act. The Board is also required to have regard to relevant Ministerial Guidelines and to comply with SPPRs in the performance of its functions: section 28 (1), (1C) and (2) of the 2000 Act: *O'Neill v. An Bord Pleanála & Ruirside* [2020] IEHC 356.

236. Section 9(3)(b) of the 2016 Act provides:

"*(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan*."

237. I agree with both Owens J. in *Pembroke Road Residents Association v. An Bord Pleanála* [2021] IEHC 403 and Holland J. in *Ballyboden v. An Bord Pleanála* [2022] IEHC 7 that the application of a relevant SPPR is not a matter of discretion for the Board. The relevance of SPPR1 is not in dispute in this case.

238. Section 9(6) of the 2016 Act is relevant where, as in this case, the application of the contents of the relevant SPPR may amount to a material contravention of the Development Plan. Section 9(6) enables the Board to grant permission for a proposed SHD even when the development materially contravenes the development plan, except where such contravention relates to the zoning of the land. Section 9(6)(c) provides:

> "*Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development*."

239. Section 37(2)(b) of the 2000 Act provides that the Board may only grant permission where it considers that one of a number of circumstances arises: the circumstances include that "*permission for the proposed development should be granted having regard to … guidelines under section 28, … and any relevant policy of the Government, the Minister or any Minister of the Government*".

240. The Advisory Note added by the Chief Executive to the Development Plan after it had been made is not relevant to the issue of Residential Mix as it refers to standards and specifications in Section 8.2.3.3 which it states are superseded by SPPR1 of the 2015 Apartment Guidelines. The standards and specifications do not include Residential Mix, nor did the 2015 Guidelines include an SPPR in relation to Residential Mix.

241. The Applicants' case is that the Board was required to expressly invoke section 9(6) and section 34(2)(b) of the 2000 Act as the proportion of 1-bed apartments in the proposed development materially contravened the terms of the Development Plan. The Applicants do not suggest that the number of 1 bed apartments is inconsistent with the SPPR1, or that the Board was not required to apply it. Both the Board and the developer submit that there was no such material contravention as the SPPR replaced the portions of the Development Plan which differed from it.

242. The Applicants rely on the judgment of Holland J. in *Ballyboden*, whereas the Board and developer rely on the *dicta* of Owens J. in *Pembroke Road*. I do not consider it necessary to resolve the differences between those two judgments, or to determine whether the Board erred in its interpretation of section 9(3) of the 2016 Act and failed to expressly invoke section 9(6) of that Act. I am satisfied that the Board would be required to apply SPPR1 as it is relevant and differs from the Development Plan. The outcome of the invocation of section 9(6) is entirely predictable in the instant case, having regard to the terms of SPPR1 and the mix proposed for the development. I do not discount the importance of the Development Plan as an environmental contract between the planning authority and the public. Both the material contravention procedure and the mandatory application of relevant conflicting SPPRs have a statutory basis.

243. However, in view of the findings I have made in respect of the other Core Grounds, it is not necessary to consider this issue further.

CORE GROUND 7 – Publication of the Application by the Applicant

244. The Applicants contend that certain documents which formed part of the application, and which were required to have been published on the website created by the developer in accordance with Article 301(3) of the Planning and Development Regulations, 2001 (as amended) were not available on the website for the entire relevant period. It is submitted that the application was invalid as a result thereof and that the Board lacked jurisdiction to determine the appeal.

245. Whilst the observations made to the Board by certain of the Applicants, and the submission made by the Department of Education complained that certain documents were not available on the developer's website, it was not contended that the application was invalid, or that the Board lacked jurisdiction to determine the application as a result of a failure to comply with Article 301(3). Whilst generally an argument may not be made for the first time in judicial review proceedings, this may be done in exceptional circumstances, particularly where the issue goes to the jurisdiction of the Board: *Reid v. An Bord Pleanála (No1)* [2021] IEHC 230. Permitting such an argument to be advanced in judicial review proceedings does not create an injustice as the Board's jurisdiction cannot be expanded by the absence of an observation raising a jurisdictional argument.

246. Article 301(3) provides:

> "*The applicant shall make a copy of an application available for inspection on the Internet at a web address set up for the purpose for the period commencing on the date of making the application and expiring 8 weeks following the sending by the Board to the applicant of a copy of its decision on the application.*"

247. The evidence before the Court establishes that the planning agent for the developer created a website to publish the application, which website went live on 8th September 2021, the date on which the application was lodged with the Board. That website included an email

address specifically to enable contact be made if a difficulty in accessing the documentation was encountered. The consultation period ran for five weeks from 8th September 2021.

248. Each of the Applicants have sworn affidavits verifying the Statement of Grounds, but they do not provide any information in their affidavits in relation to the website which is not included in the Statement of Grounds. The Applicants contend that the requirement to make the application available concerns public participation but, save insofar as the issue was raised in the observations to the Board, they have not pointed to any prejudice suffered by them or any other party by reason of the unavailability of the materials for the entirety of the relevant period.

249. 92 observations were received by the Board. The observations included a number of comments regarding the website. The following observations were specifically relied upon by the Applicants in their submissions:

- Observation dated 27th September 2021 from the seventh applicant stating that landscaping files, the Boundary Plan, Connection to Surrounding Lands, Softworks Landscape Topsoil Depth Details and the ESRI Shapefile of Clonkeen SHD were "*not available to view*;
- Observation by the fifth named applicant, and another, dated 11th October 2021 stated that BP-011-PP Boundary Plan and CP-01-PP Connection to surrounding lands, could not be accessed.
- It was stated by the sixth applicant in the observation dated 11th October 2021 that the developer had failed to make the Boundary Plan BP-011-PP and the Connection to surrounding lands CP-01-PP available.
- In its observation dated 12th October 2021, the Department of Education stated that limited information was available on the website and that "*For example key information in this regard such as BP-01-PP and CP-01-PP are not active links on the website.*"

250. None of the observations identified when unsuccessful efforts were made to view the files on the website or whether multiple attempts had been made, and none of the applicants or observers appear to have utilised the email address which was provided on the website expressly to cater for the position in which they found themselves. The Applicants'

complaint is effectively limited to the period before the end of the consultation period, which period is obviously the more significant from the public consultation perspective.

251. The developer accepts that issues with the website arose at 9:30am on 8th September 2021 and that the Board had raised an issue with the website on 17th November 2021. The evidence of the planning agent, and the developer, is that the issues were resolved on 8th September 2021. While the website was being worked on, on 8th September 2021, the files in the Landscape drawing folder were temporarily made available in another folder, which was identified on the homepage. The evidence regarding 17th November 2021 is unchallenged – it is averred that a member of the Board's staff contacted the Town Planning Consultants who checked and found the website to be working properly on that date. Notwithstanding that, the folder in question was deleted and the documents were re-uploaded to ensure that the documents were available. The email dated 17th November 2021 from the Board is exhibited. It referred to the Inspector's report and the third-party observations which raised the issue of the website. The Board did not refer to any unsuccessful attempt by any of its staff to view the application on the website, nor was it stated that the material could not be accessed on 17th November 2021. The uncontroverted evidence of the developer's Town Planning Consultants, which is relied upon by the developer, is that no correspondence was received which raised an issue regarding access to the information on the website other than the emails dated 8th September 2021 and 17th November 2021. No evidence has been provided of any other steps taken to check whether or not the entire application was available on the website in the period from 8th September 2021 until eight weeks after the Board had made its Order.

252. No complaint is made regarding the Board's obligation to make the application available for inspection or purchase at their offices during public opening hours, as required by Article 301(2) of the Regulations.

253. The Inspector considered the observations made, and her Report referred to the issue of access to the application on the website at section 12.2.38. The Report states:

> "*In relation to access to the application documentation and drawings on the SHD website for submission, I note that third parties could not access all plans, all of the time. Particularly the following: BP-01-Boundary Plan, CP-01-PP-Connection to surrounding lands; Independent tree surveys document schedule; Landscape visual*

assessment; Landscape document register; and LD-02-PP Softworks Landscape Topsoil Depth Details. However the vast majority of application documents were available to view online. All documents were also available to view from other sources, including at An Bord Pleanála's offices and Planning Authority offices and there were 92 submissions received from third parties on the application. Although, I recognise that there is an obligation upon the applicant to make application documents available on a dedicated website for the SHD application and it is unclear the extent of what documents were not available and for how long."

254. Insofar as an entire planning application is not available for review, on the website set up for that purpose, within the period from the date on which the application is lodged until eight weeks after the Board determines that application, it amounts to a breach of Article 301(3) of the Regulations. This is not seriously in issue between the parties.

255. On the basis of the evidence before the Court, I find that the entire application was not available on the website for the entirety of the relevant period. It is not possible to determine the length of the period or periods during which the complete application was unavailable, and therefore, the extent of the failure to comply with Article 301(3). There is no evidence of any issue arising after the consultation period had ended. There is no evidence that the documents could not be accessed on 17th November 2021, which is the date on which the Board raised the issue.

256. Four of the 92 observations received by the Board stated that certain documents were not available before the end of the consultation period. However, there is no evidence of the date(s) on which unsuccessful attempts were made to view the documents in question. The evidence demonstrates that none of those observers contacted the Town Planning Consultants raising any issue with the website. There is no evidence of prejudice, nor of any attempt to inspect the entire planning application at the offices of the Board or to obtain a copy thereof, albeit for a fee, unsuccessful or otherwise. Therefore, I am satisfied that no prejudice or any significant restriction of the ability of the public to participate in the application has been established.

257. The consequences of the breach of Article 301(3) are in dispute. The Applicants contend that the application was invalidated by the failure of the developer to have the entire

application available on the website for the full period, and that the Board lacked jurisdiction to determine the application. The Board pleads, in its Statement of Opposition, that any error due to the temporary non-publication of certain documentation on the developer's website is minor, immaterial, and/or inconsequential and does not entitle the Applicants to relief. The developer contends that a breach of Article 301(3) does not invalidate the application and submits that the Board did not lose jurisdiction to determine the application.

258. I am satisfied that Article 301(3) cannot be interpreted in a manner which renders an application invalid, or deprives the Board of jurisdiction, solely by reason of any breach of the obligation thereunder. It would give rise to an absurdity if a temporary failure to provide access to the entire application on the website after the Board has determined an application, retrospectively rendered the application and decision of the Board invalid. Similarly, if an application is inaccessible for a short period, for example due to a power cut or other reason outside the control of a developer and its agents, it would be absurd if a fresh application were required in order to comply with the Regulations. Neither the terms of Article 301(3), nor the legislative scheme, provide for any consequence of a breach of the obligation in Article 301(3). No distinction is drawn between the obligation to make the application available during or subsequent to the consultation period, or before or after the decision is made by the Board. The fact that the Regulations also require the application to be made available for inspection or purchase at the offices of the Board preserves the ability of the public to participate in the process even if a breach of the obligation in Article 301(3) occurs.

259. Despite the temporary breach of the developer's obligation under Article 301(3), the extent of which has not been established, neither the application nor the Board's Decision and Order were invalidated. The said breach did not deprive the Board of jurisdiction to determine the application in this case and does not entitle the Applicants to relief.

CORE GROUND 8: Appropriate Assessment

260. As I have decided that the Board has erred in a material way in relation to a number of matters of domestic planning law, I do not consider it necessary to consider and determine the challenge to the validity of the Appropriate Assessment carried out by the Board.

CONCLUSION AND PROPOSED ORDER

262. The Board has erred in the interpretation of the Development Plan, in particular in relation to the application of policies for lands in institutional use, Policies RES5, in Section 8.2.3.4(xi) and OSR11. The existing use of the site when the Development Plan was made was sporting and recreational use ancillary to Clonkeen College. The fact that the INST symbol or designation was not on the site in Map 7 does not render the policies for institutional lands inapplicable. The Board was not entitled to rely on the previous development plan, or the erection of a fence after the Development Plan had come into force to find that the site was no longer covered by the policies for institutional lands. The existing use is to be assessed at the time the Development Plan was made.

263. For these reasons, the conclusion that the permission sought did not materially contravene the Development Plan in respect of institutional lands is invalid.

264. The misinterpretation of the Plan in relation to institutional lands and the failure to consider and apply the policies related thereto, and Policy OSR11, flowed into the determination of the question whether there was a material contravention in relation to zoning, schools and density. Whilst the relevance of those policies to a particular site and the effect of those policies on a planning application are matters which involve the application of planning judgement, the Board is not entitled to disapply relevant policies Therefore, these findings of the Board in relation to material contravention were made *ultra vires*. The court cannot substitute its own view of how planning judgement should be exercised. Therefore, I make no finding as to whether the development in fact materially contravenes the Development Plan in ways which involve the exercise of planning judgement.

265. The Development Plan does provide a mathematical formula for the provision of carparking spaces, but rather the Development Plan allows for flexibility 'depending on design and location'. The flexibility provided in the Table, by the phrase "*(depending on design and location)*" should be interpreted by reference to the list of circumstances set out in Section 8.2.4.5. The Board misinterpreted the objective of the Development Plan which is to consider the need to accommodate the vehicles attracted to the development within the context of the policy of promoting the modal shift away from private cars. The reasoning of

the Inspector, which was adopted by the Board, is too opaque to enable me to assess the reasonableness or otherwise of the finding that a 40% reduction of car parking spaces from the guideline provided by the Development Plan does not materially contravene the Development Plan. A departure of this magnitude from a general standard requires a reasoned explanation by the Board.

266. As insufficient reasons were provided in respect of the application of the upward modifiers, or the Board misapplied those modifiers, I am not satisfied that the Board was entitled to find that the four blocks of six storeys do not materially contravene the Development Plan.

267. The Board correctly found that the residential unit mix complied with SPPR1 of the Apartment Guidelines. It is not necessary to resolve the question whether the Board erred in failing to invoke section 9(6)(c) of the 2000 Act on the basis that the residential mix contravened the Development Plan in light of other findings.

268. There was a breach of Article 301(3) as certain documents were not accessible on the website throughout the prescribed period as required. The extent of the established breach is minor, and there is no evidence of any prejudice to the Applicants or any other persons. The Board was not deprived of jurisdiction to determine an application, nor was its decision invalidated thereby.

269. I intend to grant an order of *certiorari* of the Board's decision of 23rd December 2023 (ABP Ref. 311329), but I shall hear the parties before making final orders in this matter.

Emily Farrell