[2020] IEHC 151

THE HIGH COURT

JUDICIAL REVIEW

2019 No. 709 J.R.

IN THE MATTER OF SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

MICHAEL REDMOND

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

DURKAN ESTATES CLONSKEAGH LIMITED

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 March 2020

* References are to paragraph numbers

INTRODUCTION

1. The within proceedings seek to question the validity of a decision of An Bord Pleanála to grant planning permission for a large scale residential development (134 units). The decision to grant planning permission was made on 10 May 2019, and bears the An Bord Pleanála reference "PL06D.304420".

2. The impugned decision was made pursuant to the special statutory procedure which governs applications for "strategic housing development" (as defined). One of the key features of this procedure is that the application for planning permission is made to An Bord Pleanála directly, i.e. there is no first-instance application to the local planning authority.

3. Notwithstanding that the planning authority does not have a formal decision-making function in respect of such applications, the authority continues to have a significant role to play. First, it is a statutory consultee and An Bord Pleanála is required to consider the report and recommendation prepared on behalf of the planning authority by its chief executive. Secondly, An Bord Pleanála must have regard to the planning authority's development plan in determining the application for planning permission. The board is precluded from granting planning permission if the proposed development would involve a material contravention of a zoning objective of the development plan or local area plan. In the case of a non-zoning objective, i.e. an objective other than one in relation to the zoning of land, the board has jurisdiction to grant planning permission in material contravention of the objective provided that certain prescribed statutory criteria are fulfilled.

4. The principal issue which arises for determination in this judgment is whether the lands, the subject-matter of the planning application, are designated as "institutional lands" under the development plan. If this designation is held to apply, then a number of subsidiary issues arise for determination by the court, including (i) whether the designation represents a *zoning* objective, and (ii) whether the proposed development constitutes a material contravention of the development plan objectives applicable to "institutional lands".

5. This judgment will also address a number of separate grounds of challenge which have been advanced by the applicant for judicial review. The legal issues presented by these other grounds can be disposed of more shortly. The lion's share of this judgment will be taken up with the issues identified in the preceding paragraph.

NOMENCLATURE

6. The following shorthand will be used to describe the parties to the proceedings. The applicant for judicial review, Mr Michael Redmond, will be referred to as "*the objector*". The applicant for planning permission, Durkan Estates Clonskeagh Ltd., will be referred to as "*the developer*". (The use of the term "applicant" to describe either of these parties will be avoided as it is apt to lead to confusion between the applicant for judicial review, and the applicant for planning permission). The decision-maker, An Bord Pleanála, will be

referred to as either "*An Bord Pleanála*" or "*the board*". Dun Laoghaire Rathdown County Council will be referred to as "*the planning authority".*

7. The underlying legislation, the Planning and Development Act 2000, and the Planning and Development (Housing) Act 2016, will be referred to by the abbreviations "*PDA 2000*" and "*PD(H)A 2016*".

8. The lands the subject-matter of the planning permission impugned in these proceedings will be referred to as "*the application site*".

9. The development plan imposes certain policies and objectives in the case of what are described as lands in "institutional use" or "institutional lands". The relevant provisions of the 2016–2022 development plan are set out in an appendix to this judgment. I will refer to lands subject to these policies and objectives as lands which have been "*designated*" as "*institutional lands*". The term "designated" is employed in contradistinction to the term "zoned". This is because, as explained at paragraph 60 et seq., the objectives and policies do not amount to a zoning objective.

THE APPLICATION SITE

10. The application site is located in Goatstown, some 5 kilometres from Dublin city centre, and is in the functional area of Dun Laoghaire Rathdown County Council. The general area in the vicinity of the application site is primarily in residential use. The application site itself measures some 1.969 hectares. The application site had previously formed part of an overall landholding of 6.4 hectares which had been in the ownership of the Congregation of Religious of Jesus and Mary *(*"*the religious congregation*"). The developer purchased the application site from the religious congregation in October 2017. The precise relationship between the application site and the overall landholding is one of the central issues in dispute in these proceedings.

11. The religious congregation had previously sold another part of the overall landholding to the same developer. A residential development known as "The Grove" has been erected on these lands.

12. The balance of the overall landholding which remains in the ownership of the religious congregation accommodates (i) a secondary school (*Jesus and Mary College*); (ii) a primary school (*Our Lady's Grove Primary School);* (iii) a new four-storey convent building (*Errew House*); (iv) a hockey pitch; and (v) tennis courts. The hockey pitch had originally run north-south, and had straddled part of the application site. An Bord Pleanála issued a (separate) grant of planning permission on 14 March 2019 which authorised the development of a new all-weather hockey pitch on an east-west alignment. This new pitch has since been installed, with the result that no part of the new hockey pitch lies within the application site. Rather, the new hockey pitch is located on lands within the continued ownership of the congregation.

"INSTITUTIONAL LANDS" DESIGNATION

13. It is evident from the positions adopted by the parties in their respective pleadings and legal submissions that the principal dispute between them centres on the interpretation of

the Dun Laoghaire Rathdown Development Plan 2016–2020 ("*the 2016–2020 development plan*"). More specifically, the parties are divided on the question of whether the application site is subject to the "institutional lands" designation. If this designation does apply, then An Bord Pleanála would have been required to have regard to certain policies and objectives in determining the planning application. In particular, it would have had to have regard to objectives in respect of (i) the density of the proposed development (dwellings per hectare); (ii) the provision of open space; (iii) the retention of trees; and (iv) the retention of sufficient space for possible future school expansion or redevelopment. Unless certain statutory criteria were met, the board would be precluded from granting planning permission for the proposed development if it constituted a material contravention of these policies and objectives.

14. The position adopted by the objector, Mr. Redmond, is that the "institutional lands" designation does apply. Conversely, An Bord Pleanála and the developer submit that the designation does not apply, and further submit that, even if it did apply, An Bord Pleanála had assessed the proposed development by reference to the relevant objectives in any event.

15. In order to resolve this dispute, it is necessary to consider the relevant provisions of the 2016–2022 development plan (both in terms of the written statement and maps). Before turning to that task, however, it is necessary first to consider the legal principles which govern the interpretation of a development plan.

INTERPRETATION OF DEVELOPMENT PLAN: LEGAL PRINCIPLES

16. The approach to be adopted in interpreting a development plan is well established. The provisions of the plan fall to be interpreted as they would be understood by a reasonably intelligent person, having no particular expertise in law or town planning. See *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527 at 535. This is the same legal test which applies to the interpretation of planning decisions as set out by the Supreme Court in *In Re XJS Investments Ltd* [1986] I.R. 750.

17. The parties were all in agreement that this is the correct approach. The parties cited more recent case law where this approach has been endorsed, including, in particular, the judgment of the Supreme Court in *Lanigan v. Barry* [2016] IESC 46; [2016] 1 I.R. 656 (interpretation of planning permission), and the judgments of the High Court in *Heather Hill Management Company clg v. An Bord Pleanála (No. 2)* [2019] IEHC 450 and *Spencer Place Development Company Ltd v. Dublin City Council* [2019] IEHC 384.

18. There was, however, disagreement between the parties as to the extent, if any, to which it is legitimate for a court to have regard to materials *outside* of the development plan in interpreting the plan. The developer submitted that it was legitimate to have regard to *earlier* development plans in interpreting the 2016–2022 development plan. In particular, it was submitted that the documentary record of the statutory procedure leading up to the making of the 2010–2016 development plan explained the significance of the change in the location of the symbol, which designates lands in "institutional use", as between the 2010–2016 plan and its precursor, namely, the 2004–2010 development plan. The

manager's report in respect of the process leading up to the making of the 2010–2016 plan indicated that the symbol had been repositioned to "the northeast corner of the defined site to more accurately reflect the residual *bona fide* institutional use remaining on the site". (See affidavit of Julie Costello, paragraph 31 and exhibit JC10). (As an aside, it should be noted that, whatever the authority's position may have been in 2010, it is evident from the chief executive's report that the planning authority is now firmly of the view that the designation applies to the application site).

19. With respect, this submission seeks to attribute far too great a knowledge to the hypothetical "reasonably intelligent person". The case law indicates that a development plan is to be interpreted as it would be by a person who has no particular expertise in law or town planning. Whereas such a person can be assumed to have read the extant development plan, it is unrealistic to assume that he or she would have gone further and sought out copies of the *previous* development plan and of the documentation leading up to the making of that plan. This would entail a level of knowledge which is the exclusive preserve of those with a professional role in town planning, i.e. planning consultants or lawyers.

20. It would also be inconsistent with effective public participation, as required under national and EU law, to impose an obligation on a member of the public, who wishes to understand current planning policy, to have to read not only the extant development plan—the contents of which often run to hundreds of pages—but also to have to read *previous* development plans and the statutory reports associated with the making of those earlier development plans. This would place an unrealistic burden on members of the public.

21. The 2016–2022 development plan thus falls to be interpreted without reference to the 2010–2016 development plan.

INTERPRETATION IS A QUESTION OF LAW FOR THE COURT

22. Before turning to consider the provisions of the 2016–2022 development plan in detail, it is necessary first to say something about the standard of review which the court is required to apply in interpreting a statutory development plan. The parties all agree that the general rule is that the interpretation of a plan is a question of law, and, accordingly, the court is not required to show deference to the views of An Bord Pleanála (or even to the views of the local planning authority who is the author of the plan).

23. It is important to understand the rationale underlying this principle that the interpretation of a development plan is a question of law for the court. The rationale is predicated on the legal effect of a development plan, and, in particular, the manner in which it acts as a fetter on the discretion of An Bord Pleanála. An Bord Pleanála enjoys a broad discretion in determining planning applications, and its decision on whether proposed development is in accordance with proper planning and sustainable development is subject only to the most limited merits-based review under the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The board is, however, required to "have regard to" the provisions of the relevant development plan. Further, there are statutory restrictions on the board's

jurisdiction to grant planning permission for proposed development in material contravention of the development plan. These statutory restrictions are stricter in the case of a "strategic housing development" application under the PD(H)A 2016 than they are in the case of a conventional planning application. The board cannot grant planning permission under the PD(H)A 2016 where the proposed development, or a part of it, contravenes materially the development plan in relation to the *zoning* of the land. This difference in treatment between a "strategic housing development" application and a conventional application is, presumably, intended to reflect the fact that an application of the former type is made directly to An Bord Pleanála without there being any first-instance application to the planning authority. The enhanced status afforded to the zoning objectives ensures that the planning authority's role, as author of the development plan, in setting planning policy, is respected. As to the role of a local planning authority in making policy, see, generally, *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163; [2012] 2 I.R. 506, [62].

> "[…] However, for the reasons already analysed, a development plan contains at least a significant element of what might legitimately be described as policy formation. It is, of course, the fact that there are limits on the range of policy options which can be adopted by a local authority for the purposes of formulating its development plan. The development plan must conform with the legislation. It must be designed and set out with 'an overall strategy for the proper planning and sustainable development' of the relevant area (s. 10(1) of the Act of 2000). It must conform with the overall policy objectives mandated by the legislation (such as have been described earlier in this judgment). Within those very general obligations a great deal of discretion is left to the local authority and it does not seem to me to be unreasonable to describe the breadth of that discretion as amounting to an express, and constitutionally permissible, conferral of at least a degree of policy- making discretion on the local authority concerned."

24. Insofar as non-zoning objectives are concerned, An Bord Pleanála may only grant planning permission in material contravention of a development plan by reference to the statutory criteria under section 37(2)(b) of the PDA 2000. (See section 9(6)(c) of the PD(H)A 2016). These criteria read as follows:

    (i) the proposed development is of strategic or national importance;

    (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned;

    (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government;

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

25. It follows from this legislative scheme that the question of whether or not a proposed strategic housing development involves a material contravention of the development plan must be a question of law exclusively for the court. Were it otherwise—and were An Bord Pleanála to be allowed to determine conclusively whether or not a material contravention is involved—then this would set at naught the statutory restraints on An Bord Pleanála's ability to grant planning permission which are imposed by section 9(6) of the PD(H)A 2016. The board would, in effect, be allowed to determine its own jurisdiction.

26. Of course, An Bord Pleanála will, as a matter of daily practice, have to take a view on the interpretation of development plans as part of its decision-making on individual planning appeals and applications. This is entirely proper. There is no suggestion that the board has to pause, and refer the question of interpretation to the High Court. Rather, the point of the above analysis is that, in the event that a planning decision is challenged by way of judicial review, then An Bord Pleanála's view on the interpretation of the plan is subject to full-blooded review, and not the attenuated form of review under the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

27. In some instances, objectives of a development plan will—on their correct interpretation—be formulated in broad terms, and it will be a matter of planning judgment as to how to apply those objectives to any given planning application. However, the correct interpretation of a development plan is always a logically anterior question to the application of the plan's objectives in the assessment of any particular development proposal. This point is illustrated by the judgment of the UK Supreme Court in *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13, [21].

> "A provision in the development plan which requires an assessment of whether a site is 'suitable' for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word 'suitable, in the policies in question, means 'suitable for the development proposed by the applicant', or 'suitable for meeting identified deficiencies in retail provision in the area', is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed."

28. The judgment in *Tesco Stores Ltd*. has been cited with approval by the High Court in *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181 and *Kelly v. An Bord Pleanála* [2019] IEHC 84 (*"Kelly (Aldi Laytown")).*

DOES THE DESIGNATION APPLY TO THE APPLICATION SITE?

29. The 2016–2022 development plan comprises a written statement, consisting of a series of chapters dedicated to particular issues, and a number of maps. It is indicated at the outset of the plan that, in the event of a conflict, the written statement is to prevail over the maps. See §1.1.4.3. as follows.

> "The 14 No. County Development Plan Maps provide a graphic representation of the proposals contained in the Written Statement and/or Appendices and indicate land use zoning and control standards together with various other objectives of the Council. The Maps do not purport to be accurate survey maps from which site dimensions or other survey data can be determined. Should any potential conflicts arise between the Written Statement and the County Maps the Written Statement shall prevail."

30. As flagged earlier, the principal dispute between the parties centres on whether the application site is subject to the "institutional lands" designation. The starting point for the hypothetical "reasonably intelligent person", in seeking to address this question, would be to consider the written statement of the development plan in order to identify the policies and objectives applicable to institutional lands. The relevant policies and objectives are set out in an appendix to this judgment. The intelligent reader would note that it is the planning authority's policy to retain the open character and/or recreational amenity of these lands wherever possible.

31. The intelligent reader would then turn to Map 1 of the 2016–2022 development plan which sets out a graphic representation of zoning objectives and other objectives contained in the written statement. The legend to Map 1 indicates that the symbol "INST" is employed to designate the objective "To protect and/or provide for Institutional Use in open lands". The language employed in the legend differs slightly from the written statement which generally employs the term "institutional lands". There is no definition of "institution", "institutional use" or "institutional lands" provided for under the 2016–2020 development plan. Examples of institutional use are cited at §2.1.3.5 as follows: education, residential or other such uses. A "residential institution" is defined under the development plan, for the purposes of the use classes, as "A building or part thereof or land used as a residential institution and includes a monastery, convent, hostel, home for older persons/nursing home".

32. The dictionary definition of "institution" includes an organisation founded for inter alia religious and education purposes.

33. The "INST" symbol appears at a number of locations on Map 1. The size of the symbol is always the same, i.e. the footprint of the symbol is not intended to delimit the lands subject to the designation.

34. The application site is not separately identified in Map 1, but rather appears within a larger overall area of lands. These lands are shown as being surrounded on three sides by existing housing, and on the fourth by a road. The site coverage of these lands, i.e.

the proportion of the lands occupied by buildings and structures, is noticeably less than the surrounding lands in residential use.

35. There are a number of factors which indicate that the intelligent reader of the development plan would interpret it as applying the "institutional lands" designation to the entire of the lands in the ownership of the religious congregation as of the date of the adoption of the 2016–2022 development plan (March 2016) as follows.

36. First, the very description of the objective as *per* the legend to Map 1 emphasises the *open character* of the lands so designated. 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.

37. Secondly, it is evident from the features depicted on Map 1 that—as of March 2016 at least—the lands to the south-west were still in institutional use. In particular, a hockey pitch associated with the secondary school (*Jesus and Mary College*) is depicted on the map, and straddles part of what is now the application site. This hockey pitch had a north-south alignment, and approximately one-third of the pitch lay within the application site. The secondary school has since obtained planning permission, on appeal, for the construction of a new synthetic all-weather hockey pitch. An Bord Pleanála's decision to grant planning permission is dated 14 March 2019. In reaching its decision to grant planning permission for the new pitch, An Bord Pleanála expressly relied on the "established use of the site for sports and recreation". The new pitch has a different alignment, i.e. east-west, than had the former hockey pitch, with the consequence that the full of the new pitch lies *outside* the application site.

38. There had been some suggestion at the hearing before me that the former hockey pitch may have fallen into disuse in more recent years, and that this is something of which the intelligent reader of the development plan would have knowledge. This suggestion was contested by the objector, Mr Redmond. Neither side addressed this issue specifically in their affidavit evidence. At all events, it is obvious from the approach taken by An Bord Pleanála in March 2019 to the application for a synthetic all-weather hockey pitch that the established use of the hockey pitch had not been abandoned. The established use for sports and recreation is expressly referenced by the board in its decision to grant planning permission.

39. An Bord Pleanála's direction records that it had "decided to grant permission generally in accordance with the Inspector's recommendation". The inspector had addressed the established use of the lands as follows at §7.1.2. of her report of 1 February 2019.

> "The appeal site is within the grounds of an established Educational Institution, i.e., Jesus and Mary College and the proposed use is an ancillary use to the existing secondary school. Furthermore, the proposal would replace the existing hockey pitch. Therefore, I would consider that the proposed development represents a replacement of an existing use and having regard to the zoning objective of the area I would consider that the proposed development would be acceptable in principle."

40. It follows that the intelligent reader examining the development plan in March 2016 would similarly understand that the lands occupied by the hockey pitch were associated with the secondary school and remained in institutional use.

41. Thirdly, the intelligent reader would be aware that—with the exception of the lands which were being transferred to the ownership of Durkan Estates Clonskeagh Ltd and have since been developed as "The Grove"—the balance of the overall site remained in the ownership of the religious congregation as of March 2016. As counsel for the developer correctly noted, one of the factors which can be considered in identifying the relevant "planning unit" is the ownership or occupation of the lands. Counsel referenced the well-known judgment in *Burdle v. Secretary of State for the Environment* [1972] 1 W.L.R. 1207 ("*Burdle*"). This judgment suggests a three point test for identifying the relevant planning unit as follows.

> "First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered.
>
> […]
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit."

42. The Court of Appeal, *per* Bridge J., then suggested the following "working rule".

> "It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as

the site of activities which amount in substance to a separate use both physically and functionally."

43. Counsel for the developer was careful to emphasise that *Burdle* is not a case concerned with the interpretation of a development plan. Rather, it is a case concerning enforcement proceedings and established use rights. Counsel also submitted that the crucial date for determining whether lands are in institutional use must be the date of the relevant application for planning permission. I will return to examine these submissions in more detail under the next heading, at paragraph 48 below.

44. For present purposes, I am satisfied that the intelligent reader of the 2016–2022 development plan would attach weight to the *ownership* of the lands in identifying the extent of the "institutional lands" designation. As of the date of the adoption of the development plan, what is now the application site had been part of the overall lands in the ownership of the religious congregation. These lands were being used for religious and educational uses associated with the congregation.

45. Finally, it is necessary to address the principal argument relied upon by An Bord Pleanála and the developer, which is to the effect that the precise location of the "INST" symbol *within* the overall landholding would be regarded as significant by the intelligent reader. More specifically, it was submitted that the location of the symbol in the north-east corner of the overall landholding would be understood as drawing a clear demarcation between the northern uses and the southern uses. The "INST" symbol was described as being tucked on the north-eastern corner of the site where all of the school-related uses and buildings are said to be. The south-western part of the site was described as being unused at the time, and as not available for public access or recreation. The location of the "INST" symbol was said to reflect the rationalisation of the institutional uses to the north of the overall landholding.

46. With respect, there are a number of flaws in this argument, and I have concluded that it does not represent the correct interpretation of the development plan for the following reasons. (To avoid unnecessary duplication with the discussion above, the reasons are stated in short form where there is an overlap with the earlier discussion. The reasons which follow should be read in conjunction with that earlier discussion.)

    (1). The contended for division of the overall landholding between institutional uses to the north-east and non-institutional uses to the south-west ignores the fact that the former hockey pitch continued to have an established institutional use, i.e. it had an established use for sports which was ancillary to the secondary school. This established use had been expressly recognised by An Bord Pleanála as recently as March 2019 in its decision in respect of the new all-weather hockey pitch.

    (2). The "open lands" to the south-west remained in the ownership of the religious congregation as of March 2016. The written statement of the development plan expressly refers to the "open character" of the lands. It would be illogical to

exclude open lands, which are the very thing to which the objectives and policies are directed, from the designation.

(3). There are "INST" symbols dotted throughout Map 1. It would be immediately apparent to the intelligent reader of the development plan that the precise location of these "INST" symbols, relative to the particular open lands and structures to which each individual symbol refers, does not follow any coherent pattern. There are, for example, three "INST" symbols on lands to the north of the religious congregation's landholding. In the case of "Saint Killian's Deutsche Schule", the symbol appears to have been placed in the vicinity of a playing field depicted on Map 1, rather than placed on any of the depicted school buildings. For the lands to the right of the German School, the symbol appears in the middle of the buildings, but for the lands on the right, the symbol is away from the buildings. In the case of the religious congregation's own landholding, the symbol appears to be placed on top of the depiction of the primary school (and not on both the primary and secondary school). It can scarcely be suggested that the designation was confined to the primary school.

Given the manner in which the placement of the "INST" symbol varies throughout the map, the intelligent reader would assume that the precise location of the symbol within an overall landholding was not intended to be determinative.

(4). The "INST" symbols are all of uniform size, and it appears from the scale on Map 1 that the symbol would only cover a footprint of roughly 50 m x 25 m. It is obvious, therefore, that the designation cannot be confined to the lands immediately within the footprint of the symbol.

47. In summary, therefore, I have concluded that the application site (which it will be recalled had accommodated part of the secondary school's hockey pitch) was subject to the "institutional lands" designation as of the date of the adoption of the development plan in March 2016. It is next necessary to consider whether the subsequent sale of the application site altered the planning status of the site.

SALE OF THE APPLICATION SITE

48. As flagged under the previous heading, counsel for the developer placed much emphasis on the transfer of ownership of the application site from the religious congregation to the developer in 2017. The developer purchased some 2.34 hectares from the congregation. Counsel for the developer confirmed that the sale was completed in October 2017 (Day 3 transcript, page 4).

49. The lands in sale included approximately one third of the north-south hockey pitch; and lands which had been occupied by the former primary school and the former convent building. The former primary school buildings were demolished after the new primary school had been completed in August 2012. The new primary school is located to the north-east. Planning permission for a new all-weather hockey pitch had been granted in

March 2019, and the new pitch is now located on the north-west part of the overall landholding.

50. It is argued on behalf of the developer that the legal effect of this transfer of ownership in October 2017 is that the lands in sale were no longer available to the institutional use.

51. The gravamen of the argument is that the extent of lands subject to the "institutional lands" designation should be determined by reference to the use of the lands as of the date that an application for planning permission for residential development is lodged, and not the use of the lands as of the date the 2016–2022 development plan was adopted (March 2016). The developer lodged the planning application, which culminated in the planning permission impugned in these proceedings, on 10 May 2019. As of that date, the application site was already in the ownership of the developer. The legal consequence of this, it is said, is that the application site was no longer available to the institutional use, and the designation no longer applied. It was further submitted that whereas the interpretation of the development plan does not change, the practical extent of the "institutional lands" designation on the ground did change as a result of the transfer of ownership. (Day 3 transcript, page 20).

52. Before turning to examine the developer's argument in detail, it should be noted that the position adopted by An Bord Pleanála was more nuanced. The board's position before the High Court concentrated on what was said to have been the *rationalisation* of the institutional uses on the north-eastern part of the overall landholding, rather than on the change in ownership of the lands. The implication was that certain parcels of land had ceased to be put to institutional use, and it was for this reason that the designation no longer applied. Reference was made, in particular, to the relocation of the primary school to the north-eastern part of the overall landholding, and the (alleged) disuse of the hockey pitch. Counsel explained that An Bord Pleanála was not saying that one can defeat a development plan by simply changing the *ownership* of lands. For example, it was not being suggested that if the religious congregation had sold off the primary school building that it would then cease to be in institutional use. (Day 2 transcript, pages 50 to 53).

53. Returning to the developer's argument, I have concluded that the sale of the lands did not have the radical effect in planning terms contended for by the developer. The rationale for this conclusion is as follows.

54. The relevant policies and objectives of the development plan are intended to inform the determination of planning applications which seek permission to authorise a material change in the use of lands which have an established use as "institutional lands". The development plan seeks to balance the objective of maintaining lands in institutional use, against the practical reality that, in some instances, there may no longer be a demand for institutional use. It is expressly stated that where no demand for an alternative institutional use is evident or foreseen, the planning authority may permit alternative uses subject to the zoning objectives of the area and the open character of the lands

being retained. On the facts of the present case, the relevant zoning objectives would allow for residential development.

55. On the developer's argument, the elaborate provision made under the development plan for regulating a change from an established institutional use to residential use would be set at naught. The development plan objectives could be by-passed by the simple expedient of a transfer of ownership. Lands which were subject to institutional use at the time the development plan was made, and for which planning permission could only be obtained by reference to the relevant development plan objectives, would be released from these requirements by the stroke of a pen on a contract for sale. On this interpretation, the only effect of the development plan would be to regulate the development of the lands for so long as they remained in the ownership of the religious congregation. The restriction would be peculiar to the congregation and would not serve any wider planning purpose.

56. With respect, such an interpretation would make an absurdity of the development plan. Development objectives are not intended to be personal or peculiar to individual landowners. Rather, planning permission enures for the benefit of the land. The developer's argument ignores the fact that, as of the date of the adoption of the development plan, the lands had an established institutional use. 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.

57. Put otherwise, the development plan contains policies which govern the release of institutional lands for residential development. Yet on the developer's argument, these policies simply do not apply to it. For the reasons set out above, this is an incorrect interpretation of the development plan.

58. Finally, it should be reiterated that the fact that the application site is subject to the "institutional lands" designation does not preclude the grant of planning permission for residential development, for the following reasons. First, even on their own terms, the development plan policies and objectives envisage that residential use may be permitted in certain circumstances. Secondly, An Bord Pleanála is authorised to grant planning permission in material contravention of the development plan. Thirdly, the provisions of the development plan can be overridden by Ministerial guidelines issued under section 28 of the PDA 2000 (as amended). The Minister can include "specific planning policy requirements" in guidelines. Where such specific planning policy requirements differ from the provisions of the development plan, then those requirements shall, to the extent that they so differ, apply *instead of* the provisions of the development plan. (See section 9(3)

of the PD(H)A 2016). (No reliance has been placed on any specific planning policy requirements to justify a material contravention of the development plan on the facts of the present case).

59. It also remains open to the new owners of the application site, i.e. the developer, to apply to have the status of the lands changed as part of the next development plan cycle.

MATERIAL CONTRAVENTION OF ZONING OBJECTIVE?

60. For the reasons set out above, I have concluded that the application site is subject to the development plan policies and objectives applicable to institutional lands. The next question to be considered is whether the decision to grant planning permission involved a material contravention of a zoning objective of the development plan.

61. The significance of the distinction between zoning objectives and non-zoning objectives is that An Bord Pleanála is precluded from granting planning permission for strategic housing development under the PD(H)A 2016 if the proposed development would constitute a material contravention of the development plan or local area plan in relation to the zoning of the land (section 9(6)(b)).

62. Map 1 of the 2016–2022 development plan indicates that the application site is subject to the zoning objective "Objective A To protect and or improve residential amenity".

63. There was some debate at the hearing before me as to whether the label which a development plan attaches to a particular objective is conclusive on the question of whether the objective is a zoning objective or not. Put shortly, does the fact that the development plan describes a particular policy as a "zoning objective" make it such. Counsel for the developer suggested that what a development plan labels as a "zoning objective" may, in truth, entail a combination of zoning and non-zoning objectives. Counsel cited, by way of example, a development plan which purported to *zone* an area for "low density residential development", and suggested that the policy in respect of density does not form part of a zoning objective within the meaning of section 10 of the PDA 2000.

64. For the reasons which follow, I have determined that whereas the label "zoning objective" as employed under a development plan will usually coincide with the legal concept of a zoning objective, the label cannot be conclusive. The concept of a zoning objective is a term of art under the planning legislation. The concept is introduced under section 10(2)(a) of the PDA 2000 as follows.

> "(2) Without prejudice to the generality of subsection (1), a development plan shall include objectives for—
>
> (a) 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;"

65. A zoning objective enjoys an enhanced status over that of other policies and objectives under a development plan. This is most immediately apparent from the provisions of section 9(6)(b) of the PD(H)A 2016 discussed above. A zoning objective also has a particular significance in the context of statutory compensation under Part XII of the PDA 2000. The general position under Part XII is that a decision to refuse planning permission will attract the payment of statutory compensation if that decision has the effect of reducing the value of an interest in the affected lands. This entitlement to compensation is, however, subject to a large number of exceptions. Relevantly, compensation will not be payable where planning permission has been refused for the following reason. (Schedule 5 of the PDA 2000, paragraph 20).

"20. The development would contravene materially a development objective indicated in the development plan 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 such uses)."

66. (This is subject to certain safeguards which address the contingency of a change in zoning objective having been made during the currency of the development plan).

67. The question of whether a particular development represents a material contravention of a zoning objective thus has a special importance both to landowners and to the local planning authority (as the entity liable to pay statutory compensation). It would be unsatisfactory were the label that the planning authority attached to an objective in the development plan to be conclusive of whether the objective was a zoning objective. Put otherwise, the fact that a development plan mistakenly describes a particular policy as a "zoning objective" cannot defeat a claim for compensation. It is clear from the case law that the courts will consider the *substance* of the relevant development plan policy or objective in order to determine whether or not it operates to exclude compensation. See, for example, *Ebonwood Ltd v. Meath County Council* [2004] 3 I.R. 34.

68. Returning to the facts of the present case, the position is clear-cut. The zoning objective applicable to the lands is "Objective A To protect and/or improve residential amenity". The institutional lands designation does not amount to a zoning objective. First, the designation does not purport to override the residential zoning objective. Rather, the policies and objectives triggered by the designation expressly recognise that residential development may in principle be permissible, but seek to regulate the precise 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.

69. Secondly, the limited extent of the lands subject to the designation suggests that the designation is more akin to the reservation of land for a particular purpose, i.e. a form of spot zoning, than to a general zoning objective. (cf. *Monastra Developments Ltd v. Dublin County Council* [1992] 1 I.R. 468).

70. Finally, it is necessary to address an argument made by the objector by reference to the treatment of institutional lands under the development plan of a *different* planning authority, namely Dublin City Council. The original version of the Dublin City Development Plan 2011–2017 had purported to regulate the development of institutional lands by way of a zoning objective, namely "Z15 (To protect and provide for institutional and community uses)". A challenge to the validity of this zoning objective was taken on behalf of the Sisters of Charity. The challenge was ultimately resolved on the narrow grounds that adequate reasons for the impugned objective had not been stated. See *Christian v. Dublin City Council (No. 1*) [2012] IEHC 163; [2012] 2 I.R. 506. The matter was remitted to the planning authority for reconsideration in the light of the findings of the High Court, and a different form of objective was ultimately adopted.

71. Mr Redmond seeks to rely on the fact that Dublin City Council had sought to implement its policies by way of a zoning objective in support of his argument that the policies and objectives under the Dun Laoghaire Rathdown development plan 2016–2022 should be characterised as a zoning objective. With respect, no useful analogy can be drawn between the two development plans. The nature of the policies and objectives are entirely different. Crucially, under the impugned version of the Dublin City Council development plan, the relevant objective had *excluded* residential development as a use which was either permissible or open for consideration. By contrast, on the facts of the present case, the application site is subject to a residential zoning, and there is no inconsistency between that zoning objective and the additional policies and objectives which apply to institutional lands. The policies and objectives recognise that institutional lands can be developed for residential use, but seek to regulate how and when this is done.

72. In summary, a decision to grant planning permission for residential development on lands subject to the "institutional lands" designation would not involve a material contravention of a zoning objective under the 2016–2022 development plan. Consequently, the impugned decision to grant planning permission does not fall foul of the prohibition under section 9(6)(b) of the PD(H)A 2016.

MATERIAL CONTRAVENTION OF NON-ZONING OBJECTIVE?

73. The consequence of the finding that the application site is subject to the institutional lands designation is that the planning application was subject to certain policies and objectives under the 2016–2022 development plan, as set out at §2.1.3.5; §8.2.3.4 (xi) and §8.2.8.2 (i). These sections of the development plan have been reproduced in full in an appendix to this judgment.

74. The test for determining whether a contravention is material is that prescribed by the High Court (Barron J.) in *Roughan v. Clare County Council*, unreported, High Court, Barron J., 18 December 1996.

> "It has been submitted on behalf of the Applicants that what is or is not a material development has to be considered in the light of the substance of the proposed development; whether or not any change of use would be significant; the location

> of the proposed development; the planning history of the site or area; and the objectives of the development plan. I accept that all these matters must be taken into account when considering whether or not any proposed contravention of the development plan is material. What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."

75. This test has been very recently approved of by the High Court (Baker J.) in *Byrnes v. Dublin City Council* [2017] IEHC 19, [23].

76. For the reasons which follow, I have concluded that the proposed development represents a material contravention of the development plan policies and objectives in respect of housing density and minimum open space. It is sufficient for the disposition of these judicial review proceedings to find that these two policies and objectives have been breached. These are fundamental provisions of the development plan, and the extent of the contravention of same is "material" having regard to the principles set out in *Roughan* (above).

77. The position in respect of other of the policies and objectives of the development plan is more nuanced in that the application of same entails the exercise of subjective planning expertise.

(i). Housing Density

78. The proposed development involves a material contravention of the relevant development plan policy in respect of housing density. Policy RES 5, which is set out at §2.1.3.5 of the development plan, addresses the housing density applicable to institutional lands as follows.

> "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."

79. The proposed development has a housing density of approx. 67 units per hectare. This density is well in excess of 35 – 50 units per hectare. It is, of course, the case that Policy RES 5 allows for *higher* densities in certain circumstances, i.e. where it is demonstrated that the higher densities can contribute towards the objective of retaining the open character and/or recreational amenities of the institutional lands. This reflects the rationale underlying the 2009 Ministerial Guidelines on *Sustainable Residential Development in Urban Areas* (cited by the objector), wherein it is indicated at §5.10 that the objective of retaining the open character of institutional lands might be achieved by *concentrating* increased densities in selected parts of the overall lands. A figure of 70 units per hectare is instanced in the guidelines.

80. There is no suggestion in the present case that An Bord Pleanála's decision to authorise a density of c.67 units per hectare had been informed by the objective of retaining the open character and/or recreational amenities of the lands. Rather, the approach taken by the inspector, and adopted by the board, had been to treat the application site as being subject to a *different* policy, namely, Policy RES 3, which provides that, as a general rule, the *minimum* default density for new residential developments shall be 35 units per hectare. A higher minimum density of 50 units per hectare will be encouraged where a proposed development is located within circa 1 kilometre pedestrian catchment of a rail station, Luas line, BRT, Priority 1 Quality Bus Corridor and/or 500 metres of a Bus Priority Route. The inspector accepted that none of those criteria were fulfilled by the application site. The inspector addressed RES 3 as follows at §12.2.4 and §12.2.5 of her report.

> "Policy RES 3 of the County Development Plan 2016-2022 requires a minimum default density of 35 units per hectare for new residential development in areas outside of e.g. a 1km pedestrian catchment of a Luas line, 1km from a Town or District Centre etc. Densities of 50 units per hectare are required within these catchments. The subject site is around a 1.4km walk to the nearest Luas stop and town/district centre. As such, the required minimum default density of 35 units per hectares applies.
>
> Density at 67 units per hectare (132 no. units on a 1.969 hectare site) is considered appropriate for this location and in compliance with relevant section 28 ministerial guidelines. The proposal to increase the density is considered appropriate given the location of the site and the proposal is not considered to represent overdevelopment of the site. The 3 no. proposed five-storey apartment blocks have 109 no. apartments in total. Block A, the south western block, has 38 no. units; Block B the south eastern unit, has 38 no. units and Block C, the north western block, has 33 no. units. There are 4 no. apartment units in Block D comprising two ground floor apartments with 2 no. duplex apartments above. Unit mix is good with 18 no. 1-bed units, 83 no. 2-bed units and 12 no. 3-bed units proposed. This would lead to a good population mix within the scheme, catering to persons at various stages of the lifecycle, in accordance with Specific Planning Policy Requirements (SPPRs) in the Sustainable Urban Housing: Design Standards for New Apartments' Guidelines 2018. The proposal for higher density at this location accords with Ministerial Guidelines.
>
> The Urban Development and Building Heights Guidelines for Planning Authorities (2018) relate to building heights for apartment buildings. Reusing brownfield land and building up urban infill sites is required to meet the needs of a growing population without growing urban areas outwards and 'increased building height is a significant component in making optimal use of the capacity of sites in urban areas…' Section 3.1 states that 'it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of increased heights in … urban locations with good public transport accessibility'. The site is proximate to public transport, with bus routes

on Goatstown Road and the NTA report is supportive of the proposed development."

81. As appears, the justification for the higher density of 67 units per hectare seems to have been informed by factors such as that the site was proximate to the bus routes on the Goatstown Road. (These are not Priority 1 Quality Bus Corridors). It also seems that the inspector had accepted the submission made by the developer that the application site should be characterised as an "intermediate urban location" under the statutory guidelines, *Sustainable Urban Development: Design Standards for New Apartment* (March 2018). It should be noted that whereas those guidelines do contain certain "specific planning policy requirements" or "SPPRs", same do not relate to housing density.

82. In summary, therefore, the board erred in finding that the proposed development was subject to the housing density set out at RES 3. Rather, the housing density to be applied was that provided for under RES 5. The planning permission purports to authorise a density of c.67 units per hectare. This density exceeds that generally provided for under RES 5, i.e. 35 units per hectare, and does not meet the criteria for higher density under RES 5 because the permitted density does not contribute towards the objective of retaining the open character and/or recreational amenities of the institutional lands.

83. Counsel for An Bord Pleanála made the point at the hearing before me that the argument in relation to RES 5 was one advanced by the objector alone. More specifically, the planning authority had not recommended the refusal of planning permission on the basis that the density breached RES 5.

84. This submission is correct insofar as it goes. However, in circumstances where the interpretation of a development plan, and, in particular, the determination of whether or not a proposed development would involve a material contravention of the development plan, is a question of law for the court, then the views of neither the planning authority nor An Bord Pleanála can be decisive. Put otherwise, the fact that the planning authority does not appear to have appreciated that the development would involve a material contravention of RES 5 does not preclude the court from reaching a contrary view in these judicial review proceedings. The argument that the proposed development involved a breach of RES 5 had been expressly raised by the objector in his submission to An Bord Pleanála, and, again, at the hearing before me. For the reasons set out above, I am satisfied that the objector's argument is well founded, and that there is, indeed, a material contravention of RES 5.

(ii). Minimum open space provision

85. The proposed development also involves a material contravention of the relevant development plan policy in respect of open space provision. The development plan requires a minimum open space provision of 25% of either (i) the total site area, or (ii) a population based provision, whichever is the greater. This open space provision must be sufficient to maintain the open character of the site.

86. The relevant parts of the policy, as set out at §8.2.3.4 (xi), read as follows.

> "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.** Such a masterplan must adequately take account of the built heritage and natural assets of a site and established recreational use patterns. Public access to all or some of the lands may be required. Every planning application lodged on institutional lands shall clearly demonstrate how they conform with the agreed masterplan for the *overall site*.* Should any proposed development deviate from the agreed masterplan then a revised masterplan shall be agreed with the Planning Authority.
>
> A minimum open space provision of 25% of the *total site area** (or a population based provision in accordance with Section 8.2.8.2 whichever is the greater) will be required on Institutional Lands. This provision must be sufficient to maintain the open character of the site - with development proposals built around existing features and layout, particularly by reference to retention of trees, boundary walls and other features as considered necessary by the Council."
>
> *Emphasis (italics) added.

87. An Bord Pleanála and the developer contend that the proposed development achieves this open space provision. (The figure is calculated by reference to the population equivalent). This contention is, however, predicated on interpreting the phrase "the total site area" as referring only to the application site, i.e. the lands within the red line of the planning application, and as not referring to the overall institutional lands. With respect, this interpretation is incorrect. The precise purpose of the objective under §8.2.3.4 (xi) is to ensure that the open character of the institutional lands is maintained. This purpose would be defeated if the minimum open space requirement were to be confined to the part of the institutional lands to be developed.

88. The position is correctly stated by the planning authority at page 17 of the chief executive's report as follows.

> "The second requirement for 'INST' sites is that 25% of the site area or a population-based equivalent, whichever is higher, of public open space be provided 'sufficient to maintain the open character of the site'. The applicant asserts that 28.9% of the 'red line' site is provided as public open space. However, it is the planning authority's assertion that this 25% requirement should apply to the entirety of the campus, rather than in a piecemeal fashion. The intention of the policy is clearly to retain the 'open character' of the site, and this can only be done by way of a comprehensive approach. Heretofore, the planning permissions on site

have developed the campus to a relatively high intensity, while the western and south-western portions of the campus have remained effectively greenfield, preserving the open nature of the campus, and maintaining the aggregate open space at above 25%. It is only the subject application that has the potential to drop the open space across the campus to below the 25% mark. As such, it is at this point that the matter must be given serious consideration.

There has been no assessment of the public open space provision across the campus provided by the applicant, but it is evident from a cursory consideration of the proposed layout that a level of 25% would not be achieved. As such, the planning authority considers that the proposed development is contrary to the policies of the CDP, and should be refused on this basis."

89. The second of the three reasons for refusal recommended by the planning authority reads as follows.

> "The proposed development, by virtue of reducing the provided and potential public open space across Our Lady's Grove campus to a level below 25%, and by virtue of the removal of the vast majority of trees from within the subject-site, would be contrary to Section 8.2.3.4 (xi) of the Dun Laoghaire-Rathdown-County Development Plan 2016–2022."

90. In circumstances where I have concluded that there has been a material contravention of the 25% open space requirement, it is unnecessary to go further and consider whether there is an additional material contravention by virtue of the removal of trees. The first finding on its own has the consequence that the planning permission is invalid.

91. Finally, for the sake of completeness, it is open to the court to make a finding of material contravention notwithstanding that the planning authority itself merely refers to the proposed development being "contrary" to §8.2.3.4 (xi). The question of whether or not there is a material contravention is, ultimately, a question of law for the court.

(iii). Future provision of additional educational facilities

92. A further consequence of An Bord Pleanála's error in failing to recognise that the application site was subject to the "institutional lands" designation is that the board did not properly take into account the possible need for the provision of *additional* school facilities. This was a matter which required to be taken into account under RES 5. See §2.1.3.5 of the development plan as follows.

> "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.)"

93. There is nothing on the face of An Bord Pleanála's decision to indicate that it took this matter into account. Indeed, there is no reference at all to the existing schools in the board's formal decision. For the reasons discussed at paragraph 124 et *seq*. below, the board is not entitled to call in aid the inspector's report in this regard.

MISINTERPRETATION IS AN ERROR OF LAW

94. The misinterpretation of the development plan is an error of law which goes to jurisdiction. An Bord Pleanála is under an express statutory obligation to have regard to the development plan in determining an application for planning permission under the PD(H)A 2016 (see section 9(2)(a)). It is a necessary corollary of this obligation that the board must correctly interpret the development plan. A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood.

CHIEF EXECUTIVE'S REPORT

95. It is alleged that An Bord Pleanála failed to consider the recommendations made in the statutory report from the planning authority, and that this represents a breach of the requirements of section 9(1)(a) of the PD(H)A 2016. To put this allegation in context, it is necessary to rehearse the relevant legislative provisions in respect of the planning authority's report.

96. Section 8 of the PD(H)A 2016 requires the chief executive of a planning authority, in whose area a proposed strategic housing development would be situated, to prepare a report ("*the chief executive's report*"). The report must set out, *inter alia*, the chief executive's views on the effects of the proposed development on the proper planning and sustainable development of the area of the planning authority and on the environment.

97. There are a number of specific matters which must be addressed in the chief executive's report as follows (section 8(5)(b)).

> "(b) In the report referred to in paragraph (a) the planning authority shall—
>
> (i) set out the authority's opinion as to whether the proposed strategic housing development would be consistent with the relevant objectives of the development plan or local area plan, as the case may be,
>
> (ii) include a statement as to whether the authority recommends to the Board that permission should be granted or refused, together with the reasons for its recommendation, and
>
> (iii) specify in the report—
>
> (I) where the authority recommends that permission be granted, the planning conditions (if any), and the reasons and grounds for them, that it would recommend in the event that the Board decides to grant permission, or
>
> (II) if appropriate in the circumstances, where the authority recommends that permission be refused, the planning conditions, and the reasons and grounds for them, that it would recommend in the event that the Board decides to grant permission."

98. As appears, the planning authority is obliged to state whether it recommends that permission should be granted or refused, together with the reasons for its recommendation. In circumstances where the planning authority recommends that permission be *refused*, the authority may nevertheless go on to specify the planning conditions that it would recommend in the event that the board decides to grant permission. Where the planning authority does specify conditions, then it must also specify the reasons and grounds for those conditions.

99. On the facts of the present case, the chief executive's report had recommended that planning permission be refused on three grounds. (These are set out in an appendix to this judgment). The report then specifies some twenty-five planning conditions that the planning authority would recommend in the event that the board decided to grant permission. The third of these conditions assumes a particular significance given the manner in which the application was addressed by the inspector. The recommended condition reads as follows.

> "3. The area in the northeast of the campus identified as 'Option Site' shall be used for education purposes only. The area of public open space within the subject site shall be made available for use by all users of the wider Our Lady's Grove campus, including the schools.
>
> Reason: in the interests of providing for the existing and future needs of the educational uses on the campus."

100. This condition had been replicated by the inspector in her report, but subsequently omitted by An Bord Pleanála from its decision. I will return to consider this condition at paragraph 124 below.

101. The objector's complaint is that the recommendations in the chief executive's report were not considered in any meaningful way by An Bord Pleanála.

102. In practical terms, the only basis on which a member of the public, the planning authority and, ultimately, the court, can assess whether An Bord Pleanála did properly consider the chief executive's report is by reference to the reasons and considerations stated for the board's decision. Whereas An Bord Pleanála is not, of course, in any sense bound by the recommendations in the chief executive's report, it should be evident that the board has considered the recommendations. Were it otherwise, the High Court would be unable to exercise its supervisory jurisdiction to ensure compliance with section 9(1)(a)(i) of the PD(H)A 2016.

103. On the facts of the present case, there is no express reference in the formal decision of An Bord Pleanála to the chief executive's report at all. It is, however, clear from the inspector's report that same was considered by her, and, in particular, reference is made in the inspector's report both to the recommended reasons for refusal, and to the recommended conditions as *per* the chief executive's report.

104. There are, in effect, two strands to the objector's arguments in respect of this ground of challenge. First, it is submitted that An Bord Pleanála should have addressed the chief executive's report in its formal decision. Secondly, it is submitted that even if the board is to be taken as having adopted the inspector's report, that report does not engage in any meaningful way with the chief executive's recommendations. I address each of these arguments in turn under separate headings below.

(i). An Bord Pleanála and the inspector's report

105. The first issue to be addressed is whether the analysis in the inspector's report can be imputed to An Bord Pleanála. This issue falls to be resolved by reference to the legal principles set out by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 ("*Connelly*"). The Supreme Court indicated that, in principle, the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. This is subject always to the requirement that the reasons must actually be ascertainable and capable of being determined. In the specific context of planning decisions, the Supreme Court accepted that in assessing the adequacy of reasons, it was appropriate to have regard not only to An Bord Pleanála's formal decision, but also to the report prepared in respect of the planning appeal by an inspector employed by An Bord Pleanála. The inspector's report is made available to the public at the same time as the board's decision is notified. The Supreme Court further accepted that it might also be appropriate to have regard to the documentation accompanying the planning appeal, including documentation submitted by the applicant for planning permission, i.e. the proposed developer.

106. The Supreme Court indicated that it would be preferable in all cases if An Bord Pleanála made expressly clear whether it accepts all of the findings of its inspector or, if not so doing, where and in what respect it differs. Failure to do so is not, however, necessarily fatal if in the circumstances it is possible to reach a significantly clear inference as to what the board thought in that regard.

107. Where the board differs from its inspector, then there is clearly an obligation for the board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the board differed from the inspector, and also to assess whether there was any basis for suggesting that the board's decision is thereby not sustainable.

108. I turn now to apply these principles to the facts of the present case. The board's formal decision does not expressly adopt the inspector's report, nor does it expressly accept the report's findings. As stated by Clarke C.J. in *Connelly*, it would be preferable in all cases if the board made expressly clear whether it accepts all of the findings of an inspector.

109. The board direction, which is the precursor to the board's formal decision and is published on the board's website, does record that the board "decided to grant permission generally in accordance with the Inspector's recommendation". The content of the board's formal decision is broadly similar to that of the inspector's recommended form of decision. One distinction between the two documents is that the formal decision omits any express

finding to the effect that the proposed development is consistent with the development plan. The inspector's recommended form of decision had expressly stated that the nature, scale and design of the proposed development is consistent with the provisions of the 2016–2022 development plan.

110. A second distinction is that the board's formal decision also omits a condition stipulating that an area in the north-east of the overall landholding was to be used for education purposes only. The text of this recommended condition is set out at paragraph 124 below.

111. It seems reasonable to infer that—with the exception of the treatment of the future expansion of the existing school sites—the board accepted the findings in the inspector's report. In particular, I am satisfied that the board agreed with the inspector's (mistaken) finding at §12.1.8 of her report that the application site is not subject to the institutional lands designation. (This finding appears to have been predicated on (i) the location of the "INST" symbol to the north-east of the lands, and (ii) the fact that the application site is now in private ownership).

112. It is correct to say, as the objector does, that An Bord Pleanála's formal decision does not contain an *express* finding to the effect that the lands were not subject to the "institutional lands" designation. It would have been preferable if the formal decision had set out an express finding on this issue, and on the related issue of the appropriate housing density. It is also, perhaps, unfortunate that the inspector's discussion at §12.1.9 segues from a finding that there is no material contravention to a suggestion that a material contravention would be justified in any event. It would have been preferable if there had been an unequivocal statement by the inspector that she was finding that the application site was not subject to the "institutional lands" designation, and that her subsequent observations, i.e. that a material contravention would be justified, were made in the alternative only.

(ii). Does inspector's report contain a proper consideration of chief executive's report

113. Having ruled that the inspector's findings can be imputed to An Bord Pleanála—with the exception of her findings on the issue of the future expansion of the existing schools—it is next necessary to consider whether the inspector's report demonstrates that the chief executive's report has been properly considered as required under section 9(1)(a) of the PD(H)A 2016.

114. Counsel on behalf of An Bord Pleanála and the developer both made much of the fact that there is no express requirement under the PD(H)A 2016 to state the reasons for not following the recommendations in the chief executive's report. This was contrasted with the requirement, in the case of a conventional planning application, to state reasons for not accepting the recommendation of the board's inspector. See section 34(10)(b) of the PDA 2000 as follows.

"(b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in—

(i) the reports on a planning application to the chief executive (or such other person delegated to make the decision) in the case of a planning authority, or

(ii) a report of a person assigned to report on an appeal on behalf of the Board,

a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

115. This submission is correct insofar as it goes. It would, however, be a mistake to read too much into the absence of an express provision requiring An Bord Pleanála to indicate the main reasons for not accepting the recommendations in the chief executive's report. First, there is an important distinction between the respective reports of the board's inspector and the chief executive. The former is an internal report which is prepared by an employee or agent of An Bord Pleanála. The latter is prepared by a separate competent authority, namely the local planning authority. The report contains not only the views of the chief executive, but also those of the "relevant elected members" as defined. Article 28A of the Constitution of Ireland expressly recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities. See, generally, *Christian v. Dublin City Council (No. 1*) [2012] IEHC 163; [2012] 2 I.R. 506, [17].

> "It seems to me that the provisions of Article 28A of the Constitution, and the more detailed measures cited from the Local Government Act 2001, provide a constitutional and legal acknowledgement of the importance of the role of local representative democracy in our constitutional model. It remains, of course, the case that local authorities have no inherent jurisdiction. The power of local government authorities to make decisions affecting the rights and obligations of parties must be found in statute. However, it does seem to me that it is open to the Oireachtas, in the light of the provisions of Article 28A, to confer a wide degree of policy discretion on local authorities. That is not, however, to say that local authorities are entirely at large. They operate within the parameters of an enabling statute even though that statute may, in its terms, confer a broad policy discretion on the local authority concerned. Against those broad observations on the status of local authority decision making it is next necessary to turn to the case law in relation to development plans."

116. The obligation for An Bord Pleanála to engage with the recommendation set out in the chief executive's report is more obvious than the obligation to engage with an internal report such as that prepared by a board inspector. This may explain why the Oireachtas considered it necessary to impose the express statutory obligation to do so in the case of the latter (section 34(10)(b) of the PDA 2000).

117. Secondly, and in any event, there is an implied obligation upon a decision-maker to address submissions which are properly made to it. The nature of this obligation has been stated as follows by the Supreme Court in *Balz v. An Bord Pleanála* [2019] IESC 90, [57].

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

118. The above statement was made in the context of submissions made by members of the public in respect of an application for planning permission. It follows that the same obligation must apply a *fortiori* to a statutory consultee, such as the local planning authority, which is required to submit a formal report in prescribed form to An Bord Pleanála.

119. Put otherwise, the recommendations in the chief executive's report cannot have a *lesser* status than submissions made by a member of the public. Thus, notwithstanding that there is no express statutory provision imposing an obligation to do so, the board is required to address the recommendations set out in the chief executive's report. This does not entail an obligation to produce a discursive judgment nor a point-by-point refutation of the statutory report. It must, however, be clear to a person reading An Bord Pleanála's decision, in conjunction with the inspector's report, as to why the planning authority's recommendation to refuse planning permission was not accepted.

120. This obligation is consistent with the purpose which a duty to state reasons serves, as identified by the Supreme Court in *Connelly* (cited earlier). Clarke C.J. formulated the legal requirements against which the adequacy of reasons may be tested as follows. First, any person affected by a decision is entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions, and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to apply for judicial review of a decision. The reasons provided must also be such as to allow a court hearing an appeal or reviewing a decision to engage properly in such an appeal or review.

121. I turn now to apply these legal principles to the facts of the present case.

122. It is evident from the inspector's report that the inspector gave careful consideration to the chief executive's report. The reasons for the recommendation to refuse planning permission are set out in full. The inspector addresses the reasons and explains why she does not accept the recommendation, as follows.

123. The gist of the first recommended reason for refusal had been that the proposed residential development would adversely affect the ability of the two existing schools to expand. This is addressed at §12.1.7 and §12.1.8 of the inspector's report.

> "Policy SIC8 relates to both the provisions of new schools and the expansion of existing schools. The Department of Education has no objection to the reduction in the size of the existing school's campus. *Should the subject planning application be successful, it is the applicant's intention to transfer the 'Option Site' (an area to the north of the Primary School) to the DoES for the sole use of the primary school for educational use*.* The development of the subject site, which are privately owned lands, does not preclude the extension of the existing schools within their sites. It is noted that the sale of the subject lands included the provision of a new all-weather hockey pitch, which will enhance the Secondary Schools facilities. Planning permission has been granted for this synthetic all-weather pitch on foot of Reg. Ref. ABP-302898-18. It is submitted that the DoES did not seek to purchase the lands when they were placed on the open market by the RJM in 2017.
>
> The Development Plan does not indicate that the subject lands have been identified (and reserved) for educational development. The legal opinion from Eamon Galligan SC enclosed with the application is highlighted. Policy SIC8 makes it clear that potential school sites are to be identified in the Development Plan. Regard being had to the position of the planning authority that 'INST' Objective does apply to the subject site and overall lands, I am of the opinion that it is clearly placed on the school lands to the north of the subject lands. The lands the subject of this application are zoned objective 'A', are in private ownership and the 'INST' local Objective only refers to general institutional purposes and does not amount to the identification of the relevant lands specifically for school or educational purposes."
>
> *Emphasis (italics) added.

124. As appears, one of the factors which informed the inspector's findings was that the applicant for planning permission, i.e. the developer, intended to transfer an area to the north of the existing primary school to the Department of Education and Skill for educational use (in the event that planning permission was granted). Crucially, the inspector recommended a planning condition to address this contingency as follows. (This replicates a condition recommended as part of the chief executive's report).

> "3. The area in the northeast of the campus identified as 'Option Site' shall be used for education purposes only. The area of public open space within the subject site shall be made available for use by all users of the wider Our Lady's Grove campus, including the schools.
>
> Reason: In the interests of providing for the existing and future needs of the educational uses on the campus."

125. An Bord Pleanála omitted this recommended condition from its decision to grant planning permission. This difference in approach between the board and the inspector creates an inescapable difficulty for the board in attempting to rely on the inspector's reasoning on this issue. At least part of the inspector's explanation for not accepting the recommendation in the chief executive's report to refuse planning permission had been that the area to the north-east would be reserved for educational use. This was to be achieved by way of the recommended condition. An Bord Pleanála chose to omit this condition. (This appears to be the only substantive difference between the conditions imposed by the board, and those recommended by the inspector). The board has, however, failed to explain in its decision what approach it took to the question of the possible future expansion of the existing schools. Indeed, it is a remarkable feature of the board's formal decision that it makes no reference at all to the existing schools nor to the implications for same of the proposed residential development. This is so notwithstanding that this was one of the principal objections raised by the planning authority in the chief executive's report: the planning authority went so far as to characterise it as a material contravention of the development plan.

126. Counsel for An Bord Pleanála sought to offer a (belated) explanation for the omission of the condition by suggesting that the recommended condition would be *ultra vires* having regard to the judgment of the Supreme Court in *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114 (even allowing for the subsequent amendments to the power to attach conditions introduced by the Planning and Development (Strategic Infrastructure) Act 2006). The submission does not provide any insight as to what approach the board actually took to the possible future expansion of the existing schools. Even if, as suggested by counsel, An Bord Pleanála may have thought that a condition requiring the reservation of land for school expansion would be *ultra vires*, the board was still required to address the planning authority's recommended reason for refusal, and to provide an explanation as to why it was not accepted. We simply do not know, for example, whether the board considered the land would be provided to the Department of Education and Skills even in the absence of a condition, or, alternatively, whether the board considered that the future expansion of the schools might be met in some other way. Perhaps the board took the view that it was not possible to give effect to the development plan policy.

127. The one thing which is certain, however, is that the board cannot rely on the inspector's reasoning on this issue. The inspector's finding is predicated on the putting in place of a legal mechanism, i.e. the proposed planning condition, to ensure that the area in the north-east be used for educational purposes only. This plank of the reasoning fell away once the recommended condition was omitted.

128. Finally, for the sake of completeness, it should be noted that, in a number of recent judgments, reliance has been placed on the fact that the board imposed planning conditions in substantially the same terms as those recommended by the inspector, as supporting the inference that the board had accepted the inspector's report. (See, for example, *Buckley v. An Bord Pleanála* [2015] IEHC 572, [117] and *Sliabh Luachra Against*

Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888, [114]). It seems to follow as a corollary that where the board has omitted a recommended condition, which addresses a matter of significance, that the board must have differed from its inspector on this aspect of his or her report. (This is to be contrasted with a scenario where the board merely makes minor revisions to the recommended conditions or amalgamates two or more of the recommended conditions).

129. The position in respect of the second and third reasons for refusal recommended in the chief executive's report is different. The second and third reasons are concerned with the provision of public open space and the retention of trees. The explanation for the difference in approach between the chief executive's report and the inspector's report is explicable by reference to a disagreement on the question of whether the application site was subject to the "institutional lands" designation. The chief executive's report proceeds on the basis that the designation does apply, and hence assesses the planning application by reference to the policies and objectives at §8.2.3.4 (xi) of the development plan. By contrast, the inspector had concluded—mistakenly—that the designation did not apply. The error, which was replicated by An Bord Pleanála, means that the decision is invalid for the reasons set out under the previous headings above. However, insofar as the specific ground of challenge now under discussion, namely the alleged failure to properly consider the chief executive's report, is concerned, it is clear that the inspector did engage with these issues.

130. In summary, therefore, the inspector's report does consider and engage with the reasons for refusal recommended in the chief executive's report as required under section 9(1)(a) of the PD(H)A 2016. This engagement does, however, disclose an error of law in respect of the interpretation of the development plan. Save with the exception of the issues concerning the implications of the proposed residential development for the possible future expansion of the existing schools, the inspector's approach can be imputed to An Bord Pleanála.

131. There has been a breach of section 9(1)(a) insofar as the board has failed to explain in its decision what approach it took to the question of the possible future expansion of the existing schools and as to why it disagreed with the first of the recommended reasons for refusal.

PRE-APPLICATION CONSULTATIONS

132. The objector makes a number of complaints in respect of procedural steps which occurred prior to the making of the application for planning permission. In order to put these complaints in context, it is necessary first to rehearse what might be described as the "pre-application procedure".

133. One of the unusual features of the PD(H)A 2016 is that it imposes a mandatory requirement for consultation between (i) the prospective applicant for planning permission; (ii) An Bord Pleanála; and (iii) the local planning authority, prior to the making of an application for planning permission. In brief, the objective of this pre-application consultation is to allow An Bord Pleanála to form an opinion as to whether or

not the documents submitted by the prospective applicant constitute a "reasonable basis" for an application. If the board's opinion is that the documents as submitted require further consideration and amendment, then the board sets out, in a notice, its advice as to the issues that need to be addressed in the documents. There is no provision for the submission of further information once the planning application has been made, and hence the importance of ensuring that all relevant issues have been addressed in advance.

134. The PD(H)A 2016 obliges a prospective applicant to consult with the local planning authority *prior to* its pre-application consultation with An Bord Pleanála. Thereafter, the planning authority concerned must submit copies of all records of the consultation(s) held with the prospective applicant to the board. As explained presently, the complaint made in this case involves an allegation that this part of the procedure has not been complied with in full.

135. A similar two-stage process, involving a pre-application consultation in advance of the making of the planning application, is to be found in the context of the "strategic infrastructure development" or "SID" procedure under the PDA 2000 (as inserted by the Planning and Development (Strategic Infrastructure) Act 2006).

136. The question of whether such pre-application consultations might undermine public participation in the formal planning process has been considered by the Supreme Court in *Callaghan v. An Bord Pleanála* [2018] IESC 39; [2018] 2 I.L.R.M. 373. The Supreme Court, *per* Clarke C.J., emphasised that An Bord Pleanála cannot be bound or influenced by the pre-application consultation.

> "It seems to me to clearly follow that, unless the relevant legislation contains clear provision to the contrary, the proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage when a final decision potentially affecting the rights or obligations of any individual is to be made. It follows in turn that the default position in this case must be that the Board cannot be bound or influenced by its earlier decision to go down the SID route when considering the strategic importance of the proposed development in the context of making a final decision as to whether to grant permission."

137. The same logic applies, by analogy, to the two-stage process provided for in the case of strategic housing development under the PD(H)A 2016.

138. The Oireachtas has been careful to ensure that the pre-application consultation process—which it will be recalled does not involve public participation—does not give rise to any reasonable apprehension of prejudgment or predetermination on the part of the board in respect of the subsequent planning application. The PD(H)A 2016 expressly precludes any reliance being placed on the pre-application stage in the determination of the subsequent planning application. Section 6(9) reads as follows.

(9) Neither—

(a) the holding of a consultation under this section, nor

(b) the forming of an opinion under this section,

shall prejudice the performance by the Board, or the planning authority or authorities in whose area or areas the proposed strategic housing development would be situated, of any other of their respective functions under the Planning and Development Acts 2000 to 2016, or any other enactment and cannot be relied upon in the formal planning process or in legal proceedings.

139. An almost identical statutory prohibition on the placing of reliance upon pre-application consultations in the formal planning process is to be found in the case of strategic infrastructure development (section 37C of the PDA 2000), and in the case of pre-application consultations with a planning authority (section 247 of the PDA 2000). The practical implications of these types of prohibition have been explained as follows by the High Court (Haughton J.) in *O'Flynn Capital Partners v. Dun Laoghaire Rathdown County Council* [2016] IEHC 480, [31] and [32].

> "It follows that, in general, reports and recommendations from planning or other local authority officials prepared in the course of the formal planning process in response to a planning application should not rely upon advice given or received at any statutory pre-planning consultation, and in turn should not be relied upon by the decision maker(s) when considering or determining the application.
>
> There will be some circumstances in which it may be permissible for reference to be made to pre-planning consultations. For instance, it is difficult to see how an applicant could realistically object to a simple listing in a planner's report of the pre-planning consultations. It may be that documentation furnished at such a meeting, if furnished with the intention that it would used in a planning application, would not be covered by the s. 247(3) prohibition. It must also be open to an applicant for judicial review who asserts that there was improper reliance by a planning authority on the content of pre-planning consultations in 'the formal planning process' to refer to sufficient material to support a case for breach of s. 247(3). There may be other exceptional circumstances in which evidence from a pre-planning consultation may be admissible, for example, where an egregious comment at such a meeting gives rise to an allegation of actual bias."

140. This completes the summary of the relevant statutory context. I now turn to the specific complaints made by the objector. It seems that three pre-application consultations were held by the planning authority in respect of different development proposals during the period 2016 to 2018. The relevant chronology is as follows.

20 October 2016	Pre-application consultation re: proposed 72 unit residential development.

19 July 2017	Pre-application consultation re: proposed 124 unit residential development.
14 June 2018	Pre-application consultation re: proposed 132 unit residential development.

141. The minutes in respect of the second and third of these meetings had been submitted by the planning authority to An Bord Pleanála in advance of the pre-application consultation between the prospective applicant; An Bord Pleanála; and the planning authority in January 2019.

142. The objector's complaint is that the minutes in respect of the first meeting, on 20 October 2016, had not been forwarded to An Bord Pleanála. With respect, this complaint is not well-founded. The meeting *predated* the coming into force and effect of the relevant provisions of the PD(H)A 2016 on 3 July 2017. Consequently, the meeting could not, by definition, be one which had been held in discharge of the obligation under section 6 of the PD(H)A 2016. It follows that the minutes of that meeting did not require to be submitted to An Bord Pleanála in accordance with section 6(4). Moreover, the nature and extent of the development proposed at that time was very different from that the subject of the application ultimately made in May 2019.

143. It should also be reiterated that the minutes in respect of pre-application meetings with the planning authority are only admissible as part of the pre-application consultation process mandated under section 6 of the PD(H)A 2016. Same cannot be relied upon for the purposes of the formal planning process thereafter, i.e. in the determination of the planning application (section 6(9)). The objector cannot therefore have suffered any prejudice as a result of the alleged failure to submit the minutes of the 20 October 2016 meeting to An Bord Pleanála.

144. The objector makes a related complaint in respect of the timing of the pre-application consultation in respect of the strategic housing development *viz-a-viz* his third-party appeal against the first-instance decision of the planning authority to grant planning permission for the all-weather hockey pitch. The sequence of events is as follows. The pre-application consultation took place on 16 January 2019. As of that date, the objector's appeal in relation to the hockey pitch was pending before An Bord Pleanála. The appeal in respect of the hockey pitch was determined on 14 March 2019. The application for the strategic housing development was submitted on 10 May 2019.

145. The record of the meeting on 16 January 2019 indicates that the following comment was made on behalf of the board officials.

> "If there is an appeal on the hockey pitch an application for this site which includes part of the hockey pitch which is to be re-positioned could be deemed premature".

146. The objector appears to argue that it was prejudicial to him for An Bord Pleanála to be considering—even if only in the context of pre-application consultations—the possibility of

residential development being carried out on lands which were then occupied by the (former) hockey pitch. The implication of this argument seems to be that the decision as to whether to grant or refuse planning permission for a new hockey pitch on an east-west alignment might be influenced by considerations related to the proposed residential development discussed at the pre-application consultation. It is submitted that the board should have postponed any pre-application consultation until the appeal in respect of the hockey pitch had been determined.

147. With respect, any concerns in this regard are not well founded. For the reasons set out by the Supreme Court in its judgment in *Callaghan v. An Bord Pleanála* (cited earlier), An Bord Pleanála cannot be bound or influenced by a pre-application consultation. This holds true not only for the planning application made consequent upon the pre-application consultation, but also for any related planning applications or appeals.

148. There is no reasonable basis for suggesting that simply because An Bord Pleanála had discussed with the developer the possibility of a strategic housing development application, that the board would do other than determine the hockey pitch appeal on its own merits. The objector has exhibited the decision and the inspector's report in respect of the hockey pitch appeal. There is nothing in any of the materials before the High Court to suggest that the board's decision to grant planning permission for the new hockey pitch in March 2019 was in any way influenced by the pre-application consultation held in respect of a *different* planning application in January 2019.

HABITATS DIRECTIVE: BATS

149. The application for planning permission was accompanied by an ecological impact assessment report ("*the ecological report").* The ecological report indicates that there is some bat activity within the application site. No bat roosts were identified within the application site, but taking a precautionary approach, the site was treated as having the *potential* for bat roosts. The ecological report valued the site as having a local ecological importance (higher value) for bats. The ecological report then set out a series of mitigation measures.

150. The inspector's report addresses these issues at §12.6. The inspector recommended that conditions should be attached to the planning permission requiring (i) that the developer implement the mitigation measures in the ecological impact assessment report; and (ii) that a suitably qualified ecologist be appointed by the developer to oversee the site set-up and construction of the proposed development.

151. These recommendations were accepted by An Bord Pleanála, and the grant of planning permission includes the following two conditions.

> "10. All mitigation and monitoring measures outlined in the plans and particulars, including the Ecological Impact Assessment report submitted with this application shall be carried out in full, except where otherwise required by conditions attached to this permission.

Reason: In the interest of protecting the environment and in the interest of public health.

11. A suitably qualified ecologist shall be appointed by the developer to oversee the site set-up and construction of the proposed development and the ecologist shall be present on site during construction works. The ecologist shall ensure the implementation of all proposals contained in the Schedule of Ecological proposals. Prior to commencement of development, the name and contact details of said person shall be submitted to the planning authority. Upon completion of works, an audit report of the site works shall be prepared by the appointed ecologist and submitted to the planning authority to be kept on record.

Reason: In the interest of nature conservation."

152. The objector complains that the decision to grant planning permission is contrary to article 12 of the EU Habitats Directive (Directive 92/43/EC). It is suggested that the carrying out of the proposed development may result in the "deliberate disturbance" of protected bats species and the "deterioration or destruction" of their breeding sites or resting places. It is alleged that a condition should have been attached to the planning permission requiring the developer to obtain a "derogation licence" under regulation 54 of the EC (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (which implements article 12 of the Habitats Directive).

153. With respect, the objector's argument appears to be predicated on a misconception as to the interaction between the planning legislation and the Birds and Natural Habitats Regulations. The existence of a grant of planning permission does not obviate the requirement to comply with other statutory codes. This is confirmed by section 10(6) of the PD(H)A 2016.

"(6) A person shall not be entitled solely by reason of a permission under section 9 to carry out any development."

154. The grant of planning permission merely confirms that the statutory requirements under the planning legislation have been complied with. Accordingly, the fact that An Bord Pleanála has granted permission does not obviate the need for the developer to apply for a "derogation licence" in circumstances where required. Had An Bord Pleanála included a condition stating that a "derogation licence" must be applied for where required, the condition would merely be replicating a legal obligation that subsists in any event.

155. On the facts of the present case, there is nothing in the materials before An Bord Pleanála which indicates that there is a likelihood that the carrying out of the proposed development will result in any of the type of activities which would necessitate a "derogation licence".

156. The mitigation measures identified in the ecological impact assessment report require that potential bat roost trees are inspected by an experienced ecologist for the presence of

bats prior to felling and are section-felled using controlled rigging under the supervision of an experienced ecologist. In the event that bats are present, then the relevant works will have to cease and it would be necessary to apply for a "derogation licence" at that stage.

SUMMARY OF CONCLUSIONS

157. An Bord Pleanála erred in law in its interpretation of the development plan. On its proper interpretation, the "institutional lands" designation applied to the lands the subject-matter of the planning application, i.e. the application site. The entire of the lands, including what is now the application site, had been in the ownership and occupation of the religious congregation as of the date of the adoption of the 2016–2022 development plan (March 2016). The application site accommodated part of the hockey pitch associated with the secondary school, and open lands in institutional use. As recognised by An Bord Pleanála in its decision of March 2019 to grant planning permission for a new all-weather hockey pitch, the former hockey pitch continued to have an established use for sports and recreation, and this use was ancillary to an institutional use.

158. The relevant policies and objectives of the development plan are intended to inform the determination of planning applications which seek permission to authorise a material change in the use of lands which have an established use as "institutional lands". These policies and objectives cannot be by-passed by the simple expedient of the sale of the lands. The application site remained subject to the "institutional lands" designation notwithstanding the transfer of the ownership of the lands from the religious congregation to the developer in October 2017.

159. The proposed development involves a material contravention of the development plan policies and objectives applicable to institutional lands in respect of (i) housing density and (ii) public open space. The decision to grant planning permission is invalid in circumstances where An Bord Pleanála did not seek to invoke its statutory power to grant planning permission in material contravention of the development plan (section 9(6)(c) of the PD(H)A 2016).

160. The inspector's report does consider and engage with the reasons for refusal recommended in the chief executive's report, as required under section 9(1)(a) of the PD(H)A 2016. This engagement does, however, disclose an error of law in respect of the interpretation of the development plan. Save with the exception of the issues concerning the implications of the proposed residential development for the possible future expansion of the existing schools, the inspector's approach can be imputed to An Bord Pleanála.

161. There has been a breach of section 9(1)(a) insofar as the board has failed to explain in its decision what approach it took to the question of the possible future expansion of the existing schools and as to why it disagreed with the first of the recommended reasons for refusal set out in the chief executive's report.

162. The grounds of challenge in respect of pre-application consultations and the Habitats Directive have not been made out.

FORM OF ORDER

163. The decision to grant planning permission is invalid and an order of *certiorari* will be made setting aside An Bord Pleanála's decision of 15 August 2019.

164. If any party intends to apply for leave to appeal to the Court of Appeal pursuant to section 50A(7) of the PDA 2000, then the draft points of law in respect of which leave is sought must be filed in the Central Office and circulated to the other parties within twenty-eight days of the date of this judgment.

165. The proceedings will be adjourned to a date convenient to the parties to address the issue of costs and any application to remit the matter to An Bord Pleanála pursuant to Order 84, rule 27 of the Rules of the Superior Courts. A date will also be fixed for the hearing of any application for leave to appeal.

Appearances

Michael Redmond, the applicant for judicial review, represented himself

Nuala Butler, SC and Fintan Valentine for An Bord Pleanála instructed by Fieldfisher Solicitors

Eamon Galligan, SC and Suzanne Murray for the notice party developer instructed by Cannon Solicitors

Isabelle Aylmer for the planning authority

APPENDIX

Policies and objective of the 2016–2022 development plan applicable to institutional lands

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.

A minimum open space provision of 25% of the total site area (or a population based provision in accordance with Section 8.2.8.2 whichever is the greater) will be required on

Institutional Lands. This provision must be sufficient to maintain the open character of the site with development proposals structured around existing features and layout, particularly by reference to retention of trees, boundary walls and other features as considered necessary by the Council (Refer also to Section 8.2.3.4(xi) and 8.2.8).

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.

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.)

8.2.3.4 Additional Accommodation in Existing Built-up Areas

(xi) Institutional Lands

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. Such a masterplan must adequately take account of the built heritage and natural assets of a site and established recreational use patterns. Public access to all or some of the lands may be required. Every planning application lodged on institutional lands shall clearly demonstrate how they conform with the agreed masterplan for the overall site. Should any proposed development deviate from the agreed masterplan then a revised masterplan shall be agreed with the Planning Authority.

A minimum open space provision of 25% of the total site area (or a population based provision in accordance with Section 8.2.8.2 whichever is the greater) will be required on Institutional Lands. This provision must be sufficient to maintain the open character of the site - with development proposals built around existing features and layout, particularly by reference to retention of trees, boundary walls and other features as considered necessary by the Council.

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.

8.2.8.2 Public/Communal Open Space – Quantity

To provide existing and future communities with adequate active recreational and passive leisure opportunities the Council will employ a flexible approach to the delivery of public open space/communal open space and more intensive recreational/amenity/community facilities.

The overarching hierarchy of public open spaces across the County is set out in Policy OSR3 in Section 4.2.2.2. The hierarchy of existing parks and open spaces within the County have also been mapped to differentiate this hierarchical classification (Refer also to Appendix 14).

The Planning Authority will require public6 and/or communal open space to be provided within new residential and large scale commercial developments. This should preferably be located at specific sites or locations that would facilitate the assembly of areas of satisfactory size or usability or would enhance established on-site features.

Applicants for all new developments are encouraged to engage with the Planning Authority at pre-planning stage to discuss the Open Space requirements for a specific site.

(i) Residential / Housing Developments Open Space:

For all developments with a residential component – 5+ units - the requirement of 15 sq.m- 20 sq.m. of Open Space per person shall apply based on the number of residential/housing units. For calculation purposes, open space requirements shall be based on a presumed occupancy rate of 3.5 persons in the case of dwellings with three or more bedrooms and 1.5 persons in the case of dwellings with two or fewer bedrooms. A lower quantity of open space (below 20 sq.m per person) will only be considered acceptable in instances where exceptionally high quality open space is provided on site and such schemes may be subject to financial contributions as set out under Section 8.2.8.2 (iii) below.

The Planning Authority shall require an absolute default minimum of 10% of the overall site area for all residential developments to be reserved for use as Public Open and/or Communal Space irrespective of the occupancy parameters set out in the previous paragraph.

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)).

Chief Executive's report: recommended reasons for refusal

1. The proposed development, by virtue of its bringing about a scenario whereby lands that were previously available to the two schools on the overall Our Lady's Grove campus would be made permanently unavailable to those schools, would result in a situation whereby the existing schools on site would be operating on sites that would be smaller than those recommended under Technical Guidance Documents TGD–025 and TGD–027 as produced by the Department of Education and Skills. As such, the proposed development would be contrary to the 'Code of Practice on the Provision of Schools and the Planning System', prepared jointly by the Department of Environment, Heritage, and Local Government and the Department of Education and Science in 2008, and by extension would be contrary to Section 8.2.12.4 of the Dun Laoghaire Rathdown County Development Plan 2016–2022, which references this Code of Practice. Furthermore, and by extension, the proposed development would result in a scenario whereby the campus would be unavailable to address the identified demand for school places in the area by way of expansion. As such, the proposed development would be contrary to Policy SIC8, and Section 8.2.12.4 of the County Development Plan, and indeed the zoning objective to 'protect and-or improve residential amenity' of which the provision of community facilities, including schools, forms part. As such the proposed development would materially contravene the County Development Plan and would be contrary to the proper planning and sustainable development of the area.

2. The proposed development, by virtue of reducing the provided and potential public open space across the Our Lady's Grove campus to a level below 25%, and by virtue of the removal of the vast majority of trees from within the subject-site, would be contrary to Section 8.2.3.4 (xi) of the Dun Laoghaire-Rathdown County Development Plan 2016–2022.

3. The proposed development would be deficient in terms of the quantity and quality of public open space available to the residents of the scheme, as required under Section 8.2.8.2 of the Dun Laoghaire Rathdown County Development Plan 2016–2022."