THE HIGH COURT
PLANNING AND ENVIRONMENT
JUDICIAL REVIEW

2022:1096:JR

Between

PAT O'DONNELL AND COMPANY

Applicant

and

DUBLIN CITY COUNCIL

Respondent

and

UNIPHAR PLC

Notice Party

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 26 NOVEMBER 2024.

Contents

INTRODUCTION[1]

1. These proceedings seek *certiorari* quashing the decision of the Respondent ("DCC") made on 2 November 2022 (the "Impugned Decision") to adopt the Dublin City Development Plan 2022-2028 (the "Development Plan") insofar as it adopted material alteration MA D-0004 (the "Material Alteration"[2]) to the prior draft Development Plan.

2. The effect of the Material Alteration was to change the zoning of 1.82 ha of lands at Chapelizod Bypass/Rossmore Drive, Kylemore Road, Dublin 20 ("the Uniphar Site") from Z6 - Employment/ Enterprise, to Z10 - Inner Suburban and Inner City Sustainable Mixed-Uses. The Applicant does not own the Uniphar Site. The Notice Party ("Uniphar") does and supported the alteration – presumably to enhance the development potential and value of its lands. The Applicant asserts, broadly correctly, that the alteration would facilitate primarily residential development on the Uniphar Site. The most recent use of the Uniphar Site was as a factory/warehouse building with associated offices. It has been largely unused[3] since about 2017 and Uniphar has been contemplating redevelopment of its Site for some years – perhaps since before 2015.

3. The Uniphar Site and the Applicant's contiguous "Pat O'Donnell lands" (together "the Sites") lie in the western outer suburbs of Dublin city in the Chapelizod/Ballyfermot area. They are generally illustrated in the Material Alteration map below. As it illustrates, to the North and East, across the Chapelizod Bypass, the land uses are residential. To the west is residential also. The Ballyfermot Training Centre[4] is to the south, further south of which the lands are also in residential use. The Chapelizod Bypass provides access to the M50 Motorway and National Roads. Uniphar asserts[5] - to no apparent disagreement - that the area generally is well-served by public transport with connectivity to the city centre (including the Lucan - City Centre Quality Bus Corridor and along Kylemore Road), educational facilities and local retail.

[1] Headings are for general navigation purposes only. They do not circumscribe substantive content.
[2] Note that the phrases "Material Amendment" and "Material Alteration" tend to be used interchangeably. Though not all amendments are material we are not concerned with non-material amendments on the facts of this case.
[3] Mr O'Donnell deposes to some recent commercial use but it seems unlikely to be very relevant to present concerns.
[4] Operated by City of Dublin Education and Training Board.
[5] In the development plan process.

4. The Applicant owns the Pat O'Donnell lands of 1.75 ha immediately contiguous to and north and east of the Uniphar Site. The Applicant claims to be Ireland's largest supplier of heavy construction plant, machinery and equipment, including bulk material-handling equipment and diesel engines. It operates its purpose-built industrial headquarters, including training, repair and maintenance facilities, on the Pat O'Donnell lands. The Applicant employs 100 staff, 75 of whom generally operate from the Pat O'Donnell lands. It uses the strip of land east of the Uniphar Site to store plant and machinery, including large machinery, and for machinery demonstration and testing. The Applicant uses its lands immediately adjoining the northern boundary of the Uniphar Site for outside storage of heavy buckets, metals wheels, and other attachments associated with heavy machinery. The Applicant operates 24 hours a day to cater for urgent work and says that its operations can be intrusive, especially at night, with the noise of deliveries, equipment, alarms and vehicles, but there is no history of complaints as to the use of the lands. However, it says its operations are incompatible with adjoining residential use and that friction between its operations and adjacent residential use and complaints by residents on the Uniphar Site would be inevitable. The Applicant says it had to move in 2005 from a previous location to the Pat O'Donnell lands for that very reason – the EPA had imposed what the Applicant says were "severe" restrictions as to noise levels and hours of operation. It says that after long search it specifically selected the Pat O'Donnell lands as appropriately zoned, as remote from sensitive land uses such as residential use and as highly accessible to the motorway network. Accordingly, it does not wish to have to move again - at an estimated gross cost of €15,000,000.[6]

5. Uniphar supports DCC's defence of the proceedings but did not participate as it considered that it had nothing to add.

6. I make the general observation that the parties' affidavits canvassed many issues of planning judgement without my role and expertise. I will refer to some only below. The affidavits are appreciably argumentative.

ZONING OBJECTIVES Z6 AND Z10

7. The following are the relevant zoning objectives of the 2022 Development Plan:

Zoning Objective Z6 - Employment/Enterprise

"To provide for the creation and protection of enterprise and facilitate opportunities for employment

[6] This account is generally taken from the Applicant's Submission to DCC dated August 2020 and the Applicant's Affidavits.

creation."[7]

8. The 2022 Development Plan[8] includes an elaboration of Z6, of which I set out edited terms:

- The primary objective for Z6 zoning is to facilitate long-term economic development. The primary use of lands so zoned is as important employment-generating zones. It is important that Z6 lands provide for intensive employment and accommodate a wide range of local services.
- The Z6 lands constitute a strategic land bank which it is important to protect. The progressive consolidation and development of these lands will be supported.
- The chapters detailing the policies and objectives for economic development and standards[9] should be consulted to inform any proposed development.
- The uses in these areas will include innovation, creativity, research and development, science and technology, social enterprise, creative industry and emerging industries. These uses will be accommodated in primarily office-based industry and business technology parks.
- Permissible uses include, *inter alia*, enterprise centre, industry (light), office, office-based industry, science and technology-based industry, training centre, and wholesale outlet. Uses open for consideration include, *inter alia*, warehousing.[10]
- The uses in this zone are likely to generate considerable traffic. Sites should, therefore, have good vehicular and public transport access.

9. However, under the previous, 2016 Development Plan, residential use was open to consideration in Z6 zoning.

Zoning Objective Z10 - Inner Suburban and Inner City Sustainable Mixed-Uses[11]

"To consolidate and facilitate the development of inner city and inner suburban sites for mixed-uses."

10. The 2022 Development Plan[12] includes an elaboration of Z6 of which I set out edited terms:

- The purpose of Z10 zoning is to promote mixed-use in order to deliver sustainable patterns of development in line with the principles of the 15-minute city.[13]
- The primary uses in this zone are residential, office and retail, with ancillary uses facilitated where they deliver on the overall zoning objective.
- The focus will be on delivering a mix of residential and commercial uses. Mixed-use will be central[14] - with 30% to 70% of the area given to one particular use. Mono uses, either all residential or all employment/office use, shall not generally be permitted.

[7] 2022 Development Plan §14.7.6.
[8] §14.7.6 Employment/Enterprise – Zone Z6.
[9] particularly Chapters 6: City Economy and Enterprise, and Chapter 15: Development Standards.
[10] These lists are much-reduced from that in the Development Plan.
[11] 2022 Development Plan §14.7.10.
[12] §14.7.6 Employment/Enterprise – Zone Z6.
[13] The Development Plan Glossary states that the 15 minute city concept envisages that within 15 minutes on foot or bike from where they live that people should have the ability to access most of their daily needs.
[14] Save for very small sites, typically less than 0.5h.

- Permissible uses include assisted living/retirement home, bed and breakfast, buildings for the health, safety and welfare of the public, childcare facility, education, enterprise centre, financial institution, guesthouse, hotel, live-work units, motor sales showroom, offices, residential, restaurant, shop (local or neighbourhood), and training centres. Uses open for consideration include various listed retail uses and light industry, office-based industry, science and technology-based industry, student accommodation, transport depots, warehousing (retail/non-food)/retail park, and wholesale outlets. [15]

11. Overall, and as relevant here, it is fair to say that, in the 2022 Development Plan, what most distinguishes Z6 from Z10 for present purposes is that Z10 envisages considerable residential development and Z6 does not.

[15] These lists are much-reduced from that in the Development Plan.

Site Address	Zoning From	Zoning To	Map Sheet	Map Reference
Chapelizod Bypass / Rossmore Drive, Kylemore Road, Dublin 20	Z6	Z10	Map D	D-0004

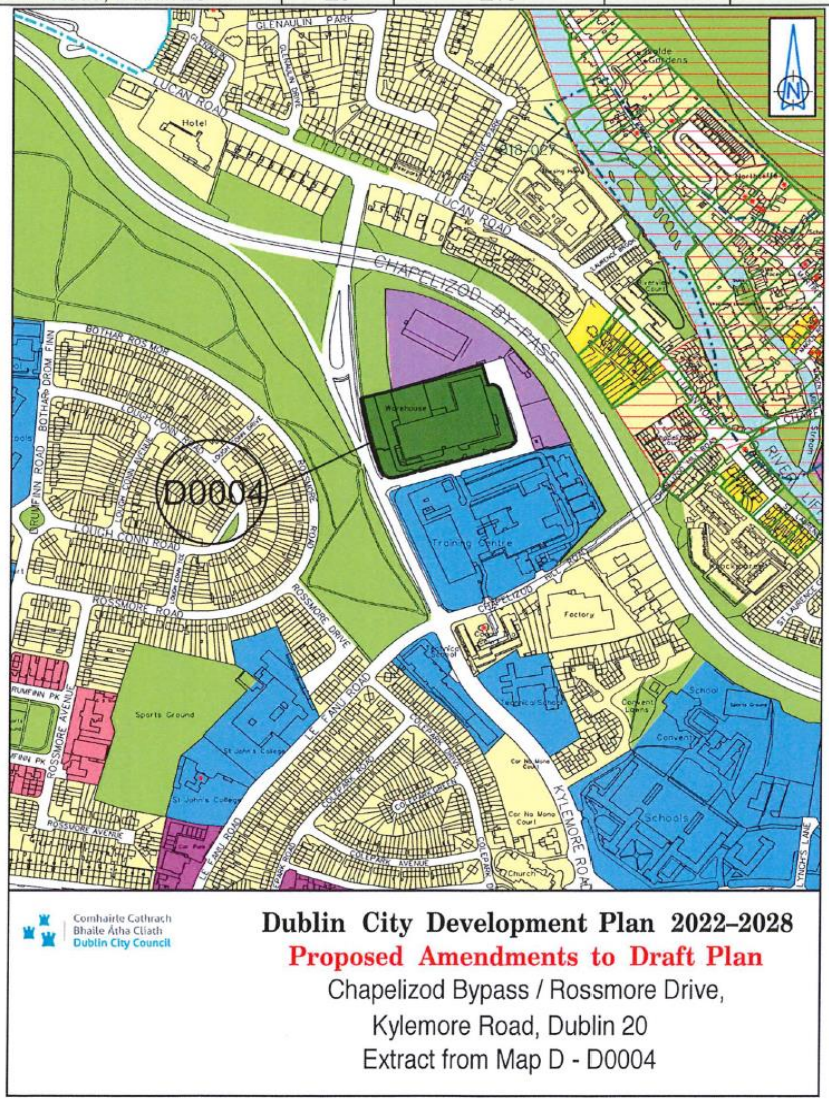

FIGURE – MATERIAL ALTERATION D-0004[16]

- The Pat O'Donnell Lands are coloured purple – zoned Z6.
- The Uniphar Site is coloured green – by the Amendment to be zoned Z10.
- The Ballyfermot Training Centre is depicted in blue just south of the Uniphar Site – zoned Z15 (Community and Infrastructure).
- The Chapelizod Bypass runs north and east of both Sites.
- Residential areas - zoned Z1 - are depicted in yellow.

[16] This map was exhibited. It originates in the CE Report dated 26 July 2022 on Material Alterations, which was not exhibited – as to which see the chronology below.

DEVELOPMENT PLAN-MAKING PROCESS – BRIEF DESCRIPTION

12. The **Development Plan Guidelines 2022**[17] helpfully summarise (inevitably incompletely) what is a lengthy and complex statutory process to the making of a Development Plan. To that end, and while I will set out a fuller chronology later in this judgment, which will result in some repetition, I think it useful to combine below edited and supplemented elements of the contents list with the substantive text of those guidelines to provide an introductory outline of the process. I should add the general comments that:

- the process may vary somewhat with circumstance. It also integrates SEA[18] and AA[19] processes which I will ignore for present purposes. I have also omitted the role of the OPR and the possibility of ministerial directions as to plan content.
- the process repeatedly requires reports by the planning authority chief executive ("CE report") to its elected members at particular points in the process.
- while guidelines cannot authoritatively inform interpretation of the relevant statutory processes, the parties agree that these guidelines accurately reflect the statutory requirements as to content of a CE report – though the parties arguably draw different conclusions on that issue.

13. The Development Plan Guidelines 2022 contain also the following practical advice, which I have edited, relevant to the present case.

§[20]	**Stages in the Development Plan-Making Process**[21]
3.2	<u>Stage 1: Preliminary Stage</u> • From one year before the commencement of the development plan review, to the time the notice to review is published. • This typically includes cross-sectoral engagement, preparation of non-statutory documents such as a baseline report, technical working papers, an issues and options paper and preliminary scoping for SEA.
3.3	<u>Stage 2: Pre-Draft - Commencing Review and Drafting the Plan</u> • From publication of notice of the commencement of the plan review, inviting submissions, via the CE report thereon, elected members' motions as to directions to the CE as to the draft plan, and preparation by the CE of the draft plan to finalisation of the draft plan[22] by the members (s.11 PDA 2000[23]). • Publication of notice of the plan review typically involves publication by the planning authority of an Issues and Options Paper to provide a focus for submissions. • The entire process takes 2 years from this point. This stage takes up to 46 weeks.

[17] Development Plans, Guidelines for Planning Authorities, Prepared by the Department of Housing, Local Government and Heritage, June 2022.
[18] Strategic Environmental Assessment under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
[19] Appropriate Assessment under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[20] § of Development Plan Guidelines.
[21] See generally the Development Plan Guidelines p26. A different and more detailed identification of the steps in making a new development plan is usefully set out by Humphreys J in Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §50 et seq. In particular, it includes the role of the OPR and the possibility of ministerial directions as to plan content.
[22] The members may amend the draft plan.
[23] Planning & Development Act 2000.

§[20]	**Stages in the Development Plan-Making Process**[21]
3.4	<u>Stage 3 - The Draft Development Plan</u> • From publication of the draft plan for public consultation, to the elected members' consideration of the CE report on submissions on the draft plan (s.12(1) to (6) PDA 2000). This stage takes to week 82. • On consideration of this CE report, the elected members may decide to amend the draft plan. • If any such amendments constitute material alterations to the draft plan, Stage 4 is triggered.
Note: In the present case, • Uniphar made a submission on the draft plan requesting that the Uniphar Site be rezoned from Z6 to Z10. • DCC's CE Report 119/2022 on submissions received on the draft plan was dated 29 April 2022.[24]	
3.5	<u>Stage 4 - Material Alterations</u> • From any decision by the elected members to amend the draft plan, to their consideration of the CE report on submissions received on the material alterations to the draft plan and consideration of members' motions thereon (s 12(6) to (10) PDA 2000). This stage takes to week 99.[25]
Note: Some of the elected members' amendments of the draft plan are deemed "Material Alterations". These are the subject of further public consultation and submissions on which the CE reports to the elected members. In this case: • The Applicant made a submission opposing the rezoning of the Uniphar Site from Z6 to Z10. • The CE Report 261/2022 is dated 22 September 2022. The Applicants are critical in these proceedings primarily of this report.	
3.6	<u>Stage 5 – Adoption/Making the Plan and Immediate Post-Adoption</u> • From when the elected members make the plan (s.12(6) or (10) to s. 12(12) and s.12(17) PDA 2000). This stage takes to week 105.[26] • The members may adopt the plan with or without some or all of the proposed amendments /material alterations and may at this stage make only minor further amendments to those amendments/material alterations. • Once made, the plan is published and takes effect 6 weeks thereafter. (s.12(12) & (17) PDA 2000).

14. As to the Stage 3 CE Report on Submissions on the Draft Plan[27] and the elected members' adoption of amendments to the Draft Plan the Development Plan Guidelines state:

- The CE report is required, <u>inter alia</u>, to
  - provide a framework and structure for the Council meetings where the draft plan will be deliberated.
  - list the persons or bodies who made submissions.
  - summarize the submissions.
  - give the CE's response to the issues raised, taking account of

[24] Report.
[25] or later subject to SEA – not relevant here.
[26] or later, subject to Strategic Environmental Assessment and/or Appropriate Assessment under the Habitats Directive – not relevant here.
[27] §3.4.1.

        - any directions of the elected members under s.11(4);
        - the proper planning and sustainable development of the area;
        - the statutory obligations of any local authority in the area;
        - any relevant policies or objectives of the Government or of any Minister of the Government
    - give clearly and succinctly worded recommendations for the elected members' consideration.

- "*Given the sometimes substantial volume of submissions received (running into many thousands in some local authorities); the planning authority should give practical consideration to ensure the preparation of a legible and functional report*."

- "*A recommended approach is to thematically group and summarise the submissions received and provide responses and recommendations on these grouped themes, rather than to include a detailed response for each individual submission received*."
    - Note: the Applicants say that this observation doesn't arise on the facts in the present case as
        - their submission on the Material Alteration in question was made at Stage 4 not Stage 3. I disagree as I consider that the course suggested is generally applicable.
        - theirs was the only submission on the Material Alteration in question. On that I agree with the Applicant. On the present facts, no question of a grouped or themed response by the CE arises. Nor, indeed, did DCC point to any. But, in fairness, I didn't understand DCC to rely, other than for general context, on this element of the Development Plan Guidelines.

- Stage 3 allows the elected members to amend the draft plan having considered the CE Report on submissions received.

15. As to Stage 4 - Material Alterations, the Development Plan Guidelines[28] state:

- Any amendments considered to be "Material Alterations" are notified to the public and placed on public display.[29] The public may make submissions thereon.
- The CE reports to the elected members on the public's submissions on the Material Alterations
    - listing the persons or bodies who made them.
    - summarising them.
    - responding to them.
    - giving his/her opinion on the issues raised therein.
- The elected members consider that report. They may modify the Material Alterations only to a limited degree.[30]

Notes:

- the Applicant observes, and it is not really disputed, that the CE's obligations as to the contents of his/her Stage 4 report under s.12(8) PDA 2000 on the public's submissions on the Material Alterations are essentially the same as the CE's obligations as to the contents of his/her Stage 3 report under s.12(4) PDA 2000 on the public's submissions on the Draft Plan. In short, they are: list; summarise; respond/recommend.

[28] §3.5.
[29] S.11(7) PDA 2000.
[30] if they do not involve an increase in the area of zoned land or an addition or deletion from the record of Protected Structures (S. 12(10)(c)).

- the Applicant in these proceedings particularly criticises the CE's Stage 4 report.

16. As to Stage 5 - Adoption the Development Plan Guidelines[31] state that having considered the CE Report on the Material Alterations, the elected members may make the development plan.[32] The resolution as recorded must be clear and precise as to the decision of the Council, in making the plan.

CHRONOLOGY

Date	Event	Notes
2016	DCC's 2016 Development Plan took effect. • Both Sites were zoned Z6 • The Z6 Zoning Objective '*to provide for the creation and protection of enterprise and facilitate opportunities for employment creation'* provided, *inter alia*, as follows: o To incorporate mixed uses in appropriate ratios. All such uses, including residential and retail, shall be subsidiary to employment-generating uses. o Uses "Open for Consideration" included residential use. • Objective CEE04 was to, *inter alia*, review the potential and adequacy of supply of lands zoned Z6,[33] and the issue of under-utilised/vacant lands.	• As will be seen, the Z6 zoning of both Sites allowed for at least some residential development potential. • It seems that at about this time a proposal to rezone both Sites was rejected by the elected members of DCC.[34]
	A Z6 review by DCC examined the most appropriate policy and zoning response to Objective CEE04 having regard to National and Regional Planning policy including the MASP,[35] and the future needs of the city.[36]	DCC places contextual reliance on this review.
November 2019	DCC proposed Variation #14 of the Development Plan as to both Sites.[37]	
20 February 2020	CE Report[38] to the elected members on the *"Proposed Variations (No.'s 8 - 27) of the Dublin City Development Plan 2016-2022".*	

[31] §3.6.
[32] Their limited scope at this point to amend the draft plan before adoption need not be explored here.
[33] It also applied to lands zoned Z7- 'to provide for the protection and creation of industrial uses and facilitate opportunities for employment creation'. But that can be ignored for present purposes.
[34] Affidavit of Karl Kent sworn 13 December 2022.
[35] Dublin Metropolitan Area Strategic Plan for the Dublin metropolitan area.
[36] See undated unsigned document entitled Proposed Variations (No.'s 8- 27) of the Dublin City Development Plan 2016-2022, of March 2018.
[37] Affidavit of Karl Kent sworn 13 December 2022.
[38] 77/2020.

Date	Event	Notes
	• It duplicates much of the content of the undated document described below.	
	• Interestingly, it records that 283 submissions were made, including one by *"Doyle Kent Planning Partnership Ltd for Pat O'Donnell*" and another by *"Future Analytics for Uniphar Group Plc"* and various others in similar form.	• I respectfully suggest that this informative format of listing submissions be considered for general adoption as a matter of good practice.
	• Variation 14 proposed rezoning both Sites from Z6 to Z1 *'To protect, provide and improve residential amenities'* – describing them as *"a small scale employment land bank located in the outer suburbs" characterised by low scale development with large areas of surface car parking."*	
	• The CE response to submissions as to Variation 14 included the following: *"… in part of the site, there is an existing use, with a submission from the owner objecting to the proposed variation. … the zoning change does not impact on the continuing use of the lands as they are."* *"The concerns raised in respect to the proposed rezoning are noted and the longstanding and existing commercial use a portion of the lands is acknowledged. It is considered that the proposed zoning will not prejudice the continued operation of existing businesses on the lands and that issues in respect to land use compatibility / the continuing operational requirements of the existing uses on site would be most appropriately dealt with in the context of the development management process where options such as buffer zones and appropriate uses can be included in any redevelopment. The detail of what is required is best addressed within the*	• The cited elements of the CE response to submissions as to Variation 14 are notable as to o reference to the objecting owner – no doubt, the Applicant. o buffer zones. o addressing detail in the development management process.[39] • While Variation #14 related to both Sites, the reference to vacant land is to the Uniphar Site.

[39] i.e. in specific planning permission applications.

Date	Event	Notes
	development management process." *"…….. residential zoning would make the most sustainable use of a large area of land that is currently vacant."*	
March 2020	Document entitled "Proposed Variations (No.'s 8 - 27) of the Dublin City Development Plan 2016-2022". • It records that the variation proposals it describes, as relevant here, resulted from the Z6 review on foot of Objective CEE04. • Their purpose was to change the zoning of well-serviced but underutilized employment (Z6) zoned brownfield lands in built-up areas to residential/ mixed use/open space (Z1, Z3, Z5, Z9 and Z10) in order to bring them into more intensive and efficient use in accordance with National and Regional planning policy and to allow for a more compatible zoning objective at the local level. • The OPR[40] supported *"the rationale of the Variations which relates to the renewal of well-serviced but underutilised brownfield lands located in proximity to public transport infrastructure for higher intensity uses, including residential uses."*	• DCC places contextual reliance on this document. • Regrettably, and contrary to good practice, it is undated and unsigned and does not identify its author.[41] • Counsel for DCC said at trial somewhat diffidently that the report was of March 2020.[42] • It is agreed that it is in fact a report by the CE of DCC to its elected members. • The National and Regional planning policy cited are the NPF[43] and the EMRA RSES[44] - the latter including the MASP. Both had been adopted since the adoption of the 2016 Development Plan. • Clearly, by proposing Z1 zoning, DCC is expressing a judgement that the Sites are not strategic employment lands.[45]
	At some point, Variation #14 was amended to "amended Variation #14" to provide that the new zoning of the Sites would not be Z1 but Z10 – *"To consolidate and facilitate*	It seems this amendment was proposed by the CE in response to elected members' objections

[40] Office of the Planning Regulator. See §6.2.1.
[41] At the time of deployment of a document, all involved may well appreciate its context, which may for example include a dated and signed authors' explanatory covering letter or e-mail or an oral explanation at a meeting in which it is deployed. However, authors often appear not to appreciate that this context may be absent when it is again deployed in other contexts – for example, some years later in legal proceedings. The remedy of dating and signing is simple, not in the least burdensome and should be automatic practice. It is anecdotally recorded that the late diplomat and civil servant used to insist on such a practice – at least as to dating of documents: Cremin, Cornelius ('Con') Christopher | Dictionary of Irish Biography'. It is a practice I respectfully commend to public administration.
[42] Transcript day 2 p37.
[43] National Planning Framework.
[44] Eastern & Midland Regional Assembly, Regional Spatial Economic Strategy, 2019-2031.
[45] i.e. not a Category 3 site within the categories set out in the document.

Date	Event	Notes
	the development of inner city and inner suburban sites for mixed-uses, with residential the predominant use in suburban locations, and office /retail / residential the predominant uses in inner city areas."	to rezoning.[46]
10 March 2020	DCC, on Uniphar's application, rezoned both Sites to Z10.	
July/August 2020	In proceedings 2020/312 JR, the Applicant got *certiorari*[47] quashing amended Variation #14. It seems it was quashed on a fair procedures point - failure to notify the Applicant of amended Variation #14 and hence that the Sites would be re-zoned Z10 - not Z1.	So, the zoning of both Sites remained Z6 until the adoption of the 2022 Development Plan.
25 November 2021 to 14 February 2022[48]	DCC put its Draft Development Plan on public display. • The Sites were to be zoned Z6 — nominally unchanged from the 2016 Development Plan. • However, the Z6 zoning wording itself was to be changed such that residential use would no longer be open for consideration.[49]	This change of the Z6 zoning wording would have resulted in the Uniphar Site losing its zoning potential for residential development. Notably, despite the history, the Uniphar Site was not proposed in the draft plan for rezoning from Z6. However, I cannot speculate why that was so.
February 2022	Uniphar, via KPMG Future Analytics ("KPMGFA"), made a submission on the Draft Development Plan. It includes the following: • It requested that the Uniphar Site, only, be rezoned from Z6 to Z10 as representing "*a more appropriate and efficient use of the lands for residential and employment generating purposes"* for "*high-density mixed use development with a strong residential component*" and "*on the basis of their strategic location relative to services, amenities and the city centre. It is stated that the lands have regeneration potential to deliver a high-quality mixed-use scheme with a large residential component*."[50]	

[46] Affidavit of Karl Kent sworn 13 December 2022.
[47] Order by consent perfected on 28 July 2020.
[48] 12 weeks.
[49] See CE report 29/4/22 pp 573 & 578.
[50] This account of the Submission is taken in part from DCC's CE report of 29 April 2022.

Date	Event	Notes
	• It describes the area as *"a well-developed primarily residential neighbourhood with a wide diversity of employment, community, and open / green and amenity spaces"* and well-served by public transport. • It says that *"crucially*", residential use is no longer an 'open for consideration use' under Z6 per the draft plan. With the proposed Z6 zoning, *"the potential of this site to deliver on the intention of national, regional and local planning policy to develop suitably located brown field sites for much needed housing and localised employment, will be lost."* • It says that residential development "*can be successfully delivered alongside the established neighbouring employment use"* and a *"combination of design and landscaping measures could prove very effective in unlocking the potential of these lands, safeguarding the amenity of any future residents and ensuring that the normal operations of the adjoining businesses are unaffected"* and *"both adjoining development lands to the north and south can co-exist with a residential-led, mixed-use scheme on this site."* • It contemplated, by way of example, a mixed-use development comprising of roughly 70% residential (upper floors) and roughly 30% localised retail. Indeed, given the terms of Z10, "*it can therefore be assumed that 70% of the scheme would be in 'residential' use …"*	• DCC says[51] the Applicant selectively emphasises the prospect of residential use and DCC observes that the converse is also true: that a Z10 zoning would in principle also allow up to 70% office and retail uses and that the Applicant merely speculates as to future use of the Uniphar lands. • However, I am not sure much turns on this converse as Uniphar's explicit assumption here, no doubt indicating its aspirations, if not intentions, at least justifies the Applicant's apprehension of a largely residential development. • DCC's accusation that the Applicant merely speculates as to future use of the Uniphar lands lacks reality as to the importance of zoning.

[51] Affidavit of Deirdre Scully, City Planning Officer, sworn 06/02/24 §33. Statement of Opposition §12(i).

<table>
<tr><th>Date</th><th>Event</th><th>Notes</th></tr>
<tr><td>29 April 2022</td><td>
CE report[52] to the elected members on the 4,323[53] submissions as to the Draft Development Plan.

• It contains a general consideration of submissions on Z6 Zonings (inter alia as to the excision of residential use from that zoning) and the CE's response in light of the review of Z6 Zonings on foot of Objective CEE04 of the 2016 Development Plan.[54] The CE considered, inter alia, that:
o certain lands zoned Z6 had been recommended for a change in zoning as <u>no longer considered optimal for extensive employment use</u>.
o the <u>remaining</u>[55] Z6 land bank represents the core strategic employment lands in the city.
o such <u>remaining</u>[56] Z6 lands are inappropriate for residential use of any kind.

• Part 4 of the report lists by name all 4,323 submissions. The entry in that list[57] relevant here reads:
<table>
<tr><th></th><th>Submission Name</th><th>Portal[58] ref No.</th><th>Agent/ Company</th></tr>
<tr><td>S-03745</td><td>Uniphar Group Plc</td><td>1774</td><td>Uniphar Group Plc</td></tr>
</table>
• The report recommended, inter alia, rezoning the Uniphar Site from Z6 to Z10 under the following headings:[59]
"Map Reference: D-0004
Site Address: Chapelizod Bypass / Rossmore Drive, Kylemore Road, Dublin 20
Draft Plan Zoning: Z6
Requested Zoning: Z10
CE Recommended Zoning: Z10"

• The CE's response to Uniphar's Submission was as follows:
</td><td>Notes: see below.</td></tr>
</table>

[52] Report 119/2022. Made under s.12(4) PDA 2000.
[53] See CE Report 21 September 2022 p7.
[54] pp370 & 371.
[55] Emphasis added.
[56] Emphasis added.
[57] P953.
[58] I understand "Portal to refer to a location on a DCC Website where the submission can be accessed.
[59] P578.

Date	Event	Notes
	"The subject lands are located in a highly accessible area in close proximity to Chapelizod Village, with good public transport links to the city centre. The subject lands are considered suitable for mixed use development given the location of the site within an established residential area to the west and east, and Z6 commercial/ employment lands to the north. The rezoning of the lands to Z10 will act as a buffer between the residential and employment uses and will contribute to the 15 minute city objective. The lands are well served by open space and amenity and are considered suitable for mixed use redevelopment."	
Note on the CE report of 29 April 2022 • This report of ran to 962 pages. • The description of the Z6 land bank as the core strategic employment lands in the city is only of the "remaining" Z6 land bank – i.e. those remaining after some had been recommended for a change in zoning as no longer considered optimal for extensive employment use. • In my view, the Applicant's deployment of this report's general consideration of submissions on Z6 Zonings[60] fails to read the report as a whole and to recognise that clearly, insofar as the CE in this report recommended rezoning the Uniphar Site to Z10, he considered that it should not belong in the core strategic employment landbank. So, rezoning the Uniphar Site is not inconsistent with this report's general consideration of submissions on Z6 zonings. • The CE's response to Uniphar's Submission of February 2022 is verbatim the same as the CE's later response to the later submission of the Applicant.[61] • The CE's recommendation amounts to acceptance of the content of the Uniphar Submission. • As will be seen, Map Reference: D-0004 in due course generated Material Alteration D-0004.		
	The members of DCC issued 526 motions proposing amendments of the Draft Development Plan.[62]	
24 June 2022	CE Report[63] to the elected members on the motions proposing amendments of the Draft Development Plan.	
5 - 7 July 2022	The elected members of DCC, • having considered the Draft Development Plan, the CE's reports on the submissions, and the motions,	• Some amendments were, and some were not, material alterations.

[60] E.g. Amended Statement of Grounds §72.
[61] CE Report 21 September 2022.
[62] See CE Report 21 September 2022 p7.
[63] Report 120/2022.

Date	Event	Notes
	• resolved to amend the Draft Development Plan - including by proposed Material Alteration MA D-0004 to rezone the Uniphar Site as Z10.	• Material alterations require a further public consultation process.
26 July 2022 to 1 September 2022	DCC published for public consultation the CE Report of July 2022 on the proposed material alterations and invited submissions thereon.[64] That report • comprises 4 volumes. • describes each material alteration. • provides a discrete map for each.	• This report is not exhibited. Its existence came to light only during the trial.[65] • The exhibited map of the subject Material Alteration D-0004 reproduced as a Figure above, derives from that report. • It is not strictly a statutory report but is published to comply with the statutory obligation to publish material alterations. • A physical copy is not made available to elected members individually. • The elected members and the public may consult hard copies in various DCC offices or a soft copy on the DCC website.
	1,096 submissions were made on the proposed material alterations. But many related to one specific site in the form of a petition.[66]	
31 August 2022	The Applicant made a submission on Material Alteration D-00004 as to Uniphar Site. • It opposed rezoning the Uniphar Site as Z10 - essentially, as residential use of the Uniphar Site would be incompatible with the existing use of the Pat O'Donnell Lands.	I will consider this submission further below.
21 September 2022	The CE's Report[67] on the Submissions on the Proposed Material Alterations. • Records that it is to be read with o The Draft Development Plan. o the CE Report of 26 July 2022 on the Proposed Alterations.[68]	See below.

[64] As required by s.12(7)(b) of the Planning and Development Act 2000 (as amended) ("PDA 2000").
[65] Transcript Day 2 p7 et seq.
[66] CE Report of 21 September 2022 p8.
[67] Report No.261/2022- as required by s.12(8)(b) PDA 2000. See p.161 as to the Applicant's Submission of 31 August 2022.
[68] CE Report of 21 September 2022 p8.

Date	Event	Notes
	• *Inter alia*, the CE summarized the issues raised in the Applicant's Submission, responded and recommended rezoning the Uniphar Site as Z10.	
Note on the CE Report of 21 September 2022 • I will consider this report further below. • It is common case that it contains the reasons for the Impugned Decision. • Whether it complies with s.12(8) PDA 2000 as to the required content of such a report is disputed. • As to some proposed material alterations this report included a map identifying the relevant lands - but only where the CE recommended amending the proposed material alteration. [69] • As the CE recommended not amending the proposed Material Alteration D-0004, no map of it was included in the report. • However, as the report is explicitly to be read with the CE Report of 26 July 2022 on the proposed material alterations and that report included a Map specific to Material Alteration D-0004.		
7 October 2021	Applicant's e-mail to Councillor Pidgeon of DCC. This e-mail • cited media coverage of the issue of rezoning the Uniphar Site from Z6 to Z10. • sought a meeting with Cllr. Pidgeon. • set out verbatim and provided a substantive critique of the CE Report of 21 September 2022 recommending that rezoning. • stated: "*The recommendation is extremely disappointing and somewhat mystifying, as it does not address the issues raised in our submission*." • stated, of the prospect of residential development of the Uniphar Site: *"….. any tenant unlucky enough to secure a home on these lands, were residential to proceed, will without any doubt be in touch with yourself and other local councillors around the issue of noise complaints and other disturbances. We are also very concerned about the safety issues that would exist if a residential site and industrial site were to share a single access road."*	• No evidence is before me as to whether the meeting sought occurred, whether similar e-mails were sent to other elected members or what, if anything, ensued from any such correspondence.
	DCC members • had opportunity to consider the CE Report of 21 September 2022 before meeting to adopt the Development Plan.[70]	• Given the procedure at the meeting of 1 & 2 November 2022, this is the point in the process at which the list of

[69] Transcript Day 2 p5.
[70] Affidavit of Deirdre Scully sworn 6 February 2024 §53.

Date	Event	Notes
	• put down 129[71] motions as to how the proposed material alterations described in that CE Report should be addressed by the members.	names would have in practice served its function of alerting members to material alterations on which they might put down motions. • No motions specifically addressed Material Alteration D-0004. So, the CE Report of 25 October 2022 did not address it.
25 October 2022	A further CE's report[72] responded to and made recommendations on these motions.	
1 & 2 November 2022	The DCC elected members met and adopted the 2022 Development Plan. • The elected members considered o the CE Report of 21 September 2022, which ran to 197 pages and that of 25 October 2022, which ran to 185 pages, in a total of 382 pages. o the 129 motions as to the proposed material alterations. • At Item 2 of the agenda, they accepted en bloc all recommendations in the CE Report[73] as to material alterations in respect of which no motion had been put down by members[74] - including Material Alteration D-0004.[75]	See below.

<u>Note on Meeting 1 & 2 November 2022</u>

- The only substantive subject matters to be considered at this meeting were the material alterations – and, in appreciable degree, only those on which motions had been put down.
- The members did not explicitly consider, discuss, or make a decision as to Material Alteration D-0004.
- What is described as a "Meeting Procedure Note" is exhibited by DCC. It is not so entitled on its face nor is it signed or addressed - nor was it dated in its typed from. It bears a written date of 1 November 2022 – the first day of the meeting. It is not apparent by whom it was created, to whom it was circulated or when it was circulated. It seems to be a speaking note for particular participants at the meeting.

[71] CE Report 262/2022, 25/10/22 Appendix 1 – List of Motions.
[72] Report 262/2022.
[73] Report No.261/2022- as required by s.12(8)(b) PDA 2000.
[74] Minute Item 2.
[75] The minute of the relevant resolution of the members reads: "That Dublin City Council considers the Chief Executive's Report on Submissions Received on the Proposed Material Alterations to the Draft Dublin City Development Plan 2022-2028 submitted Report No. 261/2022 as being considered read and agreed unless item is subject of a Motion".

Date	Event	Notes
	• It is therefore not apparent to what, if any, extent it can be read as advising the members generally of the rationale on which the meeting was to be conducted or on which they should put down motions in advance of the meeting. • It is clear that the meeting was to be conducted primarily by way of consideration of the CE's report[76] of 25 October 2022 on the motions. • It can fairly be inferred that Item 2 was by way of clearing the way for the substantive business of the meeting in considering the members' motions. • The note states that *"By conducting business in this manner, the bulk of time at this Special Council Meeting will be devoted to Motions which are substantive in nature requiring discussion*". • The Parties agree that given the en-bloc adoption of the material alterations on which no motions had been submitted the reasons for Material Alteration D-0004 are to be found, at least primarily, in the CE Report of 21 September 2022.	

THE APPLICANT/DOYLE KENT SUBMISSION - 31 AUGUST 2022

17. This submission was explicitly by Doyle Kent as planning consultant to, and for, its client, the Applicant. It was clearly the Applicant's interests which it articulated.

18. In part, the content of this submission is reflected in the Introduction above – not least as to the use of the Pat O'Donnell lands. The Applicant's assertion that "*The proposed rezoning is likely to lead to a predominantly residential development on the Uniphar lands*"[77] is not meaningfully disputed – though I will refer later to the issue of a buffer area within the Uniphar Site.

19. I am satisfied that the central and essential basis on which the Applicant opposed rezoning the Uniphar Site as Z10 was that residential use of the Uniphar Site would be incompatible with the existing use of the Pat O'Donnell lands for the reasons set out above. The Applicant says of its business that over the 15 years to date "*there have been no complaints in relation to noise or disturbance arising from the operation. This is due to its particular location, adjoined by busy roads and the industrial buildings of Uniphar, and its considerable distance from residential areas …* ". As to the prospect of residential development of the Uniphar Site, *"…. the Pat O'Donnell & Co business would remain in place to the north and to the east, but there would likely be friction with any new residents on the adjoining (Uniphar) lands*

[76] Report 262/2022.
[77] Doyle Kent submission p10.

to the south." Indeed such friction would be "*virtually guaranteed*" – a type of conflict recognised in the Draft Plan[78] - and would create "*a very difficult position*" for the Applicant.

20. The Applicant emphasises that this submission includes an introductory "*Summary Main Points of Concern*"[79] as follows:

> *"Our clients' concerns relate to both the impact of the proposed rezoning on their ability to continue in business, with over 100 employees, and the inconsistency of the proposed rezoning with stated Council policy.*
> *In summary, the main points are:*
> • ***The proposed amendment would constitute an arbitrary spot zoning of a relatively small land holding, from Z6 to Z10, which would not be consistent with the Council's stated policy in relation to retaining such Z6 zoning.***
> • *The proposed rezoning would primarily facilitate residential development on the Uniphar lands, as made clear in both the Chief Executive's report of 29th April 2022 and the Uniphar submission of February 2022, with some other uses, in a highly unsuitable location between the engineering and servicing works of our clients to the north and east and the institutional uses to the south.*
> • ***Rezoning would leave a truncated and irregularly laid out area zoned Z6, with a significant interface with the proposed Z10 lands.***
> • ***Potential adverse impact on Pat O'Donnell and Company with loss of employment.***
> • *The rezoning of the site was previously rejected by the Council in 2016."*

21. The Applicant expanded on these points in the body of its submission and all five points were in substance repeated in the Conclusion section of the submission.[80] The Applicant asserts that the CE Report of 21 September 2022 did not refer at all to the points I have emboldened above and that, given they are bullet-pointed, it would have been very straightforward for the CE to do so. I accept that assertion as to its truth in fact. Whether it implies failure of a legal test as to the validity of the CE Report of 21 September 2022 is a different matter, to which I will return.

22. The Applicant's submission says also that both Sites are "*closely integrated*" - they *"are served by the same road, Rossmore Drive, and both are located in a block surrounded by roads,*[81] *divorced from existing residential development"* and are *"relatively remote from existing residential areas and services*" being "*neither within the Ballyfermot area proper nor within the settlement of Chapelizod, but in a buffer area, separating Ballyfermot from the*" Chapelizod Bypass. Any residential development of the Uniphar Site would be "*a small, isolated parcel*".

[78] §14.7, under the heading Transitional Zone Areas.
[79] P3.
[80] P16.
[81] The R148/N4 Chapelizod Bypass to the north and east and "the very heavily trafficked" R114 Kylemore Road to the west and south.

23. Under the heading "*Inconsistent Planning Policy*", the Applicant submits that spot zoning a relatively small land holding in a location not suitable for such use would conflict with policy – including to preserve Z6 lands as a core strategic employment asset in appropriate for any residential use. The submission criticises the CE Report of April 2022 in its response to the Uniphar submission seeking rezoning to Z10. As this response was repeated verbatim in the CE Report of 21 September 2022, these criticisms are articulated in the Grounds to which I will come later.

24. The Applicant's submission to DCC states, as to the MASP, that

> *"…. in the case of proposed rezoning, it is appropriate to have regard to the need for the City to retain a full range of important economic activities and employments, including those represented by Pat O'Donnell & Co. In this connection, the …….. RSES …….. states, in relation to the …….. MASP, that there should be a focus on "the re-intensification of employment lands within the M50" (**RPO 5.6**[82]). These sentiments are echoed in the CE report of 29th April 2022 and the submission from the OPR to the Council, repeated above, wherein the importance of protecting Z6 land zonings is expressed."*[83]

> *"… whilst the ……. MASP … in the …… RSES … identifies strategic residential and employment areas principally along "key public transport corridors" for future growth in Dublin, the lands subject of the proposed rezoning do not fall within the areas so identified. The major transportation radial route (Chapelizod By-pass/N4/R148) immediately to the north of the Pat O'Donnell lands at California Heights is not one of the areas specifically identified in the MASP as a corridor for future residential development."*[84]

25. As to Ground 4,[85] the Applicant observes that its submission submits:

> *"The proposed rezoning is likely to lead to a predominantly residential development on the Uniphar lands (with some other uses) in an unsuitable location wedged between the engineering and servicing works of our client to the north and east and the non-residential uses to the south. The brief description in the CE report of the location of the site is inaccurate, as there is no residential development to the east, but there is an open yard owned and operated by our client for testing vehicles, as described above. Considered at the local level, the lands identified for proposed rezoning are neither within the Ballyfermot area proper nor within the settlement of Chapelizod, but in a buffer area, separating Ballyfermot from the R148/N4 corridor.*

> *The two properties (Pat O'Donnell & Co and Uniphar) currently zoned Z6 constitute a single block of industrially zoned land, surrounded by roads. The Uniphar lands are bounded to the west by Kylemore Road (R112) which functions as a major distributor road for the overall area, and by Rossmore Drive to the south and east. The Pat O'Donnell & Co lands are abutted by the Chapelizod By-pass road to the north and east, which road (R148) is constructed to a quasi-motorway standard at this point, as it*

[82] Emphasis added.
[83] P9.
[84] P13.
[85] See below.

is the continuation of the M4/N4 into the City."[86]

CE REPORT - 21 SEPTEMBER 2022

26. The CE Report[87] of September 2022 on the submissions on the material alterations includes the following as to the issues raised in the Applicant's submission:

> ***"As required by Section 12(8) of the Planning and Development Act, 2000 (as amended) the report sets out to:***
> *(i) List the persons or bodies who made submissions or observations ……..*
> *(ii) …….*
> *(iii) Summarise the submissions and observations made by any other persons in relation to the proposed material alterations and*
> *(iv) Give the response of the Chief Executive to the issues raised, taking account of any directions of the Members of the authority or the committee under Section 11.4, the proper planning and sustainable development of the area, the statutory obligations of any Local Authority in the area and any relevant policies or objectives in the area and any relevant policies of objectives of the Government or of any Minister of the Government."*[88]
>
> ***"Next Steps***
> *The Members will consider the Proposed Material Alterations to the Draft Plan and the Chief Executive's Report at a Special Meeting of the City Council on the 2nd of November 2022. Pursuant to Sections 12(9) and 12(10) of the Planning and Development Act 2000, as amended, the Members shall, by resolution, having considered the proposed amendments and the Chief Executive's Report, make the Plan with or without the proposed amendments, …".*[89]
>
> ***"Map Sheet D: Ref D-0004; Chapelizod Bypass/ Rossmore Drive, Kylemore Road, Dublin 20.***
>
> *Summary of Issues*
> *A single submission was received which objected to MA D-0004 (Z6 to Z10) on the basis of the incompatibility of the proposed zoning with existing adjoining land uses and supporting infrastructure. Potential conflict with MASP residential development objectives/the RSES policy requirement to retain employment lands and Draft Plan provisions for transitional zone areas were also raised as issues.*
>
> *Chief Executive's Response*
> *The subject lands are located in a highly accessible area in close proximity to Chapelizod Village, with good public transport links to the city centre. The subject lands are considered suitable for mixed use*

[86] P10.
[87] Report 261/2022 dated 21st September 2022 as required by s.12(8)(b) PDA 2000.
[88] Report 261/2022, p6.
[89] Report 261/2022, p10.

development given the location of the site within an established residential area to the west and east, and Z6 commercial/ employment lands to the north. The rezoning of the lands to Z10 will act as a buffer between the residential and employment uses and will contribute to the 15 minute city objective. The lands are well served by open space and amenity and are considered suitable for mixed use redevelopment.

Chief Executive's Recommendation
Retain zoning as in proposed Material Amendment."[90]

27. I agree with DCC's general observation[91] that the text of the CE Report of 21 September 2022, as to the Applicant's submission, "*packs in a lot of planning issues*". It is dense in that respect.

28. Part 5 of the Report of 21 September 2022 – the "List of the Persons or Bodies Who Made Submissions/Observations" includes the following entry:[92]

PORTAL NUMBER	**SUBMITTED BY**	**Type**
DCC-C43-MA-170	Doyle Kent Ltd.	Organisation

29. Note that the list entry

- identified Doyle Kent, not the Applicant,
- is not cross-referenced to the material alteration, or its reference number, on which the submission was made – in this case MA D-0004.

Nor is the listed portal number given in the narrative of the CE report as to MA D-0004. There is no cross-reference apparent on the face of the CE Report of 21 September 2022 between that narrative and the list entry. Nor is any cross-reference apparent on the face of that CE Report between the list entry and MA D-0004.

30. It seems sensible to observe at this point that a DLRCC membership deluged with over 1,000 submissions very likely works, at least as their starting point, off the Chief Executive's report: that is the practicality of the situation. Indeed it is also the law: as will be seen, s.12(9) & (10) PDA 2000 prescribe the documents which the elected members must consider in making the development plan. They do not include the submissions but do include the CE Report on the submissions.

31. Again, I understand "Portal Number" to refer to a location on a DCC website where the submission was publicly accessible from shortly after it was made. I have seen a screengrab of that portal content, which prominently identifies the party on whose behalf the submission was made as "Pat O'Donnell and Company" and provides a weblink to the submission itself. However, the Applicant points

[90] P162.
[91] Transcript Day 2 p18.
[92] Extract from List at p188 et seq. to 197 of the CE Report[92] of September 2022.

out – in my view correctly - that unless one already knew that Doyle Kent had made a submission for the Applicant (in which event one would not need the list as one could directly search the website), the list would not perform its function of informing the reader that the Applicant had made a submission and where to find it. The Applicant also contrasts this entry with the specific identification of Uniphar in the CE Report of April 2022 as having made a submission on the draft development plan, even though it too had made its submission via a planning consultant – KPMGFA.

GENERAL OBSERVATIONS

32. The parties agree, that short of irrationality, the Court has no power to intervene as to the planning merits of the Impugned Decision. This has predictably led to the Applicant's repeated insistence that its objections are as to the legality of the process which resulted in the Impugned Decision and has led, equally predictably, to DCC's repeated insistence that the grounds on which judicial review is sought, in substance, impermissibly and though "dressed up as a legal challenge", impugn the planning merits of the Impugned Decision.

33. As observed by Hogan J in **Killegland**,[93] s.10(8) PDA 2000 provides that there is no presumption in law that land zoned for any purpose in a development plan shall remain so zoned in any subsequent plan. Any zoning is liable potentially to be changed via the democratic process when the next development plan is adopted. The absence of legitimate expectation that zoning will be preserved applies to both ones' own lands and the lands of others. Hence, there is no presumption in law on which the Applicant can rely that the Uniphar Site would remain zoned Z6 in the 2022 Development Plan. In fairness, the Applicant made no such argument, but the observation seems to me worth making as to the general legal context in which these proceedings fall to be decided. It is part of the natural order – with or without the Planning Acts - that the character of locales changes over time and the acceptability of particular types of land use in particular locations waxes and wanes over time. By way only of example, that is one basis on which the concept of urban regeneration rests – though that concept is not directly applicable here.

34. It is probably realistic to observe that, while Uniphar and the Impugned Decision assume – and assert the attainability of - the successful cohabitation of the Applicant's present use of its lands and the future use of the Uniphar Site once developed in accordance with a Z10 zoning, the planning history back at least to 2019[94] demonstrates that the executive, at least, of DCC, have regarded the Applicant's present use of its lands, as a matter of evaluative planning judgement, as obsolete in planning terms. The Applicant vehemently disagrees. The City Planning Officer deposes that 'noisy' industrial use of the Pat O'Donnell lands and the low employment density thereon do not "necessarily" conform to its Z6 zoning.[95] I accept DCC's general characterisation that, as to industrial use, Z6 zoning is for light industry. However, I have significant doubts that the Applicant's use of the lands is not for light industry. It

[93] Killegland Estates Ltd v Meath County Council [2023] IESC 39 §56.
[94] see Variation #14 above.
[95] Affidavit of Deirdre Scully sworn 6 February 2024 §16 – 18 & 24.

certainly is not heavy industry. The City Planning Officer's characterisation of the Applicant's present use as an "individualistic pursuit" in contrast to "the common good" is pejorative and unwarranted.[96] Perhaps that was unintended. DCC's concern is primarily and properly with the common good. But the Applicant has a legitimate interest to defend.

35. Ultimately, however, all that is not very relevant here. *Ceteris paribus*, the Applicant cannot be directly ousted from its existing use on a planning law basis merely by reason of a planning judgement by DCC that the use is obsolete. Absent any allegation (and there is none) of unauthorised development by the Applicant, DCC's allegation that the Applicant's present use of its lands does not conform to its Z6 zoning is, even if correct, beside any point of law relevant in the case. So, the City Planning Officer's observation that residential use frequently adjoins lands with a Z6 zoning is beside the point.[97] The real planning question (not one for me) is whether residential use frequently adjoins lands used as the Pat O'Donnell lands are in fact used.

36. However, as a general matter of planning judgement, though not an issue of law for me, I see the point of DCC's argument that what it considers an obsolete use should not stymie the planning policy potential, employment potential and planning policy evolution of nearby lands, including policy favouring mixed residential and employment uses.[98] None of the Applicant's concerns imply that, as a matter of planning practice or law, the Applicant may, as a matter of right, veto the proper evolution of planning policy as to nearby lands. In fairness, the Applicant does not assert such a right – it asserts, merely and correctly, that it is entitled to be heard on such matters.

37. I note also that the 2022 Development Plan Core Strategy "*promotes a more mixed-use philosophy, with employment land uses to be developed in conjunction or in close proximity to residential development. In particular, this will be promoted on former industrial Z6 lands, many of which are now zoned Z10, ….*" .

38. While these seem to me to be substantive tensions underlying the present dispute, it is no part of my role to enter into the fray on those and other planning issues (such as employment) disclosed on the papers – my only present concern is the legality of the Impugned Decision.

39. S.10(2)(a) PDA requires that a development plan 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*

[96] Affidavit of Deirdre Scully sworn 6 February 2024 §19. "Individualistic" does not mean merely "individual". It describes an attitude. It is defined by Oxford as "more interested in individual people than in society as a whole".
[97] Affidavit of Deirdre Scully sworn 6 February 2024 §21 & 22.
[98] Affidavit of Deirdre Scully sworn 6 February 2024 §18 & 25.

> *development of the area, in the opinion of the planning authority, requires the uses to be indicated;"*

40. As to zoning decisions, the phrase *"in the opinion of the planning authority"* is important here. There is much law on the meaning of the phrase - to the effect that the Courts will not second-guess such an opinion, if the planning authority has correctly appreciated the scope of its power - if it is within vires – and the opinion is "*bona fide held, factually sustainable, and not unreasonable*".[99] In other words, and as to its planning merit, such an opinion may be impugned only for irrationality – a standard which, even allowing for debate as to the substance of the standard,[100] is "*extremely high and is almost never met in practice*" - **St. Audoen's.**[101]

41. I lend little weight to DCC's assertion that, as to peril to its interests, the Applicant conflates zoning decisions with planning permission decisions and that the Applicant's interests can be fully articulated, and if appropriate protected, in the latter. While there is a truth to it, it is in appreciable degree formal rather than substantial in reality. When it comes to interests rather than rights and obligations it seems to me unrealistic, perhaps especially in the context of zoning, to take too lawyerly a view of when and how interests are engaged. Most obviously for example, zoning decisions affect property values – for which, I imagine, there must be good reason. Indeed, Clarke J's rationale in **Christian**[102] of requiring reasons for zoning decisions was that they have

> *"… the potential to specifically affect the rights of individuals, both those who may wish to develop their own lands or <u>those who may have their own interests interfered with by the development of neighbouring lands …</u>".*[103]

Put simply, the Applicant was entitled to be heard on this zoning issue and is not to be fobbed off by assurances that its interests will receive due attention in a future planning application. Of course, I do not suggest that they would not receive due attention but what weight will be accorded them will, highly likely, be appreciably affected by the then-applicable zoning. The Applicant is entitled, as the judge of its own interest, to consider that, if the zoning will have been changed appreciably in favour of residential development of the Uniphar Site, its objections to such a planning application would be likely in appreciable degree to savour of the bolting of a stable door. No doubt its fears are heightened by DCC's categorisation of its operations, in these proceedings, as an obsolete and non-conforming use.

[99] From State (Lynch) v Cooney [1982] IR 337 via such as Kiely v Kerry County Council [2015] IESC 97, [2016] 2 IR 1, and Waltham Abbey Residents Association v An Bord Pleanála and O'Flynn Construction [2022] IESC 30, [2022] 2 ILRM 417 to, most recently, Sweetman v The Environmental Protection Agency [2024] IEHC 55 §55 et seq.
[100] See for example Jennings v An Bord Pleanála [2023] IEHC 14 §15 et seq.
[101] The Board of Management of St. Audoen's National School v An Bord Pleanála [2021] IEHC 453.
[102] Christian v Dublin City Council (No.1) [2012] 2 IR 506.
[103] Emphasis added.

LEGISLATION & SOME COMMENTARY THEREON

ARTICLE 28A OF THE CONSTITUTION – ROLE OF LOCAL GOVERNMENT & PART II, CHAPTER I, PDA 2000

42. As relevant, Article 28A of the Constitution reads as follows:

> "*1 The State 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.*
>
> *2 There shall be such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law*."

43. The Applicant cites the Supreme Court in **Killegland**[104] to the effect that Article 28A.1 provides for the democratic representation of local communities. That a development plan is "*founded upon and justified by the common good and answerable to public confidence*"[105] is redolent of the objective of Article 28A. So, the Applicant says, Part II, Chapter I, ss. 9 to 17 PDA 2000,[106] as to Development Plans, should be interpreted in the manner that "best promotes" public confidence and the representation of local communities. I accept that Part II, Chapter I PDA 2000 must be interpreted in accordance with the Constitution generally and that such interpretation will be informed by Art. 28A. However, consistency with Art. 28A may properly fall appreciably short of what some may reasonably consider to "best promote" the interests underlying Art. 28A. It is for the Oireachtas to decide such issues within a very considerable margin of appreciation.

44. In fact, the Supreme Court in **Killegland** invoked Art. 28A as to a separation of powers principle which informs the principles of judicial review - to the effect that *"…any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature."* The Supreme Court did not deploy Art. 28A as relating to the interpretation of the PDA 2000. While, of course acknowledging its general importance and constitutional status, and its relevance to the standard review of impugned decisions in judicial review, I do not find Art. 28A of particular assistance in this case as to statutory interpretation. I am encouraged in this view by the recent conclusion of Hogan J in **Conway**[107] as to Article 28A that *"the effects of this provision are, on the whole, relatively modest."*

SS.9, & 10(1A) PDA 2000 - DEVELOPMENT PLAN & CORE STRATEGY

[104] Killegland Estates Ltd v Meath County Council [2023] IESC 39.
[105] Byrne v Fingal County Council [2001] IEHC 141, [2001] 4 IR 565 at 580.
[106] In fact, the Applicant s.12 specifically, but the logic applies to the entire of Part II, Chapter I and it is convenient to note the submission at this point.
[107] Conway v An Bord Pleanála [2024] IESC 34.

45. S.9 PDA 2000 obliges planning authorities to make a development plan in respect of its functional area every 6 years. S.9(6) provides that

> *"A development plan shall in so far as is practicable be consistent with such national plans, policies or strategies as the Minister determines relate to proper planning and sustainable development."*

46. S.10(1A) PDA 2000, as relevant, requires that a development plan contain a core strategy, which shows that the development objectives in the plan are *"consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the RSES."*

S.11 PDA 2000 – DRAFT DEVELOPMENT PLAN

47. As relevant, s.11 PDA 2000 reads as follows:

> *"(1A) The review of the existing development plan and preparation of a new development plan under this section by the planning authority shall be strategic in nature for the purposes of developing—*
> *(a) the objectives and policies to deliver an overall strategy for the proper planning and sustainable development of the area of the development plan, and*
> *(b) the core strategy,*
> *and shall take account of the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government."*

S.12 PDA 2000 - MAKING OF A DEVELOPMENT PLAN

48. It will assist to note first that

- s.12(4) PDA 2000 prescribes the content of the CE Report on the submissions on the draft development plan – in this case the report of 29 April 2022.
- s.12(8) PDA 2000 prescribes the content of the CE Report on the submissions on the material alterations – in this case the report of 21 September 2022.

49. As relevant, s.12 PDA 2000 reads as follows:

> *"(4) (a) Not later than 22 weeks after giving notice under subsection (1) and, if appropriate, subsection (3), the chief executive of a planning authority shall prepare a report on any submissions or observations received under subsection (2) or (3) and submit the report to the members of the authority for their consideration.*
>
> *(b) A report under paragraph (a) shall—*

(i) list the persons or bodies who made submissions or observations under this section,

(ii) provide a summary of—

(I) the recommendations, submissions and observations made by the Minister, where the notice under paragraph (a) of subsection (2) was sent before the establishment of the Office of the Planning Regulator,

(II) the recommendations, submissions and observations made by the Office of the Planning Regulator, and

(III) the submissions and observations made by any other persons,

in relation to the draft development plan in accordance with this section,

(*iii) give the response of the chief executive to the issues raised, taking account of any directions of the members of the authority or the committee under section 11(4), the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives of the Government or of any Minister of the Government and, if appropriate, any observations made by the Minister for Arts, Heritage, Gaeltacht and the Islands under subsection (3)(b)(iv).*"

(7) (a) …where the proposed amendment would, if made, be a material alteration of the draft concerned, the planning authority shall, …publish notice of the proposed amendment …

…….

(b) A notice under paragraph (a) … shall state that—

(i) a copy of the proposed amendment of the draft development plan may be inspected … during a stated period of not less than 4 weeks .. and

(ii) written submissions or observations with respect to the proposed amendment of the draft made to the planning authority within the stated period shall be taken into consideration[108] before the making of any amendment.

(8) (a) … the chief executive of a planning authority shall prepare a report on any submissions ….. and submit the report to the members of the authority for their consideration.

(aa) …

(b) A report under paragraph (a) shall —

(i) list the persons or bodies who made submissions or observations under this section,

(ii) provide a summary of —

…

(III) the submissions and observations made by any other persons, in relation to the draft development plan …….

(iii) give the response of the chief executive to the issues raised, taking account of

[108] The Applicant disavowed any argument that the obligation to take submissions "into consideration" exceeded the relatively well-understood obligation to "have regard" to a matter. See generally Coyne v An Bord Pleanála & Enginenode [2023] IEHC 412 §14 et seq and, recently Cork County Council v Minister for Housing [2021] IEHC 683 §43.

- *the directions of the members of the authority or the committee under section 11(4),*[109]
- *the proper planning and sustainable development of the area,*
- *the statutory obligations*[110] *of any local authority in the area and*
- *any relevant policies or objectives for the time being of the Government or of any Minister of the Government*."[111]

(8A) (a) Written submissions or observations received by a planning authority under this section shall, subject to paragraph (b), be published on the website of the authority within 10 working days of its receipt by that authority.

……

(9) (a) The members of a planning authority shall consider the amendment and the report of the chief executive under subsection (8).

(10) (a) The members of the authority shall, by resolution, having considered the chief executive's report, make the plan with or without the proposed amendment that would, if made, be a material alteration.

(11) In making the development plan …. the members shall be restricted to considering the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government.

(18) In this section 'statutory obligations' includes, in relation to a local authority, the obligation to ensure that the development plan is consistent with —

(a) the national and regional development objectives specified in—

(i) the National Planning Framework, and

(ii) the regional spatial and economic strategy …".

GROUND 1: CE REPORT – IDENTIFICATION OF APPLICANT - SUMMARY OF & RESPONSE TO SUBMISSION

OUTLINE OF ISSUES

50. The Applicant's position is that by s.12(8)(b) PDA 2000, the CE Report of September 2022 must, but fails, ultra vires, to, (i) identify the Applicant as having made a submission on the amendments, (ii) summarise that submission, (iii) respond to the issues raised.

[109] (d) Following the consideration of a report under paragraph (c), the members of the planning authority or of the committee, as the case may be, may issue directions to the chief executive regarding the preparation of the draft development plan, F95[and any such directions shall be strategic in nature, consistent with the draft core strategy, and shall take account of] the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government, and the F98[chief executive] shall comply with any such directions.

[110] See s12(18) below.

[111] Layout changed for purposes of exposition.

51. DCC's position is that Ground 1 is based on the incorrect approach to reading the CE Report in a way which renders it invalid rather than valid and:

a. The Applicant contends for an implausible and/or unsustainable interpretation of s.12(8)(b) PDA 2000 as to what is required by way of summary of and CE response to submissions.

b. The complaint of failure to identify the Applicant as having made a submission is formalistic and trivial. While "Pat O'Donnell & Company" is not listed as having made a submission, its planning agent, Doyle Kent Ltd, who made the submission for it, is listed in the CE Report as having made a submission[112] and the submission was published online in accordance with s.12(8A).

c. The Applicant's submission was in fact considered by the Council and is expressly summarised in the CE Report.

d. The CE Report does in fact respond to the issues raised in the Applicant's submission.

e. In purporting to ascribe significance to the Applicant (as opposed to his agent) being specifically identified, the Applicant fails to recognize that personal considerations such as the identity of the party as being an employer making the submission is irrelevant to proper planning and sustainable development.

f. The Applicant also inappropriately attributes ignorance to the elected members when considering the CE Report, when in fact they are an informed expert body with local knowledge.

FAILURE TO LIST APPLICANT AS A PERSON THAT MADE A SUBMISSION

Failure to List - Applicant's Particulars & Submissions

52. The Applicant pleads & submits that:

a. the CE's Report of September 2022 listed the persons who had made submissions on the material alterations. Contrary to s.12(8)(b)(i) PDA 2000, it did not list the Applicant. Instead, at reference DCC-C43-MA-170,[113] it listed Doyle Kent,[114] planning agent, which had prepared and made the submission for the Applicant. That is non-compliant with s.12(8)(b)(i). A planning agent may make any number of submissions for different principals – indeed Doyle Kent made two submissions for different parties. Listing an agent obscures rather than reveals the identity of the person making a submission. Indeed, the CE Report of April 2022 had listed Uniphar's submission correctly under its name even though KPMGFA had made Uniphar's submission as its agent.

[112] Part 5, p192.
[113] This is an identification number ascribed to the Doyle Kent Submission.
[114] Doyle Kent Planning Partnership Ltd.

b. the obligation to list persons who have made submissions is mandatory by s.12(8)(b)(i) PDA 2000 and of considerable practical significance. Underpinning the statutory scheme is the fact that it is not reasonably possible for elected members to read all submissions— a point made by the City Planning Officer herself. There were over 1,000 in this instance. The purpose of listing the names of those who have made a submission is to alert elected members to the identity of such persons - for example, residents of or employers in their locality. The importance of listing by name those that made submissions is to allow members to identify submissions that may be of importance to their area. In this case, a proper listing would have alerted the members to the fact that a significant local employer had made a submission.

c. the list is also conducive to public confidence in the process on the part of those making submissions. That is a virtue in itself but also in accordance with Article 28A of the Constitution.

d. in this case an elected member who may have been looking out for the Applicant (given the planning history[115]) — might conclude that the Applicant had not made a submission, and so was not objecting to any aspect of the draft plan.

e. there is no evidence that any DCC member read the Applicant's Submission. Also, the Applicant was not identified by name in the substantive consideration of its submission in the CE Report.

f. the Oireachtas does nothing in vain. In **Southwood Park**[116] Simons J said that the Court's jurisdiction "*to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited*". In **Ballyedmond**,[117] Clarke J said: "*…. where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the court.*"

g. that elected members could have discovered elsewhere – on the DCC website or by reading the Doyle Kent Submission - that the Applicant had made a submission is beside the point of s.12(8)(b)(i). They cite **McAnenley**:[118] "*It is difficult to treat non-compliance with an express statutory requirement on a de minimis basis. …… I cannot disregard this statutory requirement*".

[115] The failed rezoning effort under the 2016 Development Plan as recorded above.
[116] Southwood Park Residents Association v An Bord Pleanála [2019] IEHC 504 §34. The Applicants cite also Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] ILRM 64 at 69.
[117] Lord Ballyedmond v Commission for Energy Regulation [2006] IEHC 206 §4.3.
[118] McAnenley v An Bord Pleanála [2002] 2 IR 763 at p4.

Failure to List - Respondent's Particulars & Submissions

53. DCC says[119]

a. While "*Pat O'Donnell & Company*" is not listed in the CE Report of 21 September 2022 as having made a submission, nothing turns on this as
   - its planning agent, Doyle Kent who made the Applicant's submission, is listed.
   - The Applicant's submission was put on DCC's public website[120] on a webpage which identifies *"Pat O'Donnell and Company*".[121]
   - The Applicant's submission was considered by "the Council" and is summarised in the CE Report of 21 September 2022.

b. The Applicant raised no issue before these proceedings as to the listing.

Failure to List – Discussion & Decision

Are Statutory Provisions Mandatory or Directory?

54. The approach taken in judicial review to breach of a statutory duty is informed in considerable part by whether the duty is mandatory or merely directory. That is a matter of statutory interpretation - e.g. **Gillen**.[122] In **Gillen,** and as to the principles on which mandatory statutory duties can be distinguished from those merely directory, the Supreme Court cited with approval Lord Penzance in **Howard v Boddington***[123]* as follows:

> *"The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? … There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view … I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."*

[119] Affidavit of Deirdre Scully, City Planning Officer, 6/2/24.
[120] within 10 working days in accordance with section 12(8A)(a) PDA 2000.
[121] Of which webpage DCC exhibits a screengrab- TAB 5 to "DS 1".
[122] Gillen v Commissioner of An Garda Siochana [2001] 1 IR 574 O'Donnell J §54.
[123] (1877) 2 PD 203.

55. As to the principles on which mandatory statutory duties can be distinguished from those merely directory, in **IGP Solar,**[124] McDonald J cited, as had the Supreme Court in Gillen, Henchy J in **Elm Developments**[125] as follows:

> *"Whether a provision in a statute … which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused".*

56. It will be seen that the foregoing passage posits a dichotomy between, on the one hand, obligations "*integral and indispensable*" to the statutory intendment and scheme and, on the other, directions "*not of the substance*" of that intendment and scheme. As to any posited intermediate zone, or doubt in a given case, given the importance of the concept of the rule of law and the nature of law as binding, prescriptive, regulatory and, at least desirably, characterised by legal certainty, it seems to me that no exaggerated view should be taken of the words "integral and indispensable" and that the default presumption – though, in case of dispute, a starting point not a conclusion - of statutory interpretation is that statutory instructions phrased as such are mandatory not directory. Of course, that is not to say that enabling provisions or discretionary powers are not a commonplace of statutes and generally presumptions, being starting points of interpretation rather than conclusions, will inform but if needs be yield to a text in context interpretation of the particular statutory provision in question.

57. The word "shall" is used in s.12(8)(b) PDA 2000 to describe what it is the CE Report is to contain. Generally, though not always, word "shall" will be construed as imposing a mandatory statutory requirement. While "shall" in a statutory provision can be interpreted in context to mean "may", for it to impose a directory rather than a mandatory duty is not the norm. The word has the effect that the statutory provision in which it appears is, as Henchy J said in Elm Developments, "*on the face of it is obligatory*".[126] The word had that effect in **McAnenley**[127] and in **Graves**[128] - cases cited by McDonald J in **IGP Solar** as of particular assistance and as illustrating that, in a planning context*, "the use of the word "shall" is particularly important".* While that does not absolve the court of a contextual interpretation of a statutory provision, the text is the starting point: *"the words of a statute are given primacy ... as ... the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated"* - **Heather Hill**.[129] McDonald J in **IGP Solar** said that *"While the use of that word does not automatically make mandatory the obligation imposed, the word "shall" as a matter of ordinary English usage, carries that connotation".* The mandatory force of the word "shall" seems to

[124] Sweetman v An Bord Pleanála & IGP Solar 8 [2020] IEHC 39, [2020] 1 JIC 3104 §28.
[125] Henchy J in the Supreme Court State (Elm Developments Ltd) v Monaghan County Council [1981] ILRM 108 at p110.
[126] Elm Developments p110.
[127] McAnenley v An Bord Pleanála [2002] 2 IR 763.
[128] Graves v An Bord Pleanála [1997] 2 IR 205.
[129] Heather Hill v An Bord Pleanála and Burkeway Homes [2022] IESC 43 ([2022] 2 ILRM 313) §115.

me generally amplified by the consideration that the alternative - the contrasting word "may" – is obvious to and often used by the legislator to denote a merely directory instruction. Given the obviousness of the choice, the choice made by the legislator in a given case seems likely, at least as a starting point of analysis, to be deliberate and significant. For example, in **PRSA v Dooley**[130] Barniville J was able to say: *"The words used in s. 70(1) in terms of the plain and ordinary meaning of the language used are to my mind clear. A person who is the subject of a decision by the Authority to impose a major sanction "may" appeal from that decision to the High Court. The word "may" is used and not the word "shall". That is surely because there could be no obligation on that person to appeal against the Authority's decision."*

58. All that said, I of course accept the view of O'Donnell J in **Gillen**[131] that, in discerning whether a statutory provision is mandatory or directory,

> *"… in each case, the purpose of the legislation is an important consideration. That purpose is to be discerned from an analysis of the regulation set against its factual and legal background. This exercise involves considerably more than a consideration of what is meant by the word "shall". …This involves an analysis of the language and syntax used by the regulation, the legal context and perhaps most importantly the purpose sought to be achieved by the regulation."*

59. I note also the observation that "*almost all cases in which a regulation has been held to be directory only will involve some such word, and indeed often if not invariably the word "shall"."* Though I confess to respectfully wondering whether this is a function in appreciable part of litigants' choices as to what to litigate and whether the absence of "some such word" in particular instances is significant in that regard. To put it another way, the interpretation of clear statutory provisions (one hopes most are) is less likely to be litigated.

60. Though valid and well-established, it may be that the mandatory/directory distinction distracts somewhat from the real question – which is what did the legislator intend the consequences of breach of the statutory obligation to be? The Supreme Court in **Gillen** cites Lord Steyn in **Soneji**[132] to the effect that *"… the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."* As has been seen, Lord Penzance had earlier phrased the question similarly. In a recent **ALAB** judgment,[133] I attempted to elucidate the description in **Heather Hill**[134] of the phrase "legislative intent" as a "misnomer" as an insistence on objective interpretation of the intent of statutes as opposed to attempting to divine the subjective intent of legislators.

[130] Property Services Regulatory Authority v Dooley [2023] IEHC 419.
[131] Gillen v Commissioner of An Garda Siochana [2001] 1 IR 574 O'Donnell J, §54 & 55.
[132] R v Soneji [2006] 1 AC 340 at 353, cited by the Supreme Court in Gillen v Commissioner of An Garda Siochana [2001] 1 IR 574.
[133] SWI, IFI, Sweetman & Ors v ALAB et al [2024] IEHC 421. §1412 et seq.
[134] Heather Hill v An Bord Pleanála and Burkeway Homes [2022] IESC 43 ([2022] 2 ILRM 313) §115.

61. Perhaps I may add the tentative observation that while a statute will often impose a mandatory duty to exercise a discretion, it may be that a statutory provision conferring a discretion is somewhat more amenable to interpretation as empowering and directory than a provision conferring no discretion. Of course, here, the obligation to list is not discretionary.

A Feedback Loop?

62. As will be seen, whether the breach of a "truly mandatory" obligation requires invalidation of a decision will turn in a given case on whether the breach was *de minimis*. I turn to that criterion below. The question whether a breach was *de minimis* arises only if and once the obligation has been identified as mandatory. But it seems to me there is a feedback loop here. The Oireachtas is taken to know the law – including that breach even of mandatory statutory obligations may be excused as *de minimis* if appropriate. Thus, it knows that the law has at least some capacity to avoid disproportionate consequences of breach of even mandatory obligations. It seems to me that this allows of a somewhat greater readiness to identify obligations as mandatory in the first place.

Is the Obligation to List Mandatory or Directory? Who must be Named?

63. In my view, s.12(8)(b)(i) PDA 2000 imposes a mandatory obligation on a chief executive to list in his/her report the persons and bodies who have made submissions, and to do so by name of those persons specifically rather than by name of their planning agents. I say so for the following reasons:

c. These seem to me to be the plain, ordinary, and literal meanings of s.12(8)(b)(i) PDA 2000. As I have noted, the text is the starting point: "*the words of a statute are given primacy .. as .. the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated*" - **Heather Hill**.[135]

a. The word "shall" is used in s.12(8)(b) PDA 2000. As I have noted, it can be interpreted in a statutory context to mean "may" – but that is not the usual interpretation (Elm Developments and IGP Solar). There can be no doubt but that s.12(8)(b)(ii) & (iii) PDA 2000, as to summarising the recommendations, submissions, and observations by the Minister/OPR and the submissions and observations made by any other persons and as to responding to the issues raised are of their nature mandatory. I note that similar obligations in s.179(3)(b) PDA 2000 were held "*of course mandatory*" in **Griffin**.[136] To read "shall" in s.12(8)(b) as "may" as it relates to the listing obligation would require that a single use of the word "shall" should be read in very different senses as to its application to the three subject matters identified in s.12(8)(b)(i),(ii) & (iii) PDA 2000. That seems to me inherently and highly unlikely and I decline to draw that conclusion.

[135] Heather Hill v An Bord Pleanála and Burkeway Homes [2022] IESC 43 ([2022] 2 ILRM 313) §115.
[136] Griffin v Dublin City Council [2020] IEHC 507 §53.

b. Purposively, it is significant that the right of public participation in decision-making is a highly important value in planning and environmental law. It is recognised as such in international law – notably in the Aarhus Convention. It is recognised as such in EU Law – for example in the Public Participation Directives[137] and in many decisions of the CJEU. It is recognised in Irish Law and in many cases, such as **Southwood Park**.[138] In **McTigue Quarries**[139] MacMenamin J described the Planning Acts as regulating *"an area where, of its nature, legislation is supposed to have a strong public participation aspect."* Indeed, the right of public participation in Irish planning law since the 1963 Planning Act precedes the advent of EU law. Even if EU law affords greater rights of public participation, they apply here to the adoption of a development plan which is subjected to SEA[140] and AA.[141]

c. Though the point is obvious, it has been made in the "**Talk Fracking**" case[142] that a right to participate by making submissions necessarily implies a right to have those submissions considered – considered, I would add, by the decision-maker – though this does not preclude reliance on consideration, summary thereof and advice thereon by the decision-maker's advisors.[143] The fourth of the "Sedley criteria", as to consultation in public law decision-making, approved in **Talk Fracking**[144] as "*a prescription for fairness*" is *"that the product of consultation must be conscientiously taken into account".*

d. It seems to me relevant that the adoption of a development plan, though a legal process and to be based only on proper planning considerations, is also political process reserved by statute, not to the executive of the planning authority, but to its democratically elected representative members. They are the representatives of their constituents and, in my view, a considerable purpose of the statutory list is to make the elected members properly aware of who, amongst those constituents and local employers (not excluding others), has made submissions.

e. As is clear from the caselaw, CE reports are to be considered in the context that they typically in development plan making, seek to address very numerous submissions. In this process, the CE Report of April 2022 on the Draft Plan addressed 4,323 submissions and the CE Report of 21 September 2022 on the Material Alterations addressed over 1,000 submissions. An elected member simply cannot master them all – nor, as I have observed and given s.12(9) & (10) PDA 2000, is he or she obliged to even read them all and they may read the CE Report instead. There can be no doubt but that the list, in a report proffered to the elected members, is intended to enable the elected member to locate from amongst that many, the particular submissions of interest to him/her. I have no doubt that the name of the person making the submission is

[137] Conway v Ireland [2017] IESC 13, [2017] 1 IR 53 defined the Public Participation Directives as being
- Directive 85/337/EC (EIA)
- Directive 96/61/EC (IPPC)
- Directive 2003/35/EC (Public Participation)
- Directive 2011/92/EU (EIA – codifying).

[138] Southwood Park Residents Association v An Bord Pleanála [2019] IEHC 504.
[139] An Taisce — The National Trust for Ireland v McTigue Quarries [2019] 1 ILRM 118.
[140] Strategic Environmental Assessment under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
[141] Appropriate Assessment under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[142] Stephenson (Talk Fracking) v Secretary of State for Housing [2019] EWHC 519 (Admin).
[143] For example, see recently R (Save Stonehenge) v Secretary of State for Transport [2024] EWCA Civ 1227.
[144] And, earlier by the UKSC in R(Stirling/Moseley) v Haringey LBC [2014] PTSR 1317.

valuable to that end – and the statute, in prescribing the list, recognises that value. While, no doubt, all identifying information may be useful, that value does not most obviously lie in the names of planning consultants, many of whom will have made multiple submissions for different clients on different subject-matters. The value most obviously lies in the name of the person by or for whom the submission was made.

f. I am fortified in that view by the fact that it is clear that, in its substance as opposed to in the list, a CE's report may lawfully describe and respond to multiple submissions in a grouped or themed manner without specific reference to individual submissions or the names of those who made them. That is perhaps especially so in a report addressing strategic issues which are prominent in making development plans and on which multiple submissions may have been received. Thus, it may be that the list is the only point in the report in which the names appear of those, or many of those, who have made submissions.

g. That the planning authority understands the list as intended to enable the elected member to locate the particular submissions of interest to him/her, is incidentally confirmed by its assignment (helpful though not statutorily required) of a portal reference number to each submission and listing it (I understand in the form of a hyperlink to the relevant portal entry) in the list with the name of the person who made the submission.

h. By so alerting the elected members, listing may prompt elected members to bring a motion supportive of or to amend or refuse a proposed material alteration to the Development Plan or to take a view on a motion submitted by another member or to deal with it in some way other than that recommended by the CE in his report.

i. It seems to me obvious as a matter of substance that the person to be identified is the person whose substantive interest (using the word "interest" in its broadest sense) is advanced in the submission. It is the person who wants to be heard and whose right of public participation is being exercised who should be identified in the list.

j. It is trite law that the act of an agent, such as here a planning agent, is in law and in substance the act of its principal - see **Dalton.**[145]

64. At the cost of some repetition and further as to the purpose of the list:

a. I accept the Applicant's submission that the obligation to list persons who have made submissions is of considerable practical significance – at least potentially. I accept that underpinning the statutory scheme is the fact that it is not reasonably possible for elected members to read all submissions - over 1,000 in this instance. The purpose of the list of names is to alert elected members to the identity of persons - for example local residents or local employers/businesses or local civil society organisations – who have made submissions. It assists members – I imagine appreciably - to at least identify as worthy of examination submissions that

[145] Dalton v An Bord Pleanála [2020] IEHC 27 §§36- 44.

may be of importance either generally to the development plan or to their local area. That may, for example, be because the list identifies someone known to the member as a person who, for one reason or another – perhaps local knowledge, residence, interests or experience – is likely to have had something worthwhile to say on the planning issues arising in making a development plan. And it may well be that those planning issues addressed by such a person will not be personal to the interests of that person. Indeed, human nature and politics being what they are it would not surprise me if, in practice, the list is often the first part of the report read by a member. In this context and given the statutory prescription of the list, I see no reason why the law should ignore the realities of human nature and politics in order to depreciate the significance of what "*parliament has ordained*"[146] – indeed, I see every reason why it should not.

b. Nor is it relevant to here observe, as does DCC and as does Hogan J, of course correctly, in **Killegland**[147] that *"… questions of the identity of the owner of lands are in general an irrelevant consideration in planning matters. Planning and zoning decisions should, generally speaking, at least, be blind as to issues of ownership."* That explicitly general observation must yield to the inevitable conclusion that, in the specific matter of listing persons who have made submissions, the Oireachtas by s.11(4) and s.12(4)&(8) explicitly makes exceptions to that general rule as to CE Reports on submissions, respectively in the development plan review process, on draft development plans, and on proposed material alterations. There are multiple other similar provisions in the PDA 2000.[148] There is nothing unusual about this: whatever the logic of blindness to ownership, experience suggests that in reality and as matter of human nature, those who exercise rights of public participation in a democratic and political process – the right to be heard - naturally expect their submissions to be associated with their name.[149] They tend to be reassured or suspicious according to whether that expectation is realised. Anonymisation of submissions in political processes tends more or less to desiccate them. Listing by name those who make submissions also serves purposes of transparency to the public at large in a political process - though that is not a principle the Applicant here calls in aid.

c. DCC also cite **Flanagan**[150] in which Blayney J said that ***"****How the applicant or his employees would be affected personally by a refusal of the application could not in my opinion be said to have any relevance to the proper planning or development of the area of the County Council."* However, this observation, while correct, should not be taken either out of context or as a statutory rule. In Flanagan, it related to considerations irrelevant to a retention application as to a commercial store, that its refusal would require the applicant to emigrate and throw his employees on State provision. In **Killegland**, the principle was applied to deem irrelevant the belief (as it happened, mistaken) that the Catholic Church owned the land in question. It is not necessary here to tease out the parameters of the concept of a "planning matter". But some personal considerations are routinely taken into account in planning decisions: most obviously the residential amenities of nearby residents – for example, as to matters of overlooking or overshadowing of their homes or effects on traffic conditions in their locality. Indeed, such matters are often the very stuff of

[146] Kelly J in McAnenley.
[147] Killegland Estates Ltd v Meath County Council & Giltinane [2023] IESC 39 §84, citing Flanagan v Galway City and County Manager [1989] IR 66 and Griffin v Galway City and County Manager, High Court, 31 October 1990.
[148] See ss.13, 20, 85, 169, 170A, 179, 238 PDA 2000.
[149] Of course, some prefer anonymity – but that is not the point here.
[150] Flanagan v Galway City and County Manager [1990] 2 IR 66.

planning decisions. And as was said in **Kelly**[151] as to the legitimacy of private interests in planning matters: *"the law has always recognised that those who live close to a development site and who will have to live with what is built on it have legitimate interests as to which they are particularly entitled to be heard".* The judgment cited Kearns J in **Harding**[152] who had said: *"… the framers of the legislation had in mind a range of interests originating in, but not necessarily limited to, considerations of how an applicant's property or financial interests might be affected by the particular development."* When, in **Balz**,[153] O'Donnell J referred to objectors being "*expected to accept decisions …. with whose consequences they may have to live"*, he was speaking figuratively but also literally. None of this is to doubt Flanagan or Killegland on these issues or to suggest that personal considerations hitherto regarded as irrelevant are in truth relevant. It is merely to caution against sweeping statements when, as Hogan J noted in Killegland, the principle is "general", not exhaustive.

However and all that said, ultimately the answer to DCC's reliance on Flanagan is the same as that to its reliance on Killegland: s.11(4) and s.12(4)&(8) explicitly require that those who make submissions be listed – on that basis alone, the submissions that their names are irrelevant is untenable.

d. I respectfully reject the alternative suggested by DCC,[154] that the purpose of the list is as a checklist to ensure that every submission is addressed in the report. I confess that I am not entirely clear how reliably the list would perform that function. I do not rule it out as a subsidiary purpose to assist the CE in performing his/her function in compiling the report. But the report, by statute, speaks primarily to the elected members and the primary function of the list must be ascertained from that perspective.

e. In the present case, the specific obligation to list those making submissions, despite and in addition to the obligation in any event to summarise and respond to their submissions, seems to me to imply that the Oireachtas did not consider the risk of not listing them fanciful. Further, the duty is not a discretionary one. It may have been belt and braces, but the Oireachtas expressly prescribed both the obligation to summarise and respond as well as the obligation to list. I must presume it did so for good reason. As I have said, one reason I can think of is that grouped or themed summary of, and response to, multiple submissions may have the effect that the list is the only point in the report in which the names appear of those, who made submissions. It is perhaps understandable also given the function of the list in assisting members to conveniently navigate and pluck those of interest from often-numerous submissions on a development plan on a wide range of subjects as to a wide range of locations.

65. I conclude therefore that s.12(8)(b)(i) PDA 2000 imposes a mandatory obligation on a chief executive to list in his/her report the persons and bodies who have made submissions and to do so by name of those persons specifically rather than by name of their planning agents.

[151] Kelly v An Bord Pleanála [2022] IEHC 238.
[152] Harding v Cork County Council, An Bord Pleanála & Xces Projects Ltd [2008] 4 IR 318.
[153] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 ILRM 637.
[154] Transcript Day 2 p127.

Was there a Breach of the Duty to List?

66. Given my conclusion above that the obligation is to list by name the principal making a submission rather than his/her agent, it follows that there was a breach of that obligation in this case in that "Doyle Kent" was listed rather than "Pat O'Donnell & Company".

67. Given my identification of the purpose of the list, it is irrelevant to that purpose that the Applicant's submission on the Material Alteration was published online at the portal link/reference identified in the list sub nom "Pat O'Donnell and Company". The list did not serve its intended purpose of directing the reader, by means of the name "Pat O'Donnell and Company", to that portal.

68. I am in no doubt that, in law and in substance, whatever about in form and in the context of agency,[155] the "person or body" which was to be listed in the report was the Applicant and not Doyle Kent. In any event, for reasons I have set out, this is not a mere matter of form. The listing of "Doyle Kent" tended to obscure the fact that "Pat O'Donnell and Company" had made the submission (as in law and in substance it had) and that "Pat O'Donnell and Company" considered its interests to be engaged in the rezoning of the Uniphar Site. It does not seem to me that the words "Doyle Kent" reliably alerted even vigilant members to that fact – though I imagine some recognised the location on reading the CE's report. Put simply, even if the reader knew Doyle Kent was a planning consultant it could, as far as the list revealed, have been acting for anybody and, in point of fact, it had made two submissions for different parties. It cannot be said that what was in fact done in substance served the purpose of the statutory requirement.

69. Notably, DCC provided no rationale or explanation for listing planning agents rather than their clients as having made submissions - other than the conclusionary and essentially unreasoned argument that naming the planning agents represents compliance with s.12(8)(b)(i) PDA 2000. Even the suggestion[156] that this represented DCC's practice was undermined by the fact that, in fulfilling their identical obligation as to the CE Report of April 2022 on the submissions on the draft development plan, DCC listed "Uniphar PLC" as having made the submission, when it had been made by KPMGFA. By the logic of its asserted practice, and whether correctly in law or not, the relevant entry should have identified KPMGFA not Uniphar. In the absence of any evidence of any established or consistent protocol, practice, instruction or procedure, one may contrast the use of Doyle Kent's name and that of other planning consultants in the September list with the use of Uniphar's own name (as opposed to KPMGFA) in the April list. Indeed one may contrast both with the use in the CE Report of February 2020 of the helpfully informative formulae *"Doyle Kent Planning Partnership Ltd for Pat O'Donnell*" and *"Future Analytics for Uniphar Group Plc"* and various others in similar form.

[155] i.e. Doyle Kent acted as planning agent to the Applicant.
[156] In argument and on instructions in response to my inquiry but not on affidavit.

70. The inference, as a probability, is that DC has had no established or consistent protocol, practice, instruction or procedure and that the usage in a given case was either random or a variable function of the personal practice of the individual who prepared the list. This does not seem a sensible, consistent or systemic approach to compliance with an explicit and mandatory statutory duty.

Discretion to excuse Breach of Mandatory Obligations - *De Minimis*

71. If mandatory, a statutory obligation cannot itself be *de minimis*. Only a breach of a mandatory statutory obligation can be *de minimis*. It cannot be said in a general sense that the clear statutory obligation, set by s.12(8)(b)(i) PDA 2000, to list persons who have made submissions is *de minimis*.

72. As to whether a given breach of a mandatory statutory obligation is *de minimis*, if the obligation itself cannot be *de minimis*, it logically follows that a complete failure to fulfil it in a specific instance cannot be *de minimis*. To so hold would be to undermine the will of the Oireachtas in imposing the obligation. That is why excusing a breach of a mandatory duty on a *de minimis* basis requires substantial compliance with the obligation. **Alf-a-Bet**[157] applies:

> *"… what the Legislature has, ….. nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule… and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."*

73. In that light, I confess to finding **Byrnes**[158] difficult. In that case, and by s.179(3)(a) &(b) PDA 2000, the chief executive of DCC was required to report to the elected members on submissions by the public as to a proposal, in reliance on s.179 PDA 2000 (colloquially known as a "Part 8" process[159]), to approve a development by DCC itself. That was by way of the change of use, from a hotel to temporary accommodation for homeless people, of premises on Fitzwilliam Street, Dublin - an area of historical and architectural sensitivity. S.179(3)(b)(iii) required the CE to "*list the persons or bodies who made submissions or observations*". This obligation is in the same terms as that set out in s.12(4) and s.12(8)(b) PDA 2000. In Byrnes, the list was entirely missing from the report but the omission was described as "technical", "minor" and "trivial" – and so relief was refused on a discretionary basis. One could view Byrnes as depreciating the obligation itself as "technical", "minor" and "trivial" given the failure to comply with the obligation to list persons and bodies who had made submissions was complete. It is difficult to see how, on application of the *de minimis* rule as described in Alf-a-Bet, one could consider in

[157] Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] ILRM 64 at 69.
[158] Byrnes v Dublin City Council [2017] IEHC 19.
[159] The reference is to Part VIII of the Planning and Development Regulations 2001.

Byrnes that, as to the obligation to list, "*the prescribed obligation has been substantially, and therefore adequately, complied with"*.

74. McDonald J, in **Dalton**[160] in 2020, took that view of Alf-a-Bet. Agreeing with Simons J in Southwood Park that the court's jurisdiction to excuse or waive a breach of a procedural requirement of planning law prescribed by legislation is "severely limited", he said:

> *"In order for the de minimis principle to be applied, it must be clear that the failure to comply with the relevant statutory obligation is of a trivial or insubstantial nature. If, however, there has been a complete failure to comply, I cannot see how there is any scope for the application of the de minimis principle."*
>
> *"…. if the de minimis principle is to be capable of application in the present case, it must be shown that the appeal made by the applicants to the respondent substantially complied with the obligation."*
>
> *"In circumstances where, in the present case, the obligation to state the names and addresses of the owners and residents of St. Michael's Cottages for whom the applicant acts have not been stated anywhere in the appeal or in the documents attached to the appeal I can see no basis on which one could take the view that the obligation has been substantially complied with. In light of the approach taken by the Supreme Court in the Monaghan UDC case, it is clear that, absent substantial compliance, the de minimis principle is not capable of application .."*[161]

75. McDonald J also reviewed the cases – notably citing the great assistance he gleaned from the carefully considered obiter of Finlay Geoghegan J in **O'Connor**.[162] Agreeing with Kelly J in **McAnenley**,[163] she had held that the court may not excuse, on a *de minimis* basis, non-compliance with a "*truly mandatory*" statutory requirement[164] that an appeal to the Board state the address of the appellant. Significantly, Finlay Geoghegan J also took the view, citing **Gormley**,[165] that *"It also follows from this conclusion that the Court has no discretion to excuse non-compliance with the requirement to state the address …. on the basis of an alleged absence of prejudice to the applicant or any other person."*

76. Finally as to Dalton, the facts bear brief mention as shedding some light here: a planning appeal was lodged in the name of "*Brendan Dalton, Dalton Brokers … on behalf of the owners/residents of St. Michael's Cottages"*. In breach of s.127 PDA 2000, the residents were not named and despite a *de minimis* argument, McDonald J upheld the Board's invalidating of the appeal. In his appeal, Mr Dalton described himself as a "*broker advocate*" and "*development broker*" and the residents as his "*clients*".

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[160] Dalton v An Bord Pleanála [2020] IEHC 27 §§36-44.
[161] Emphases added.
[162] O'Connor v An Bord Pleanála [2008] IEHC 13.
[163] See below.
[164] s.127(1)(b) PDA 2000.
[165] Electricity Supply Board v Gormley [1985] IR 129, at pp156, 157.

McDonald J rejected, as lacking *"any plausible basis …. the view that the applicant in this case was himself the appellant in the appeal such that it was only necessary to give his name and address .."* He held *"it is clear that the applicant was acting on behalf of others who he described as his clients. He was not acting on his own behalf."* It is true that s.127 PDA 2000 explicitly required identification of both appellants and their agents but as, in law and clearly, the submission of an agent is that of his principal, I don't see that as a basis for distinguishing Dalton from the present case. Indeed, McDonald J observed that "*It is trite law that the act of an agent is the act of his or her principal."* Doyle Kent here are in the same relationship to the Applicants as Mr Dalton was to the residents of St. Michael's Cottages. However Dalton is not an authority as to the relief in judicial review which should flow from the breach in the present case as in that case s.127 expressly provided that breach invalidated the appeal.

77. In **Ballyedmond**[166] Clarke J, as to the proposition that he should take an overview of the process when considering its fairness, said:

> *" …. where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the court."*

78. In **McAnenley**[167] Kelly J refused to excuse as *de minimis* a council's complete non-compliance with its obligation to transmit to the Board a copy of its decision[168] - even though the Board had copy of the council's notification of decision to grant permission which included the information contained in the decision itself. Kelly J nonetheless quashed the impugned decision and in doing so said:

> *"It is difficult to treat non-compliance with an express statutory requirement on a de minimis basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard this statutory requirement."*

79. Nonetheless, the failure I have described was not the only failure in McAnenley and Kelly J also said: "*That is not to say that, notwithstanding non-compliance with the provisions of s. 6(c), in an appropriate case certiorari might be withheld as a matter of discretion, if that were the only lacuna involved and no injustice would result*."[169] This obiter might be seen to suggest that relief may be refused even where the breach is not *de minimis*. However, more recently, in **IGP Solar**,[170] McDonald J similarly reviewed the cases and echoed the principles he had identified in **Dalton**. He was of the view that compliance with a truly mandatory statutory provision *"will be regarded as a pre-condition to the validity of any decision affected by the statutory provision in question unless it can be shown"* that its breach was *de minimis* in the sense described in Alf-a-Bet – i.e. an insubstantial or trivial breach such that the

[166] Lord Ballyedmond v Commission for Energy Regulation [2006] IEHC 206. That was essentially a fair procedures/natural justice case, as opposed to a case about non-compliance with mandatory statutory requirements.
[167] Indeed, as recognised in later decisions – see below.
[168] i.e. the order of the county manager.
[169] That was not so in McAnenley for reasons Kelly J explained.
[170] Sweetman v An Bord Pleanála & IGP Solar 8 [2020] IEHC 39, [2020] 1 JIC 3104 §28.

obligation has been substantially complied with. he said that breach of a mandatory obligation *"will render any decision of the Board invalid unless it can be established that the failure to comply was of an insubstantial or trivial nature (in which case the non-compliance might be excused)"* and *"the de minimis principle can only be applied where there is substantial compliance with the relevant statutory obligation such that any non-compliance with the obligation can be regarded as trivial or insubstantial."* [171]

80. In light of that caselaw and returning to **Byrnes,** it seems to me that must be understood in its context and on its facts.

- First, a Part 8 process is very different from the consideration of material alterations in the adoption of a development plan. A Part 8 process is typically concerned with a single, discrete, development. While there may be many objections, they will at least be focused on that single, discrete, development. In contrast, the process of making a Development Plan encompasses the entire functional area of the planning authority and prompts submissions on a much wider variety of topics as to a much greater number of locations. Further, and at least typically, the process of making a Development Plan prompts very many more submissions than does a discrete development consent application. On the facts here, the 63 submissions on the single project in Byrnes[172] may be contrasted with over 1,000 submissions[173] on the material alterations – and, for that matter, the 4,323 submissions on the draft development plan. . Leaving aside the many non-zoning material alterations[174] those as to zoning of particular sites or areas numbered 60 locations, spread widely over the DCC functional area.

- Second, amplifying the first point and in contrast to the present case, Baker J considered it important that the particular development at issue in Byrnes was *"a unique development of accommodation of a sensitive nature in an area of architectural and historic importance in the city of Dublin … proposed at a time when provision of services for homeless persons was a matter of political importance. I consider it unlikely that the elected members required in those circumstances to have summarised for them any more details than those contained in the Report …".* It is not all apparent that anything similar can be said in the present case.

- Third, the members, in the view of Baker J, "*were uniquely aware of the planning and policy considerations in play, and … had available to them for several days prior to the meeting the entire detailed and complete files on the development, and were therefore armed with sufficient information to question the Chief Executive at the meeting with regard to any element of the proposal.*" There is no reason to believe that was so in the present case.

- Fourth, and as to the specific site on Fitzwilliam Street and its development, *"There were available to the elected representatives a wide range of objections and observations, including a critique by the conservation architect of the Council itself …".* In the present case there were only two submissions – Uniphar's and the Applicant's.

[171] Sweetman v An Bord Pleanála & IGP Solar 8 [2020] IEHC 39, [2020] 1 JIC 3104 §§ 19, 20, 27 & 30. Emphases added.
[172] 58 objectors, 1 supporter and 4 observers.
[173] Even allowing for duplication in the form of a petition.
[174] See CE Report 21/9/24 Parts 2 & 3 over 126 pages of the report.

81. None of Baker J's observations set out above can be made, even by analogy, of the present case. Byrnes is distinguishable on its facts. And, whether I or DCC think such a list of names was necessary in practical terms, as Kelly J put it in **McAnenley**, "*parliament has ordained*" that its provision was necessary.

82. However, Baker J did make some comments relevant given the function of the list is to alert members to submissions. The *de minimis* cases, including Alf-A-Bet have tended to be about the adequacy of public planning notices in which planning applicants must be named. These serve a function analogous to the function of the list in the present case save that the target reader is not the public but the elected members. Baker J[175] cited a **Blessington** case[176] in which Kelly J asked whether the notice was "sufficient" in its description of the development to "*alert any vigilant interested party to what was contemplated*" and "*If they wished to have further information as to precisely what was envisaged, they could have inspected the plans submitted with the planning application*." Indeed, the members to whom the list was addressed in the present case are a more generally well-informed and expert cohort and, one presumes, more vigilant and interested than the public generally.

83. In **Blessington,** Kelly J refused to quash the permission at issue on the basis that a notice had omitted the word "Limited" from the name of the planning applicant company. I can see how one could find "*substantial compliance*" in such circumstances. He cited **Toft**[177] in which "*Rum Spirits Limited*" had been misnamed in the notice as "*Spirits Rum Company Limited*" - a non-existent company. However, the list in the present case does not make an error of detail in the name of the Applicant or misname the Applicant itself. Rather, it names a quite different person which actually exists. The situation seems to me closer to that in the **Sandy Lane** case.[178] There, the plaintiff applied under O. 63, r. 1(15) RSC to amend the name of the plaintiff from "Sandy Lane Hotel Limited" to "Sandy Lane Hotel Co. Limited" - asserting that the incorrect plaintiff had been named by clerical error. The Supreme Court refused to allow the amendment on the basis that the concept of clerical error did not encompass error by lack of knowledge, mistaken belief or wrong information. The plaintiff was seeking the substitution as plaintiff of a new entity - an entirely different company which co-existed with the plaintiff at all material times. It was not a case of merely failing to get the plaintiff's name right. The same is true as between "Pat O'Donnell and Company" and "Doyle Kent". Indeed, in some contrast to the present case, in Sandy Lane the names were at least similar. I hasten to appreciate that the analogy with Sandy Lane is far from complete. A very different set of rules was in issue, a different possible consequence was at stake[179] and the information conveyed by the misnomer to a reader was not the point. But it seems to me that the analogy has at least some value and, in any event, there is no argument here by DCC that what occurred was a clerical error – indeed it denies error at all.

[175] §75 et seq.
[176] Blessington & District Community Council Ltd v Wicklow County Council [1997] 1 IR 273.
[177] The State (Toft) v Galway Corporation [1981] ILRM 439.
[178] Sandy Lane Hotel Limited v Times Newspapers, [2009] IESC 75, [2011] 3 IR 334.
[179] Hardiman J observed that the defendants might be able to object to the substitution of a new party on the grounds that the Statute of Limitations had run as against that party.

84. In **Southwood Park**[180] Simons J quashed the impugned planning permission for failure[181] to publish a bat survey report on the Board's website.[182] He said that the court's jurisdiction "*to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited*" and *"before a breach can be waived, it must be technical, trivial, peripheral or otherwise insubstantial."* The Board argued that the error was *de minimis*. Simons J, in a remark applicable here *mutatis mutandis*, said "*The regulations could not be clearer in their terms …".* He considered on the facts that the omission of the 2018 version from the website risked misleading members of the public. This risk was not "*fanciful*". The facts in that case were more obviously not *de minimis* than the facts here.[183] But Simons J observed that "*The breach in McAnenley was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form. This has an obvious resonance with the present case."*

85. Contrasting the law as to fair procedures, Simons J said:

> *"The legal position is entirely different where, as in the present case, the decision-maker has no discretion. In such circumstances, it is inappropriate for either the decision-maker, or for the court, to embark upon a detailed examination of the content of the material with a view to determining whether or not it is significant or otherwise."*

In **IGP Solar,** McDonald J cited this passage to the effect that it is difficult to apply the *de minimis* principle *"where the public authority is given no discretion in the performance of an obligation under a statutory provision."* Nor did DCC in the present case have a discretion whether to list the Applicant as having made a submission.

<u>Can the breach in the present case be excused as *de minimis*?</u>

86. I have already made some specific observations as to this case:

- DCC had no discretion whether to list the Applicant itself – not its agent - as having made a submission.
- It failed completely, as to the Applicant, to comply with that obligation.
- It is difficult to see how complete non-compliance can be considered substantial compliance.
- Byrnes is distinguishable from the present case.

[180] Southwood Park Residents Association v An Bord Pleanála [2019] IEHC 504, §34. see also Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] ILRM 64 at 69.
[181] Contrary to Article 301(3) PDR 2001.
[182] The Board had published an earlier and materially different version of the report.
[183] In that case the developer had, in breach of a statutory requirement, posted online a 2017 version of the 2018 bat survey report which had accompanied its planning application. The Board's inspector heavily relied on the 2018 version in her assessment of the ecological impact of the proposed development. The content of the two versions of the document was broadly similar – the Board said there was no significant difference. Simons J considered on the facts that the differences were not trivial, technical, or insubstantial. The principal difference was that the 2018 version included (i) the results of an additional bat survey done in 2018, and (ii) a revised set of mitigation measures reflecting the results of the 2018 survey. Also the mitigation measures recommended in the 2017 version had expressly referred to the need to obtain a derogation licence if the main house on site proved to be a bat roost. This mitigation measure is omitted from the 2018 version – the mitigation measures recommended in which were in some instances less robust.

87. DCC argues[184] that even if it breached its obligation, relief should be refused on a discretionary basis. The basis identified above on which breach of a mandatory obligation may be excused is that the breach was *de minimis* and merely formalistic. As to formalism, DCC cites **Power**[185] which in turn cites **Kelly**[186] as to "*excessive formalism*". However the dismissal for formalism of the relevant grounds in Power was, as will often be the case, circumstance-specific and Power also cautioned that *"care must be taken not to mistake illegality for merely formalistic error."* In my view, given the authorities, this issue is best considered by asking whether the breach was *de minimis.*

88. As to whether this breach was *de minimis*, first, it seems to me that the obligation imposed on DCC by s.12(8)(b)(i) PDA 2000 to list in the CE Report those who have made submissions, falls into the category identified by Simons J in Southwood Park and McDonald J in IGP Solar as one in which "*the public authority is given no discretion in the performance of an obligation."* It follows that is difficult to apply the *de minimis* principle to a breach of that obligation. In my view illustrating and arguably amplifying that difficulty, I add that, as to a particular listing of a person/body, compliance or non-compliance is, at least usually, a binary issue.[187]

89. DCC argues that nothing turns on the error as the Applicant's submission was considered by "the Council" and is expressly summarised in the CE Report of 21 September 2012. This ambiguous observation fails

- to observe that the summary in the CE Report did not identify the Applicant by name either.
- in referring to "the Council", to distinguish the executive of DCC from its elected members. It was the latter not the former who, on receipt of that CE Report, were to decide in what terms to make the development plan.

True, the Applicant's submission was considered by the executive - but the function of the list is to inform specifically the elected members. Indeed, the premise of the list compiled by the executive in its report is that it has already at least adverted to the submissions – otherwise it could not compile the list or, for that matter, summarise and respond to the submissions.

90. In the event in this case, the members made the plan without discussing the Material Alteration D-0004 – instead adopting without discussion all material alterations as to which no member had put down a motion. From the members' point of view and *ceteris paribus* that was a reasonable course. But all things were not equal: the list was deficient and failed to inform the elected members that the Applicant had made a submission and so the Applicant seems entitled to a different point of view.

91. In this case, a proper listing would have served the purpose of alerting the members to the fact that a long-established local employer and business had made a submission. It is entirely conceivable

[184] Affidavit of Deirdre Scully, City Planning Officer, 6 February 2024.
[185] Power v An Bord Pleanála [2024] IEHC 108.
[186] Kelly v An Bord Pleanála [2019] IEHC 84.
[187] Save perhaps as to degrees of inaccuracy of naming such as in Toft and Blessington, but that need not detain us here.

that a member thus alerted would have thought the applicant's submission itself worthy of his/her attention for a variety of reasons – by no means confined to the Applicant's interests.

92. Notably, here we are concerned with the breach of that listing obligation as to a particular Material Alteration by the only objector to it – and that to a zoning issue which, it asserts, affects its lands significantly, if indirectly but in a respect recognised in **Christian**: a person "who may have their own interests interfered with by the development of neighbouring lands …".

93. I have said that Byrnes is distinguishable on its facts from the present case. While it would go too far to describe Material Alteration D-0004 as, from the members' perspective, a needle in the haystack, there is no reason in the present case to reliably infer that members (other than Cllr. Pidgeon[188]) who may have been interested were alerted to that Material Alteration by means other than by the Applicant's name which the list ought, by statute, to have provided. Nor as I have said, is there any evidence that any member read the Applicant's submission.

94. In contrast to pleas made in other cases to overlook breaches of statutory duty, and wisely in my view, DCC did not in this case argue any burdensome nature of the duty here. It is impossible to see that, as between listing a planning agent and listing a landowner, there was any incremental burden at all. Compliance is a very simple matter.

95. DCC also argues, in effect, that to any extent the members were ignorant of the Applicant's submission and opposition to the rezoning of the Uniphar site, in the practical sense it has only itself to blame. It cites **Baile Bhruachlain**[189] in which landowners disappointed by a zoning decision criticised, *inter alia*, the CE's summary, in his report to the members, of their submissions. Importantly, the ratio of the decision on that issue was that their criticism was rejected: the CE's summary was adequate.[190] Only as an alternative[191] and hence obiter, did Humphreys J observe[192] that if the landowners had any real grievance about the summaries they could have done a lot about it at the time. The obvious thing to have done would be to themselves contact the members, informing them of content of their submissions which, in their view, the CE had inadequately summarised. But "*they did nothing*" and "*In such matters, the law helps those who help themselves*".[193] On that issue of "self-help" an oddity of this case is that the Applicant in fact e-mailed a particular elected member and articulated its concerns in detail as to both the substance of the rezoning issue and what it considered the inadequacies of the CE Report of 21 September 2022 on that issue. But there is puzzlingly no evidence that the Applicant pressed or realised its request to meet that member (and if not, why not, and if so, with what result) or communicated with other members. However, it does not seem to me that I should decide this case by reference to that factor.

[188] With whom the Applicant had corresponded.
[189] Baile Bhruachlain Teoranta v Galway County Council [2024] IEHC 604.
[190] §§62 – 68.
[191] §69 "Even if I am wrong on all that, and even if, counter-factually, there was a legal breach, there are two reasons why certiorari isn't appropriate."
[192] §73.
[193] Humphreys J cited Benjamin Franklin and Euripides to the effect that the ancient Greek gods took a similar approach.

96. I appreciate the practicality, in a particular case, of the view taken by Humphreys J. But I confess to unease at refusing relief in judicial review on a basis that, where a public authority has breached a statutory duty it can, in effect, blame the putative victim - the statutorily-identified beneficiary of that duty - for not having taken an extra-statutory course to compensate for its breach. I find such a view difficult to reconcile with the view taken by Kelly J in **McAnenley**, in which, after all, the Council had – and by statutory means - conveyed to the Board in another document the very information contained in the document which it had, in error, omitted to convey. Yet *certiorari* ensued. In wider and more strategic practical terms, the logic of such exercise of discretion against such a statutorily-identified beneficiary could prove difficult to limit and so could have wide and compelling application in many situations at risk of unintended consequences. This may be so not least perhaps, in the real world and in light of the view that the overarching aim or project of judicial review is *"the maintenance of the highest standards of public administration"* and public confidence therein – **Huddleston**.[194]

97. As to the issue of prejudice by reason of the error, I have referred above to the view Finlay Geoghegan J took in **O'Connor** to the effect that "*the Court has no discretion to excuse non-compliance with the requirement to state the address …. on the basis of an alleged absence of prejudice to the applicant or any other person."* I apply that view here.

98. However, to any extent prejudice could be relevant in this regard, it is also relevant that this is not a case of an applicant for judicial review saying, or not, that he himself was misled by an error in a notice or the like – or even that the public were misled. Rather, this Applicant says that the members of the very respondent in the judicial review were, in breach of an express statutory requirement, disadvantaged in their appreciation of the information in reliance on which the Applicant sought to persuade them of its view. As to knowledge peculiar to it and given its duty to put its "cards face up"[195] in the judicial review, it is notable that none of those members of the respondent have volunteered reassurance that they in fact recognised the Applicant's interest as to the Material Alteration D-0004 - on which no motions were put down and which was not specifically addressed at the meeting of 1 and 2 November 2022. Nor, for that matter, is there any evidence that members actually read the Applicant's submission. It is not essential that any would have - but had DCC deposed that they done so it could have provided at last some reassurance that the Applicant had been identified as having made a submission.

[194] R(Huddleston) v Lancashire County Council [1986] 2 All ER 941; Fairyhouse Club Limited v An Bord Pleanála [2001] IEHC 106, Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55, Murtagh v Judge Kevin Kilrane [2017] IEHC 384, Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540, O'Lone v An Bord Pleanála [2023] IEHC 136 – though the issues of integrity in that case do not arise here. Shadowmill Limited v An Bord Pleanála [2023] IEHC 157.

[195] R(Huddleston) v Lancashire County Council [1986] 2 All ER 941, cited, *inter alia*, in RAS Medical Ltd v Royal College of Surgeons in Ireland [2019] IESC 4, [2019] 1 IR 63, Student Transport Scheme Ltd v Minister for Education [2021] IESC 35; Cork Harbour Alliance for a Safe Environment v An Bord Pleanála [2019] IEHC 85, and ZK v Minister for Justice – ICEA, Power J, 20 October 2023, Mount Salus Residents Owners Management CLG v An Bord Pleanála [2023] IEHC 691.

Failure to List – Conclusion and Remedy

99. For the foregoing reasons, I conclude that DDC's breach in this case of the obligation imposed on it by s.12(8)(b)(i) PDA 2000 to list the Applicant as having made a submission as to Material Alteration D-0004 cannot be excused as *de minimis*.

100. I have considered whether a declaration of DCC's breach might suffice. While the issue seems to me finely balanced, in the end I think not. I might have taken a different view had

- the name omitted from the list been stated in the body of the CE Report of 21 September 2022 in its substantive consideration of the proposed Material Alteration - but it was not.

- the subject matter of the submission not been of such acute interest to the Applicant – as I accept it was. As I have said, here we are concerned with the breach of that obligation as to a particular Material Alteration by the only objector to it – and that to zoning issue which, it asserts, affects its lands significantly if indirectly and in a manner recognised in Christian.

- Material Alteration D-0004 been, which it is not apparent that it was, a subject of wider and more general interest and/or the subject of other submissions by persons or bodies who were listed and who had essentially made similar points to that made by the Applicants so that those points were in substance considered.

- the substance of the submission by the person omitted from the list been the subject of a motion or active consideration, discussion and decision by the members at their meeting - but it was not.

- there been a link or cross-reference apparent on the face of the CE Report of 21 September 2022 between the narrative as to Material Alteration D-0004 and the list entry - but there was not. I note also that the list is not cross-referenced to the material alteration, or its reference number, on which the submission was made – in this case Material Alteration D-0004. Nor is the portal number given in the narrative treatment of Material Alteration D-0004. There is no apparent link between that narrative and the list entry.

and/or

- the submission by the person omitted from the list supported or conformed to, or at least not opposed, the position taken by the Chief Executive and adopted without consideration or discussion by the members - but it did not.

101. I accept, of course, that in the last instance judicial review may have been unlikely in any event – unless perhaps at the instance of another person invoking a *ius tertii*, with predictable lack of success. However, even that instance points up the fact that Material Alteration D-0004 was adopted without consideration or discussion by the members – the facilitation of the possibility of which consideration or discussion was the purpose of the list.

102. Accordingly, I will quash the impugned content of the 2022 Development Plan by reason of the failure of the CE Report of 21 September 2022 to list the Applicant as having made a Submission on the Material Alteration.

FAILURE TO SUMMARISE AND RESPOND TO ISSUES RAISED

Failure to Summarise & Respond - Applicant's Particulars & Submissions

103. The Applicant pleads & submits as follows.

104. Contrary to s.12(8)(b)(ii)&(iii), the CE's Report of 21 September 2022 did not summarise the Applicant's Submission of 31 August 2022 adequately or at all or respond to it adequately or at all. The following elements of the Submission are not summarised:

a. as to the location and nature of the Uniphar Site and the Pat O'Donnell lands.
b. that the amendment results in arbitrary spot zoning, which concerns the factual position regarding this specific site.
c. that the rezoning would lead to a truncated and irregularly laid out zone.
d. the works or activities carried out on the Pat O'Donnell lands, the time of day at which they are carried out, or the type of noise generated.
e. the section entitled "*Potential Loss of Employment*", the adverse impact on the Applicant and the risk of loss of employment in the Ballyfermot area.
f. the rejection of the previous rezoning proposal in 2016.
g. The nature and effect of RPO5.6 was not set out or explained, and no information was provided as to how the rezoning of the Uniphar Site was consistent with RPO5.6.

105. The seven-line response in the CE's Report of 21 September 2022 is not a response to the issues raised in the Submission of 31 August 2022. The text is identical to that in the CE Report of 29 April 2022, made prior to receipt of the Applicant's submission.

106. There is no response to the issues raised in the Submission as to
a. the factual position and the nature of the site, adjacent sites and their location, and the planning considerations to which these give rise.
b. the content under the heading "Unsuitability of the Lands for Residential Use"
c. the location of the site.
d. the fragmented, irregular zoning layout.
e. incompatibility between the use of the Pat O'Donnell lands and residential use,
f. the impact of the rezoning on the Applicant's business and use of the Pat O'Donnell lands.

g. transitioning between different zones or conflict between uses.
h. potential loss of employment.
i. conflict with the MASP and RSES, and in particular RPO5.6.

Failure to Summarise & Respond - Respondent's Particulars & Submissions

107. As relevant, I will address DCC's answer to the issue of summary of and response to the Applicant's submission in the "Discussion and Decisions" section below.

Failure to Summarise & Respond – Discussion & Decision

108. DCC's broad point that it is *"a logistical impossibility to provide detailed individualised summaries of each submission (and each point or sub-point made in each submission) to elected members"*[196] is overstated. But its broad thrust as to practicality in summarising over 1,000 submissions in a legible, wieldy and functional report is correct. And many such submissions may be long and complex, particularly if made by planning consultants. An excessively long report would be self-defeating. On the other hand, somebody or some group of people in the DCC executive must read and consider all submissions in their entirety. And as, as DCC accepts, members cannot do so and the law does not require them to do so,[197] I accept the Applicant's general point that it is the very fact that members cannot feasibly read every submission which renders it necessary that the CE summarise them adequately. I accept the Applicant's submission that it thus becomes the more important that the summaries in CE reports be adequate.

109. But adequate for what? In this context (as opposed to in the context of the listing of names), DCC is correct to observe that the summaries in the CE Report direct the members to the submissions themselves on its website. It seems to me that a summary must be such as to allow a member to decide, on an adequately informed basis, whether (s)he needs to read the submission to which it relates.

110. The law as to the requirements of CE Reports in summarising and responding to submissions is stated in the **Sandyford**, **Byrnes, Griffin** and **Baile Bhruachlain** cases.[198] The Applicant fairly accepts that the obligation is relatively light.[199] While each of those cases is fact-specific, in each the CE report sufficed.

- In **Sandyford**, the issue was whether the CE's Report under s.13(4) PDA 2000 which imposed the same obligations as those at issue here, had adequately summarised and responded to the submissions of

[196] Affidavit of Deirdre Scully, City Planning Officer, sworn 6 February 2024, §41.
[197] S.12(9)&(10) PDA 2000.
[198] Sandyford Environmental Planning and Road Safety Group Limited v Dun Laoghaire Rathdown County Council [2004] IEHC 133, [2004] 11 ICLMD 67; Byrnes v Dublin City Council [2017] IEHC 19; Griffin v Dublin City Council [2020] IEHC 507; Baile Bhruachlain Teoranta v Galway County Council [2024] IEHC 604.
[199] Transcript Day 1 p107.

those who had opposed a variation of the development plan rezoning land used by local residents as a public amenity from open space to residential use.

- In **Byrnes**, as has been seen, the issue was whether the CE's Report had adequately summarised and responded to the submissions of those who had opposed a Part 8 proposal to change the use of a building from hotel to temporary accommodation for homeless people in Fitzwilliam Street, Dublin.
- In **Griffin**, the issue was whether the CE's Report was adequate as to a Part 8 approval of development by DCC of a new avenue and apartment buildings near Croke Park.
- In **Baile Bhruachlain**, the issue was whether the CE's Report on submissions on the draft development plan had adequately summarised and responded, for the purpose of s.12(4) PDA 2000, to the submissions of disappointed landowners who had made submissions seeking rezoning of their lands to residential or tourism uses in the new development plan.

111. In **Baile Bhruachlain,** Humphreys J made an obvious but very worthwhile observation: "*By definition a summary leaves a lot out*". He continued: "*The process has to be workable. The CE has to have a lot of latitude in summarising under such circumstances, if the report isn't to be impossibly long. Anyway a dissatisfied party will always be able to complain about something being left out. The CE here didn't exceed the wide margin of discretion that must be inherently involved.*" It sufficed that the summary *"identifies the fundamental thrust of the submission".* It identified that the land should be rezoned and that a justification supporting that submission had been supplied. *"It is not an obligation of s. 12(4) to set out the analysis of the entity making the submission as to why they are looking for what they are looking for. The core point is included – rezoning to residential. The rest is detail."*

112. In **Sandyford**, McKechnie J was:

> *"… of the view that the distillation by the Manager of the public submissions was adequate and was within the duty imposed upon him. In complying with this obligation he is not bound to use any formula or follow any specified method. There is within the section scope for a variety of presentations, some of which by choice may be far more extensive than others.*
>
> *The applicant's challenge, however, is not put in this way. In truth, this is a question of statutory interpretation, and although quite briefly dealt with, I am nevertheless satisfied that the issues raised, both in substance and in materiality, were adequately outlined in his said report."*

I consider that the use of the word "distillation" as a synonym for "summary" implies that what is required in a summary is the essence of the submissions and the phrase "*some of which by choice may be far more extensive than others*" underscores the width of the CE's margin of appreciation in composing summaries.

113. Baker J in **Byrnes** was fully conscious of the "*importance of a manager's report*". She said it "*cannot be overstated*" as it is *"the statutory means by which the members of a local authority are informed of all relevant matters arising for their consideration, and forms the framework within which their decision making process is engaged."* She cited the excerpt from Sandyford cited above.

114. Baker J's decision thereafter is nuanced. She considered that the CE's response to the submissions "*was not adequately articulated. The single line at the end of that part of his Report is not in any real sense a response in substance as to the planning materiality of the observations. ….. the Report was defective in failing to clearly state the views of the Chief Executive as required by the statutory provisions*." However, she also considered that the function of a court in judicial review of the adequacy of a manager's report is to ask, "*whether there has been compliance with the statutory requirements in the round, and to consider whether taken as a whole, a report was sufficient to present to the elected members evidence on which they could make a decision*." Also, and echoing Sandyford, she said, *"there is no statutory requirement that mandates a particular formula or structure or amount of content that must be found in a report"* and "*provided a report taken as a whole is not so generic or vague or lacking in detail so as to fail to identify the nature and planning implications of a proposed development, a report would satisfy the purpose for which it is mandated.*" It is a report addressed to the members as *"an expert body with … expertise and knowledge of the planning and policy considerations in their functional area."* Thus considered, the manager's *"approach can be gleaned from the report taken as a whole and the various planning and policy considerations of the Council identified there …".* Despite having found it defective in summarizing the submissions, Baker J considered the CE report "*adequate for the statutory purpose for which it was prepared*".

115. In **Griffin**, Pilkington confirmed that the review is fact-specific as to the report taken as a whole:

> *".. each submission and CEO report must be considered within its own parameters. …. I am satisfied that considering the report as a whole that all matters have been fairly and properly considered."*

116. For my part, I would add that the test is not whether a better or more complete summary could have been supplied. That can almost invariably be asserted more or less credibly. It will often be possible to say that it would have been very simple and not at all burdensome to have done better. Indeed, that is said here as to the bullet-pointed list of issues which could have been cut from the Applicant's submission and pasted in the CE Report. While such submissions can be beguiling and may illustrate inadequacy of a summary in a given case, it is important not to lose sight of the true test – which is whether the summary in fact supplied was adequate in law.

117. In the present case, it may well have assisted had the CE cut and pasted into his report the bullet-pointed arguments of the Applicant's submissions. However, those arguments were the technical (which is not to say insubstantial) points made in support of a single, simple, underlying and main concern of the Applicants and the true basis of their objection to the rezoning of the Uniphar Site. The pith of its submission was its view that development of the Uniphar Site in accordance with a Z10 zoning would be incompatible in practical terms with the Applicant's present use of the Pat O'Donnell lands. In Sandyford terms, that is the distilled essence of its submission. In **Baile Bhruachlain** terms, that was the

"*fundamental thrust of the submission"* and, one echo in this case, only slightly inaccurately,[200] the observation in Baile Bhruachlain that "*The core point is included – rezoning to residential. The rest is detail.*"

118. Above, I agreed with DCC's general observation that the text of the CE Report of 21 September 2022 as to the Applicant's submission densely "packs in a lot of planning issues". The CE identified the submission as based on "*incompatibility of the proposed zoning with existing adjoining land uses"* and referred to the *"Z6 commercial/ employment lands to the north"* at the location generally identified as at *"Map Sheet D: Ref D-0004; Chapelizod Bypass/ Rossmore Drive, Kylemore Road, Dublin 20"* to members with, in Byrnes terms, *"expertise and knowledge of the planning and policy considerations in their functional area."* In my view, the CE explicitly referred to the Applicant's central objection - incompatibility of Z10 zoning of the Uniphar Site with adjoining existing land uses on commercial/ employment lands to the north – i.e. the Pat O'Donnell Lands and their existing use. His response must be considered in that light.

119. For these reasons, Ground 1 as to the allegation that the CE failed to summarise the Applicant's submission fails.

120. I will address the alleged failure to respond to the submission when considering Ground 3 as to failure to give reasons.

FAILURE TO TAKE ACCOUNT OF STATUTORY OBJECTIVES ETC

121. The Applicant pleads that in Ground 1 that, contrary to s.12(8)(b), the CE Report of September 2022 does not take account of

- the proper planning and sustainable development of the area,
- the statutory obligations of the local authority, or
- relevant policies or objectives of the Government or of any Minister of the Government.

By s.12(18), RPO5.6 of the EMRA RSES 2019-31[201] "*constituted a statutory obligation of which account was required to be taken under section 12(8)(b) in the CE's response*." In breach of this obligation, the CE's response failed to take account of the said statutory obligation, or to explain how the Material Alteration was consistent with the same. This plea in substance overlaps with Ground 2 and will be disposed of in that context.

[200] In the sense that Z10 permits only partly residential development.
[201] Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-31.

GROUND 2: BREACH OF S.12(11) PDA 2000 - RPO5.6 & GUIDING PRINCIPLES FOR LOCATION OF STRATEGIC EMPLOYMENT AREAS

RSES - RPO5.6 & GUIDING PRINCIPLES FOR LOCATION OF STRATEGIC EMPLOYMENT AREAS

122. The EMRA RSES,[202] Chapter 5 sets out the MASP. MASP §5.8 as to Employment Generation, records that the MASP identifies large-scale employment and mixed-use development areas in the metropolitan area which should be developed in co-ordination with the sequential delivery of infrastructure and services. The MASP aims to continue densification in the city centre and re-intensify strategic employment areas within the M50 ring, providing for limited but intensive employment locations accessible to public transport. However, the list of strategic employment areas does not include the Sites.[203] In §5.8 Employment Generation, RPO5.6[204] reads as follows:

> *"MASP Employment lands*
> *RPO5.6: The development of future employment lands in the Dublin Metropolitan Area shall follow a sequential approach, with a focus on the re-intensification of employment lands within the M50 and at selected strategic development areas and provision of appropriate employment densities in tandem with the provision of high quality public transport corridors."*

123. The MASP, at §5.8 RSES, lists some *"Guiding Principles for the location of strategic employment areas" and cross-refers to the full list at §6.3.* §6.3 EMRA RSES 2019-31, states the full list of Guiding Principles to Identify Locations for Strategic Employment Development[205] as follows:

> *"These considerations were used as principles to identify the locations for strategic employment development as set out in Chapter 4 People and Place and Chapter 5 for the MASP.*
> *Local authorities in development plans and through LECPs[206] should apply the same principles.*
> *Planning to accommodate strategic employment growth at regional, metropolitan and local level should include consideration of:*
> *• Location of Technology and Innovation Poles – Institutes of Technology (IoTs) and Universities, as key strategic sites for high-potential growth of economic activity.*
> *• Current employment location, density of workers, land-take and resource/infrastructure dependency, including town centres, business parks, industrial estates and significant single enterprises.*
> *• Locations for expansion of existing enterprises.*
> *• Locations for new enterprises, based on the extent to which they are people intensive (i.e. employees/customers), space extensive (i.e. land), tied to resources, dependent on the availability of different types of infrastructure (e.g. telecoms, power, water, roads, airport, port etc.) or dependent*

[202] Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-31.
[203] Table 5.2 Potential of Strategic Employment Development Areas in the Dublin Metropolitan Area. These are essentially the Docklands and City Centre and along DART, Luas, Metrolink and Commuter Rail lines. Including the area around Dublin Airport.
[204] Regional Policy Objective 5.6.
[205] §6.3, p130.
[206] §1.3 reads in part:- "The RSES will be implemented in policy by way of review by local authorities of all development plans and Local Economic and Community Plans (LECPs) after the adoption of this Strategy."

on skills availability.
• Locations for potential relocation of enterprises that may be better suited to alternative locations and where such a move, if facilitated, would release urban land for more efficient purposes that would be of benefit to the regeneration and development of the urban area as a whole, particularly in metropolitan areas and large towns.
• Within large urban areas where significant job location can be catered for through infrastructure servicing and proximity to public transport corridors."

OUTLINE OF ISSUES

124. The Applicant submits that

a. The Sites, together, form an "employment landbank" inside the M50 and 2.4km from it. They lie adjacent a major transport corridor[207] and are well-served by public transport.

b. So, RPO5.6 is directly engaged by the impugned Material Alteration.

c. DCC breached ss.11(1A) and 12(11) PDA 2000 in failing to take any or sufficient account of RPO5.6 and/or the Guiding Principles for the location of strategic employment areas.

125. The Applicant's particulars plead that, contrary to s.12(11) PDA, DCC failed to take into account relevant considerations in that, by the listing deficiencies of the CE's Report of 21 September 2022 pleaded in Ground 1, DCC's members were deprived of the material required to allow them to take into account

- the issues as to the proper planning and sustainable development of the area, raised in the Applicant's Submission but not adequately summarised or responded to in the CE Report of 21 September 2022, and
- DCC's statutory obligation comprised in RPO 5.6 and the incompatibility of Material Alteration D-0004 with RPO 5.6.

126. DCC pleads and submits that
a. breach of s.11(1A) is not pleaded and so can't be maintained.
b. there has been no breach of s.12(11) PDA 2000.
c. more generally, the Applicant is limited to its pleaded case[208] - which is that DCC failed to take into account relevant considerations, namely the proper planning and sustainable development of the development plan area.
d. the CE Report,[209]
    - demonstrates consideration of the proper planning and sustainable development of the development plan area.

[207] The R148, Chapelizod Bypass, which is the road to Lucan, Athlone, Galway etc.
[208] Amended Statement of Grounds, Core Ground 2 and section E (Part 2) §§33-35.
[209] 261/2022 dated 21st September 2022 at, *inter alia*, internal pages 6, 10, 113 and 141.

- summarised the Applicant's submission as to EMRA RSES RPO 5.6.

e. The Applicant has failed to demonstrate or establish evidentially that DCC failed to take account of RPO 5.
f. The Applicant's merits-based and/or subjective submission is not a basis for *certiorari*.
g. The Applicant erroneously construes RPO 5.6 as prescriptive about the zoning of any particular land and fails to recognize that consideration of RPO 5.6 and the zoning of particular land involves an exercise of planning judgement.

GROUND 2 - DISCUSSION AND DECISION

127. The argument as to breach of s.11(1A) was not pursued. Breach of the "Guiding Principles", is not pleaded. I will consider neither further.

128. S.12(11) restricts the elected members, in making the development plan, to considering the proper planning and sustainable development of the area, its statutory obligations and any relevant Government policies or objectives. In effect, the Applicant argues, and I accept in principle, that this section has positive as well as negative force. It does not merely restrict – it obliges the local authority to consider such matters. Of course, such a broadly stated obligation of general application, when applied to a specific issue must, to avoid absurdity, be read as requiring consideration only of those matters relevant to the particular issue. And it says nothing capable of direct application as to the weight to be attributed to any such matter – either in the absolute sense or relative to other relevant such matters. Thus, in a practical sense, the force of s.12(11) is likely to lie more in its restrictive exclusion of irrelevant considerations than in its positive obligation. However, I do not consider that I need here explore the intricacies of the positive obligation.

129. As to the general question of consideration of "proper planning and sustainable development", the concept is so broad and all-encompassing of all planning matters that there is little option but to agree with DCC's submission that a fundamental difficulty for the Applicant is the critical presumption, recorded by Hardiman J in **GK**[210] and by Humphreys J in **Jones**[211] and in **Cork County Council,**[212] that material has been considered if the decision says so and the Applicant bears the onus of rebutting that presumption by evidence. The concept is so broad that legal error can in reality be established, if at all, only by reference to more specific complaints. In that light, I note that the Applicant's submissions on this issue conclude: *"The point is that no account was taken of RPO 5.6 when making this amendment, rendering the process unlawful."* As counsel for the Applicant said: *"I'm not here to cavil on a merits-based review with the decision"* - the point is "*that the RPO was not considered."*[213]

[210] GK v Minister for Justice, Equality and Law Reform [2002] 2 IR 418.
[211] Jones v South Dublin County Council [2024] IEHC 301.
[212] Cork County Council v Minister for Local Government [2021] IEHC 683 §43.
[213] Transcript Day 1 pp134 & 132.

130. In fact, the impugned CE Report of 21 September 2022, as to specifically Material Alteration D-0004, records in its "Summary of Issues", *"Potential conflict with MASP residential development objectives/the RSES policy requirement to retain employment lands".* I accept DCC's submission that, in substance and reading the Report on pragmatic and common sense **XJS** principles[214] as if by an intelligent, informed, inexpert layperson and not as if it were a statute and, impermissibly, with a view to its validity rather than its invalidity,[215] its citing the RSES/MASP *"policy requirement to retain employment lands"* readily encompasses reference, even if not in terms, to RPO5.6 which refers to *"re-intensification of employment lands within the M50".* The CE response clearly reflects awareness of, and his views of, issues relating to employment lands – referring in terms to the Applicant's Z6 commercial/employment lands to the north and, to his view (whether one agrees with it or not) that rezoning of the lands to Z10 will act as a buffer between residential and employment uses. In my view, the Applicant has failed to discharge its evidential onus of proof of substantive failure to have regard to RPO5.6 as a relevant consideration. There is merit in DCC's invocation of the observations in **Jones**[216] that *"The applicants' point is simply a merits-based disagreement dressed up in legal language"* and "*The cry that the site is unsuitable is ultimately a merits-based disagreement."*

131. Accordingly, I reject Ground 2.

GROUND 3: FAIR PROCEDURES & REASONS

OUTLINE OF ISSUES

132. The Applicant alleges, by its pleadings and submissions, breach by DCC of fair procedures (audi alteram partem), of natural and/or constitutional justice, of a fundamental right of the Applicant at common law and of Articles 40.3 and 43 of the Constitution, and failure to provide reasons, such that it acted ultra vires. It says that:

a. Referring to the identical text of the CE's April and September reports on the issue of rezoning the Uniphar Site to Z10, counsel for the Applicant[217] argued "*the crucial issue that arises from the two responses being verbatim; there is no reason given at all for not accepting the submissions made by my client on 31st August 2022 ….".*

b. Proceedings, procedures, discretions, and adjudications prescribed by an Act are to be conducted in accordance with the principles of constitutional justice – citing **Croke**.[218]

[214] See, e.g. Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §119 et seq; Camiveo Ltd v Dunnes Stores [2019] IECA 138; Shadowmill v ABP & Lilacstone [2023] IEHC 157.
[215] For example, O'Donnell & Ors v An Bord Pleanála [2023] IEHC 381 §54; St. Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 [2024] 2 JIC 2003; Mulloy v An Bord Pleanála & Knockrabo [2024] IEHC 86 §81; Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §119; Duffy v An Bord Pleanála [2024] IEHC 558 §42.
[216] Jones v South Dublin County Council [2024] IEHC 301.
[217] Transcript Day 1 p137.
[218] Croke v Smith [1998] 1 IR 101

c. S.12 PDA must be so interpreted as to effect fair procedures and natural and constitutional justice.

d. The Applicant, whose property rights and commercial interests were affected by the proposal to rezone the adjacent Uniphar Site from Z6 to Z10, was entitled to be heard, fully and fairly, by DCC on the Material Alteration.[219] The Applicant cites Humphreys J in **Killegland** to the effect that a decision-maker must consider the submissions of a participant in the process.

e. Specifically, there is a duty grounded in fair procedures to provide reasons for rezoning decisions – **Christian**[220] and **Killegland**.[221] Reasons allow the court to assess whether the decision has a legal basis – including as to its rationality.

f. The Applicant cites Humphreys J in **Jones**[222] as summarising the Supreme Court decision in **Killegland**,[223] to the effect that a Council making a development plan acts as a *"deliberative assembly"* and *"… any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature."*[224] – all the more so given Article 28A of the Constitution. However, The applicant submits that the "*slow to interfere*" principle applies to the rationality of a decision – not to other aspects of its legality.

g. So, DCC was required to meaningfully and discernibly hear and engage with the Applicant's submission and give reasons for its decision.[225] It failed to do so at its meeting of 1 and 2 November 2022 and in its resultant Impugned Decision to adopt the Development Plan including Material Alteration D-0004.

h. Insofar as DCC relies on the CE's Report of 21 September 2022 it does not, adequately or at all, engage with or respond to the Applicant's submission or provide any or adequate reasons for the Impugned Decision.

i. Also, DCC's breach of s.12(8) was a breach of the Applicant's rights of under Articles 40.3 and 43 of the Constitution of Ireland and of a fundamental right of the Applicant at common law.

133. DCC replies that

a. The Applicant was given and availed of the opportunity to make submission on the draft Development Plan and Material Alteration MA D-0004.

[219] Citing PP&F Sharpe Limited v Dublin City and County Manager [1989] IR 704 at 717-718 per Finlay CJ; McCaughey Developments Ltd v Dundalk Town Council [2011] IEHC 193 (10 May 2011); Central Dublin Development Association v Attorney General [1975] 109 ILTR 69; and Glencar Explorations plc v Mayo County Council [1993] 2 IR 237.
[220] Christian v Dublin City Council (No.1) [2012] 2 IR 506.
[221] Killegland at §59 et seq.
[222] Jones v South Dublin County Council [2024] IEHC 301.
[223] Killegland Estates Ltd v Meath County Council [2023] IESC 39.
[224] Humphreys J citing Malahide Community Council Ltd. v Fingal County Council [1997] 3 IR 383 at 397.
[225] Citing Balz v An Bord Pleanála [2019] IESC 90; SR v Minister for Justice (Respondent) [2023] IECA 227; Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540 and Talla v Minister for Justice and Equality [2020] IECA 135.

b. The Applicant propounds an erroneous view of what is required in terms of reasons. Lack of narrative discussion is not failure to have regard to something and there was no obligation to engage with the Applicant's submissions in a discursive, point-by-point manner.

c. DCC adequately engaged with the Applicant's submission and gave reasons for its Decision.

d. The allegations of failure to engage and give reasons are mere assertions, unsupported by evidence, are incorrectly based on reading the Impugned Decision in a way that renders it invalid rather than valid and inaccurately describe and/or characterise of the DCC meeting of 1 and 2 November 2022.

DISCUSSION - REASONS & THE REPETITION POINT

134. I of course accept **Croke**[226] as authority for the general point that statutes, including the PDA 2000, are to be implemented in accordance with the principles of constitutional justice/fair procedures. That is a broad principle and in appreciable degree, fair procedures are a matter of common sense considered broadly: **Wexele** and **Haverty**.[227] The right to be heard is fundamental but what fair procedures require is reasonable fairness in all the circumstances. Its substance varies and in a given case is context-, fact- and circumstance-specific - see **Dellway**.[228] In **Killegland**,[229] Humphreys J "*broadly accept(ed) the principle that a decision-maker is required to consider the submissions of a participant in the process, and that obviously includes the submissions of a landowner or anyone else in the making of a development plan*."

135. In my view, the degree and quality of reasons required in the present case is informed by the fact that the Impugned Decision was a zoning decision taken in the process of making a development plan. I am not convinced that caselaw as to reasons for development consent decisions – for example **ETI**[230] - much assists here. The law has developed distinctly as between adequacy of reasons for a decision on a planning application (in which the issues are typically more focused – at least in the sense of relating to development consent for a particular proposed development on a particular site) and adequacy of reasons to be given in making development plans (in which the issues are typically more high level and diffuse across an entire functional area, which, typically, yield many more submissions from the public and which, even as to localised zoning, deal with principle not specific development proposals).

136. **Christian**[231] established that whether there is a right to reasons for sub-decisions[232] made in making a development plan depends on the subject-matter of the sub-decision when placed on a wide

[226] Croke v Smith [1998] 1 IR 101.
[227] Wexele v An Bord Pleanála [2010] IEHC 21; State (Haverty) v An Bord Pleanála, [1987] IR 485 at 493.
[228] Dellway Investments Ltd. v NAMA [2011] 4 IR 1.
[229] Killegland Estates Limited v Meath County Council [2022] IEHC 393 at §201.
[230] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540.
[231] Christian v Dublin City Council (No.1) [2012] 2 IR 506.
[232] Regarding the overall making of the development plan as the main decision.

spectrum running from high policy (for which no reasons are required) to localised, specific and concrete implementation measures, with *"many points in between those two extremes*". Towards the latter end of the spectrum, Clarke J instances sub-decisions which *"get[s] down to the nuts and bolts in a way which has the potential to specifically affect the rights of individuals".* It is clear from his judgment that he also instances sub-decisions which potentially specifically affect the obligations and the legitimate interests of individuals. Indeed, he instances relevant individuals as including *"both those who may wish to develop their own lands or those who may have their own interests interfered with by the development of neighbouring lands".* The second category includes the Applicant in this case.

137. Clarke J considered zoning decisions, no doubt depending on circumstances, to fall at least potentially into the category of sub-decisions which potentially specifically affect the rights, obligations or interests of individuals. He held that the specific zoning decision at issue in Christian fell into that category. His resulting prescription was somewhat diffident – perhaps nuanced is a better description. He said that as to such zoning decisions

> *"…… it is necessary to give at least some reasons for the precise means of implementing the overall strategy or policy adopted. The extent of the reasons required to be given will depend on the nature of the specific provisions of the development plan under consideration."*

138. DCC were generally correct in asserting that the recent cases of judicial review challenges to development plans is at least generally unsupportive of the Applicant's position as to reasons (**Killegland - McGarrell Reilly – Jones - Bartra - DAA**[233]).

139. Humphreys J in **Jones**[234] pithily summarises certain elements of **Killegland**[235] including that:

- "*the power to make a development plan is [a] function of the elected members*", they are empowered by law to make a democratic decision regarding the scope of the development plan.
- when the Council exercises these powers, it acts as a deliberative assembly.
- any land use (zoning) objective is "*liable potentially to be changed via this democratic process at some future stage when the next development plan is adopted*".
- "*any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature*", [236]
- these sentiments apply with even greater force since the adoption of Article 28A.1 of the Constitution with its recognition of the role of local government in providing a forum for the democratic representation of local communities[237] in exercising and performing at local level powers and functions conferred by law.

Humphreys J also states:

[233] References footnoted elsewhere in this judgment.
[234] Jones v South Dublin County Council [2024] IEHC 301 §1.
[235] Killegland Estates Ltd v Meath County Council [2023] IESC 39.
[236] Humphreys J citing Malahide Community Council v Fingal County Council [1997] 3 IR 383 at 397.
[237] The judgment in Jones says "authorities" but the error and its correction are clear.

> *"The determination of land use objectives in a development plan is perhaps the single most significant policy function entrusted to elected local councils, who must account for their policy stewardship directly to the electorate every 5 years. …… as a collective, policy-based, merits-based, decision made by an elected, deliberative, political assembly, it is one which necessarily involves a significant margin of appreciation*."[238]
>
> *"the chief executive did give reasons, and the actions of the members in adopting the plan on foot of that report constitute acceptance of such reasons."* [239]

140. The Applicant submits that the principle that the court "*must be very slow to interfere with"* a zoning decision applies only to the rationality of an impugned decision – not to other aspects of its legality. I respectfully reject that submission – at least as to the duty to give reasons.

- First, as the standard of irrationality required in judicial review is in any event "*extremely high and is almost never met in practice*", [240] requiring "*something overwhelming*", [241] confining to irrationality the principle of reluctance to interfere would imply that Malahide Community Council,[242] Killegland and Jones did little more in invoking Article 28A than gild a lily. That is not impossible but is unlikely.

- Second, and more importantly, the application of the "*very slow to interfere"* principle to the duty to give reasons is entirely consonant with the often-diffuse characteristics of reasoning by deliberative assemblies and the observation by Hogan J in Killegland that reasons for decisions as to development plan content often don't come as "*neatly packaged and presented*" as they do in other public law decisions.

- Third, the reluctance to interfere is appropriate where reasons will inevitably be a case-specific response to the judgment of a deliberative assembly as to where, on Clarke J's "multi-pointed" spectrum between high policy and concrete implementation, a particular sub-decision lies.

- Fourth, given the nature and scope (in all senses, including but not limited to wide geographic scope and very many subject-matters/"planning matters") of a development plan, the premise of analysing the making of a development plan as comprising sub-decisions necessarily implies a very large number of such sub-decisions – indeed a number which might credibly vary widely depending on the granularity of analysis.

- Fifth, in light of the foregoing four points, In this context it is important to remember

[238] Jones v South Dublin County Council [2024] IEHC 301 §230.
[239] Jones v South Dublin County Council [2024] IEHC 301 §212.
[240] The Board of Management of St. Audoen's National School v An Bord Pleanála [2021] IEHC 453.
[241] See, for example, The State (Keegan) v Stardust Compensation Tribunal [1986] IR 642 and Littondale Ltd v Wicklow County Council [1996] 2 ILRM 519.
[242] Malahide Community Council v Fingal County Council [1997] 3 IR 383 at 397.

- that adequacy of reasons is case- and context-specific **- MRRA**[243] **FC**[244] and **Duffy.**[245]
- the observation of Charleton J in **Marques**[246] that reasons must be "*adequate to the situation*".
- and that of Ní Raifeartaigh J in **FC**:[247] "*there is a balance to be struck. It is of course ultimately a question of substance and not form, and there must be an element of common sense and practicality in approaching the question of adequacy of reasons.*"

141. The Applicant objects that, in response to its submissions on the Material Alteration, the Chief Executive in his report of 21 September 2022 merely repeated his response to Uniphar's submissions as set out in his report of April 2022. This is not per se illogical or legally deficient: as I observed at trial, two different questions may have the same answer and that is the more likely when the central issue underlying each is the same. That is so here as to the central issue of rezoning the Uniphar Site from Z6 to Z10. Here, the obvious setting in which the Applicant's submissions were made was the CE's prior and legitimate favouring in the April 2022 report rezoning the Uniphar Site to Z10. The repetition of that view in his September 2022 report in response to Applicant's submissions signifies, not that he had not considered those submissions (which he had summarised just above), but that they had not sufficed to change his mind for the reasons he repeats.

Killegland – Sequence of Events

142. Killegland sought *certiorari* of a development plan insofar as it dezoned its lands. *Inter alia*, it alleged a want of reasons for that dezoning. Simplifying considerably, the sequence of events in Killegland included the following:

- Killegland's lands were zoned residential.
- The new draft development plan proposed to maintain that zoning and the chief executive of the planning authority reported to the elected members accordingly.
- The members passed motions to amend the draft plan to dezone Killegland's lands to community infrastructure. Their reasons were apparent at that stage.
- Killegland, the OPR and the chief executive opposed the dezoning.
- The members, nonetheless, in making the development plan, included the dezoning of Killegland's lands from residential to community infrastructure zoning.

It will be seen that the facts in Killegland differed markedly from the present case in that the elected members in Killegland rejected their chief executive's advice and so the chief executive's report did not provide the reasons for their decision. Nonetheless, the case does assist here.

[243]MRRA v An Bord Pleanála & Lulani [2022] IEHC 318 §64.
[244] FC v Mental Health Tribunal [2022] IECA 290.
[245] Duffy v An Bord Pleanála [2024] IEHC 558.
[246] Marques v Minister for Justice and Equality [2019] IESC 16.
[247] FC v Mental Health Tribunal [2022] IECA 290.

Killegland – High Court[248]

143. Humphreys J in the High Court dismissed the proceedings. He considered that generally "*the requirement for reasons applies to a decision to rezone an individual piece of land.*" The extent of the reasons required is the main reasons on the main issues.[249]

144. Humphreys J, obiter but clearly correctly, considered that *"Where members accept a reasoned Chief Executive's report (whether to keep a term of the existing plan such as zoning or to change it), that acceptance inherently involves the acceptance of the reasons stated, so no further articulation of reasons by the members is necessary."*[250] That is the position in the present case.

145. Further, Humphreys J cited a *"broader principle that a decision-maker doesn't need to give reasons for not changing her mind from an already-articulated position, or for not making an exception to a clear policy for which reasons have been previously articulated, unless there is a significant change in circumstances or the unusual case of a new point being made of such significance that it needs to be expressly addressed."*[251] That observation is relevant in the present case to the Applicant's complaint that, despite its submission on the Material Alteration intervening between them, the Chief Executive's reasons as stated in his September 2022 report are, repeated verbatim, those stated in his April 2022 report.

146. Further relevant to the repetition argument, Humphreys J also said, and I agree, that in discerning reasons for zoning decisions it is significant that the adoption of a development plan involves *"a complex choreography of different steps all of which have to be read together ... It would be unrealistic and inappropriate to try to judge the reasons for the ultimate decision in the absence of a holistic overview of all the various critical steps involved."*[252] I further agree with his observation as follows:

> *"Nor is it the case that a decision-maker has to reiterate previously-articulated reasons just because a contrary submission is made subsequently. If the previous reasons deal with the essence of the main issues, then they do not need to be reiterated just because a submission or a further submission is made thereafter, unless a significant new point emerges or there is a significant change of circumstances. Ultimately the whole argument being made is an attempt to detach the final decision of the elected members from its context …"*[253]

147. In my view correctly, Humphreys J considered any duty to engage with submissions to be part of the law as to reasons rather than a separate requirement. He also considered it as not requiring

[248] Killegland v Meath County Council [2022] IEHC 393.
[249] §75 – citing Connelly v An Bord Pleanála [2018] IESC 31, [2018] 2 ILRM 453 and Atlantic Diamond v An Bord Pleanála [2021] IEHC 322, [2021] 5 JIC 1403.
[250] §65.
[251] §67.
[252] §102 & 103.
[253] §115.

engagement in some *"sort of discursive, hand-to-hand combat sense*" and that *"one must avoid the applicant's classic error of confusing lack of narrative discussion with failure to have regard to something".* While I agree as far as that goes, "*have regard to*" obligations are not coterminous with the obligation to give reasons. And that reasons must engage with relevant submissions seems to me firmly established as part of the entitlement to know why one has lost. In **NECI**,[254] MacMenamin J, for a unanimous Supreme Court:

- cited **Balz**[255] as making

> *"clear that a decision-maker must engage with significant submissions. The judgment emphasises that 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 was 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."*[256]

- posited an objective test of adequacy of reasons which *"had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large, that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute."*[257]

- said, *"There is a fundamental difference between mentioning "issues raised", and actually addressing those questions substantively by a response giving reasons. … I do not say all NECI's issues needed to be determined by the Labour Court in a discursive, reasoned judgment. But there is no indication in the recommendation or report as to whether any of these important questions raised were actually considered, other than a recital that documentation had been put before it by the applicants. … The duty is to <u>give reasons</u>."*[258]

148. In **Baynes**,[259] Ferriter J quashed a decision made *"without proper engagement with the case made by an applicant in support of such an application and without any means of an applicant understanding whether the basis for his or her application had been understood and if so, in broad terms why it had been rejected."* In **McEvoy**,[260] Binchy J for the Court of Appeal said that *"it must be apparent from a decision that a submission, … has been considered and addressed, and, where applicable, rejected, for stated reasons. <u>It is not enough merely to say that it has been considered</u>."*[261] It cited Hogan J in **Flynn**[262] as confirming that while a discursive judgment is not required but[263] *"the essential rationale*

[254] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court, [2021] IESC 36, [2021] 2 ILRM 1.
[255] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 ILRM 637 §57 et seq.
[256] §155.
[257] §157.
[258] §170 & 171.
[259] Baynes v Financial Services and Pensions Ombudsman [2022] IEHC 678.
[260] McEvoy v Preliminary Proceedings Committee [2022] IECA 174.
[261] Emphasis added.
[262] Flynn v Medical Council [2012] 3 IR 236.
[263] Citing Murray CJ in Meadows v Minister for Justice [2010] IESC 3, [2010] IR 701.

of the decision should be evident – or, at least, be capable of 'being inferred from its terms and its context'." Binchy J concluded accordingly that *"this aspect of the decision was unlawful in failing altogether to demonstrate any engagement with the case made under this subsection."*[264] While **Baynes** and **McEvoy** might be distinguished as relating to more clearly adversarial decision-making processes, in **St Audeons**,[265] as to a planning matter, Simons J held that *"The right to make submissions carries with it, as a corollary, a right to be informed of the reasons for which those submissions are not accepted."* And Bradley J in **Konisberry**[266] states that

> *"A review of the extensive jurisprudence on this issue*[267] *in recent years, for example, emphasises that the singular responsibility on a decision-maker – the Board in this instance – is one of 'meaningful engagement' where, for example, its decision will clearly show that relevant submissions were addressed and that an explanation was given as to why they were not accepted."*

149. Correctly rejecting a "*superhuman obligation to explicitly give every micro-sub-reason for every micro-sub-issue that parties may seek to make in voluminous submissions or buried somewhere in thousands of pages of materials*" is, nonetheless, to have set up a straw man. I confess to respectfully holding the view that the foregoing consideration of the cases is not to take the passages cited out of context.[268] Rather, NECI cites Balz as making "clear" and emphasising as "basic" a point which Balz had described as "fundamental". Subject to these observations, I agree with Humphreys J in **Killegland**[269] when he says that *"the decision-maker is not obliged to respond to submissions on a point-by-point basis if the main reasons for the main issues are apparent".*

150. More generally, there is no need for a discursive, narrative analysis, nor need reasons be lengthy or ponderous. The adequacy of reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved and should not be read in isolation: *"The reasons for the decision must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."*[270] Nor need reasons be stated for the obvious. And a flexible approach is required as where the reasons are to be found - as long as the relevant content can be reliably identified as in fact being the relevant reasons or part thereof.

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[264] Emphasis added.

[265] Board of Management of St Audeons National School v An Bord Pleanála & Merchants Quay Ireland CLG [2021] IEHC 453 – cited to this effect in Grafton Group PLC v An Bord Pleanála [2023] IEHC 725 §105 (Farrell J).

[266] Konisberry v An Bord Pleanála [2024] IEHC 194.

[267] Citing "for example" Killegland Estates Limited v Meath County Council [2023] IESC 39; Náisiúnta Leictreach Contraitheoir Éireann v Labour Court [2021] IESC 36; [2021] 2 ILRM 1; Balz & Heubach v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd [2019] IESC 90; [2020] 1 ILRM 36; Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála [2019] IEHC 888; Connelly v An Bord Pleanála [2018] IESC 31, [2021] 2 IR 752, [2018] 2 ILRM 453; Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 59; [2012] 3 IR 297; Meadows v Minister for Justice [2010] IESC 3; [2010] 2 IR 701; Rawson v Minister for Defence [2012] IESC 26; EMI Records (Ireland) Limited v Data Protection Commissioner [2013] IESC 34; Oates v Browne [2016] IESC 7; [2016] 1 IR 481.

[268] Killegland v Meath County Council [2022] IEHC 393 §79.

[269] Killegland v Meath County Council [2022] IEHC 393 §114.

[270] Sweetman v An Bord Pleanála [2009] IEHC 599, [2009] 10 JIC 0908.

151. All that said by way of general observations on the duty to engage with submissions when giving reasons, I return to the points that the extent of reasons required is to give the main reasons for the main issues, the substance of that obligation depends on the context and the making of a development plan is a quite particular context. Clarke J described it as such in Christian and in Killegland, Humphreys J said, and I agree with the general point, that

> *"An important contextual point is that 2,452 submissions were made on the development plan. Any practical and realistic assessment of the level of reasons required has to have some regard to that context."*[271]

Killegland – Supreme Court[272]

152. In the Supreme Court, Hogan J dismissed the appeal in Killegland, concluding, as to "*the essence of Killegland's case*", that the Council had given valid reasons for its zoning decision. He did not find it necessary to explore the nuances of the law of reasons (for example, whether **Balz**,[273] as to reasons, is generally applicable or applies only where submissions are rejected *in limine* – any doubt was resolved in **NECI**[274] in favour of its general applicability). Consistently with Humphrey's J's espousal of discernment of reasons from a holistic view of the process of making a development plan and his endorsement of the lack of necessity of repetition of reasons previously expressed, Hogan J identified "*the heart of this element of the case*":

> *"One may thus ask: is there a documentary record which sufficiently explains the rationale for the decision of the elected members? If so, are those reasons consistent with the requirements of the 2000 Act? Were reasons given and, if so, did they adequately explain the rationale for the de-zoning decision?"*

On the facts he concluded:

> *"… the councillors proposing this change had on many occasions explained the reasons for their decision. They wanted to preserve the 0.7ha site as the access point from Churchfield to the proposed park, thereby facilitating an access road and servicing a car park to that proposed park. While it is true that these reasons were expressed in different ways and at different times and that there is no single written expression of that view … nevertheless no one could really have been in any doubt as to the reasons given for the de-zoning."*

153. For present purposes, the point is that, depending on circumstance, it may be that the reasons for a particular decision in making a development plan, may be found earlier in the plan-making process.

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[271] §100.
[272] Killegland v Meath County Council [2023] IESC 39.
[273] Balz v An Bord Pleanála [2020] 2 ILRM 637.
[274] Náisiúnta Leictreach Contraitheoir Éireann v Labour Court, [2021] IESC 36.

Indeed, in Killegland, reasons found in motions sufficed to answer submissions made after those motions had issued.

McGarrell, DAA v Fingal & Bartra

154. Hogan J gave judgment for the Supreme Court in **McGarrell**[275] on the same day as he did so in Killegland – as to the same development plan but as to a different zoning decision. It seems to me notable that Hogan J held on the facts, citing **Christian**, **Connelly** and **Balz**,[276] that the reasons given for the zoning decision were *"sufficient for McGarrell to know in at least general terms the reasons why these decisions were taken"* - and this despite his view that "*in some instances the reasons might perhaps have been more clearly explained*".

155. **DAA v Fingal**[277] seems to me to assist – perhaps the more so as it involved the members' rejection of the CE report despite which their reason for rezoning was upheld, though the less so as the factual context was quite different. No doubt simplifying the facts somewhat, as I understand, the case related to the zoning of a sports complex operated by the Aer Lingus Social and Athletic Association ("ALSAA") pursuant to a licence on DAA-owned lands at Dublin Airport. There was a background of dispute between DAA and ALSSA – which, while a not-for-profit entity, now caters for the community generally in the area. DAA wanted the sports complex zoned Dublin Airport ("DA") – which it was in the draft plan. A Material Alteration proposed to rezone it as Community Infrastructure ("CI") as ALSSA wished. DAA made a detailed submission opposing CI Zoning.[278] The CE's report agreed with DAA – giving a relatively lengthy reason, essentially adopting the lengthier DAA submission. The members disagreed and zoned the complex CI.

156. While the transcript of the meeting, as recorded in the judgment in DAA, ranges widely, the proper[279] planning rationale for the decision appears to have been "*sparse, to the effect that "[t]he CI zoning is most appropriate at this location, having regard to the existing facility here""*[280] Though sparse, the reason was adequate – if specifically in the context of a decision to rezone to render an existing non-conforming use in conformity with the zoning.[281] Humphreys J said:

> *"48. What an applicant is entitled to is the main reasons on the main issues. As far as the stated planning rationale is concerned, ….. the members favoured CI zoning as they thought it was appropriate to support the existing use. Implicitly, that necessarily involved the proposition that that consideration outweighed such features of the situation as favoured the DA zoning.*
> *DAA complains that multiple sub-aspects of their submissions weren't considered – that's true but*

[275] McGarrell Reilly Homes v Meath County Council [2023] IESC 40.
[276] Christian v Dublin City Council(No. 1) [2012] IEHC 163, [2012] 2 IR 506 at p. 537; Connelly v An Bord Pleanála [2018] IESC 31, [2018] 2 ILRM 453; Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 ILRM 637.
[277] DAA v Fingal County Council [2024] IEHC 589 §90.
[278] Set out at §20 et seq of the judgment.
[279] The zoning was quashed on the different ground of consideration of irrelevancies. But the proper reasons survived muster.
[280] DAA v Fingal County Council [2024] IEHC 589 §28 & 63.
[281] DAA v Fingal County Council [2024] IEHC 589 §51.

that isn't the standard. As in Killegland … nobody could be in doubt as to the essential reason set out in the planning rationale. The members wanted to support and continue the existing social and recreational use.

49. The level of reasons for the decision has to be read in context. The context was:

- *both ALSAA and DAA proposed to continue the existing sporting and recreational use, so the context was a lack of a live dispute about that issue;*
- *that existing use which was proposed to be continued was non-conforming with the existing zoning which impliedly created an argument for aligning the zoning with the use, if the use was to be continued;*
- *there were 164 material amendments making it impracticable for there to be extensive reasons for each individual motion; and*
- *more generally, the political, collective, deliberative nature of the decision-making process at issue in the adoption of material or other amendments to a development plan also made it impracticable for there to be elaborate reasons."*

…

52. Another factor is the fact that there were 164 material amendments put forward. Given that the bar for reasons would have to be multiplied by that number of motions, one has to be realistic about how much detail is practicable without a disproportionate or impractical expenditure of energies. Analogously to how it was for Hogan J. in Killegland, the real question ultimately is whether the applicant could be in any real or genuine doubt about what the reason for the CI zoning is. The answer to that is clearly not."

157. **Bartra**,[282] in which Killegland was applied, assists in holding that the rationale for zoning decisions *"needs to be considered in its legislative context, but also in the context of the overall process."* O'Donnell J held that the reasons in that case made it *"clear that the elected members had engaged with the essential thrust of those submissions, and that the principal reasons were valid planning reasons".*

APPLICATION OF LAW TO THE PRESENT CASE - DECISION

158. Of course, here the complaint is not that in the absence of contemporaneous reasons the decision-maker relies on reasons previously given. It is that the reasons given in the CE Report of 21 September 2022 were no more than the express repetition of reasons previously expressed in the CE Report of April 2022 prior to the making of the Applicant's Submissions on Material Alteration D-0004. But if, per Killegland, it is unnecessary to repeat reasons previously given which remain valid, then logically, *ceteris paribus* and *a fortiori*, their express repetition is not invalid.

159. Ultimately and despite intricate argument at trial, the position here is reasonably simple. There was in my view only one main issue in the Applicant's submission opposing the rezoning: its *"essential*

[282] Bartra Property (Dublin) Ltd v Dun Laoghaire Rathdown County Council [2024] IEHC 535.

thrust" was that residential use of the Uniphar Site would be incompatible with its use of the Pat O'Donnell Lands. The rest, as bullet-pointed in the submission, was argument in support of the Applicant's view of that issue or articulating it in other ways – for example as to spot zoning. The CE's report explicitly recognises that essential thrust – recording the Applicant's assertion of *"incompatibility of the proposed zoning with existing adjoining land uses".* It is clear enough from the CE's response that he had considered and rejected that assertion in favour of the considerations which he saw as favouring a Z10 zoning of the Uniphar lands - as to which the Applicant's submissions had not changed his view as previously expressed in April 2022. Indeed "*in the context of the overall process"* further light is shed in that, as I have said above, the reasons given in April 2022 in effect reflected the CE's acceptance of the content of the Uniphar Submission of February 2022.

160. In my view and applying the law set out above as to reasons for zoning decisions, the reasons given sufficed: as Hogan J put it in Killegland, no one could really have been in any doubt as to the reasons for the decision in this case.

161. I am not to be taken as foreseeing the adequacy of any reasons which might be given in a planning permission decision with respect to the Uniphar Site and as to an assertion of incompatibility of a specific proposed development with the Applicant's existing adjoining land use. As I have said a planning permission decision is a context different the making of a development plan and the requirements as to reasons generally differ accordingly.

162. For these reasons, I reject Ground 3 and the assertion in Ground 1 that the CE Report of 21 September 2022 failed to respond to the Applicant's Submissions.

GROUND 4: CE REPORT - MATERIAL FACTUAL ERRORS

163. The Applicant pleads two material factual errors in the CE Report to the elected members – alleged errors as to

- the location of the Uniphar Site – incorrectly describing it as "*within"* an established residential area to the west and east. There is no residential development to the east;
- and in baselessly asserting that rezoning the Uniphar Site to Z10 will provide a buffer between the residential and employment uses;

even though both errors had been pointed out in the Applicant's submission – to which, in these regards, the CE's Report did not respond, contrary to s.12(8) PDA 2000.

164. As to the buffer issue, the Applicant had submitted that:

- the Uniphar Site is in a buffer separating the Ballyfermot from the R148/N4 corridor,
- bringing residential uses to the Uniphar Site would lead to conflict, as residential uses would be incompatible with the present use of the Pat O'Donnell lands, and

- the rezoning therefore does not create a buffer – it removes a buffer between employment and residential uses.

165. So, the members took into account irrelevant considerations, failed to take into account relevant considerations and acted irrationally in a decision unsupported by evidence and the decision is vitiated by plain error. Hence it was made ultra vires.

166. DCC says that Ground 4 is essentially an attempt to litigate the merits of the Impugned Decision. It says there were no such factual errors. As to the residential area issue, it says Ground 4 is premised on an over-literalist, parsing of the CE Report of 21 September 2022, inappropriately focusing on the word "within" and reading the Report with a view to its invalidity rather than its validity. A validating reading of the Report is reasonably available and so is preferable. DCC says it is entitled to its view given that the Sites are within short walking distance of both the residential Rossmore Road estate to the west and Chapelizod Village to the north/east.

167. In my view, it is plain from the Figure above that, while one might reasonably disagree, reading the Report of 21 September 2022 on XJS principles[283] as if by an intelligent, informed, inexpert layperson, and not as if a statute, the description as a matter of evaluative planning judgement of the Sites as within an established residential area to the west and east was entirely reasonable as a broad description of the locale. That is all the more so if one reads it as if by expert members of DCC to whom it was addressed.

168. As to the issue of a buffer, while it might not be quite as obvious in the Report, DCC pleads and argues,[284] and it seems to me reasonable to infer, preferring an available validating reading, that DCC considered that under a Z10 zoning the inevitably mixed-use nature of any development on the Uniphar Site provides the opportunity to so place the non-residential uses as to constitute such a buffer between the residential uses and the Pat O'Donnell lands. Indeed, as DCC pleads and the Applicant itself argued,[285] that was the very point made in Uniphar's Submission of February 2022. The Applicant's attempt to interpret the CE Report as excluding this meaning seems to me both strained and to seek impermissibly to interpret the Report with a view to its invalidity rather than its validity, [286] in breach of the presumption of validity of impugned public law decisions.

169. Ultimately, when pressed as to whether Ground 4 was fairly criticised as an impermissible attempt to litigate the planning merits of the Impugned Decision, counsel for the Applicant did not press

[283] See, for example, Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §119 et seq.
[284] Statement of Opposition §12(iii) & (v). Affidavit of Deirdre Scully, City Planning Officer, sworn 6 February 2024, §46 & 47.
[285] Statement of Opposition §12(v). Affidavit of Karl Kent sworn 13 December 2022, §123.
[286] For example, O'Donnell & Ors v An Bord Pleanála [2023] IEHC 381 §54; St. Margaret's Recycling v An Bord Pleanála [2024] IEHC 94 [2024] 2 JIC 2003; Mulloy v An Bord Pleanála & Knockrabo [2024] IEHC 86 §81; Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §119; Duffy v An Bord Pleanála [2024] IEHC 558 §42.

back strongly.[287] In my view, that was wise. I reject Ground 4 on that basis and also as based on the fallacy of reading the CE Report of 21 September 2022 as invalid when a validating reading is reasonable.

CONCLUSION

170. I will quash the Z10 zoning of the Uniphar Site by reason of DCC's failure to list the Applicant in the CE's Report of 21 September 2024 as having made a submission. In light of the different courses taken as to remittal in **Tristor**[288] and **Christian**[289] on the one hand in which remittal was ordered , and **DAA** on the other in which it was refused, the parties at trial disagreed whether remittal should ensue on certiorari. I will hear them further on that that issue and as to final orders and costs. I will list the matter for mention only on 16 December 2024.

David Holland
26/11/24

[287] Transcript Day 2 p153.
[288] Tristor Ltd v Minister for the Environment & Ors [2010] IEHC 397 and [2010] IEHC 454.
[289] Christian and others v Dublin City Council [2012] IEHC 309 §4.10.