THE HIGH COURT
PLANNING AND ENVIRONMENT
JUDICIAL REVIEW

H:JR:2024:1088
[2026] IEHC 365

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

BETWEEN:

ABBEY PARK AND DISTRICT RESIDENTS ASSOCIATION BALDOYLE
and
JOHN OLIVER MCCANN

Applicants

And

AN COIMISIÚN PLEANÁLA

Respondent

And

RONDESERE LTD

Notice Party

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JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 16 JUNE 2026

INTRODUCTION

1. The Applicants seek certiorari quashing the Commission's Impugned Decision of 3 July 2026 to permit the Notice Party ("Rondesere") to build a Proposed Development consisting of a Large-scale Residential Development[1] ("LRD") of 104 apartments in one "block" of up to 11 storeys over basement on a 0.45-hectare Site ("the Site") at the junction of Grange Road and Longfield Road in Dublin 13 - west of Baldoyle and just north of and across the Grange Road from Baldoyle Industrial Estate.

2. "Block" is a slightly misleading description – though not in any legal sense. Rondesere's planning application was for an L-shaped building, including a 12-storey tower at the south eastern corner of the Site at the junction of Grange Road and Longfield Road, stepping down to 4-5 storeys to the north along the Longfield Road Site boundary and to 5 storeys to the west along the Grange Road Site boundary.[2] The Impugned Decision conditioned the omission of, specifically, the 2nd floor. So it permitted an 11-storey tower stepping down to 3-4 storeys to the north and to 4 storeys to the west.

3. The Site is currently brownfield - a builders' yard and buildings. It is bounded to south and east by Grange Road and Longfield Road. A 3-storey school adjoins it to the west. To the north it is bounded by Myrtle Road, across which lies the Myrtle Apartment development which Rondesere describes variously as of 2-4 storeys and 2-6 storeys (I suspect the latter is correct).[3] It is about 500m from Clongriffin train station.[4]

4. The First Applicant is an unincorporated association and describes itself as dedicated to the protection of the built and natural environment of Abbey Park, Baldoyle and the greater Baldoyle area. The Second Applicant describes himself as a local resident of the area which will be impacted by the Proposed Development and as the secretary of the First Applicant. The Applicants' general standing to prosecute these proceedings is not disputed. I will refer to the Applicants collectively as "Abbey Park".

5. Fingal County Council[5] ("Fingal") and Rondesere met pursuant to s.32C PDA 2000[6] on 19 September 2023. Further to that meeting, Fingal issued an opinion under s.32D PDA 2000 that Rondesere's LRD

[1] Within the meaning of the Planning and Development Act 2000 – ("PDA 2000").
[2] See graphics in Rondesere's Architectural and Urban Design Statement, 4.3 | Bird's Eye View and 5.4 | Proposed Massing.
[3] Architectural and Urban Design Statement 2.2 | Neighbourhood Context.
[4] See graphic in Rondesere's Architectural and Urban Design Statement 5.5 | Neighbourhood Height Context showing radii from the train station. The relevant circle runs through the middle of the Site – which is clearly the appropriate measuring point – not least in a Site on which the proposed buildings are beyond that point. I disregard some lesser given figures.
[5] The planning authority.
[6] Planning and Development Act 2000 As amended.

proposal did not constitute a reasonable basis on which to apply for an LRD permission. Fingal's opinion cited inappropriate density, scale, massing and layout, inappropriate visual impact, insufficient provision and quality of public open space and insufficient on-Site car parking.

6. On 14 December 2023, Rondesere made an LRD permission application to Fingal for a Proposed Development on the Site described in the Inspector's report and as here relevant, as follows:

> *"Demolition of existing single-storey storage structures on site (c. 446.5sq. metres GFA[7]).*
> *Construction of a residential development (c. 15,234.11sq. metres GFA) comprising of 120 no. apartment units (15 no. studio units, 18 no. 1 bed units, 78 no. 2 bed units, 7 no. 3 bed units, 2 no. 4 bed penthouse units) within 1 block (ranging in height from 4-12 storeys over basement level).*
> *The construction of a basement to be accessed off Myrtle Road with provision of c. 47 no. car parking spaces, ……. 2 no. creche drop off car parking spaces at surface level. ……*
> *Provision of c. 1877sq. metres of open space to serve the development and green roof garden terraces between 5th and 10th floor level.*
> *Provision of a childcare facility at ground floor level (c. 156.6sq. metres GFA) with capacity in order of 35 no. children and associated, secure, open play area (c. 117.1sq. metres). ……"*[8]

7. By papers filed in the High Court on 27 August 2024, Abbey Park sought leave to seek judicial review, which was granted on 4 November 2024 and an amended Statement of Grounds was filed on 12th November 2024. Rondesere has not participated in the proceedings. Grounds 4, 5 and 6 are not pursued. The trial took 2 days.

8. On 21 May 2026, the Court (Humphreys J) granted the Commission leave to file, on a de bene esse basis, a Supplemental Affidavit of Robert Brophy, sworn on 20 May 2026, to exhibit certain documents – planning application drawings - not exhibited previously. Issues of admissibility were to be addressed at trial. Ultimately, at trial, no objection was taken to the exhibits.

GENERAL OBSERVATIONS

PROPER PLANNING & SUSTAINABLE DEVELOPMENT IS ABOUT LIVING CONDITIONS - THE "LENS"

9. I should mention one aspect of the argument which I found surprising. Counsel for the Commission was reluctant, in the absence, he said, of any specific statutory provision to that effect, to accept that, as to planning permission applications for proposed residential development by developers other than the likely ultimate resident or residents, the requirements of proper planning and sustainable development impose on planning authorities and the Commission a duty to seek to protect the residential conditions and amenities

[7] Gross Floor Area.
[8] Layout of text altered for exposition. Content irrelevant to these proceedings omitted.

(using the word amenity in its broad sense) of those, usually as yet unidentified or unidentifiable, who will live in the dwellings proposed. I was surprised as I consider that to be an indisputably obvious proposition.[9] While it has many other aspects, if proper planning and sustainable development is not at least about living conditions of residents, is it worth the candle? I consider the proposition amplified, and as imposing a particular and autonomous duty on planning authorities and the Commission, by the consideration that as to such dwellings – for example, apartments built for sale or rent – the residents, as yet unidentified or unidentifiable and who, likely, themselves do not yet anticipate living in the proposed development in question, but whose living conditions will ultimately be in very large degree determined by that proposed development, are highly unlikely to participate in and be heard in the planning process, or even to be able to do so. The point is illustrated by the rhetorical question: absent objectors raising the issue, may the planning authority or the Commission, in deciding a residential planning application, ignore such living conditions? If not, the duty is autonomous. I should say that it is not my experience that they do ignore such living conditions – which made counsel's reticence all the more surprising.

10. It may be that counsel's reticence arose from a recent, in itself proper, tendency in the law to consider the legality of a planning permission though the "lens" of the material before the planning authority or the Commission and to ask whether anyone in the planning process "raised" the issue later argued in judicial review. Of itself, that can be an important and sometimes determinative approach in judicial review. But it should not be over-deployed. Nor should it prompt reluctance to identify the duties of the planning authority or the Commission as autonomous. Perhaps it derives from lawyers' proper tendency in adversarial litigation, indeed, in particular in judicial review, to insist that the issues are determined by the parties in their pleadings and decided by reference to the evidence each chooses to adduce. If so, the analogy is far from precise.

11. It is true, of course, that the lens of the material before the Commission will always be the starting point of inquiry. Planning applications are grounded in particular development proposals. They are not abstract exercises. But neither are they litigation. While opposed planning applications are in practice considerably adversarial, they are primarily inquisitorial processes - **Stapleton**.[10] Or, to put it another way, a planning applicant faced with no objectors has, nonetheless, far from an open goal. Planning authorities and the Commission are not passive recipients of planning applications. An inquisitor must be inquisitive. Curial deference to decisions of expert bodies is contingent on their actively deploying both that expertise and proper curiosity. As was said in **Fernleigh**,[11] "*the very function of expertise, and the reason it is accorded deference, is to exercise judgment in analysis."*

12. The material placed before the planning authority is, in very large part, put there by the developer, whose interests are, perfectly properly, primarily private and commercial. For that matter, objectors' interests are often and, equally properly, primarily private. So, the materials placed and issues raised before the decision-maker are often a function of choices largely informed by private interests. Yet the duties of planning authorities and the Commission and the interests they must protect are primarily, or at least

[9] Reflected, for example, in Rondesere's Architectural and Urban Design Statement 7.1 | Residential Quality.
[10] Stapleton v ABP & Savona [2024] IEHC 3 §208.
[11] Fernleigh v ABP & Ironborn [2023] IEHC 525.

largely, public. It follows that planning authorities and the Commission are very far from prisoners of, or constrained by, the materials placed before them by private interests on either side of an argument.

13. Further, and as to decision-makers' duties of inquisition, in a process in which experts of many kinds are now invariably deployed and the decision-maker is invited to rely on that expertise, it bears observing that expert reports are not always as independent as they should be of their clients' interests. There is no reason to think that experts deployed in planning applications are any less susceptible than experts deployed in litigation to the concerns expressed by Collins J in **Duffy**[12] when he said:

- *"… arguably the most significant concern about expert evidence relates to issues of objectivity, impartiality (lack of bias) and independence …"*

- *"… many expert witnesses either fail to understand and/or fail to take seriously their duties as such. Far too frequently, expert witnesses appear to fundamentally misunderstand their role and wrongly regard themselves as advocates for the cause of the party by whom they have been retained. It may be said that this is an established part of litigation culture. If so, the culture is unacceptable and it needs to change. To that end, courts need to be forceful in policing the rules …"*

14. Charleton J articulated similar concerns in **Weston,**[13]

"22. Planning applications seek to change the character of a neighbourhood and landscape. The granting of permission can be the fulfilment of a modest domestic ambition or the opening up of what is perceived to be the path to riches. Human nature, with its inescapable tendency to exaggeration, evasion and deception, is an integral part of this process. The role of an inspector under the planning code is to bring objectivity to bear in circumstances where assertions may be made that are unsupported; where what appears on the ground may be different to the maps and plans supplied; and where wishful thinking may be seen in the cold light of reality. An inspector is entitled to make his own observations not only in the context of the arguments advanced in favour of a planning permission, but as to how facts may be assessed. It may be fair to observe, in the context of planning applications especially, that those who seek permission rarely make errors against their own interest."

15. As a result **Stapleton**[14] refers to a

*" … Board whose duty of "scrupulous rigour" is identified in **Weston**[15] and whose duty of both "expert" and "detailed scrutiny" – a duty of the "utmost importance" – is identified by O'Donnell J for the Supreme Court in **Balz**.[16] In similar vein, Humphreys J in **Treascon**[17] emphasised "the need for thoroughly*

[12] Duffy v McGee [2022] IECA 254, [2022] 11 JIC 0701.
[13] Weston v An Bord Pleanála [2010] IEHC 255.
[14] Stapleton v ABP & Savona [2024] IEHC 3 §208 §19.
[15] Weston v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102.
[16] Balz v An Bord Pleanála [2019] IESC 90; [2020] 1 I.L.R.M. 367 §454.
[17] Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700.

*independent and detailed expert scrutiny by the statutory decision-maker" and in **Jennings** its duty was described as one of "active and critical interrogation".*[18]

16. Similar observations are found in **Fernleigh**[19] and **Coolkill**.[20] The latter refers to "*the Board's duties of independent curiosity and stringent scrutiny*" and of "*rigorous scrutiny and critical interrogation of planning applications*". To be clear, the material before the Commission does not, as it may do the Court's duties in litigation, circumscribe the Commission's duties of "*active and critical interrogation*". The Commission's duties include testing the accuracy, reliability and completeness of the information before it and seeking out what may be missing. If it fails to do so, the lens of the material before the Commission will be more or less myopic.

17. I emphasise that no aspersions of misdirection or concealment were made in this case. Nor was anyone's integrity impugned. My purpose in mentioning these issues is, rather, to explain why the Commission's duties are actively inquisitorial and considerably autonomous, why they are far from prisoners of the materials placed before them and why care should be taken in judicial review not to overly rely on the lens of those materials when clarity of vision is required of the Commission.

DISCRETIONARY RELIEF & HARMLESS ERROR

18. As is now all but invariable in proceedings such as these, the Commission urges that, even if I find the Impugned Decision in legal error, I should refuse relief as a matter of discretion. Of course, relief is inherently discretionary in judicial review - though the court is not in any real sense at large as to the exercise of that discretion, which either must be exercised within the framework of recognised categories of case, or be justified on a principled and reasoned basis – e.g. **Independent Newspapers v IA**[21] and **LA.**[22] Of course, I accept generally the principles recited in **Reilly** as to the exercise of the discretion to refuse relief – though I would respectfully doubt whether **Independent Newspapers** is authority that the discretion is wider, or appreciably so, as to breach of domestic law than EU law, and **L.A.** seems to me a counterweight to that proposition.

19. Humphreys J in Reilly took care to make clear that his list of principles and factors relevant to the exercise of the discretion is not exhaustive or exclusive. He introduces them with the words: "*some issues regarding discretion established by the caselaw are as follows*". As to harmless error, he "*summarised*" the law – but again I do not understand him to have essayed an exhaustive, exclusive or definitive account of the law in that regard.

[18] [2023] IEHC 14, §410.
[19] §69 & 70.
[20] Concerned Residents of Coolkill v An Bord Pleanála & Midsal Homes [2025] IEHC 265.
[21] Independent Newspapers v I.A. [2020] IECA 19, [2021] 1 IR 384.
[22] L.A v The Chief Appeals Officer, [2026] IESC 22, [2026] 3 JIC 2503, [2026] 3 I.C.L.M.D. 55.

20. As is said in Reilly, on ample authority, one "*well-established*" instance of that discretion is that relief may be refused where the error in law is harmless in that it did not materially affect the result effected by the Impugned Decision. Of course, error may be harmless in different ways. For example, the error may be procedural - an error in a site notice of a planning application may be harmless to an objector who saw the newspaper notice and participated in the planning process. The position seems to me more difficult where it is suggested that the error was harmless as to the merits of the decision.

21. I think it useful to add certain further observations on these issues as follows. They are proffered not in diminution of, much less in correction of, but in addition to and in elaboration of the principles stated in Reilly.

22. Importantly, and as Donnelly J said for the Supreme Court recently in **L.A**.,

> *"… the exercise of discretion to refuse to grant a remedy of judicial review which may otherwise be justified is tightly bounded by legal and constitutional considerations. In judicial review, the High Court exercises supervision over administrative bodies and courts of limited jurisdiction and in that way acts as a safeguard to the rule of law. There is a public interest in ensuring that those bodies and courts act in accordance with law."*
>
> *"The use of the term discretion, in the sense of judicial discretion, is strictly delineated. As O'Donnell J. (as he then was) said in* ***Kelly***[23]*…. "The fact that the remedies involved are discretionary does not, however, mean that a court is at large, or is free to take into account <u>its views on the underlying merits</u>."*[24] *When used in the context of a ground to refuse judicial review it is a vital consideration that "the circumstances which allow the court not to make an order which would otherwise be justified must be such as to derive from an important constitutional or legal value of sufficient weight to warrant not making an order otherwise justified."*

23. As to planning injunctions but in terms broadly transferrable to judicial review (as the foregoing indicates), Humphreys J has recently, in **Threshford**,[25] echoing many cases including **Planree**,[26] emphasised the *"primary consideration of the integrity of the* (planning) *system, the principle of legality, the need for equal justice and the rule of law".*

24. Accordingly, and for the following reasons, primarily grounded in the raison d'etre of judicial review and in the importance of the rule of law as identified by Donnelly J, I respectfully caution against too-ready deployment of the discretion to refuse relief in judicial review and of the concept of harmless error. The rule of law, its application in administrative decision-making and the integrity of the planning code may not seem as important in an instant case when contrasted with urgent necessities of development. In **Independent**

[23] Kelly v Minister for Agriculture [2023] 1 IR 38, [2021] IESC 62.
[24] Emphasis added.
[25] South Dublin County Council v Threshford [2026] IEHC 342 .
[26] Donegal County Council v Planree & Mid-Cork Electrical [2024] IEHC 194 [2024] IECA 300; [2025] 3 I.C.L.M.D. 45.

Newspapers, Murray J instanced, as relevant to the exercise of the discretion, the "*importance of the underlying issue"*- though he may have been referring to the issue of law rather than the substantive subject matter of the impugned decision. (**Farrell**,[27] which Murray J understandably cites for the general proposition, does not seem to me to illuminate that distinction). In any event, strategically over time, the rule of law, its application in administrative decision-making and the integrity of the planning code are, in truth, highly pragmatic. That is because on them rests in very considerable part public confidence in, and the democratic and legal validity of, both the administrative and the judicial decision-making processes. So I observe as follows:

a. First, legal error does not strictly entitle the applicant to relief (at least usually – there are cases of entitlement ex debito justitiae) but it does presumptively result in relief. As the court can exercise of its own motion the discretion to refuse relief, I do not use the concept of presumption in its usual sense of assignment of onus of proof – though, own motion exercise apart, the onus of persuasion is on the party submitting that relief should be refused. Perhaps a better way of putting it is that, where legal error is established, its remedy is the starting point of analysis.

b. Second, legal error is presumptively harmful of itself. Perhaps the primary raison d'etre of judicial review is to correct – and to correct only – legal error. The project of judicial review is *"the maintenance of the highest standards of public administration"*.[28] Fordham J (of particular eminence in judicial review) has said in **Badger Trust**[29] that *"The public interest enterprise of judicial review accountability secures lawfulness. It promotes discipline. It exposes unlawfulness. It promotes public confidence in public authority decision-making."* The rule of law and public confidence in the rule of law, especially when confronted with the mighty power of the State, and as was observed in **Balz**,[30] real imbalance of forces as between protagonists, are values – constitutional and democratic - of high weight in and of themselves. The rule of law is not to be reduced, in administrative decision-making, to a mere means of producing a substantively meritorious result. The integrity of and public confidence in administrative processes – perhaps especially planning and environmental processes in which financial, environmental, private and public interests and other stakes are often high – are fundamentally underpinned by the rule of law.

c. Decisionmakers' proper insistence that judges stay away from the merits of their decisions (save in case of irrationality) is not too readily to be reversed once legal error is found and the merits are thought to weigh for rather than against the decision. If over-deployed, such reversals could justify a cynical view of the law's priorities and even-handedness. (I use the words "too readily" and "over-deployed" deliberately.) Further, such reversal would offend the constitutional separation of powers on which administrative decision-makers properly insist. In **Talbot**[31] the Supreme Court rejected an argument that

[27] Eastern Health Board v Farrell [2000] 1 ILRM 446.
[28] Shadowmill v ABP & Lilacstone [2023] IEHC 157, citing R v Lancashire CC ex p. Huddleston [1986] 2 AER 941; Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55; Murtagh v. Kilrane [2017] IEHC 384; Environmental Trust Ireland v An Bord Pleanála, Limerick City and County Council & Cloncaragh Investments Ltd [2022] IEHC 540; Jennings v. An Bord Pleanála [2022] IEHC 16.
[29] R.(Badger Trust) v Natural England, [2025] EWHC 2761 (Admin) [2026] A.C.D. 4, [2025] Costs L.R. 1751.
[30] Balz & Heubach v An Bord Pleanála, Cork County Council & Cleanrath Windfarms [2019] IESC 90, [2020] 1 I.L.R.M. 367, §45: "It is of the utmost importance that planning authorities and the board, on appeal (or, as is increasingly the case, the board in those circumstances in which direct application can be made to it for permission), should carry out their functions as professionally and competently as possible. The system of appeal (or first instance application) to an independent expert body was a great advance when introduced in 1976. The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."
[31] Talbot v An Bord Pleanála [2008] IESC 46, [2009] 1 IR 375.

leave to seek judicial review should be refused on the basis that the applicable planning policy was so obviously against the applicant that even if the planning refusal was quashed, a subsequent planning application would fail such that no benefit would accrue to the applicant from certiorari. To rephrase the argument – the impugned refusal had caused the applicants no harm which was not inevitable anyway. Fennelly J recognised that the planning history in that case was very strong evidence that the applicants faced an uphill battle in seeking planning permission. However, he noted that it would be open to the planning authority to modify their position and he insisted that *"a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions."* It is only if this is kept in mind that fears of the doctrine fall into what Humphreys J termed "alarmist cliché".

d. It may be that harmless error is to the discretion to refuse relief what irrationality is to legality: that it operates only where it is clear that a different decision on remittal would be irrational. If so, it represents a high hurdle – though, clearly absolute certainty would represent an unworkable standard – **Foran**.[32] Humphreys J in Reilly seems to have had had a similar idea in mind when he suggested a "*working approach*" that in finding harmless error, *"the court should exclude a reasonable possibility that the error would have made a difference to the actual outcome."* He seems to have used the phrase "*a reasonable possibility"* in the sense of "*any reasonable possibility".* In that context and of his assignment of the onus of proof, the statement of Humphreys J that "*Where by contrast the error would have had a material effect on the outcome, any breach of EU law should normally be remedied by certiorari"* might perhaps be reframed as "*Where those seeking to uphold the decision have not shown to the requisite standard of proof that the error would not have had a material effect on the outcome, any breach of EU law should normally be remedied by certiorari*." And, as Humphreys J said, on the premise of a finding of legal error and as to the question of discretionary refusal of relief by reference to the substantive merit of the decision, *"Any after-the-event assessment which would allow a permission to stand should only be permitted in exceptional circumstances."*

e. Clearly, the proportionality of relief to the legal error found may weigh in the scales of discretion – sometimes heavily and perhaps especially so when weighed against merely technical or trivial errors of law. And certiorari is always very significant relief – not to be under weighed. But, these days, remittal is, correctly in principle and in law, emphatically the norm. Even remittal imposes both delay and cost and sometimes consequential burdens – often imposed on an innocent third party in whose favour the quashed decision was illegally made. In the planning sphere and in some cases those considerations may even suffice to frustrate a particular development. But while proportionality should not be under weighed, nor should it be over weighed. Certiorari with remittal does not, at least usually, prevent lawful development. Delay (or, more neutrally, time taken to make planning decisions) is, in considerable part and perfectly properly, a function of resource allocation to decision-makers, as to which the courts should not second-guess executive priorities. If, on remittal, permission is granted in accordance with law, development can proceed. If, on remittal, permission is refused in accordance with law the developer can have no valid complaint. And the principle identified in Talbot seems all the easier to justly apply where remittal absolves the developer from starting the application process all over again.

[32] Foran v An Coimisiún Pleanála & Glenveagh [2026] IEHC 23.

25. Finally on this issue, and lest a contrary impression be formed, it is not the case that the rule of law requires that every legal error in administrative decision-making merits certiorari. All of the foregoing is to be understood in the context of the caselaw generally on discretionary relief and harmless error. They are important recourses in cases proper to their careful and judicious deployment. In particular, they assist in cases of merely technical or trivial legal error.

DEVELOPMENT PLAN & LAP

26. The development plan applicable to the Impugned Decision was the Fingal Development Plan 2023-2029 ("the Development Plan"). The Site is also covered by the Baldoyle-Stapolin Local Area Plan 2013 ("the LAP").[33] The following Development Plan provisions are relevant.[34] (Note, I set out the Development Plan content as to Playgrounds when addressing Ground 2 below).

Community & Zoning

a. **Policy CSP22 – Howth, Sutton and Baldoyle –** Consolidate the development and protect the unique identity of Howth, Sutton and Baldoyle. This includes protection against overdevelopment.

- Accompanying text[35] includes: Baldoyle, Sutton and Howth are long established, historical settlements with distinct character and sense of place which contribute significantly to the character of Fingal. Integral to their character and exceptional amenity offer is their coastal environment … and strong built heritage including the presence of Architectural Conservation Areas in both Baldoyle and Howth Villages as well as excellent public transport accessibility. It is envisaged that these areas will develop through the provision of a range of facilities to support existing and new populations. For this to be achieved, it is vital that the role of Baldoyle, Howth are strengthened, and development consolidated within the original villages.

b. **Zoning Objective 'RA' Residential Area**

- Objective: Provide for new residential communities subject to the provision of the necessary social and physical infrastructure.
- Vision: Ensure the provision of high quality new residential environments with good layout and design, with adequate public transport and cycle links and within walking distance of community facilities. Provide an appropriate mix of house sizes, types and tenures in order to meet household needs and to promote balanced communities.

[33] The Fingal Planner's Report appended to its decision of 16 February 2024 records that the LAP had expired in May 2023 but was in effect extended by CDP §3.5.3, which reads, in part: "The Council will continue to implement the LAPs … currently in place at the time of adoption of the Development Plan."
[34] There is quite a bit of repetition in Development Plan text. I have omitted some.
[35] P73.

Open Space

c. **Open Space Serving Residential Development**[36] **-** As to Development Management, there are three categories of open space: Public Open Space, Communal Open Space and Private Open Space. The quantum, location and design of open space is addressed as part of the Development Management process and conditioned as part of a planning permission for development.

d. Public open space is accessible to the public at large and in general is intended to be 'taken-in charge' by the Local Authority, but in certain circumstances may be privately managed. Appropriate provision must be made for public open space within all new developments. In all instances where public open space is not provided, a contribution under Section 48 will be required for the shortfall. "(Target minimum amount of 15% except in cases where the developer can demonstrate that this is not possible, in which case the 12% to 15% range will apply.)"

e. **Public Open Space – Quantity -** For all developments with a residential component, the overall standard for public open space provision is a minimum 2.5 hectares per 1000 population. In order to provide existing and future communities with adequate recreational and leisure opportunities, the Council will employ a flexible approach to the delivery of public open space and more intensive recreational/amenity facilities. It is the intention of the Council, however, to ensure, except under exceptional circumstances, public open space provision exceeds 12% of a development site area.[37]

f. **Objective DMSO51 – Minimum Public Open Space Provision -** Require a minimum public open space provision of 2.5 hectares per 1000 population. For the purposes of this calculation, public open space requirements are to be based on residential units with an agreed occupancy rate of 3.5 persons in the case of dwellings with three or more bedrooms and 1.5 persons in the case of dwellings with two or fewer bedrooms.

g. **Objective DMSO52 – Public Open Space Provision** - Public open space shall be provided in accordance with Table 14.12.

Table 14.12: Recommended Quantitative Standards *(Sustainable Residential Developments in Urban Areas, Guidelines for Planning Authorities 2009)*

Land use	**Minimum public open space standards**
Overall standard.	2.5 hectares per 1000 population
New residential development on greenfield sites/LAP lands	12% - 15% of site area
New residential development on infill/brownfield sites	12% of site area

(Target minimum amount of 15% except in cases where the developer can demonstrate that this is not possible, in which case the 12% to 15% range will apply.)

[36] §14.6.5.
[37] §14.3.2.

h. **Table 14.11 Public Open Space and Play Space Hierarchy and Accessibility Standards** - The standards allow for a wide variety of accessible public open spaces. In all residential developments a mix of public open space types should be provided where achievable. Table 14.11 describes the following types of public open space: Pocket Parks, Small Parks (both Class 2 as per Development Contribution Scheme), Local Parks, Urban Neighbourhood Parks and Regional Parks (all Class 1 as per Development Contribution Scheme).

Financial Contribution in Lieu of Public Open Space

i. **Objective DMSO53 – Financial Contribution in Lieu of Public Open Space -** Require "minimum" open space, as outlined in Table 14.12 for a proposed development site area**.** (Target minimum amount of 15% except in cases where the developer can demonstrate that this is not possible, in which case the 12% to 15% range will apply).

- The Council has the discretion to accept a financial contribution in lieu of the "remaining" open space requirement to allow provision for the acquisition of additional open space or the upgrade of existing parks and open spaces subject to these additional facilities meeting the standards specified in Table 14.11.

- Where the Council accepts financial contributions in lieu of open space, the contribution shall be calculated on the basis of 25% Class 2 and 75% Class 1, in addition to the development costs of the open space.

- The Council has the discretion for the remaining open space required under Table 14.11 to allow provision or upgrade of small parks, local parks and urban neighbourhood parks and/or recreational/amenity facilities outside the development site area, subject to the open space or facilities meeting the open space 'accessibility from homes' standards for each public open space type specified in Table 14.11.

- The Council has the discretion for the remaining open space required under Table 14.11 to allow provision or upgrade of Regional Parks in exceptional circumstances where the provision or upgrade of small parks, local parks and urban neighbourhood parks and/or recreational/ amenity facilities is not achievable. This is subject to the Regional Park meeting the open space 'accessibility from homes' standard specified in Table 14.11.

- The Council has the discretion to accept a financial contribution in lieu of remaining open space requirement required under Table 14.11, such contribution being held solely for the purpose of the acquisition or upgrading of small parks, local parks and urban neighbourhood parks and/or recreational/amenity facilities subject to the open space or facilities meeting the open space 'accessibility from homes' standards for each public open space type specified in Table 14.11.

- The Council has the discretion to accept a financial contribution in lieu of the remaining open space requirement to allow provision or upgrade of Regional Parks in exceptional circumstances where the provision or upgrade of small parks, local parks and urban neighbourhood parks and/or

recreational/amenity facilities is not achievable, subject to the Regional Park meeting the open space 'accessibility from homes' standard specified in Table 14.11.

j. **Objective DMSO57 – Development Contribution Schemes -** Require the monetary value in lieu of open spaces to be in line with the Fingal County Council Development Contribution Scheme.

k. The **Development Contribution Scheme**[38] as to Open Space Shortfall provides as follows:

"The Fingal Development Plan provides the discretion to the Council to determine a financial contribution in lieu of all or part of the open space requirement for a particular development. This contribution in lieu of open space will be levied at the following rates;

1. Class 1 Open Space - €100,000 per acre to purchase land based on the value of amenity land, Plus €100,000 per acre for development costs.
2. Class II Open Space - €250,000 per acre to purchase land in residential areas, Plus €100,000 per acre for development costs.

These rates may be reviewed by the Council from time to time have regard to market conditions. The contributions collected will be used for the provision of open space, recreational and community facilities and amenities and landscaping works – see Appendix 2."[39]

SuDS

l. **Sustainable Urban Drainage Systems (SuDS)**,[40] **Objective DMSO203 – FCC SuDS Guidance Document & Objective IUO11 – SuDS in New Developments**

"Ponds, artificial wetlands and water features can make a positive contribution to the provision of SuDS and to the amenity of an area. Properly designed and located SuDS features can be incorporated within and can complement the amenity and aesthetic value of open spaces. There is a requirement to ensure that the design of SuDS enhances the quality of open spaces. SuDS shall be incorporated into all parts of a development (open spaces, roads, footpaths, private areas) as per the FCC SuDs Guidance Document – Green/ Blue Infrastructure for Development, as amended (Appendix 11), and shall ensure:

- *That the design of SuDS enhances the quality of open spaces and when included aspart of any open space provision, it must contribute in a significant and positive way to the design and quality of the open space.*
- *Open space areas shall not be dominated by SuDS features."*

m. **Development Plan Appendix 11 (SuDS Guidance Document)** states[41] *"Properly designed and located SuDS features can be incorporated within and can complement the amenity and aesthetic value of open*

[38] Fingal County Council Development Contribution Scheme 2021-2025 (under Section 48, Planning & Development Act 2000, as amended).
[39] The Appendix project list for "Community & Parks" is explicitly indicative only.
[40] §4.5.2.8, Table 14.6: Open Space Categories.
[41] Pg 8.

spaces. SuDS areas do not form part of the public open space provision, except where they contribute in a significant way to the design and quality of open space as defined by the Planning Authority."

n. **Development Plan Appendix 11, Appendix A Surface Water Management Design Statement** states:[42] *"Applicants shall be required to clearly demonstrate how the design makes a significant and positive contribution to the amenity value of the open space provision and shall state how the usability of these areas by the public has been addressed."*

Visual & Landscape

o. **Objective GINHO55 – Protection of Skylines -** Protect skylines and ridgelines from development.

p. **Objective GINHO56 – Visual Impact Assessments -** Require any necessary assessments, including visual impact assessments, to be prepared prior to approving development in highly sensitive areas.

q. **Objective GINHO57 – Development and Landscape -** Ensure development reflects and, where possible, reinforces the distinctiveness and sense of place of the landscape character types, including the retention of important features or characteristics, taking into account the various elements which contribute to their distinctiveness such as geology and landform, habitats, scenic quality, settlement pattern, historic heritage, local vernacular heritage, land-use and tranquillity.

Building Heights - LAP

27. As to **Local Area Plans**, the Development Plan states that Fingal "*will continue to implement the LAPs currently in place at the time of adoption of the Development Plan*" – including the LAP. It will do so "*in co-operation with relevant stakeholders, and actively seek the achievement of the specific objectives within*."[43]

28. The LAP, as to building heights, states **Objective RS 12** – "*Require buildings to conform to the heights set out in Figure 4D.2 Building Heights within the LAP lands*." **Figure 4D.2** identifies the Site as a "*Punctuation Node*" and for building height of 3 – 4 storeys. The accompanying text includes the following:

"… a central requirement of the LAP is that the new development be fundamentally urban. …. Broadly speaking, the LAP provides for increased densities and height around the village centre and the Racecourse Park edge falling to lower height and densities throughout the remainder of the development and in particular along the quiet streets. The height gradient across the site naturally corresponds to the density gradient and minimum and maximum heights (by floor) are established for all areas of the LAP lands.
A number of punctuation nodes are provided for at key junctions and identified strategic locations. Buildings at these points should acknowledge their strategic location within the Plan lands. They may be

[42] Pg 2.
[43] §2.4.1, Table 2.15, §3.5.5 & Objective SPQHO16.

slightly higher than their neighbours (but still within the heights parameters set out above) and/or have specific corner treatment which distinguishes them from other corner locations."[44]

Notably,

- the Site is on the southern boundary of the LAP Area. It is designated for meduim density of 42-50+ units per hectare.
- The "village centre" referred to is not an existing village centre. It is a new Baldoyle-Stapolin village centre envisaged by the LAP about 500m north of the Site, near Clongriffin train station.
- The Racecourse Park edge is some distance further north of the Site and east of the Site.[45]

STATUTE

29. **S.34(4)(d)** and s.**37(1)(b)** PDA 2000 combine to provide that the Commission may impose planning conditions requiring provision of open spaces.

30. **S.37(2)** PDA 2000 provides that

"(a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—
(i) the proposed development is of strategic or national importance,
(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

31. **S.177V** PDA 2000 provides for the Board's Appropriate Assessment, under Article 6.3 of the Habitats Directive, whether a proposed development would adversely affect the integrity of a European site and that it shall consent to the proposed development only having determined that it shall have such effect.

[44] §4D.4 Heights.
[45] See LAP Map at LAP Pg v. and Figure 4D.1 Preferred Density Masterplan.

FINGAL'S REFUSAL

32. On 16 February 2024, Fingal decided to refuse permission ("Fingal's Refusal") for 5 reasons as follows:

"(1) The site is within and adjoining a designated 'Highly Sensitive Landscape' as per the Fingal County Development Plan 2023-2029, wherein Objective GINHO57 aims to ensure development reflects, where possible, reinforces the distinctiveness and sense of place of the landscape character types, including retention of important features or characteristics taking into account settlement pattern and land use.
Having regard to the massing and height strategy proposed, the Planning Authority considers that the proposed development would be at variance with Objective GIHO57 of the FCC Development plan as it would result in an excessive scale, bulk and massing of development at the interface of Grange Road and Longfield Road, would fail to appropriately integrate with the surrounding landscape character and public realm, and would be overbearing, thus seriously injurious to the visual amenity of the area.

Furthermore, the design, layout, height, and massing of the proposed development is at variance compliance[46] with the development strategy for Baldoyle under Policy CSP22 whereby the unique identity of Baldoyle should be protected from overdevelopment,
and Specific Planning Policy Requirement 3 of the Urban Development and Building Heights Guidelines for Planning Authorities …….
The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

(2) Having regard to the overall, scale, height and design with transitions in height across the site it is considered that the proposed development would be visually dominant and intrusive on the skyline. The proposed development would therefore contravene Objective GINHO55 - Protection of Skylines of the Fingal Development Plan 2023-2029 and Objective GINHO56.

(3) Due to the inadequacy of the information provided with the application and contained within the NIS[47] screening assessment, particularly in relation to surface water drainage and assessment of designated sites that occur at the outfall location, the Planning Authority cannot be satisfied that the proposed development individually, or in combination with other plans and projects would not be likely to have a significant effect on nearby Natura sites.
In addition, the report failed to assess the potential for any nearby sites to be utilised as ex-situ feeding sites for SCIs of any designated site.
Given that the building is proposed to be more than double the height of any other nearby structure, it would also be appropriate that the Appropriate Assessment give some consideration to collision risk and provide evidence that this will not be an issue.

[46] Sic.
[47] Natura Impact Statement for purposes of Appropriate Assessment within the meaning of the Habitats Directive.

The proposed development would be contrary to the proper planning and sustainable development of the area, and in such circumstances the Planning Authority is precluded from granting permission.

(4) The proposed development by reason of excessive density and layout fails to provide sufficient car parking provision in accordance with the standards as set out in the Fingal Development Plan 2023-2029. The proposed car parking provision is below 'maximum' of the development standards and is unacceptable given the restricted nature of the site and its location adjacent to a school and existing residential area which is already experiencing inappropriate on street car parking.

(5) Having regard to the nature of proposed public open space to serve the development including a green roof garden and a creche playground and the majority of public open space being dominated by SuDS, it is considered that the applicant has failed to provide any public open space. The proposal would therefore materially contravene Objective DMS051 and Objective DMS052 of the Fingal Development Plan 2023-2029."[48]

33. Fingal's Refusal was informed by, inter alia, its planner's report, its ecologist's report and its Parks Report.[49] It will be seen that, while Fingal's Refusal recited various variances from and contraventions of the Development Plan, it identifies only one explicitly as a material contravention – the finding of failure to provide any public open space.

RONDESERE'S APPEAL, INSPECTOR'S REPORT & IMPUGNED DECISION

34. On 14 March 2024, Rondesere appealed Fingal's decision to the Commission – ("the Appeal"). It responds sequentially to each of Fingal's Refusal reasons. Inter alia it,

a. As to Reasons 1 and 2, disputes, with some force, the characterisation of the Site as within and adjoining a designated "Highly Sensitive Landscape" and as a Peripheral Site. It essentially reiterates its application reports as to height, effect on skyline, density, scale, massing and layout. It invokes the Compact Settlement Guidelines[50] as to increased building heights and densities and recites recent local permissions for high buildings, arguing that Fingal fails to understand the emerging character of the area. It disputes the assertion of contravention of Development Plan objective CSP22 and also invokes SPPR3 of the Height Guidelines.[51]

b. As to Reason 3, includes a revised NIS, dated March 2024 addressing, inter alia, risk of bird collisions with the building.

[48] Layout of text altered for exposition.
[49] Report of Fingal's Parks and Green Infrastructure Division dated 12 February 2024.
[50] Sustainable Residential Development and Compact Settlements Guidelines for Planning Authorities, 2024
[51] Specific Planning Policy Requirement 3 (within the meaning of Section 28 (1C) PDA 2000) of the Urban Development and Building Heights Guidelines for Planning Authorities 2018.

c. As to Reason 5, essentially reiterates its measurements and application reports as to open space provision encloses a drawing of the SuDS provision. It asserts that Fingal's Parks department "*ultimately determines that a contribution in lieu would be acceptable*" – i.e. in lieu of open space - and expresses itself happy to contribute.

35. I may as well say here that Rondesere's assertion that Fingal's Parks department regarded a financial contribution in lieu of open space "acceptable" is dubious at best. The primary, express and clear "Conclusion" of the Parks Report was that *"The proposed Public Open Space and play provision are not acceptable in their present form both quantitatively and qualitatively."* This is entirely unsurprising in view of their conclusion (whether correct or not) that "*No Public Open Space has been provided*." As is entirely normal in a departmental report of this kind, the authors appreciate that their advice against the grant of permission may not be taken by the decision-maker and that considerations wider than their particular concern may result in a decision contrary to their conclusion. So, prudently – indeed all but invariably - they provide for that eventuality – here by pointing, inter alia, to the need for a financial contribution in lieu. That should not have been spun as regarding a financial contribution as "acceptable". Or, at very least, it should have been cited in the explicit context of the primary conclusion that the proposed public open space and play provision was "*not acceptable*". Decontextualised, it was "spin".

36. Inter alia, Abbey Park and Fingal made submissions on the Appeal, requesting that Fingal's decision be upheld. Fingal considered, inter alia, that,

- It had concerns regarding height, scale, massing and density and no public open space being provided. The Proposed Development is unacceptable at this location and is overdevelopment of the Site, detrimental to the existing and future residential amenities of the Site and surrounding area.

- The Proposed Development contravenes Development Plan policy CSP22 to consolidate and protect the unique identity of Baldoyle – including by protection against overdevelopment. A development more akin to the surrounding density and heights would be more suitable.

- Buildings of the height, mass and scale proposed should be directed to sites around the train station as per the roll out of organised and granted development. This is an isolated and peripheral site where the Proposed Development would have a negative impact on existing surrounding development.

37. By Report dated 10 June 2024, the Commission's Inspector recommended the grant of permission subject to conditions – including, in particular, Condition 2 as follows for the omission of the 2nd floor level reducing the development to an 11-storey block and 104 apartments.

38. On 26 June 2024, the Commission met and decided the appeal. On 27 June 2024, the Commission issued a Direction recording its decision to grant permission generally in accordance with the Inspector's recommendation. On 3 July 2024, the Commission issued its Order (the Impugned Decision) granting permission for development as recommended by its Inspector and subject to 21 Conditions.

39. The Commission's Direction stated that it "*decided to grant permission generally in accordance with the Inspector's recommendation …*".

40. Under the heading "**Reasons and Considerations**" the Impugned Decision records that, in deciding to grant permission, the Commission had regard to, inter alia:

- *"(ii) the nature, scale and design of the proposed development which is consistent with the provisions of" the Development Plan.*
- *(iii) the Sustainable Residential Development and Compact Settlements Guidelines.*[52]
- *(iv) the Building Height Guidelines.*[53]
- *(vi) "Housing for All"*[54]
- *(vii) the pattern of existing and permitted development in the area;*
- *(viii) the submissions and observations received, and*
- *(ix) the report of the Planning Inspector."*

41. In **AA**,[55] the Commission

- screened in the Baldoyle Bay Special Area of Conservation, the Baldoyle Bay Special Protection Area, and the North Bull Island Special Protection Area.[56]
- considered the information before it sufficient to complete AA.
- adopted the Inspector's report as to AA.
- concuded beyond reasonable scientific doubt that the Proposed Development would not adversely affect the integrity of the European sites in view of their conservation objectives.

42. In **EIA**,[57] the Commission

- completed EIA screening.
- considered that Rondesere's EIA Screening Report identified and described adequately the effects of the Proposed Development on the environment.
- Had regard, inter alia, to
  - (i) the nature and scale of the Proposed Development, which is below the threshold in respect of Class 10(b)(i) and (iv);[58]
  - (ii) the Site's Development Plan zoning - 'RA';

[52] Sustainable Residential Development and Compact Settlements: Guidelines for Planning Authorities", issued by the Department of Housing, Local Government and Heritage in January 2024.
[53] Urban Development and Building Height, Guidelines for Planning Authorities", issued by the Department of Housing, Local Government and Heritage in December 2018.
[54] issued by the Department of Housing, Local Government and Heritage in September 2021.
[55] Appropriate Assessment within the meaning of the Habitats Directive.
[56] All European Sites within the meaning of the Habitats Directive.
[57] Environmental Impact Assessment within the meaning of the Environmental Impact Assessment Directive.
[58] Irish EIA law identifies types of project by reference to thresholds above which EIA is automatically required and below which EIA may be required on foot of EIA Screening. See PDR 2001, Schedule 5 Development Part 10 For The Purposes Of Article 93 (EIA Thresholds), 10. Infrastructure projects, (b) (i) Construction of more than 500 dwelling units. ……. (iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere.

- (iii) the existing use on the site and pattern of development in surrounding area.
- Considered significant effects on the environment unlikely and EIA and an EIAR unnecessary.

43. In its **Conclusions on Proper Planning and Sustainable Development** the Commission considered that, subject to compliance with the conditions imposed, the Proposed Development would, inter alia,

- constitute an acceptable residential density at this location,
- not seriously injure the residential or visual amenities of the area or of property in the vicinity,
- be acceptable in terms of urban design, height, and quantum of development,
- provide acceptable residential amenity for future occupants.

44. The following **Conditions** of the Impugned Decision are notable:

- 2. Requiring omission of the second-floor level reducing the development to an eleven-storey block and the provision of 104 apartment units.

- 19. The open spaces shall be developed for, and devoted to, public use. They shall be kept free of any development and shall not be gated. Reason: In order to ensure the development of the public open space areas and their continued use for this purpose.

- 21. This condition requires a developer's financial contribution to the planning authority in respect of public infrastructure and facilities benefiting development in the area of the planning authority in accordance Fingal's Development Contribution Scheme made under s.48 PDA 2000. Details of the application of the Scheme shall be agreed between Fingal and the developer or, in default of agreement, shall be determined by the Board. It also states *"The developer shall also pay a financial contribution to the planning authority in respect of a shortfall of public open space."* The reason given is that the PDA 2000 requires *"that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission".*

GROUND 2 – PLAYGROUND

CORE GROUND 2[59]

45. Core Ground 2 asserts that

> **The Commission**
>
> - **failed to consider and/or conclude that the Proposed Development was in non-compliance and/or material contravention of CDP Objective DMS068 and so acted in breach of sections 34(4) and 37(1)(b) PDA 2000.**

[59] I have altered the text/layout of the Core Grounds for clarity without altering meaning.

- **failed to address Fingal's conclusion and/or submission that the Proposed Development did not provide a playground as required by the Development Plan.**
- **failed to give adequate reasons in relation to the foregoing.**

PLAYGROUNDS - DEVELOPMENT PLAN & GUIDELINES

46. The Development Plan provides that

- All residential schemes exceeding 50 units should incorporate playgrounds at a rate of $4m^2$ per unit.[60]

- Playgrounds should cater for defined age groups and provide for a variety of facilities and play opportunities. [61]

- **Objective DMSO68 – Playground Facilities within Residential Development -** Provide appropriately scaled children's playground facilities within residential development. Playground facilities shall be provided at a rate of $4m^2$ per residential unit. All residential schemes in excess of 50 units shall incorporate playground facilities clearly delineated on the planning application drawings[62] and emarcated, built and completed, where feasible and appropriate, in advance of the sale of any units.

- **Objective DMSO69 – Requirements for Equipped Playgrounds -** Ensure that in the instance of an equipped playground being included as part of a specific facility, it shall occupy an area of no less than 0.02 hectares. A minimum of one piece of play equipment shall be provided for every 50 sq. m of playground.

47. I observe that, as a matter of fact, a playground may be in private open space (for example as in a commercial creche), in communal open space (open only to children resident in the development and, presumably, their "play dates") or in public open space (open to all children). The Development Plan, perhaps regrettably, does not specify requirements as between these three possibilities. In Rondesere's favour, though with some doubts, I will assume that a private playground can contribute to the provision required by the Development Plan.

48. It is agreed that, as to the permitted development of 104 units, Objective DMS068 required a playground of $416m^2$.

49. It is a bit difficult to know what to make of Objective DMSO69 – Requirements for Equipped Playgrounds. I should have thought that all playgrounds must be "equipped" in at least some degree. It is

[60] §14.13.3.2
[61] §14.13.3.2
[62] Emphasis added.

unclear what is meant by "in the instance of" and "specific facility" – save that they seem to imply that only some playgrounds fall within Objective DMSO69. My impression from Table 4.2,[63] in which the concept of an "Equipped Area for Play" appears, is that the concept of Equipped Playgrounds relates to their provision in public parks. I do not formally so find but am content to proceed on that premise. It follows that Abbey Park's reliance on the absence in the Proposed Development of one piece of play equipment for every 50m^2 of playground – 9 items in this case – does not avail it.

PROPOSED DEVELOPMENT

50. The Proposed Development includes a creche with capacity for "*up to*" 35 children[64] *"and associated, secure, open play area (c. 117.1 m^2)."*[65] It includes no other playground. The visual materials[66] submitted depict the "*secure, open play area"* as fenced off from the surrounding open space – as one would expect of a creche in which very young children require security and supervision. It is clear that the play area is a private open space for the children in the creche and will not be accessible (or at least not reliably so) to children not attending the commercial creche. Put another way, access to the play area will very probably be for a fee.

51. Leaving paid access aside and as between the Objective DMS068 requirement of 416m^2 of playground and the intended provision of 117.1m^2, there is a shortfall of 299m^2 .[67] That is a shortfall of 72%. Put another way,

- given the creche playground will be off limits to children not customers of the creche,
- assuming in Rondesere's favour that all children customers of the creche, live in the Proposed Development (that may or may not be the case - the provision of creche drop-off parking, which residents would not obviously need, may suggest that not all children customers of the creche will live in the Proposed Development),
- assuming the Development Plan requirement of 4m^2 per residential unit reflects Fingal's considered expert view of the number of children likely to reside in the Proposed Development.

It follows that about 72% of the children resident in the Proposed Development - about 90 children[68] - will be without an on-site playground.

[63] Table 4.2: Public Open Space and Play Space Hierarchy and Accessibility Standards.
[64] Rondesere Planning Report §5.9. Elsewhere in the planning application documents, the phrase "in the order of" rather than "up to" is used. However, Planning Report §5.9 addresses compliance with relevant guidelines and I do not think Rondesere can have the benefit of its own lack of clarity in this regard.
[65] See also Rondesere's Architectural and Urban Design Statement 7.2 | Residents Café and Creche.
[66] See graphics in Rondesere's Architectural and Urban Design Statement 4.1 | Design Overview, 6.1 | Compliance With The 12 Urban Design Criterion.
[67] Rounding 117.1 to 117.
[68] 35/28x72 = 90.

52. Though Rondesere's Planning Report and Statement of Consistency does recite Objective DMSO68, it does not identify, much less quantify or seek to justify, this shortfall.

FINGAL ON PLAYGROUND

53. Fingal's Parks Report (to which I have earlier referred) states that Rondesere had not provided the required play provision in accordance with Development Plan standards. It concluded that "The proposed Public Open Space and play provision are not acceptable in their present form both quantitatively and qualitatively." It advised that if permission is granted, the play provision shall be clearly shown on the agreed landscape plan. Any shortfall of play provision in accordance with Development Plan standards shall be dealt with by financial contribution.

54. As I read its report, Fingal's Parks Division,

- Considered the proposed play provision unacceptable.
- Whether correctly or not given the failure of the Development Plan to address the issue, it seems fair to infer, assumed that playground provision should be in public open space.
- Correctly considered that the proposed creche playground will not be public open space.

55. It should be said that while the Parks Division asserts that the Proposed Development materially contravenes Objectives DMS051 and DMS052, in that Rondesere failed to provide any public open space, inter alia, on the basis that the creche playground will not be public open space, and that the application should be refused on that account, it does not explicitly assert material contravention of Objective DMS068 as to playground provision.

56. Fingal's planner's report, adopted by Fingal's chief executive in Fingal's refusal, recited the Parks Report content, including that the proposed creche playground will not be in public open space, the developer has not provided the required play provision for this development in accordance with Development Plan standards, and the proposed Public Open Space and play provision are not acceptable in their present form both quantitatively and qualitatively.

57. As a result, Fingal refused permission, inter alia, for Reason 5, which I have set out above – material contravention of Objectives DMS051 and DMS052 as to provision of public open space.

58. I have the strong impression that Fingal

- elided the issues of playground provision and public open space provision on the assumption that the Development Plan required playground provision in public open space.

- considered the absence of a playground in public open space to be a material contravention of the Development Plan and so implicit in its Refusal Reason 5.

However, given

- the significance in the statutory scheme of the concept of material contravention, including for the limitation power of the Commission to overrule a planning authority's refusal for material contravention,
- that a planning decisionmaker must comprehensively state its reasons for refusal of permission,
- the fact that Fingal does not explicitly record material contravention of Objective DMS068 as to playground provision,

I consider that I must take it that Fingal did not find material contravention of Objective DMS068 as to playground provision. As **Nee**[69] and **Freeney**[70] hold, a refusal of permission for contravention of the development plan must be explicit and explicitly material to trigger S.37(2)(b) PDA 2000.

59. On that basis, and as to the issue of playground provision, S.37(2)(b) PDA 2000 does not constrain the Commission's power to grant permission in material contravention of the Development Plan as to playgrounds. Rather, S.37(2)(a) PDA 2000 permits it to do so. I will return to the implications of S.37(2)(a) PDA 2000 in due course.

INSPECTOR & COMMISSION ON PLAYGROUND

60. The Inspector's report[71]

- Lists relevant Development Plan objectives but not DMS068 as to playground provision - even though it clearly applies to the Proposed Development as it exceeds 50 units.
- Notes Fingal's Parks report as asserting "*Failure to provide required play provision*" and Fingal's refusal reason 5.
- Does not otherwise address the issue of playground provision.
- Indeed, it does not even recommend the condition for a financial contribution in lieu of the shortfall as recommended by Fingal's Parks report. It is difficult to see how, had the matter been considered at all, such a condition would not have been at least explicitly considered and, I suspect as a high probability, imposed.

61. The Impugned Decision does not further address playground provision.

[69] Nee v. An Bord Pleanála [2012] IEHC 532.
[70] Freeney v An Bord Pleanála [2024] IEHC 427 [2024] 7 JIC 0902.
[71] Inspector's report §6.4.1.

G2, PLAYGROUNDS - DISCUSSION & DECISION

62. The Commission asserts that, as Abbey Park did not raise the inadequacy of playground facilities in the planning process, they cannot do so now. Abbey Park reply that the Commission had an autonomous duty to address the issue. They also point out that Fingal had clearly deemed the playground provision unacceptable – or, at very least, its Parks department had. For reasons I have set out above as to the Commission's autonomous duties, I have no hesitation in accepting Abbey Park's reply. The provision of children's play facilities in new residential developments of apartments (which do not have gardens) is undoubtedly within the Commission's autonomous duty to concern itself with the protection of the residential conditions and amenities of those, usually as yet unidentified or unidentifiable, who will live in the dwellings proposed.

63. I have no hesitation either, in finding that, as to playground provision, the Proposed Development is in material contravention of Development Plan Objective DMS068. The law is clear, and, in fairness, was accepted by counsel for the Commission. Whether there is a material contravention is a matter of law for the Court. Objective DMS068 is not the type of development plan provision requiring the exercise of evaluative judgment by the Commission which merits curial deference by the court. The objective is clear, quantified and specific. As applied to the Proposed Development, it required a playground of 416m^2. The shortfall is of 72% of that figure and, as the provision offered is of a private play area only, roughly 90 children will be deprived of the playground which the Development Plan solemnly represented[72] to them they would get. And the 35 children who will get a playground will pay for the privilege. In that light, the Commission's submission that Abbey Park has not "*identified any prejudice whatsoever*" is as disheartening as it is brave.

64. The Commission argued that Fingal's failure to find a material contravention on the playground issue suggested that any contravention was not material. I have already expressed my doubts as to the proper interpretation of Fingal's decision in this regard – though holding in the Commission's favour that s.37(2)(a) PDA 2000 does not apply. The Commission added to this consideration the absence of objections on the playground issue in suggesting that the **Roughan**[73] test of materiality – the actuality or reasonable expectation of opposition by local interests – was failed. Barron J in Roughan proposed that if his test was failed the contravention was "*unlikely to be a material contravention*". He did not propose an acid test. In **Coolkill**[74] and in **Stapleton**[75] the view was expressed that, while the **Roughan** test *"undoubtedly remains a proper focus – often the primary focus",* it is doubtful that "*the local opposition test now circumscribes, if it was ever intended to circumscribe, the issue of materiality*". In Coolkill, it was thought, of the issue of materiality of contravention of bedroom size requirements, easy to conceive that such contraventions might in many cases excite, of themselves, little local opposition but nonetheless have considerable implications for the amenity of future residents. So too for on-site playgrounds. I have addressed above the question of the Commission's autonomous duty to protect the amenities of future residents inherently unlikely to participate in the planning process. Ultimately, counsel for the Commission came as far as to agree that the

[72] Byrne v Fingal County Council [2001] 4 IR 565, McKechnie J.
[73] Roughan v Clare County Council (unreported, High Court, Barron J, 18 December 1996).
[74] Concerned Residents of Coolkill v An Bord Pleanála & Midsal Homes [2025] IEHC 265.
[75] Stapleton v An Bord Pleanála & Savona [2025] IEHC 178 §77.

"the local opposition test" is "flexible" enough to encompass consideration of the amenities of such future residents. That suffices for present purposes – though I should make clear that I do not think the concession goes, in law, far enough. However, given the concession, I hold that the **Roughan** test of materiality is passed here.

65. Of course, such an omission might not be material – for example, in an apartment development adjacent a public park. But, absent analysis of alternative provision nearby, a 72% shortfall leaving about 90 children living in apartments with no on-site playground is material - is a case of res ipsa loquitur.

66. Of course, as has been seen, the Commission can grant permission in material contravention of the Development Plan. But it cannot do so inadvertently.[76] That is so for at least the following reasons. To do so would be a failure of its duty to:

- have regard to the development plan.

- autonomously consider the possibility of material contraventions of the development plan – **Murphy**.[77] In **Four Districts**[78] Humphreys J. held that, even if the issue is not raised in observations, there is an autonomous duty on the decision-maker to comply with the law regarding material contravention and that the Board must satisfy itself that a proposed development does not materially contravene the development plan.

- vindicate the status of the development plan as the Fingal's environmental contract with and solemn representation to its public (including future residents of permitted residential developments) that it will implement the plan in the development managenment process – **McGarry** and **Byrne**.[79] As McKechnie J put it, *"This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good."*

- recognise that "*While material contravention permissions by the Board are by no means unusual in practice, nonetheless as disapplications of democratically-adopted development plans, they are no small thing, are legally exceptional and should arise only for substantial reason*." – **Ballyboden TTG (Shannon Homes)**[80] and **Kimmage Dublin Residents**.[81]

- recognise that the exceptionality in law of permissions in material contravention is reflected in the words "*even if*" in s.37(2)(a) PDA 2000.

[76] The observation in Eglington Residents Association v. An Bord Pleanála [2025] IEHC 209 "That is not to say that the Board was required to expressly find that doing so would amount to a material contravention, nor was it required to apply section 37(2)(b)" appears to me to have been obiter.
[77] Murphy v. An Bord Pleanála [2024] IEHC 186.
[78] Four Districts Woodland Habitats v An Bord Pleanála [2023] IEHC 335.
[79] Attorney General (McGarry) v Sligo County Council [1991] 1 IR 99; Byrne v Fingal County Council [2001] 4 IR 565, McKechnie J.
[80] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.
[81] Kimmage Dublin Residents Alliance CLG v. An Board Pleanála [2024] IEHC 261.

- fulfil its duty to give reasons for granting permission in material contravention of the development plan. I reject the Commission's submission that the explicit duty imposed by s.37(2)(c) PDA 2000 to state reasons for the exercise of the Commission's power under s.37(2)(b) PDA 2000, implicitly absolves it of the duty to give reasons for the exercise of the Commission's power under s.37(2)(a) PDA 2000. Explicit and particular statutory duty to give reasons apart, the Commission has a general duty to state the main reasons on the main issues for its decision. The requirement of adequate reasons "*arises as a matter of justice*" and the underlying objective is fairness - **Weston**[82] and **Grassridge**.[83] Given the status of the development plan as I have briefly cited it above and the legal exceptionality of permission in material contravention it will, at very least usually, be a main issue on which reasons must be given - **Murphy**.[84]

67. This view seems of a piece with that of Woulfe J in **Sherwin**.[85] As to questions of material contravention for the Court and whatever standard of judicial review should apply, He said:

> *"… the first question must be the nature of the determination (if any) actually made by the decision-maker, "as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan", (per Costello J. in SWR[86]), in circumstances where there has been the required focus by the decision-maker on the specific provision of the plan allegedly materially contravened. In my opinion that question is the crucial starting point, …."*

68. Later, Woulfe J said: *"It seems to me that the details of this planning application, and the materials before the Inspector and the Board, also required a focus by the Board on the policy set out in s. 16.10.15 of the development plan …"*[87] So, Woulfe J considered that the details of a planning application and the materials to hand could require focus on particular development plan content, with a view to considering the possibility of its material contravention. I have little difficulty, as to a planning application for a multi-storey apartment development, in applying that logic as requiring focus on Development Plan provisions as to the requirement of on-site playgrounds in such developments.

69. One may add reference to **Eglinton**,[88] in which Farrell J said: *"The fact that the Board may grant permission in material contravention of the Plan …….*[89] *does not lessen its obligation to have regard to all relevant considerations, which includes relevant policies and objectives in the Plan."*

70. The Commission, by non-evidentiary (though without formal objection) deploying of Google maps of the general area, sought to lure me into a discretionary refusal of relief on the basis of other green areas and

[82] Weston v An Bord Pleanála [2010] IEHC 255.
[83] Grassridge v DLRCC [2024] IEHC 669 §59 and cases cited therein.
[84] Murphy v. An Bord Pleanála [2024] IEHC 186.
[85] Sherwin v An Bord Pleanála [2024] IESC 13.
[86] South-West Regional Shopping Centre Promotion *Association Limited v. An Bord Pleanála* [2016] IEHC 84. In that case, Costello J. stated that, in deciding a planning application, "the Board must make its own determination as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan"
[87] §116.
[88] Eglington Residents Association v. An Bord Pleanála & Red Rock Donnybrook [2025] IEHC 209.
[89] I omit the words "without complying with section 34(2)(b)" as the proposition applies irrespective whether s.34(2)(b) or s.34(2)(a) PDA 2000 applies.

playgrounds around and about. In effect, and perhaps ironically given its usual and proper insistence that planning judgements are for it and not for the Courts, the Commission invited me to make an evaluative planning judgement as to the adequacy of those other areas as a substitute for on-site playground provision. Abbey Park objected, though not to the maps, to the invitation. Rightly so. Such a judgement is for the Commission to make – not for a judge. The Commission submitted that only one observation to it which mentioned playground suggested that there are already playgrounds in the area. I am satisfied that this is a decontextualised account of that observation, the gravamen of which clearly was (whether one agrees or not) that "*the time has come to call a halt to any further development in the Baldoyle area. The infrastructure is already groaning …"* and which nowhere suggested that the playgrounds mentioned were in such range of the Site as would render them an acceptable substitute for on-site provision.

71. In any event, as discussed with counsel at trial, had I accepted the invitation, I confess that I would have been far from convinced that, as to young children, playgrounds at some distance and across, likely busy, roads are an adequate substitute for the casual, easy but important convenience of an on-site playground. Of course, the world is not ideal. On-site playgrounds may be unattainable in particular cases – perhaps on small or infill sites in urban locations. I hope I am not too cynical in imagining that at least some of those who are sanguine as to such circumstances may not, in their childhoods or in parenting their children, have had to experience them. But, my views on that don't matter - the Development Plan clearly proceeds from the view that on-site playgrounds for children in large multi-unit residential developments are not a luxury.

72. To the Commission's observation that by s.37(1)(a) PDA 2000 it could have granted permission despite material contravention of Objective DMS068, the answer is that it could have but did not. Nor did it, of its autonomous duty, but in any event in light of Fingal's Parks Report (which it noted but did not address), address the playground issue. It follows that the Commission failed to give adequate reasons on that issue. It follows that I will quash the Impugned Decision as unlawful as to playground provision and remit it for the Board's reconsideration.

OTHER GROUNDS

73. As I will quash the Impugned Decision Ground 2 as to playground provision, I do not need to decide the other grounds. I will limit myself to the following.

GROUND 8 - AA

74. I am quite unconvinced by Ground 8 as to AA of the risk of bird collisions with the transparent glazing of the Proposed Development - asserting that Rondesere failed to do a bird survey to quantify the

risk. I reject Abbey Park's submission that Fingal's ecologist's call[90] for "evidence" that Brent Geese collisions will not be an issue was not met in Rondesere's Revised NIS.[91] In my view, it is clear that the Revised NIS assumed the risk and addressed it via mitigation. It stated[92]:

> *"As the proposed development includes come[93] glass facades, the potential for bird collisions will need to be reduced for the development. The site is located between the Baldoyle Bay SPA and the North Bull Island SPA, and Brent Geese are known to travel between them and ex-situ feeding sites nearby. The following measures will be implemented regarding bird collisions.*
>
> *Based off[94] research on Bird-safe Building Guidelines developed under the Project Birdsafe initiative by Audubon Minnesota in the USA, numerous mitigation measures were considered to ensure the design of the building would minimise the potential for negative impacts upon bird populations. The following were considered the most viable solutions :*
> *• The glass facades on the building will be comprised of UV treated glass or films. Bird species can see light in a visible spectrum greater than humans and UV is visible as a separate colour . Glass can be developed with integral patterns in the ultra-violet range that will be visible to birds and not humans. A UV pattern on the glass will prevent the birds from seeing the glass as transparent and trying to pass through it.*
> *• Shading devices, screens, and other physical barriers can be installed to reduce reflectivity and birds' access to glass .*
> *The designers of the site have deemed the ultra-violet treatment of the windows the best solution on how to minimise the potential for bird collisions without sacrificing the aesthetic of the site."*

75. The Revised NIS Stated "*Findings of no significant effects*"[95] which included the following:

> *"Describe how the project is likely to affect the Natura 2000 site: Bird collisions by birds moving between Baldoyle Bay SPA and North Bull Island SPA*
> *Explain why these effects are not considered significant: The strict mitigation measures outlined in this plan must be fully enforced to ensure that these impacts will not occur."*

76. In my view, this conclusion sufficed in AA. The onus of proof of inadequacy of evaluative judgement in AA is on Abbey Park. Had it adduced expert evidence impugning the AA as to the risk of bird collisions, the position might have been different. But it didn't. Nor is error apparent on the face of the materials before the Commission. The Commission was entitled to and did conclude beyond reasonable scientific doubt that the efficacy of UV patterning of glazing, rendering it non-transparent to flying birds, would minimise risk of bird collisions such that there will be no risk to the integrity of European Sites having regard to their conservation objectives.

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[90] Report 12 February 2024.
[91] Revised Natura Impact Statement, March 2024.
[92] Revised NIS §8.3.
[93] Sic.
[94] Sic.
[95] Revised NIS §9.

77. Accordingly, I reject Ground 8 as to AA.

GROUND 7 – EIA AS TO HEIGHT

78. Core Ground 7 asserts that the Commission,

- erred in EIA screening in considering that the Proposed Development did not require EIA and/or
- failed to give adequate reasons to justify that conclusion.
- irrationally breached Article 4(4) and (5) of the EIA Directive and/or Article 109(2) and Schedule 7 PDR 2001.[96]

79. The Proposed Development will extend to up to 11 storeys in a locale, at least until recently, characterised by development of up to 5 storeys. Fingal's planner's report describes the "*surrounding context*" as comprising mid to low density residential development ranging in height from 2-6 storeys. Fingal's Refusal described the Proposed Development as more than *"double the height of any other nearby structure".*

80. The Inspector described the location as follows:

> *"The site is currently in use as a commercial storage yard (builders yard) with an existing warehouse structure on site and open yard area. The site is defined by Grange Road along its southern boundary, Longfield Road along its eastern boundary and Myrtle Road along its northern boundary. Adjoining uses include a school premises on the site to the west (three-storeys). To the north is a housing development consisting of a mixture of three-storey townhouses and five storey apartment blocks. To the east on the opposite side of Longfield Road is small park and beyond it is a car sales showroom."*

81. In reciting the local planning history, the Inspector identified permissions for high buildings in the general vicinity – of up to 8, 16 and 17 storeys respectively.[97] But they do not feature in his analysis. Nothing is said of them in EIA and what is said as to height in the EIA Screening Determination[98] appended to his report is as follows:

[96] Planning and Development Regulations 2001 as amended.
[97] See text and graphics in Rondesere's Architectural and Urban Design Statement, 2.2 | Neighbourhood Context, 5.5 | Neighbourhood Height Context and 5.6 | Comparison with Relevant Developments.
[98] Inspector's Report – Appendix A.

Question	Response: Yes/ No/ Uncertain	Where relevant, briefly describe the characteristics of impacts (i.e. the nature and extent) …	Is this likely to result in significant effects on the environment? Yes/ No/Uncertain
1.1 Is the project significantly different in character or scale to the existing surrounding or environment?	No	The proposed development consists of a 12-storey apartment blocks to the west of Baldoyle Road with adjoining developments comprising mainly 3-5 storey development. The development is not regarded as being of a scale or character significantly at odds with the surrounding pattern of development.	No

82. With some sang froid, counsel for the Commission described the wording in the third column of this table as merely "sub-optimal" - suggesting comparison with the use of that phrase in cases such as **Duffy**.[99] He also called in aid the undoubted proposition that "significance", for EIA purposes, is not a hard-edged concept and that decision-makers have an appreciable margin of appreciation as to what is and what is not a significant effect for EIA purposes – the concept of significance of effect was reviewed in **MRRA**[100] and **Shadowmill**.[101] I accept that it is possible that, on a consideration of all the facts, including the permitted high developments at some greater remove from the Site than its immediate surroundings, the Commission might properly conclude that any effect, by reason of the height of the Proposed Development, would not be significant for EIA purposes. However, that margin of appreciation presupposes a correct identification of and analysis of the facts. What the Commission may not do is rewrite in judicial review the Impugned Decision it in fact made on the basis that the materials before it would have supported a rewritten decision. What matters is not the decision the Commission could have made but the decision it did make. As was said in **Four Districts**, judicial review is a process of examining the decision that was in fact made, not writing a new one. In this regard, see also **Clane Community Council**.[102]

83. Here, had the Inspector omitted the words "*comprising mainly 3-5 storey development*" a different position might have arisen. But he pinned his colours to the mast – clearly intending to convey to the reader the general character, as to building height, of the environs of the Site.

84. That a 12-storey building, more or less double the height of the adjoining buildings, is not, as to height, of a scale or character significantly at odds with the surrounding pattern of development is hardly

[99] Duffy v. An Bord Pleanála [2025] IEHC 715.
[100] Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318.
[101] Shadowmill Limited v An Bord Pleanála [2023] IEHC 157 §55 et seq.
[102] Clane Community Council v. An Bord Pleanála [2023] IEHC 467.

the most self-explanatory of conclusions. Though as the Commission, though the Inspector had not recommended it, directed the reduction of the tower to 11 storeys, they clearly considered the height issue.

85. As I will quash the decision on Ground 2, I need not decide Ground 3. But I respectfully commend careful attention to the issue on remittal – at very least as to adequacy of reasons.

GROUND 3 – HEIGHT

86. Core Ground 3 asserts that the Commission

- **Failed to consider that the Proposed Development was not in accordance with the Development Plan as to height on the site and so acted in breach of sections 34(4) and 37(1)(b) PDA 2000 Act**

- **in particular failed to consider and/or give adequate reasons as to consideration of**
  - **Development Plan Objectives GINHO56 and GINHO57 and/or Policy CSP22**
  - **Development Plan §3.5.5 as it incorporated the Baldoyle LAP which specified a maximum of 3 – 4 storeys on the site**

- **erred in its reliance on §3.2 of the Height Guidelines and/or gave inadequate reasons and/or consideration as to the application of the same.**

87. I do not decide Ground 3. However, two findings may assist the Commission on remittal. First, I reject Abbey Park's reliance on Development Plan **Policy CSP22**. It appears to me to be the type of generally worded development plan policy to material contravention of which the test applicable is of irrationality – for reasons identified in **Jennings**[103] and **Sherwin**.[104]

88. Second, I refer to the issue of application of the Local Area Plan as to height on this Site as a matter of proper interpretation of the Development Plan which incorporated the LAP. Of course, lawful regard to/consideration of a document presupposes its correct interpretation and its misinterpretation is an error of law and prevents lawful regard – **Redmond**,[105] **Foran**,[106] **Coyne**[107] and **Eglinton**.[108]

[103] Jennings v. An Bord Pleanála [2023] IEHC 14.
[104] Sherwin v. An Bord Pleanála [2024] IESC 13.
[105] Redmond v. An Bord Pleanála [2020] IEHC 151 "A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood."
[106] Foran v An Coimisiún Pleanála & Glenveagh [2026] IEHC 23.
[107] §20, citing Redmond; Killegland Estates Limited v Meath County Council [2022] IEHC 393, regard "presupposes a correct understanding". Tesco Stores Limited v Dundee City Council [2012] UKSC 13 "a planning authority must proceed upon a proper understanding of the development plan … the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them".
[108] Eglington Residents Association v. An Bord Pleanála [2025] IEHC 209.

89. I was initially attracted by Abbey Park's argument. But I have concluded that it is wrong. The Inspector's report,[109]

- Records that the Development Plan[110] states that the Council will continue to implement the LAPs in place at the time of adoption of the Development Plan – including the Baldoyle Stapolin Local Area Plan of May 2013 - which he considered to be incorporated in the Development Plan.

- Records that the LAP[111] identifies the Site (I add, the Site specifically and by Figure 4D.2.)
  - as suitable for a density of 42-50+ and a height of 3-4 storeys. (I add that LAP Objective RS 12 imperatively states "*Require buildings to conform to the heights set out in Figure 4D.2 Building Heights within the LAP lands*." It is in that drawing that the height of 3-4 storeys is stipulated.
  - as a "Punctuation Node" site which would allow for higher than adjoining development. (I add that the LAP states:
    - *"A number of punctuation nodes are provided for at key junctions and identified strategic locations. Buildings at these points should acknowledge their strategic location within the Plan lands."*
    - *"They may be slightly higher than their neighbours (but still within the heights parameters set out above) and/or have specific corner treatment which distinguishes them from other corner locations"*.

    (Why the Inspector omitted the word "slightly" I cannot say. But it seems regrettable.)

- Notwithstanding the incorporation of the LAP in the Development Plan "*I would consider that Development Plan policy takes precedent in terms of building height and overall impact and has been informed by more up-to-date national policy including the Urban Development and Building Heights Guidelines."*

90. First, I will explain why I was attracted to Abbey Park' argument. I can well see that the Inspector might have considered the LAP of 2013, as to density and height, as outdated. I can take judicial notice that planning policy has generally favoured greater height of more recent times. But that does not entitle the Inspector to rewrite the Plan. The Inspector invokes general provisions of "*Development Plan policy"* as overriding a highly particular LAP provision specific not merely to the LAP area but, quite specifically, to this particular Site. No doubt the **XJS**[112] interpreter of the Development Plan – the reasonable, intelligent, informed layperson – would not reach for the phrase "*generalia specialibus not derogant."* But he or she would readily understand, agree with and apply the concept which underlies it – that a particular provision prevails over a general provision. Often, even Latin expresses common-sense. In **4 Districts**[113] Humphreys J invoked the principle in observing that *"Tension between two provisions of a development plan is almost inevitable because plans seek multiple objectives, ..."* He said: "*the best view of the law is that any tension between a general clause and a specific provision is best resolved by favouring the specific provision.*" He

[109] Inspector's report §9.4.2 & 6.4.2.
[110] §3.5.5.
[111] Section 4D and Figure 4D.2 Building Heights at p38.
[112] In re XJS Investments Ltd [1986] IR 750.
[113] Four Districts Woodland Habitat Group v An Bord Pleanála & Romeville [2023] IEHC 335.

applied the principle to development plan interpretation in **Flannery**.[114] In **Mulloy**,[115] on an issue of interpretation of planning guidelines – also interpreted on XJS principles – a similar view was taken of the approach of reasonable, intelligent, informed layperson to tensions of this kind.

91. However the phrase "*generalia specialibus not derogant*" is not a rule. It is an interpretive principle or aid. And in a proper case, it yields to the words of the document itself. That is so here. The Development Plan as to Building Heights[116] reads as follows:

> *"National policies with respect to the achievement of consolidation, increased densities and long-term strategic development are supported by guidance on building height including Urban Development and Building Heights – Guidelines for Planning Authorities 2018. The Guidelines require that increased building height be considered in all urban contexts, subject to ensuring the highest standards of urban design, architectural quality and place-making outcomes. Applications for development proposals which include buildings of increased height and density should clearly demonstrate the suitability and positive impacts of the proposal with reference to the receiving environment, including justification for the height strategy proposed. This includes a demonstration of compliance with the 4 no. Specific Planning Policy Requirements (SPPR's) contained within the Guidelines and summarised below."*

92. Development Plan Table 14.5 follows. It is headed "*Urban Development and Building Heights – Guidelines for Planning Authorities 2018 Specific Planning Policy Requirements*". It includes the following:

SPPR 3	Where a development proposal complies with Guidance criteria and the assessment of the Planning Authority concurs, the Planning Authority may approve such development, <u>even where specific objectives of the relevant</u> development plan or <u>local area plan may indicate otherwise,</u> taking account of the wider strategic and national policy parameters set out in the National Planning Framework. Undertake a review of the existing planning schemes to ensure that the Building Heights criteria are fully reflected in the scheme.[117]

93. It should be said that the text above summarises SPPR 3 – which, as relevant reads verbatim as follows:

> *"It is a specific planning policy requirement that where;*
> *(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above;*
> *and*
> *2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;*

[114] Flannery v An Bord Pleanála & Templeogue Synge Street GAA Club [2022] IEHC 83 §126 & 127.
[115] Mulloy v ABP & Knockrabo Investments 2024 IEHC 86 §153.
[116] §14.5.3.
[117] Emphases added.

then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."

94. I leave aside questions of statutory obligation to comply with SPPR 3 if the "criteria"[118] are satisfied. Treating the issue solely as one of interpretation of the Development Plan, it seems to me that the words *"even where specific objectives of the relevant …. local area plan may indicate otherwise"* displace the operation of the principle "*generalia specialibus not derogant*" such that, if SPPR3 permits greater height on the Site, the LAP does not limit it.

95. I refrain from here deciding whether, by reference to those criteria, SPPR3 permits greater height on the Site as it is not necessary to do so to decide the case.

GROUND 1 – PUBLIC OPEN SPACE

96. For similar reasons, I refrain from here deciding Ground 1. It asserts that the Impugned Decision erroneously calculated the public open space required by the Development Plan, in particular given the presence of SuDS in proffered open space, by

- failing to take into account relevant considerations and so acted in breach of s.34(4) and 37(1)(b) PDA 2000;
- giving inadequate reasons to justify the shortfall in public open space;
- failing to justify a material contravention of Objectives DMS051 and DMS052 by reference to reasons under section 37(2)(b) PDA 2000;
- failing to give adequate reasons to justify a financial contribution in accordance with Objective DMS053.

97. However, I will say something of the issue of financial contributions in lieu of open space. In truth, there was little disagreement between the parties in this regard. But it seems worth recording the position. Development Plan Objective DMSO53 does not seem to me to be at all optimally worded. But it must be accorded meaning. The following may assist the Commission on remittal.

98. Interpreting Development Plan Objective DMSO53 on a workable basis, the Fingal Development Contribution Scheme assists. The relevant content is entitled "Open Space Shortfall" and states that that the Council may determine a financial contribution in lieu of all or part of the open space requirement for a particular development.

99. As to what the open space requirement for a particular residential development actually is, Table 14.12 is also unclear. It states two bases of calculation – one based on site area which differs as to different

[118] Set out in §3.2 of the Guidelines.

classes of residential development and another "overall" standard of "2.5 hectares per 1000 population". I presume the latter applies to all classes of residential development. Presumably, in any given case and depending on density, the overall standard or the site area standard may produce the higher requirement. But we are not told which is to prevail – the higher or the lower. Interpreting from the perspective of public interest in residential amenity and in proper planning and sustainable development, I infer that whichever is the higher applies.

100. For the site area standard, Table 14.12 contradistinguishes residential development on "greenfield sites/LAP lands" from that on "infill/brownfield sites". But it does not tell us how to address the case here – of an infill/brownfield site on LAP lands. Interpreting from the same perspective of public interest, I infer that the higher, LAP, requirement applies. This also seems consistent with the view that LAPs are generally more specific and involve more detailed and particular policy creation and designation of site character than does the more generic classification of "infill/brownfield sites".

101. Finally, the phrase below – outside - the Table "(Target minimum amount of 15% except in cases where the developer can demonstrate that this is not possible, in which case the 12% to 15% range will apply.) is, first, unfortunate. The phrase "target minimum" is oxymoronic. That said, it seems to me to be capable of referring only to new residential development on greenfield sites/LAP lands. That is so as to target 15% on new residential development on infill/brownfield sites would contradict the 12% stipulation and "the 12% to 15% range" is stated only as to new residential development on greenfield sites/LAP lands.

102. On the foregoing bases, Table 14.12 can be read as follows:

Residential Land use	**Minimum public open space standards** (whichever of the population-based and area-based standards yields the higher requirement, it will apply)
Overall standard.	2.5 hectares per 1000 population
New residential development on greenfield sites/LAP lands	15% of site area (except where the developer demonstrates that 15% is not possible, in which case a 12% to 15% range will apply.)
New residential development on infill/brownfield sites – save on LAP lands.	12% of site area

103. In this case the calculations work as follows

- Population-based requirement - 0.45375 ha
- Area-based requirement at 15% x 0.45ha - 0.0675 ha
- Actual requirement - 0.45375 ha

104. Objective DMSO53 also stipulates that the financial contribution is to allow provision for the acquisition of additional open space or the upgrade of existing parks and open spaces subject to these additional facilities meeting the standards specified in Table 14.11. Abbey Park argues that this implies that, in exercising its discretion to take a financial contribution in lieu of open space, the Council must have specific additional facilities at least in prospect. In principle, I can see Abbey Park's point - it may be little consolation to the eventual residents (a cohort not usually heard in planning applications and whose protection is the decision-maker's particular responsibility) with no or inadequate on-site recourse to public open space to know that the Council is in funds to provide such facilities in its large functional area. For all that, I ultimately reject Abbey Park's point. I agree with the Commission that there is no basis discernible in law for a specific requirement, informing the exercise of the discretion to accept a financial contribution, of a prospect of the Council's acquiring and developing public open space nearby. Indeed, Abbey Park didn't really formulate a clear, much less a workable, proposition to that end. How reliable must the prospect be? How near? How big? A decision to take a contribution in lieu is clearly multi-factorial and evaluative. The resident may have access to ample communal open space. The public may already have access to adequate open space nearby. Site-specific constraints may apply. Parking requirements may intrude. Density and site-use efficiency may be a priority in the cause of compact development. These are just examples. Planning is often a trade-off between desiderata and of apples against oranges.

105. All that said, contribution in lieu schemes cannot become a default means of allowing planning applicants to, as it were, buy their way out of required public space provision. The exercise of the discretion must be informed by explicit considerations of proper planning and sustainable development and where it is a main issue decision-makers must give their main reasons accordingly. It follows that developers would be (at least) well-advised to make their case for contribution in lieu by reference to explicit considerations of proper planning and sustainable development. A mere expression of willingness to make contribution in lieu does not address the issue the decision-maker must decide. Indeed, mere willingness is irrelevant in planning terms – it is not a proper planning consideration.

106. I reject the plea that the reason given for Condition 21 of the Impugned Decision is in error on the basis that a condition for financial contribution in lieu of public open space is not based on s.48 PDA 2000. S.48 authorises schemes requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or is intended to be provided, by or on behalf of a local authority. Open space, recreational and community facilities and amenities and landscaping works fall within the concept of public infrastructure and facilities – s.48(17) PDA 2000. Fingal's s.48 Scheme specifically provides for financial contributions in lieu of public open space and that they will be used for the provision of open space, recreational and community facilities and amenities and landscaping works. That Scheme has not been challenged as unlawful. I see nothing erroneous in the reason given for Condition 21. And if I am wrong and in the absence of a challenge to the very power to impose a financial contribution in lieu of public open space, certiorari by reference to the reason for Condition 21 would be entirely disproportionate.

107. Finally, I observe that Rondesere's proffered public open space[119] included SuDS facilities – inter alia a dry detention basin and a bioretention raingarden.[120] I will not, as I need not, decide the issues whether SuDS "dominates" the public open space, as Fingal found, whether the Commission disagreed as to such domination and whether, if it did dominate, the Commission's view that the SuDS provision in the public ,open space was unavoidable on this Site amounted to a finding of material contravention of the Development Plan. The Commission can consider those issues on remittal. I merely note that Rondesere

- provides a graphic[121] to illustrate that most of the basin is available for recreation during most rainfall events – "*day-to-day*" rainfall. Presumably, this was provided to address the Development Plan requirement to state "*how the usability of these areas by the public has been addressed."*[122]
- describes and illustrates a bioretention raingarden in terms suggestive of aesthetic as well as practical SuDS virtues.[123]

CONCLUSION

108. The Impugned Decision will be quashed on Ground 2 as to playground provision and remitted to the Commission's reconsideration. While I have decided certain elements of the other grounds, I am not to be taken as having completely decided any of them, save for my rejection of Ground 8 as to AA. I provisionally consider that Abbey Park should have their costs. I will list the matter for mention and for final orders on 6 July 2026.

David Holland
16/6/26

[119] Green Infrastructure Plan, P.10 SuDS in Public Open Space
[120] Green Infrastructure Plan, P.11 states that Raingardens are designed to collect and manage reasonably clean water from roofs and low pollution risk drives and pathways. They are generally installed where community or private maintenance is available to upkeep these attractive features. Key aspects of raingarden design include: 1. gentle side slopes with water collected at the surface; 2. a free-draining soil, sometimes with an underdrain to avoid permanent wetness; 3. a minimum of 450mm improved topsoil, with up to 20% coarse compost; 4. garden plants that can tolerate occasional submersion and wet soil – this includes most garden plants other than those particularly adapted to dry conditions; 5. an overflow in case of heavy rain or impeded drainage.
[121] Green Infrastructure Plan pg. 10.
[122] Development Plan Appendix 11, Appendix A Surface Water Management Design Statement Pg 2.
[123] Green Infrastructure Plan pg. 11.