

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2022] IEHC 329**

**[Record No: 2020/616 JR]**

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

**BETWEEN:**

**BARFORD HOLDINGS LIMITED**

**APPLICANT**

**AND**

**FINGAL COUNTY COUNCIL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 26<sup>th</sup> day of April, 2022**

**INTRODUCTION**

1. The applicant challenges a decision of the respondent made on the 20<sup>th</sup> of July 2020 and recorded in the ‘Record of Executive Business and Chief Executive’s Order’ Order No. PF/0930/20 and Register Reference F14/0109/E1, not to extend the duration of planning permission register reference F14/0109 (hereinafter the “Decision”).

2. The Decision was consequent upon an application made by the applicant on the 29<sup>th</sup> of May 2020, pursuant to s. 42(1)(a)(ii) of the Planning and Development Act, 2000 (as amended) (the “PDA”), seeking to extend the duration of planning permission register reference F14/0109 (the “Planning Permission”) to the 11<sup>th</sup> of September 2025.

3. In accordance with s. 42(1)(ii), the respondent was required to extend the duration of the Planning Permission upon compliance with prescribed conditions including, in material part, if it were “*satisfied*” that “*there have been no significant changes in the development objectives in the development plan ... for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area*” (s. 42 PDA was amended on the 9<sup>th</sup> of September 2021 and no longer includes section 42(1)(a)(ii) II).

4. The core issue for determination is whether the respondent erred in law in its interpretation and application of s. 42(1)(a)(ii)(II) and consequent upon this error of law failed to otherwise determine the application in accordance with law. Specifically, the question which I must determine is whether the respondent is entitled to have regard to the relevant local area plan (being the Baldoyle-Stapolin Local Area Plan for the time being in force- in considering whether or not there have been “*significant changes in the development objectives of the development plan*” when determining an application under section 42(1)(ii) of the PDA.

## **FACTUAL BACKGROUND**

5. The applicant is a company engaged in the business of development. It is the owner of lands at Main Street / Coast Road, Baldoyle, Dublin 13, where the Baldoyle Racecourse was formerly located (the “Lands”).

6. On the 24<sup>th</sup> of February 2011 the applicant was granted planning permission for the development of a residential retirement care facility comprising 150 en suite bedrooms, treatment rooms and ancillary facilities together with a hotel (hereinafter “the Development”).

7. The grant of permission was the subject of an appeal to An Bord Pleanála (hereinafter “ABP”) and on the 20<sup>th</sup> of April 2015, ABP granted the Planning Permission

(ABP Ref. No. PL 06 F.243832) (Reg ref 14A/0109). The Development for which Planning Permission was granted was described in the public notices and on large plans and particulars as follows:

*“Permission Consequent on the Grant of Planning Permission (Reg. Ref. No. FLA/0328) for (i) part 2, part three-storey retirement home (total gross area of 10,157 m<sup>2</sup>) with respite care including 150 No. en-suite bedrooms, 6 no. consultation outpatient treatment rooms, physiotherapist room, reception and main offices and ancillary patient facilities such as common room, quiet rooms, 2 no. libraries, lounges, roof terraces etc; (ii) a part two, part three storey with basement hotel (total gross floor area including basement areas 14,081 m<sup>2</sup>), comprising 130 no. Bedroom and 16 no. suites, reception, bar and café, restaurant/dining area, a conference/banquet room (c. 720 m<sup>2</sup>), a business centre incl. 8 no. meeting rooms, and a leisure centre (c. 2,500 m<sup>2</sup>), including 25 m swimming pool and gymnasium, spa and beauty treatment studios; hotel kitchen, staff areas, cold and dry storage, plant etc. all at basement level; (iii) 303 no. car parking spaces (226 at surface level and 77 at basement level under the hotel only); (iv) Vehicular access at Red Arches Road, landscaping and all ancillary site development works on 5.1 hectares site at the site of the Strands, Stables and Parade Ring of the former Baldoyle Racecourse, Main Street/Coast Road, Dublin 13.”*

**8.** The Planning Permission was due to expire on the 29<sup>th</sup> of July, 2020. At the time that the Planning Permission was granted in 2015, the Final County Development Plan 2011-2017 was in force (hereinafter “the 2017 Development Plan”), which included Specific Local Objective 469 (hereinafter “SLO 469”). The subject lands were zoned High Amenity (hereinafter “HA”). SLO 469 stated:

*“Provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats Directive.”*

9. When the Planning Permission was granted the Baldoyle-Stapolin LAP 2013 (hereinafter “the 2013 LAP”) was in force for the area where the Lands were located. It included several references to the proposed retirement village/hotel development (more fully set out at para. 13 below) and referred to “Map Objective 4” as follows:

*“Provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats Directive as per Local Objective 469 in the 2011-2017 Fingal Development Plan or as may be revised in any future Development Plan.”*

10. In accordance with the provisions of ss. 40(3), 251 and 251A of the PDA the Planning Permission was due to expire on the 29<sup>th</sup> of July, 2020.

11. During the currency of the Planning Permission, the Fingal Development Plan 2017 – 23 (the “2023 Development Plan”) was made by the elected members on the 16<sup>th</sup> of February 2017 and came into effect four weeks later, on the 16<sup>th</sup> of March 2017. While the zoning for the subject lands remained unchanged, SLO 469 was no longer included in the 2023 Development Plan, although no record has been produced to evidence any discussion or debate in this regard. Objective Z02 of the 2023 Development Plan states as an objective *“Prepare and implement Local Area Plans where required.”* The 2023 Development Plan further provided a number of special objectives for Baldoyle, where the Lands are located, including in relevant part ‘Objective 3 Baldoyle’. ‘Objective 3 Baldoyle’ states:

*“Prepare and/or implement a Local Area Plan for lands at Baldoyle/Stapolin to provide for the strategic development of the area as a planned sustainable mixed use residential development subject to the delivery of the necessary infrastructure. (Refer to Map Sheet No. 10, LAP 10.A)”*

12. During the course of the hearing, I requested the parties to identify which map was referred to as Map Sheet No. 10, LAP 10.A. While Map Sheet No. 10 shows the area in which the subject site is located, LAP 10.A appears to refer to a portion of the lands in the area which is separate from and away from the subject lands.

13. On the 12<sup>th</sup> of March 2018, the Baldoyle-Stapolin LAP 2013 was extended for a further period of 5 years to the 11<sup>th</sup> of May 2023 by a resolution of the elected members of the respondent (the “2013 LAP as extended”). The resolution of the elected members of the respondent extending the 2013 LAP was based on advice, in accordance with statutory requirements, to the elected members which included confirmation that it was the chief executive of the respondent’s opinion that the 2013 LAP was consistent with the objectives and core strategy for the 2023 Development Plan.

14. References in the 2013 LAP (as now extended to May, 2023) to local objectives include:

a) At p. i reference to “local objectives” applying appears as follows:

*“Within the Development Plan, the Baldoyle-Stapolin Local Area Plan comprises land with the following zoning objectives:*

- *c. 41 hectares of land zoned Objective RA – Provide for new residential communities in accordance with approved local area plans and subject to the provision of the necessary social and physical infrastructure. This area, known as The Coast, includes the existing residential communities of Myrtle and Red Arches.*
- *c. 81 hectares of land zoned Objective HA – Protect and enhance high amenity areas.*

*“The area zoned for residential development in the Baldoyle-Stapolin Plan lands also contains a number of Local Objectives within its boundaries.”*

- b) At p. 03 further reference is made to the zoning objectives as above but with specific reference to specific local area objectives within its boundaries including: Objective 469 which is set out in the following terms:

*“provide for a public park and sensitively designed retirement village subject to screening for assessment under the habitats directive.”*

- c) The LAP Map includes Map Objective 4 (p. v) by identifying on the map the area concerned and stating in the legend on the face of the map as follows:

*“provide for public park and are 2011-2017 Fingal Development Plan or as may be revised in any future Development Plan.”*

- d) At p. 08 under the heading “Retirement Village Site” the LAP states:

*“Local Objective 469 of the Fingal Development Plan 2011-2017 provides for the development of a public park and sensitively designed retirement village, subject to screening for assessment under the Habitats Directive, on a c.5ha site at the southeastern corner of the plan lands adjoining the Coast Road and the established built up area of Baldoyle Village. This was the location of the stands, stables and parade ring of the former Baldoyle Racecourse and the eastern boundary of the site is marked by a stone, concrete and brick wall that contains the original brick ‘red arch’. There is an extant outline planning permission on these lands for the construction of a retirement home hotel and associated car parking car parking which is due to expire in 2016.”*

15. It appears from the foregoing that while there are several references to “*Local Objective 469*” in the 2013 LAP, only the LAP map legend reference includes the words:

*“or as may be revised in any future Development Plan”.*

16. Accordingly, while SLO 469 was not carried into the 2023 Development Plan, reference to it continued to be included in the 2013 LAP (as extended) as seen above by

the continued incorporation of Local Objective/Map Objective 4. At the time of the adoption of the 2023 Development Plan in March, 2017, the 2013 LAP was due to expire in 2018 but was then extended for a further period of 5 years to the 11<sup>th</sup> of May 2023. At the time of extension of the Baldoyle-Stapolin LAP, the Planning Permission was extant and not due to expire for another 28 months or so. Accordingly, when the 2023 Development Plan was adopted and the LAP was extended, there remained in place a valid, extant Planning Permission for a proposed development as already agreed following an appropriate statutory process and in line with planning objectives as determined by the respondent. As far as the respondent was concerned provision had been made for the development of a retirement village to meet the proper planning requirements of the area by satisfying a local need for this type of accommodation.

**17.** On the 29<sup>th</sup> of May 2020, during the currency of both the 2023 Development Plan and the extended Baldoyle-Stapolin LAP, the applicant made an application to the respondent pursuant to s. 42(1)(a)(ii) of the PDA to extend the life of the permission to the 11<sup>th</sup> of September 2025 (“the Application”).

**18.** The Application was made on the basis that the development works had not commenced because of commercial and economic considerations beyond the control of the applicant, there had been no significant changes in the development objectives in the development plan, the permitted development accorded with all Ministerial guidelines, planning policies and objectives the relevant national, regional and local development plans and the permitted development could be completed within the extension sought (in accordance with the requirements of s. 42(1)(a)(ii)).

**19.** The Application was directed to demonstrating how each of the requirements specified in s. 42(1)(a)(ii)(I)-(IV) were satisfied. In the Application the respondent was referred to the wider commercial and economic considerations in relation to the permitted retirement home and hotel with emphasis on the predicted requirement for additional nursing home places to meet the demands of an aging population and the failure to

deliver the required additional capacity due to identified barriers including limited supply associated with prohibitive construction costs.

**20.** The Application also addressed the regional planning guidelines and regional spatial and economic strategy detailing how the permitted development remained fully compliant and consistent with the objectives set before turning to address the development objectives for the area as set out in the 2023 Development Plan in a manner directed to the requirements of s. 42(1)(a)(ii)II. In particular, with regard to subparagraph (II), the Application stated as follows:

*“4.27 The subject site was zoned objective HA – “to protect and enhance high amenity areas” in the Fingal County Development Plan 2011-2017, which was the statutory development plan for the area when the application was approved in April 2015.*

*4.28 The 2011 county development plan is replaced by the 2017-2023 County Development Plan, which retains the HA zoning objective on the site ... There is no change in the zoning of the subject lands since permission was granted in 2015 and there has been no change to the status of hotel use within the zoning objective.*

*4.29 Specific local objective (SLO) 469 is identified on the subject site on Map 10 of the 2011 Plan which objective is to “provide for a public park and sensitively designed retirement village subject to screening under the Habitats Directive”. However, this objective is not included on the equivalent map in the 2017-2023 Development Plan. Instead, objective 469 along with objectives 459, 467 and 471 are incorporated into the Baldoyle Stapolin Local Area Plan 2013 ... being specific objectives within the local plan area. The same objectives therefore apply to the site as when permission was granted.*

...



4.32 *There is no material change in the zoning objective and other development objectives pertaining to the proposed development of a retirement home, hotel and ancillary facilities at the site.*

21. The Council was invited to agree that there had been no significant changes in the development objectives in the regional plan, development plan and the 2013 LAP as contended since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area. Finally, the Application also addressed the question of compliance with Ministerial Guidelines (in accordance with s. 42(1)(a)(ii)III) and considerations of Environmental Impact Assessment and Appropriate Assessment (s. 42(1)(a)(ii)IV). It was confirmed that a period of five years was sufficient to allow for the completion of the development. Although the Application was addressed to each of the requirements of s. 42(1)(a)(ii), for the purpose of these proceedings it is necessary only to consider the requirements of s. 42(1)(a)(ii)II as no issue arose as to compliance with the other prescribed statutory pre-conditions to the extension of the life of the Planning Permission.

22. On the 20<sup>th</sup> of July, 2020 (Decision Order No. PF/0903/20) the respondent made the Decision not to extend the duration of the Planning Permission. The following reasons were given for the Decision:

*“the duration of permission associated with register reference F14A/0174 cannot be extended by reason of Section 42(1)(a)(ii) of the Planning and Development 2000 (as amended) as there has been a significant change in the development objectives in the development plan for the area of the planning authority since the date of the permission such a development would no longer be consistent with the land use zoning objective (HA) and the proper planning and sustainable development of the area. The significant change in question is map-based local objective No. 469 which pertained to the subject site in the Fingal Development Plan 2011-2017 and sought to provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats*

*Directive is no longer applicable to the subject lands. The proposed development would therefore contravene materially a development objective indicated in the Fingal Development Plan 2011-2017 for the zoning of High Amenity (HA) lands.”*

23. Emphasis is placed in these proceedings on factual errors contained in the Decision. Indeed, it is accepted that there are two errors in this part of the Decision. Firstly, the reference to “F14A/0174” in the operative part of the Decision is an error. Secondly, the reference to the proposed development “*would*” contravene the Fingal Development Plan should identify the 2023 Development Plan but instead refers to the 2017 Development Plan.

24. In relation to the mistaken register reference number, a review of the full record of the Decision shows that the correct reference number appears throughout including as follows:

- a) the Register Reference cited at the start of the Council’s Decision is “*F14A/0109/E1*” indicating the Decision related to planning permission register reference “*F14A/0109*”;
- b) thereafter, that Register Reference “*F14A/0109/E1*” is repeated in the header (top right) of every one of the remaining six pages of the Council’s Decision;
- c) page 2 of the Council’s Decision confirms “*[t]his is an application for an EXTENSION OF DURATION OF PERMISSION (Reg. Ref. F14A/0109)*”;
- d) page 5 of the Council’s Decision, describing the ‘*Background*’ to the application to extend duration, states “*Final Grant of permission was issued for F14A/0109 on the 20<sup>th</sup> April 2015*”;
- e) at the end of page 5 of the Council’s Decision, having considered the relevant zoning objective, it states “*Accordingly, the duration of Reg. Ref. F14A/0109 cannot be extended.*”, and;
- f) On the page 6 (the same page on which the ‘*Reasons*’ section with the mistaken reference is contained), the “*Conclusion*” states “*it is recommended that duration of Reg. Ref. F14A/0109 shall not be extended.*”

- g) Further, the notification sent to the applicant's agent also refers to "*Register Ref F14A/010/EI*" and that reference is also included in the header on the other page of the notification.

25. Following the communication of the Decision, the applicant wrote by letters dated the 27<sup>th</sup> of July, 2020 and the 2<sup>nd</sup> of September, 2020 to complain that the Decision was legally flawed. In particular, it was pointed out that the LAP in respect of the area where the Lands were located had been extended by resolution of the respondent in 2018 and remained in force.

### **PRINCIPAL ISSUES**

26. The applicant contends that the Decision contained an error of law on the face of the record in that it:

- (a) refers to a planning permission which is not the Planning Permission, was not the subject of the Application and was not granted in respect of the Lands and;
- (b) refers to 2017 Development Plan rather than the 2023 Development Plan which replaced it and which was in force at the time that the application and Decision were made.

27. It is further contended on behalf of the applicant that a third error of fact and law permeates the Decision in the following statement is wrong in fact, namely:

*"map-based local objective No. 469 which pertained to the subject site in the Fingal Development Plan 2011-2017 and sought to provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats Directive is no longer applicable to the subject lands"*

28. It is contended that this statement is wrong in fact because SLO 469 continues to apply to the subject lands by reason of the extension of the Baldoyle-Stapolin LAP which

incorporates SLO 469 of the Development Plan as Objective No. 4 of the Baldoyle-Stapolin LAP.

**29.** It is, in addition, contended that the respondent erred in law and acted contrary to fair procedures and natural and constitutional justice in making the decision without giving the applicant notice of an intention to refuse the application and providing it with an opportunity to make submissions as to whether the change in the development objectives in the Development Plan for the area of the respondent since the date of the Planning Permission was significant and/or the effect of the change was such that the development would no longer be consistent with the proper planning and sustainable development of the area.

**30.** The respondent disputes that there is any error underpinning the conclusion that map-based local objective No. 469 no longer applies to the subject lands relying on the fact that it has been removed from the Fingal Development Plan in its 2017-2023 iteration. It is the respondent's position that Objective No. 4 of the Baldoyle-Stapolin LAP (*"Provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats Directive as per local objective 469 in the 2011-2017 Fingal Development Plan or as may be revised future development plan"*) did not survive the removal of Local Area Objective 469 from the Fingal Development Plan.

**31.** More fundamentally, it is the respondent's position that for the purpose of the Decision under s. 42, the respondent should not and did not have regard to the LAP but is confined to a consideration of the Development Plan itself. Indeed, it is the respondent's position that had they proceeded to consider the LAP they would have exceeded their jurisdiction under s. 42 and would have failed to apply the correct legal test.

**32.** The applicant contends that the position adopted by the respondent that it does not have regard to the LAP but is confined to the Development Plan to identify whether there has been a significant change in development objectives reflects an error of law on the part of the respondent in its interpretation and application of the requirements set out in s. 42(1)(a)(ii) of the PDA. Specifically, while it is accepted that there has been a change in

the development objectives (through the removal of Local Objective 469 from the Development Plan), the applicant's position is that this does not constitute a significant change in the development objectives in the development plan for the area since the date of the Planning Permission such that the Development would no longer be consistent with the proper planning and sustainable development of the area. It is the applicant's case that the respondent is entitled to have regard to the applicable LAP in determining whether the requirements of s. 42(1)(a)(ii)(II) are met. Further, it is contended that failure to have regard to the applicable LAP is a failure to have regard to relevant considerations.

**33.** The applicant adopts this position in circumstances where it is contended that Local Objective No. 469 in the 2017 Development Plan 2011-2017 has been incorporated into Objective 4 (*"Provide for a public park and sensitively designed retirement village subject to screening for assessment under the Habitats Directive as per Local Objective 469 in the 2011-2017 Fingal Development Plan or as may be revised future development plan"*) and therefore, on the applicant's case, continues to apply to the lands by virtue of the 2013 LAP (which has been extended for a further period of five years to the 11<sup>th</sup> of May 2023 by resolution of the elected members of the respondent made on the 12<sup>th</sup> of March 2018).

## **PROCEDURAL HISTORY**

**34.** Proceedings commenced by issue of originating Notice of Motion issued on the 10<sup>th</sup> of September, 2020 by way of an application for judicial review. Leave was granted *ex parte* by order of the High Court (Meenan J.) on the 10<sup>th</sup> of September, 2020. The proceedings are grounded on the affidavit of Antoinette Kennedy who is a director of the applicant. She exhibits a map of the subject lands, a copy of the Notification of Grant of Planning Permission dated the 24<sup>th</sup> of February, 2011 from the respondent, a copy of the Order of ABP dated the 20<sup>th</sup> of April, 2015, a copy of the Application to the respondent to extend the life of the permission to the 11<sup>th</sup> of September, 2025 pursuant to s. 42(1)(a)(ii), the Decision of the respondent dated the 20<sup>th</sup> of July, 2020 not to extend the

duration of the planning permission, the Planning Officer's report typed on the 16<sup>th</sup> of July, 2020, a copy of the Chief Executive's report to the elected members (Agenda Item 23) under ss. 19(1)(d),(e), (f) and 20(3)(a)(i), (ii) of the PDA in relation to the extension of duration of the Baldoyle-Stapolin LAP, the minutes of the meeting of the Council held on the 12<sup>th</sup> of March, 2018 approving the extension of the Baldoyle-Stapolin LAP and pre-litigation correspondence.

**35.** Ms. Kennedy confirms that the impact of the Decision to refuse to extend the Planning Permission on the applicant was substantial and emphasised the suitability of the Lands and their location for a retirement centre as had been planned. Further affidavit evidence confirms that as part of the conditions of planning a public park had to be developed at the centre of the development and running through the whole length of the site is a major trunk sewer which sterilises that part of the lands owned by the applicant and which the applicant gifted to the respondent on a goodwill basis. Similarly, a pumping station sterilises part of the Lands and was also gifted to the respondent. The applicant agreed to gift approximately one acre at the back of its site to the respondent's recreational football grounds to square up its boundary.

**36.** A Statement of Opposition was filed in September, 2020. Arising from the terms of the Statement of Opposition it is clear that the respondent contests the proceedings on the basis, *inter alia*, that the Application to extend the life of the Planning Permission did not demonstrate how the Development accorded with all planning policies and objectives in the relevant local development plans. It is contended that there have been significant changes in the development objectives in the 2023 Development Plan since the date of the Permission which was granted under the previous development plan, such that the Development would no longer be consistent with the proper planning and sustainable development of the area with specific reference to the removal of Local Objective No. 469 from the 2023 Development Plan.

**37.** As Local Objective No. 469 is said to no longer apply, the relevant development objective was HA (High Amenity) under which "*Residential Care Home/Retirement*

*Home*” is “*Not Permitted*”. This is said to have the effect that the Development would be a material contravention of the 2023 Development Plan and would not be consistent with the proper planning and development of the area, albeit that this reasoning was not developed in the Decision itself. It is contended that the applicant’s reliance on Map Objective 4 of the 2013 LAP as extended is misplaced because s.42(1)(a)(ii)(II) of the PDA is concerned with the development objectives of the development plan and not the local area plan. It is contended that the removal of SLO 469 from the 2023 Development Plan had the effect that Map Objective 4 of the 2013 LAP ceased to have any effect pursuant to s. 18(4)(b) of the PDA because it conflicted with the provisions of the 2023 Development Plan which in providing for HA zoning prohibited the development of a retirement village, albeit that the zoning for the area where the Lands were situated did not change.

**38.** It is contended that the mistaken reference to a different planning decision in the Decision was the result of a human clerical error which did not invalidate the Decision. Similarly, the mistaken reference to the 2017 Development Plan under the “Reasons” section of the Decision was a clerical error and it is clear from the Decision that the Council’s assessment was based on the correct development plan. It is maintained that the respondent was not entitled under s. 42 PDA to give the applicant notice of its intention to refuse the applicant to extend nor was it entitled to give the applicant an opportunity to make further submissions.

**39.** The Statement of Opposition is grounded on the affidavit of Sean Walsh, Senior Executive Planner. He exhibits the Board Inspector’s report dating to 2015. He exhibits relevant extracts from the Fingal Development Plans 2011-2017 and 2017-2023 to demonstrate the removal of SLO 469. He also exhibits the relevant zoning extracts from the two plans which show the zoning as unchanged as HA (High Amenity) in both but which indicates that residential care home/retirement home is “*not permitted*” in the later plan. He further contends that the 2013 LAP was extended to facilitate the provision of residential units and not the subject development. In a later affidavit he objects to the suggestion that he was seeking to change or not comply with the resolution of the elected

members in circumstances where nothing on the record supports the position that selected parts only of the 2013 LAP were extended. He modifies his position by stating more mildly that the 2013 LAP as extended had to be interpreted in the light of SLO 469 not being included in the 2023 Development Plan.

## STATUTORY FRAMEWORK

40. Section 42(1)(a) as it applied as of the date of the application, provided that:

*“On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:*

*(a) either –*

*(i) the authority is satisfied that—*

*(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended;*

*(II) substantial works were carried out pursuant to the permission during that period, and*

*(III) the development will be completed within a reasonable time,*

*or*

*(ii) the authority is satisfied—*

*(I) that there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission,*



*(II) that there have been no significant changes in the development objectives in the development plan or in regional development objectives in the regional spatial and economic strategy for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area,*

*(III) that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section, and*

*(IV) where the development has not commenced, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted.”*

**41.** From the language of s. 42 it is clear that the legislative intention was to provide a simplified process whereby a planning permission granted pursuant to extensive statutory requirements under the PDA was capable of extension without the need to undergo the process again provided that the prescribed criteria are met. This was in recognition of the fact that it is not always possible to complete a development within the life-span of a planning permission. The power to extend is not open-ended in time and under the statutory scheme a permission extended in this way may only be extended by a period of five years or less.

**42.** Under s. 10 of the PDA, the development plan sets the overall plan for proper planning and sustainable development and consists of a written statement and a plan or plans indicating the development objectives for the area. Section 10(7) of the PDA expressly provides that:

*“A development plan may indicate that specified development in a particular area will be subject to the making of a local area plan.”*

43. As we have seen, in this case the 2023 Development Plan made reference to the local area plan and ‘*Objective Baldoyle 3*’ as therein set out expressly contemplated that a local area plan was to be implemented in respect of Baldoyle/Stapolin, which would provide for the strategic development of the area “*as a planned sustainable mixed use residential development subject to the delivery of the necessary infrastructure.*”

44. At the time the 2023 Development Plan was adopted by the respondent, the extant Baldoyle / Stapolin LAP incorporated SLO 469 as Map Objective 4 and there was a valid, extant Planning Permission pertaining to the Lands. This begs the question as to the impact the removal of SLO 469 from the 2023 Development Plan had on the extant LAP, as it clearly did not affect the Planning Permission which remained valid.

45. Section 18 of the PDA provides for the making of local area plans. Section 18(3)(a) requires a local authority to have regard to the local area plan when considering an application for permission under s. 34 of the Act. Importantly, s. 18 (4)(b) provides:

*“A local area plan may remain in force in accordance with paragraph (a) notwithstanding the variation of the development plan or the making of a new development plan affecting the area to which the local area plan relates except that where any provision of the local area plan conflicts with the provisions of the development plan as varied or the new development plan the provision of the local area plan shall cease to have effect.”*

46. The express language of s. 18 makes it clear that a provision of a local area plan is continued notwithstanding the adoption of a new development plan during its term unless the provision conflicts with the provisions of the development plan as varied.

47. Section 19 of the PDA provides for the content and application of local area plans. Under s. 19 it is mandatory to have in a place a local area plan for areas above a specified population such as the Baldoyle-Stapolin area. The renewal of a LAP is a statutory process set out in s. 19(1)(d) and (e) of the PDA.

48. Section 19(1) provides for the extension of the local area plan in the following terms:

*(d) Subject to paragraph (e), not more than 5 years after the making of the previous local area plan, a planning authority may, as they consider appropriate, by resolution defer the sending of a notice under section 20(3)(a)(i) and publishing a notice under section 20(3)(a)(ii) for a further period not exceeding 5 years.*

*(e) No resolution shall be passed by the planning authority until such time as the members of the authority have:*

*(i) notified the chief executive of the decision of the authority to defer the sending and publishing of the notices, giving reasons therefor, and*

*(ii) sought and obtained from the chief executive —*

*(I) an opinion that the local area plan remains consistent with the objectives and core strategy of the relevant development plan,*

*(II) an opinion that the objectives of the local area plan have not been substantially secured, and*

*(III) confirmation that the sending and publishing of the notices may be deferred and the period for which they may be deferred.*

**49.** It is clear from s. 19(1)(e) that the local area plan cannot be lawfully extended absent an opinion from the chief executive of the respondent to the effect that the plan remains consistent with the objectives and core strategy of the relevant development plan and that the objectives of the local area plan have not been substantially secured.

**50.** Section 19(2B) provides that where any objective of a local area plan is no longer consistent with the objectives of a development plan it must be amended in the following terms:

*“Where any objective of a local area plan is no longer consistent with the objectives of a development plan for the area, the planning authority shall as soon as may be (and in any event not later than one year following the making of the development plan) amend the local area plan so that its objectives are consistent with the objectives of the development plan.”*

**51.** Section 20 of the PDA provides for the making of local area plans and the process is subject to public consultation. It is clear from the hierarchy set out in the PDA that, in the case of a conflict between a development plan and a local area plan, the local area plan must be amended. Browne, the Law of Local Government, 2<sup>nd</sup> ed. [p. 1-110] explains that:

*“the LAP is not dependent on the authority’s development plan and provisions of the LAP remain in force, notwithstanding a variation of a development plan or the making of a new development plan”.*

## **DISCUSSION AND DECISION**

**52.** In *Friends of the Irish Environment Ltd. v. An Bord Pleanala & Ors* [2019] IEHC 80 Simons J. (at paras. 79-80) notes that there are two alternative bases upon which an

application for an extension of the duration of a planning permission can be made and each involves different considerations. The first is where works have been carried out pursuant to the planning permission during the period sought to be extended and the development will be completed within a reasonable time. The second is where there are considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of the development or the carrying out of substantial works pursuant to the planning permission. Simons J. observed that in the case of the second basis, there are a number of safeguards built into s. 42 in order to ensure that stale planning permissions do not undermine the evolution of planning policy.

**53.** These proceedings arise from the exercise of a discretion to refuse to extend on the second basis having regard to the respondent's application of one of the safeguards referred to as being directing to ensuring that that the extension of a planning permission does not have the effect of undermining an evolution in planning policy and turns on the correct interpretation and application of section 42(1)(a)(ii)II.

**54.** As I understand the respective positions of the parties, the applicant relies on the fact of the extension of the 2013 LAP to make the case that the change in the Development Plan was not "*significant*" as the respondent has extended the 2013 LAP containing the objective being satisfied that it is consistent with the 2023 Development Plan. On the other hand, the respondent does not resile for the view that the LAP (as extended) is consistent with the 2023 Development Plan but its position is that the local objective 4 is no longer included in the 2013 LAP as extended by reason of s. 18(4)(b) of the PDA because it conflicts with the development objectives in the 2023 Development Plan.

**55.** The primary issue for this Court to determine is whether the respondent is correct in adopting the position that it was precluded from considering anything other than the development objectives identified in the Fingal Development Plan when deciding on

whether there has been a significant change to development objectives under the Development Plan on an application under s. 42(1)(a)(ii) as contended by the respondent.

**56.** If the respondent is correct in its interpretation, this is dispositive of the contention that there has been a failure to have regard to relevant considerations in failing to take account of the 2013 LAP (as extended) in deciding whether there had been a significant change in the development objectives in the development plan such that the development would no longer be consistent with the proper planning and sustainable development of the area and is also material to the contention that there has been a breach of the requirements of fair procedures in failing to afford the applicant an opportunity to make submissions addressed to a perceived error in the respondent's consideration of the application.

**57.** On the other hand, if s. 42(1)(a)(ii) permits the development objectives identified in the Development Plan and the significance of any change thereto to be construed as to in the light of the applicable local area plan, then the issues of failure to have regard to relevant considerations and compliance with the requirements of fair procedures are properly engaged.

*Error of Law as to Jurisdiction under Section 42(1)(a)(ii)II PDA*

**58.** The applicant contends that SLO 469 continues to apply to the subject site as a development objective by reason of having been incorporated in the 2013 LAP (as extended). The respondent maintains that this development objective did not survive the removal of SLO 469 from the 2023 Development Plan on the basis that its inclusion in the 2013 LAP was dependent on its existence as a specific local objective in the Development Plan and it was not carried over on the extension of the 2013 LAP where it was no longer contained in the 2023 Development Plan. In this case, as set out above, the extension of the LAP was approved by the respondent following the chief executive's report, which states that in the chief executive's opinion:

*"The Baldoyle-Stapolin LAP 2013 remains consistent with the objectives and Core Strategy of the Fingal Development Plan 2017-2023".*

**59.** Section 42(1) is mandatory in its terms, stating that a planning authority “*shall*” extend the appropriate period provided the listed requirements are complied with. *Simons on Planning Law* (3<sup>rd</sup> ed.) at p. 5-196 states that:

*“The wording of s.42 suggests that a planning authority has very little discretion in relation to its decision as to whether or not to extend the life of a planning permission. In particular, it would seem - by analogy with judgements in respect of the equivalent provisions of the previous legislation - that once the relevant statutory conditions have been fulfilled, the planning authority has no choice but to grant the extension.”*

**50.** The mandatory nature of s. 42(1) is apparent from *State (McCoy) v Dun Laoghaire Corporation* [1985] ILRM 533 and was confirmed in *Merriman v Fingal County Council*, [2017] IEHC 695 at [50], where Barrett J. summarised the applicable principles as follows (para. 50):

*(1) the administrative or mandatory nature of the function being exercised by a planning authority pursuant to s.42 reflects the fact that s.42 provides merely for the extension of the duration of a planning permission which has been granted in accordance with the provisions of PADA, i.e. pursuant to a statutory decision-making procedure, which entails full rights of participation and the exercise by an expert decision-maker of discretion and planning judgment in determining whether a particular development is in accordance with the proper planning and sustainable development of the area concerned.*

*(2) section 42 does not allow a planning authority to interfere with the conditions of a planning permission. Nor does it allow a planning authority to extend the scope or extent of what is to be constructed under a planning permission...*

(3) section 42(1) provides that 'On application to it in that behalf a planning authority **shall...**' [emphasis added], so a planning authority is being mandated to do something in the event that certain circumstances present.

(4) unlike s.4(1) of the Local Government (Planning and Development) Act 1982, a legislative forerunner of s.42 that was the subject of consideration in State (McCoy) v. Corporation of Dún Laoghaire (Unreported, High Court, Gannon J., 1st June, 1984) ... s.42 does not provide for extension 'if, and only if' defined criteria are satisfied. The requirement in s.42 is simply 'shall'. So, to that extent, the observations of Gannon J. in McCoy need to be treated with some degree of caution, though the underlying principles touched upon in that case remain applicable.

(5) the current text of s.42 was inserted into PADA by s.28 of the Planning and Development (Amendment) Act 2010. So it was enacted at a time when the nation was wrestling with the perfect storm of financial problems that presented for the State and its residents following the collapse of the banking sector and the arrival of the Great Recession, a state of affairs that clearly informs the substance of s.42(1)(a)(ii)(I).

(6) it is notable in this last regard that s.42(1)(a)(ii)(I) of PADA speaks of 'considerations of a commercial...[etc.] nature...which substantially militated against...' The phrase 'substantially militated against' is a relatively low standard. It does not mean that the applicant for permission has to prove beyond doubt or even prove as a matter of probability that it was not able to proceed with a development because of particular considerations. There need merely be considerations that 'substantially militated against'...

(7) looking to s.42(1)(a)(ii)(II) of PADA, that provision, it seems to the court, establishes an important safeguard which a planning authority is in a fairly unique position to assess, because a planning authority will be familiar with all of the relevant provisions and guidelines...



*(8) the same points, mutatis mutandis, can be made in respect of s.42(1)(a)(ii)(III) as the court has just made in respect of s.42(1)(a)(ii)(II).*

*(9) as to s.42(1)(a)(ii)(IV) of PADA, it is both rational and understandable that the Oireachtas, when addressing a situation where (i) a development consent has issued, and (ii) the period or duration of that development consent is about to expire, and (iii) any ability to challenge the consent under the two month period will likewise have expired, would elect to distinguish between circumstances where (a) a development has commenced, i.e., where somebody, acting on an existing consent (and the principle of legal certainty) has commenced development, and (b) where no one has acted on the permission and no works have commenced ...*

*(10) the issues that arise for consideration in the context of s.42 are primarily factual matters. That, it seems to the court, is an important consideration, because that goes to the nature of the discretion that is being exercised. There is undoubtedly a limited element of discretion. So s.42 does not involve what was referred to at hearing as a "box-ticking" exercise. What it does involve is what was referred to by counsel for Fingal County Council at hearing as a 'prescribed discretion', in truth a limited prescribed discretion, in that the relevant factors are identified in s.42 and a planning authority has to engage with those factors in terms of resolving certain questions of fact.*

*(11) the clear purpose of s.42 is clear. It is ... a statutory forerunner of s.42, "'to enable the development to which the permission relates to be completed'", or to use the wording of s.42 itself 'to enable the development to which the permission relates to be completed.'*

*(12) it seems to the court that any fair-minded reading of s.42 should (and in the case of the court does) lead to the recognition that the Oireachtas clearly meant to establish thereby a stream-lined expeditious procedure without a requirement as to public consultation..."*

**51.** At para. 66 of his judgment in *Merriman*, Barrett J. quoted with approval from *McDowell v. Roscommon Co Council* [2004] IEHC 396 where Finnegan P. held:

*“The wording of section 42 is clear. It provides that if the Planning Authority are satisfied on certain matters the Planning Authority must grant an extension. It is clear on the authorities that to take into account any other matter, fact or circumstance is ultra vires.”*

**60.** Thus, when Barrett J. came to consider the “*Extent of Discretion Arising under Section 42*” (see paras. 61 to 82), he concluded at para. 81:

*“81. The clear effect of the case-law considered above is that s.42 of PADA requires that a planning authority such as Fingal County Council, upon application to it under s.42 as regards a particular permission, must extend the appropriate permission, provided that the prescribed requirements are complied with. The clear effect of the case-law considered above is that s.42 of PADA requires that a planning authority such as Fingal County Council, upon application to it under s.42 as regards a particular permission, must extend the appropriate permission, provided that the prescribed requirements are complied with. It follows that the basis on which the Case 1 applicants have sought to make their case is misconceived having regard to the case-law of the Superior Courts. For example, they are fundamentally incorrect in their submission that before a development consent could be extended in the circumstances presenting, or any circumstances, that matters beyond those set out in s.42 need to be considered. ”*

**61.** In this case the respondent refused to extend the permission under s. 42(1)(a)(ii)(II) on the basis that there had been a significant change in the development objectives in the development plan, such that the development would no longer be consistent with the land use zoning objective and the proper planning and sustainable development of the area. To properly exercise its statutory power the respondent was required to assess the “*significance*” of the change. Assessing the significance of the change is not the question the Court was addressing in either *Merriman* or *McDowell*.

While the Court in *Merriman* and *McDowell* found that the respondent's discretion was limited and an extension must be granted where conditions are met but refused where conditions are not met, there remains a discretionary decision-making exercise in determining whether the change in question is "*significant*" in view of the development objectives for the area when deciding to extend a stale permission in the case of the second basis *viz*, where works are not already advanced having regard to the evolution of planning policy for the area. While the significance of the change is a matter of fact which is properly within the subject matter expertise of the respondent, the issue which confronts the Court is one of law in terms of identifying whether the respondent is confined to the terms of the Development Plan proper or may interpret the development objectives in the development plan by reference to other materials such as the LAP and where the proper parameters of the discretion lie.

**62.** This brings us to the central issue. Shortly stated, in assessing whether there had been a significant change in the development objectives contained in the 2023 Development Plan, is the respondent confined to considering only the 2023 Development Plan or is it permissible to also have regard to the terms of the 2013 LAP as extended? The parties adopted diametrically opposing positions and both refer to other provisions of the PDA to support their respective positions. The fact that a change has occurred is accepted but whether the change is a "*significant change*" for the purpose of s. 42 remains much in contention.

**63.** The parties were largely agreed as to the principles which apply to the interpretation of the Development Plan. Both sides relied upon *XJS Investments Ltd.* [1986] I.R. 75 and the "*well settled*" principles of construction for planning documents and cases such as *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527; *Redmond v. An Bord Pleanála* [2020] IEHC 151 and most recently *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IEHC 7 where Holland J. at para. 119 set out how:

*"The law goes back almost 40 years to In re XJS Investments Ltd [[1986] IR 75]. McCarthy J, for a unanimous Supreme Court, said:*

*“Certain principles may be stated in respect of the true construction of planning documents:–*

*(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.*

*(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning ...”*

*McCarthy J was considering a decision refusing planning permission but, no doubt deliberately and more generally applies the principles to “planning documents”. It is also notable that his interpretative approach is informed by the characteristics of both the drafter and the addressees.”*

**64.** Holland J. also approved of the approach of Barr J. in *Tennyson v. Dun Laoghaire Corporation* and reasserted at para. 122 :

*“The XJS and McGarry excerpts above were quoted in Tennyson v Dun Laoghaire Corporation [1991] 2 IR 527] in which Barr J, in their light, applied XJS principles of interpretation to a development plan which set numerical density limits allegedly materially contravened, as follows:*

*“In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions?”*

**65.** On the basis of the foregoing, the parties agree that a court interpreting a planning document - be it a planning permission, development plan or local area plan - "*should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions*". Despite agreement as to the principles which apply, both sides in this case contend that a reasonably intelligent person, having no particular expertise in law or town planning would arrive at a different conclusion as to whether Local Objective 4 was continued through the extension of the LAP and a relevant consideration or removed as a planning objective for the area once the new development plan was adopted without reference to SLO 469 and therefore not a relevant consideration.

**66.** The respondent relies on s. 18(4)(b) to contend that Map Objective 4 of the 2013 LAP ceased to have effect upon the adoption of the 2023 Development Plan which no longer provided for SLO 469. Such a position is dependent on a conclusion that Objective 4 conflicts with the new Development Plan. The respondent further relies on the map legend in the LAP which refers to the local area objective as one which may be revised in "*any future Development Plan*". The respondent maintains that a conflict is evidenced by the fact that the 2023 Development Plan provides that development of this type is not permitted in High Amenity (HA) areas, which the subject land is. It is recalled, however, that the subject Lands had a HA designation under the 2017 Development Plan also and it is common case that there is no change in the zoning objectives for the site as between the two development plans. Further, as we have seen, almost a year to the day after the adoption of the 2023 Development Plan, the 2013 LAP which had incorporated SLO 469 as Map Objective 4 was extended for a five-year period on the express basis that it was considered to be consistent with the objectives and core strategy of the relevant development plan.

**67.** As set out above, the statutory framework (s. 10(7) of the PDA) expressly provides in relation to development plans for specified development in a particular area being subject to the making of a local area plan. This occurred in this instance with provision made for Objective Z02 in the 2023 Development Plan. This means that

determining whether a change in planning objective in the development plan is “*significant*” can entail considerations broader than the terms of the Development Plan itself where it is contended that a development objective has been continued notwithstanding that it no longer appears in express terms in the Development Plan because:

- (i) section 18 provides that a local area plan may remain in force following the making of a new development plan affecting the area to which the local area plan applies unless a provision of the local area plan conflicts with the provisions of the new development plan and;
- (ii) section 19 provides for an extension of a local area plan where it is consistent with the development plan.

**68.** The power to extend a permission in s. 42 is one of a number of statutory provisions addressed to what happens in planning terms consequent upon changes in matters of planning concern resulting from the passage of time. I am satisfied that to properly construe s. 42 and to give the power to extend a planning permission there provided for its true meaning and effect, it is necessary to have regard to where s. 42 fits in the statutory scheme and how the separate provisions are intended by the Legislature to interact. Construing ss. 10, 18, 19 and 42 together it seems to me that there is a clear legislative intention that planning objectives may be identified in a local area plan, a planning permission granted in line with a previous development plan may be extended subject to the respondent being satisfied that there are no significant changes in development objectives and objectives incorporated into a local area plan may also be extended for so long as they are “*consistent*” with the objectives set in a new development plan. Where there is an inconsistency, provision is made to vary the plan.

**69.** Interpreting the statutory provisions both by relying on the literal meaning of the language used and in context as part of the statutory scheme, it appears to me that a change in development objectives by the removal of a specific local objective is not necessarily a change which would bring the existing LAP (which incorporates a specific objective) into conflict with a new development plan. That said, in determining whether

the change is “*significant*” the question of whether it conflicts or is consistent with the new development plan is, to my mind, a relevant consideration. It seems to me that where a change is not inconsistent, it is less likely to reach the threshold of “*significant*”. Similarly, while a significant change is not necessarily an inconsistent change, it seems to me that change which is inconsistent with the development plan is more likely to be considered “*significant*”.

70. Thus, when gauging whether the change in this case is “*significant*”, it is relevant to consider whether the proposal now conflicts with or is inconsistent with the 2023 Development Plan. In this context, I consider it important to recall that under s. 19(2B) of the PDA where any objective of a local area plan is no longer consistent with the objectives of a development plan for the area, the planning authority is required as soon as may be (and in any event not later than one year following the making of the development plan) amend the local area plan so that its objectives are consistent with the objectives of the development plan. It cannot properly be ignored that no application to amend the LAP was made in this case. Furthermore, the fact that the respondent did not seek to amend the LAP before extending it but extended it unchanged on the basis that it was consistent with the new development plan is a factor which could influence a decision as to whether the change was significant or not.

71. While the respondent contends that it was not necessary to vary the LAP to bring it into line with the new development plan as it has ceased to exist, by virtue of a conflict with the development plan pursuant to s. 18, I have a significant difficulty with the logic of this argument which appears to ignore the sequence of decision making relevant to this case. It is unclear to me how the reasonably intelligent person seeking to construe a development plan should understand that a provision has ceased to exist without this being expressly stated. Whereas s. 18 provides that a provision in an LAP which conflicts with the new development plan ceases to exist, no provision is made to make clear when this occurs. Nor do I accept that it is proper to interpret the 2013 LAP as extended as no longer including Local Objective No. 469 within its terms in reliance on a single map legend because of the use of the words “*or as may be revised in any future*

*Development Plan.*” The fact that there are several references to the local objective but these words are used only in one place (and as part of a map legend rather than the text proper of the LAP) supports my view that it would be inappropriate to place much reliance on these words, particularly in view of the statutory framework which makes express provision for the steps to be taken in the event of a revision which requires a change to a local area plan but no such steps were taken following the adoption of the 2023 Development Plan.

72. On the respondent’s case the reasonably intelligent person interpreting the development plan is expected to know that a provision has ceased to exist even though it appears in black and white in a current local area plan as published by the respondent. This is an interpretative feat which I do not consider it appropriate to expect of a reasonably intelligent person and it is counter-intuitive.

73. Most telling in my view is that when the 2023 Development Plan was adopted, the respondent did not proceed to remove an inconsistent provision of the 2013 LAP by amendment as it was obliged to do if the provision were considered inconsistent. If the provision relating to local objective 4 is in conflict as the respondent contends, then of necessity it is “*inconsistent*” and in those circumstances an application to amend should have been made. It seems to follow from the fact that an application was not made that the respondent did not consider at anytime between the adoption of the 2023 Development Plan and the extension of the 2013 LAP in March, 2018 that there was an inconsistency which warranted an amendment of the LAP. By its failure to amend the Plan to effect the removal of Map Objective 4, it seems to me that the reasonably intelligent person may be satisfied that in the respondent’s view the objectives of the existing LAP remain consistent with the objectives of the 2023 Development Plan.

74. While the respondent is properly concerned with changes to the development objectives of the development plan, I am satisfied that assessing whether those changes are significant or not means that one cannot look at the Development Plan in isolation where that plan itself refers to the local area plan and where both are connected within the statutory scheme and the policy hierarchy. It is established that the LAP is a means used



to develop local planning policy within the umbrella of wider policy objectives as part of the policy hierarchy (see *South West Regional Shopping Centre Promotion Association Limited v. An Bord Pleanála & Ors.* [2016] 2 I.R. 481, para. 100, which concerned a modification of an extended permission as opposed to an application to extend simpliciter, where Costello J. referred to the “*policy hierarchy*” which included local area plans).

75. Indeed, it is clear from the language of s. 42(a)(ii) that the respondent is directed to the development objectives in a range of policy documents (not limited to the development plan albeit not expressly identifying the LAP) for a particular purpose namely to identify whether the development would be consistent with the proper planning and sustainable development of the area. The statutory purpose is therefore to support proper planning and sustainable development and to interpret what that means for the area in question rather than to interpret the terms of a development plan as though it were a statute. It seems to me, as identified by Simons J. in the *Friends of the Environment* cited above, that the statutory intention is directed to supporting evolving policy with regard to proper planning and sustainable development of the area as identified through the relevant policy documents.

76. The fact that policy documents created as part of the policy hierarchy evolve at a different pace is also recognised in the statutory framework. Sections 10(7), 18 and 19 of the PDA govern the interaction between a development plan and a local area plan and what happens in the event of a change to a development plan during the life of an extant local area plan. Whether powers under these sections have been exercised or not has a bearing on the proper interpretation of the development plan and the significance to be ascribed to any change made to the development plan because it reflects the respondent’s attitude to the significance or materiality of changes at different levels of the hierarchy and whether amendment of other documents within the hierarchy is required in circumstances due to any inconsistency where it is the author of both development plan and local area plan.

77. Bearing in mind the established jurisprudence that the interpretation of a development plan is not equivalent to an exercise in statutory interpretation but involves considering what a reasonably intelligent person of no particular expertise would think, it seems to me that such a person would consider that the significance of the change identified as presenting a potential impediment to the extension application would fall to be construed in the light of the LAP given the statutory link between the development plan and the LAP pursuant to ss. 10, 18 and 19 and the fact that express provision is made to deal with the interaction of the two.

78. In my view the reasonably intelligent person seeking to interpret the 2023 Development Plan would be entitled to rely on the fact that at the time the 2023 Development Plan was adopted there was a valid Planning Permission in being which provided for the development of a retirement home to meet the need identified in the 2017 Development Plan and which accorded with a local objective properly included in the 2013 LAP which was extended without change following the adoption of the 2023 Development Plan thereby seemingly carrying forward the specific local objective. The reasonably intelligent person had no reason to believe that the intervening adoption of 2023 Development Plan, during the currency of the Planning Permission and the 2013 LAP, resulted in the local objective being excised from the extant LAP such that it was not extended when the 2013 LAP was extended. The reasonably intelligent person might simply conclude that the specific objective was not reproduced in the 2023 Development because that local planning need had been identified and addressed in the 2017 Development Plan and the Development was in train, albeit not yet advanced when the 2023 Development Plan was adopted in 2017 (there being almost three years left to run on the Planning Permission). This is certainly the more apparent interpretation than that pressed by the respondent which is predicated on the reasonably intelligent person understanding that selected parts only of the 2013 LAP were extended on the basis that other parts had ceased to apply from the adoption of the 2023 Development Plan, albeit without evidence that this position was ever recorded and published by the respondent prior to its opposition of the within proceedings.

**79.** While on any view, the removal of the specific development objective relating to the applicant's project from the 2023 Development Plan is clearly relevant, it is not necessarily "*significant*" particularly if there is an argument to be made, as has been advanced in this case, that the removal of the express reference from the Development Plan did not have the effect of removing it as a local development objective for the 2013 LAP which had been extended. Where this argument is made, the reasonably intelligent person would consider the statutory framework and the interaction of the development plan and local area plan to decide whether there had been a "*material*" (a word used by the respondent in its submissions) or "*significant*" change in development objectives expressed in the development plan. In other words, the reasonably intelligent person with no special expertise who knows about ss. 10, 18 and 19 would consider it appropriate to consider the objectives expressed in the development plan in its' overall statutory and factual context to identify whether there exists material relevant to the decision.

**80.** Accordingly, while removal of SLO 469 is in itself undoubtedly a weighty consideration, it seems to me that neither the dicta in *Merriman* and *McDowell* nor the wording of s. 42 preclude consideration of broader planning considerations affecting the local area relevant to that particular development objective when determining whether changes in the development objectives in the development plan should be treated as "*significant changes*" for the purpose of a s. 42 extension application, as contended by the respondent.

**81.** In view of the foregoing, I am satisfied that in considering whether there had been a "*significant change*" to the development objectives in the development plan regard should be had to the local area plan adopted to give effect to those objectives in a specific area. As the respondent accepts that it treated itself as precluded under s. 42 from considering the 2013 LAP as extended in deciding whether there had been a significant change in development objectives under the 2023 Development Plan and where I am satisfied that s. 42 does not preclude such consideration, I am driven to conclude that the Decision is flawed by reason of error of law.

### Relevant Considerations

**82.** It is accepted by the respondent that it did not address its mind to the provisions of the extended LAP and the legal basis for extension of the LAP in deciding that the development objectives had significantly changed and refusing the application for an extension of the life of the planning permission on that basis. In the circumstances where I consider that the respondent could properly have had regard to the provisions of the extended LAP in view of the manner in which ss. 10(7), 18 and 19 work together with s. 42, it would follow that the respondent's admission that it did not have regard to the fact that the local objective was contained in the LAP leads to a conclusion that the respondent did not properly address a relevant consideration.

**83.** It is important in this regard to recall that the Application for an extension was advanced squarely on the basis of a contention that SLO 469 was continued through the extension of the local area plan which incorporated that objective. Accordingly, the applicant identified the continuation of the SLO through the extended LAP as relevant to the respondent's decision-making process and relied upon it and in my view properly did so. The respondent's Decision fails to address this contention at all either to find that the applicant was misguided in its view that the objective was continued and why, as it contended in opposition to the proceedings, or to address it as a consideration to decide whether the change to the objectives of the development were "*significant*" and therefore patently failed to have regard to a relevant consideration.

### Fair Procedures

**84.** Were the respondent correct in its contention that it has no jurisdiction to consider the 2013 LAP as extended in determining whether there has been a significant change in the 2023 Development Plan, then I am satisfied that there would be little benefit to affording an opportunity to make submissions on matters which the respondent does not have jurisdiction to entertain. Having decided, however, that the status of Local Objective 4 within the 2013 LAP as extended has the potential to impact the respondent's Decision

on a proper consideration of whether there has been a “*significant change*” in development objectives in the 2023 Development Plan, I must now consider whether there is substance to the separate complaint made by the applicant that there had been a breach of its right to fair procedures arising from the failure to give the applicant notice of its intention to refuse the Application and to give a further opportunity to make submissions as to whether the change in the development objectives was such that the Development would no longer be consistent with the proper planning and sustainable development of the area.

**85.** The respondent maintains that it was not entitled under s. 42 of the PDA to give the applicant notice of its intention to refuse the Application to extend nor was it entitled to give the applicant an opportunity to make further submissions. They maintain that the respondent had a “*limited prescribed discretion*”, which did not permit it to go beyond the provisions of s. 42 and the applicable regulations (Articles 40 to 46 of the Planning and Development Regulations 2001 (as amended)(the “PDR”). The respondent further refers to the fact that in *Merriman v. Fingal County Council* [2017] IEHC 695 Barrett J. rejected the argument that there was a right to make submissions in the s. 42 process *inter alia* when considering the “*Extent of Discretion Arising under Section 42*” (see paras. 61 to 82). The learned Judge concluded *inter alia* at para. 82:

*“Likewise it is clear that the Case 1 applicants, and indeed the public in general, do not have a right to make observations on applications brought pursuant to s.42 of PADA. There is no provision in s.42 which allows for the consideration of submissions from the public. And the High Court, in its previous decisions in, e.g., Coll and Lackagh Quarries, has been entirely clear that PADA makes no provision for third party participation in this regard. (See also Collins v. Galway County Council [2011] IEHC 3).”*

**86.** I am satisfied that in *Merriman*, as apparent from the above extract, the Court was dealing with the rights of third parties. The applicant is not a third party but is the beneficiary of the planning permission sought to be extended. The applicant relies on

article 44(2)(b) of the PDR which permits the respondent to seek further particulars for the purpose of compliance with Regulations 42 and 43 (see para. 57 of the applicant's submissions). The respondent contends that this provision does not apply as the respondent did not "*consider[] that [the] application to extend or extend further the appropriate period as regards a particular permission [did] not comply with the [relevant] requirements*" so the Council could not use this article to seek "*such further particulars as may be necessary to comply with the said requirements*". The respondent similarly maintains that it did not require any "*further information, particulars or evidence*", so article 45 of the PDR could not be invoked.

**87.** I do not accept the respondent's reliance on the statutory scheme and circumstances where express provision for seeking further information is made to establish that the respondent had no power to invite submissions. It is well established that a statutory body exercising statutory decision-making functions has an implied power to do what is necessary to ensure that the decision is made in accordance with the requirements of constitutional justice. In *North Wall Property Holding company Limited v. Dublin Docklands Development Authority & Anor.* [2008] IEHC 305, Finlay-Geoghegan J. stated (para. 60):

*"It is common case that, in accordance with well established judicial principles in relation to the construction of functions conferred by statute, that the implied decision-making process of the respondent must be discharged in accordance with principles of constitutional justice. This requires that the decision be taken in accordance with fair procedures which would appear to require that persons who have property rights that could be affected by the decisions taken be given an opportunity of making submissions and have those submissions considered."*

**88.** Accordingly, I do not accept the respondent's submission that it had no power to give the applicant an opportunity to make further submissions. That said the respondent is not obliged to enter into a dialogue with an applicant or to indicate in advance its thinking or views, particularly when involved in the exercise of a limited prescribed

discretion, before deciding on an application unless a failure to do so would render the decision unfair. As Lynch J. stated in *Frenchchurch Properties Limited v. Wexford County Council* [1992] 2 IR 268, p. 281:

*“In the ordinary course of events the planning authority will receive an application; consider it; and decide on it without giving any advance reasons. If the planning authority refuses the application it must give its reasons for such refusal at that stage and not earlier.”*

**89.** The question of the extent to which the power to invite submissions on a proposed Decision is open to the respondent under the terms of the Regulations in vindication of a right to fair procedures might arise where the applicant was deprived of an opportunity to address an issue in advance of the Decision because they were not on notice of the issue and therefore could not address it in the Application proper. In *Frenchchurch Properties Limited v. Wexford County Council* [1992] 2 IR 268 at p. 284 to 285 Lynch J. qualifies his dictum that there is no requirement to give advance notice of a decision in certain circumstances such as:

*“if there is a point on which the planning authority knows that the applicant relies to a significant extent and which the planning authority (unknown to the applicant) thinks is invalid the planning authority should draw the applicant’s attention to this point to give the applicant an opportunity of trying to persuade the planning authority that he is right and they are wrong”.*

**90.** In this case I have reflected on whether any unfairness attaches to the failure to advise the applicant in advance of its Decision of the fact that it was not accepted that the local area objective had been continued and that accordingly there had been a material change to the 2023 Development Plan. I have weighed the fact that the applicant knew the statutory test that applied to the extension of the Planning Permission and set out in its Application why it was contended that the local area objective persisted and the change was not significant. However, its argument was predicated on a particular construction of the respondent’s discretion which, it transpired, differed from that of the respondent. I

asked the applicant's counsel during the hearing what might have been said that had not been said in support of the Application. In response, counsel argued that the case made in these proceedings could have been advanced, specifically that the respondent was in error of law in its interpretation of s. 42(1)(a)(ii)II as limited consideration to the terms of the development plan and precluding any regard to any applicable local area plan.

**91.** Accordingly, the applicant contends that they were denied the opportunity of advancing a more elaborate legal argument directed to the proper application of the statutory test. To this extent this is not a case like *Lackagh Quarries Limited v. Galway County Council* [2010] IEHC 479 where the respondent did not put the applicant on notice of the fact that it considered itself entitled to have regard to environmental considerations in exercise of a decision-making function under s. 42 to allow the applicant an appropriate opportunity to make submissions in respect of such environmental matters. This case is more akin to *Frenchchurch* where the Court was also dealing with a complaint that an opportunity to make submissions directed to an error of law had not been afforded. As I read that decision, the conclusion of the Court that there had been a failure to observe fair procedures in the decision-making process arose on a two-fold basis, namely by the omission (p. 285):

*“to take into account something that ought to have been taken into account and by failing to give an opportunity to the applicant to address the point in question”.*

**92.** I have already found that by reason of its erroneous approach to the interpretation of s. 42, the respondent has failed to have regard to relevant considerations because due regard has not been had to the argument that local objective 4 continues to apply. Accordingly, notwithstanding that the applicant had an opportunity to present the Application as it saw fit having regard to the statutory test, the failure to give notice of the proposal to refuse or the reasons therefor in a manner which might have permitted the applicant an opportunity to persuade the respondent to properly address the implications of the 2013 LAP as revised in its Decision, combined with the error of law already identified herein, could on an application of the dicta of Lynch J. in *Frenchchurch* justify



the Court in exercising a discretion to quash the Decision by reason of a breach of fair procedures in the decision making process.

**93.** Having said that, in this case it is clear from the conduct of the proceedings that the parties had opposing positions as to the appropriate approach in law to the interpretation of the s. 42 power to extend such that it seems to me to be unlikely that further or more elaborate legal submissions would have changed the outcome. To this extent *Frenchchurch* may be distinguishable in that Lynch J. appears to have been of the view that the error of law in question in that case might have been avoided by further submissions. Further submissions might have resulted in a reasoned statement as to why the respondent considered that it could not have regard to objectives stated in the LAP but the outcome would probably have been the same, consistent with the argument before me.

**94.** Ultimately, as I have found the process flawed by reason of error of law and a failure to have regard to relevant considerations, it is a moot question as to whether I would also have been prepared to quash the decision as a breach of fair procedures alone by reason of a failure to give advance notice of the proposed decision and the reasons for it.

#### *Error on the Face of the Record*

**95.** Two clear errors are notable on the face of the record in this Decision. Firstly, the wrong register reference appears with regard to the planning permission which it was sought to extend. Register reference F14A/0174 was not the planning permission for the proposed project and concerns an entirely different development at a different location. Secondly, the reference to the proposed development contravening materially a development objective indicated in the 2017 Development Plan for the zoning of High Amenity (HA) lands should read the 2013 Fingal Development Plan. These errors are admitted but the effect of the errors on the validity of the Decision is disputed.

96. Relying on the decision of the High Court in *ABM v. Minister for Justice* [2001] IEHC 110, where it was held that the references in the decision to the incorrect country of origin was such a significant error of fact that it constituted an error of law, the applicant maintains that the error of facts contained on the face of the record in this case goes to the jurisdiction of the respondent.

97. The applicant further objects to the explanation proffered by the respondent that the errors were clerical and were the result of human error and in this regard relies on the decision of the Supreme Court in *State (Crowley) v. the Irish Land Commission* [1951] I.R. 250. In *State (Crowley) v. The Irish Land Commission* [1951] I.R. 250, it was held at p. 256 that an administrative decision maker cannot seek to supplement a decision by way of affidavit evidence:

*“While the affidavit showing cause was read and considered before me without objection, I am of opinion that the judgment and order of the Commissioners must speak for themselves and must be construed and interpreted by me in the words of the judgment and order ... It is, however, sought to supplement the orders and written judgment by reference to the affidavit sworn by the Lay Commissioners. I do not consider that recourse can be had to the affidavit for this purpose. The determination of the Lay Commissioners appears in, and must be gathered from, the formal orders made by them and the affidavit cannot be utilised for the purpose of adding to, explaining, or contradicting their written orders.”*

98. In similar vein reliance is placed of Hyland J. in *Jackson way Properties v The Information Commissioner* [2020] IEHC 73, where she held that certain paragraphs of the affidavit sworn on behalf of the Information Commissioner were inadmissible (para. 33):

*“...this paragraph seeks to supplement or vary the Decision by explaining what certain passages in the Decision meant, to what extent they were material to the Decision and their impact on the Decision as a whole. This seems to me an impermissible attempt to add to the Decision in the way criticised in Crowley. The*

*Decision must stand or fall on its own terms and should not require to, or be permitted to, read in conjunction with a later explanation.”*

**99.** The principle enunciated in these cases is well established; it is not open to the respondent to seek to supplement the Impugned Decision to better explain the Decision taken and to persuade a Court that matters not referred to in the Decision were actually properly considered. However, I do not accept that this is a correct characterisation of what the respondent has done as regards the two so-called clerical errors in these proceedings.

**100.** Addressing the two errors, the respondent accepted that Planning Register Reference F14A/0174 is for a development that is unrelated to the development the subject of these proceedings but they point out that planning Register Reference “F14A/0174” is mentioned nowhere else in the respondent’s decision nor the notification that was sent to the applicant’s agent (apart from the ‘*Reasons*’ section). On the other hand, there are multiple references to the correct planning register reference throughout the record of the decision.

**101.** Further, where the respondent’s decision is describing a change as between two development plans, it is reasonably clear that the second reference to “*the Fingal Development Plan 2011-2017*” in the ‘*Reasons*’ section should be a reference to the 2023 Development Plan.

**102.** It seems to me that the errors in this case may properly be compared to those assessed by the Court in *Shillelagh Quarries Ltd. v. An Bord Pleanála & ors* [2019] IEHC 479, an authority urged on the Court by the respondent. In that case Barniville J. considered a challenge to a decision of An Bord Pleanála on the basis that its order contained a number of errors including citing the wrong legislation and an erroneous reference to a previous application that had, in fact, not been made. The High Court (Barniville J.) summarised its conclusion at the start of the judgment refusing the

applicant's challenge to the Board's decision. In respect of the challenge based on errors on the face of the Board's order, Barniville J. held (para. 10):

*"10. Finally, while the Board Order recording the decision of the Board on the applicant's application contains some errors, I am satisfied that these minor errors are harmless, insubstantial and inconsequential, that the Board Order makes clear what the Board was deciding and the statutory basis on which it was making its decision and, further, that the applicant was not in any way misled or prejudiced by any of those errors."*

**103.** Barniville J. made that finding based on the principles set out the authorities and caselaw that the learned Judge considered at paras. 165 to 169 of his judgment. At para. 166 he approved the principle in *KK v. Taaffe* [2009] IEHC 243 where:

*"The High Court (O'Neill J.) refused to quash the orders on the basis of these errors. The court held (at para. 4.14) that, although the first order did not have a recital paragraph such as that contained in the second order, the fact that the first order had a heading with the relevant legislative provision under which the order was being made, made the jurisdiction which the District Court was exercising "sufficiently clear"."*

**104.** I do not accept that the applicant was "*misled or prejudiced*" by the two obvious errors in the Decision. I am satisfied that it is "*sufficiently clear*" that the respondent was deciding to refuse to extend the duration of the Planning Permission the subject of the application (Register Reference F14A/0109) on the basis that the proposed development would contravene materially a development objective indicated in the 2023 Development Plan.

**105.** While I note that the respondent has no power to amend errors in the record of its decision making with the result that the only way the record can be corrected is by way of judicial review, I am not satisfied that the errors in question are such as to mislead or

undermine the substance of the decision when regard is had to the full record of the Decision from which the meaning and effect of the order is clear. These errors do not go to the jurisdiction of the respondent because it is clear from the record as a whole that the respondent understood which planning permission and which development plan were referred to, as did the applicant. There is no evidence that the applicant was misled by the mistakes which appeared in the Decision. On their own, they would not operate to persuade this Court to exercise its discretion by way of judicial review.

**106.** Insofar as the applicant contended during the hearing that there was a third error on the face of the record, namely the statement that SLO 469 no longer applies to the subject lands when it is the applicant's case that it does by reason of the extension of the LAP without amendment, it seems to me that this complaint is tied up with the core issue of law which I have been required to decide in this judicial review in deciding whether there has been a proper application of s. 42 of the Act and does not require to be separately addressed here.

## **CONCLUSIONS AND ORDERS SOUGHT**

**107.** In view of my findings above, I propose to grant an order of *certiorari* of the Decision of the respondent made on the 20<sup>th</sup> of July 2020 (Decision Order No. PF/0930/20) and an order remitting all the application made by the applicant to the respondent on the 29<sup>th</sup> of May 2020 pursuant to s. 42(1)(a)(ii) of the PDA to be determined in accordance with law.

**108.** I will hear the parties in relation to the form of the orders and any consequential matters.