THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 535

[2022 No. 352 JR]

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

BETWEEN

BARTRA PROPERTY (DUBLIN) LIMITED

APPLICANT

-AND-

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Barry O'Donnell delivered on the 4th day of September, 2024.

INTRODUCTION

1. This judgment concerns a challenge brought by way of judicial review in which the applicant company seeks to quash part of the Dún Laoghaire Rathdown County Development Plan 2022 to 2028, made and adopted by the respondent Council on 10 March 2022.

2. The particular aspect of the Development Plan under consideration concerns an area within Dún Laoghaire Rathdown called Bullock Harbour, and a significant portion of that area

is owned by the applicant. The challenge arises from a decision made by the elected members of Dún Laoghaire Rathdown County Council (*DLRCC*) to change the zoning of Bullock Harbour to exclude residential development.

3. On 25 May 2022, the High Court granted the applicant leave to apply for a judicial review. Following some narrowing of the issues at the hearing of this case, the following substantive reliefs were sought: -

> *"An Order of Certiorari by way of application for judicial review quashing the decision of the Council to make and adopt, within the New Plan, proposed amendment no. 239 (that was tabled as motion no. 61 from the floor at a meeting of the elected members of the Council on 18 October 2021).*
>
> *…*
>
> *An order remitting the matter to the Respondent to be considered and determined in accordance with law and in accordance with such directions as the Court considers appropriate."*

4. The application as set out in the very extensive Statement of Grounds is predicated on four core legal grounds, which were described as follows.

5. Core Ground 1:

> *"The Decision is invalid, ultra vires, unlawful, irrational and/or unreasonable because the Council failed to properly consider the report and recommendation of the Chief Executive and/or give reasons for rejecting the recommendation of the Chief Executive and/or give reasons for rejecting the submissions made by the Applicant, in breach of Articles 6 and 8 of Directive 2001/42/EC on the assessment of the effects of certain*

plans and programmes on the environment (otherwise "strategic environmental assessment" or "SEA"), subsections (9), (10) and (11) of section 12 of the Planning Acts and/or natural and constitutional justice and/or failed to provide any or any adequate reasons for its decision contrary to the general administrative duty to give reasons and/or contrary to the judgment of the High Court in Christian v. Dublin City Council [2012] IEHC 163."

6. Core Ground 2:

"The Decision is invalid, ultra vires, unlawful, irrational and/or unreasonable because the Council failed to consider, whether properly or at all, the proper planning and sustainable development of the area to which the development plan relates, in breach of section 12(11) of the Planning Acts and/or failed to have regard, properly or at all, to relevant considerations including:

(a) the determination of the Council's Planning Officer on 20 February 2018 that residential use of the Bartra Lands is consistent with the proper planning and sustainable development (Planning Officer's report on Council reference no. D17A/1135) and the same determination made by the Board on 28 June 2019 (when granting Board reference number ABP-301237-18);

(b) the evidence within the KHSK Report that the Bartra Lands have lost its previous commercial marine function, is now a brownfield site, with its former large warehouse/workshop/shop buying disused, and that other none other non-residential uses, as provided for in the New Plan, will not be viable without a residential component;

(c) the provisions of the New Plan in relation to risk of flood, wave overtopping or erosion that required detailed assessment of any proposed development within the planning application (or development management process);

(d) the provisions of the New Plan in relation to heritage protection for the rock outcrop area along the foreshore, measuring approximately 0.31 Ha, within the Bartra Lands; and/or

(e) the provisions of the New Plan that could lead "open for consideration" on the Bartra Land use for "Assisted Living Accommodation"."

7. Core Ground 3: -

"The Decision is invalid, ultra vires, unlawful, irrational and/or unreasonable because the Council failed to restrict its considerations to the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government, in breach of section 12(11) of the Planning Acts and/or contrary to the judgment of the High Court in Christian v. Dublin City Council [2012] IEHC 163 and/or have regard to irrelevant considerations including:

(a) prejudgment on the part of the elected members in respect of any pending or future application or appeal made that includes "residential use" and as, perhaps, a warning that no such applications will be entertained;

(b) the motive or desire to fetter the discretion of the Council and/or the Board, when making a decision on any pending application or appeal considering any planning or future application or appeal made that includes "residential use", to "put to bed" the "long battle" about suitability of the Bartra Lands for

"residential use" and/or, in particular, to interfere with the pending application (and now appeal); and/or,

(c) the "controversy" about, or numbers of persons interested in, the potential for "residential use" of the Bartra lands"

8. Core Ground 4: -

"The Decision is invalid, ultra vires, unlawful, irrational and/or unreasonable because the Council failed, when including in the New Plan zoning objectives for the new area, to restrict its considerations to the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government, or any Minister of the Government, in breach of sections 10(2) and 12(11) of the Planning Acts and/or contrary to the judgment of the High Court in Christian v. Dublin City Council [2012] IEHC 163 by including objectives that are not "of particular areas for particular purposes", but are singularly and uniquely applicable only to the lands in the Applicant's ownership and/or are discriminatory."

9. The core grounds can be reduced to the propositions that the decision was invalid because of (a) a failure to give adequate reasons, (b) a failure to take account of relevant considerations, (c) taking account of irrelevant considerations, and (d) improper discrimination or singling out of the applicant's lands.

10. In summary, the court is not persuaded that the grounds have been made out and the application should be refused. As can be seen, the grounds of challenge are framed by reference to classic administrative law propositions. Despite that framing, it was difficult to avoid the

strong sense that the applicant's fundamental disagreement was with the merits of the decision made by DLRCC. This court is not concerned with the merits of the decision; instead, the focus must be on the process that led to and informed the decision. The obligation to avoid engagement with the merits seems to me to be heightened when the decision under challenge is one made as part of the policy function of an elected deliberative assembly. In that regard, I agree with the observations of Humphreys J. in *Jones v. South Dublin County Council* [2024] IEHC 301, where he notes at paragraph 230:

> *"The determination of land use objectives in a development plan is perhaps the single most significant policy function entrusted to elected local councils, who must account for their policy stewardship directly to the electorate every 5 years. That is not an unlimited power of course, but, especially as a collective, policy-based, merits-based, decision made by an elected, deliberative, political assembly, it is one which necessarily involves a significant margin of appreciation."*

BACKGROUND

11. For the purposes of this judgment, I will be referring to the Environment (Miscellaneous Provisions Act 2011 and the Planning and Development Act 2000, as amended, as the "*Planning Acts"*.

12. The applicant is a private company engaged in the business of property development. It owns lands at what is described as the former Western Marine Building, Bullock Harbour in Dalkey, County Dublin. The applicant acquired these lands in March 2017 from an associated company who in turn had acquired the lands in 2016. Bullock Harbour is on the coast in Dún Laoghaire Rathdown, approximately 1km from Sandycove and approximately the same distance from Dalkey Village. The lands owned by the applicant in Bullock Harbour include a

former and now disused commercial warehouse premises comprising workshop, ship chandlers and boatyard. Between the buildings and the sea there is a rocky outcrop area to the east and north which adjoins the foreshore. In addition, the general area of Bullock Harbour includes a pumping station which is owned by Dún Laoghaire Rathdown County Council and a parcel of land in the ownership of an apartment complex known as Pilot View. There is also, on the site, a cottage which is not owned by the applicant.

13. Prior to the changes to the County Development Plan that are impugned in these proceedings the Bullock Harbour area was zoned as Objective W. In the respondent local authority's County Development Plan 2016-2022, zoning Objective W is to provide for waterfront development and harbour related uses. Under that heading, certain uses were permitted in principle. In particular, *residential, residential institution,* and *assisted living accommodation* uses were noted as open for consideration. The Development Plan also included certain specific local objectives (*SLOs*). SLO22 was an objective specific to Bullock Harbour, and it provided: -

> *"That any residential development shall form part of a mixed-use scheme which will include commercial marine-based activity and public water-based recreational uses and shall have regard to the special nature of the area in terms of the height, scale, architecture and density of built form."*

CHRONOLOGY

14. In order to understand the issues in the proceedings, it would be helpful at this point to summarise chronologically the history of the planning process as it affected the applicant's lands at Bullock Harbour. It should go without saying that the overall process of preparing the

Development Plan was extremely extensive and generated significant documentation. The following summary will only address the matters relevant to these proceedings.

15. Before the applicant acquired the lands, an associated company made a planning application on 7 December 2016 seeking permission for a mixed-use marine, commercial, leisure, community and residential based development at the former Western Marine Building. A second planning application was made in or around the same time seeking permission for the demolition of the former warehouse buildings in order to facilitate the development of the lands subject to planning. At all relevant times, the applicant was assisted by Doyle Kent Planning Partnership Limited (Doyle Kent) in its interactions with the local authority.

16. On 3 February 2017 Dún Laoghaire Rathdown County Council refused permission in respect of both of those planning applications. The first planning application had been refused for three reasons including that the amount of the site area reserved for residential use was excessive and there were inadequate provisions for marine related uses, which would compromise the harbour's ability to attract and maintain good marine related uses. The second reason related to the proposed visual form and structure of the development, which was considered to be seriously injurious to the amenities of the adjacent property within the harbour. Third it was considered that the design and layout as proposed significantly isolated the proposed development from the harbour and adjacent coastal area and did not integrate appropriately with the harbour area.

17. On 22 December 2017 a further planning application was made seeking permission again for a mixed-use marine commercial, leisure/community and residential based development at the lands. The second application was refused on 22 February 2018. Again,

three reasons were given. First, it was considered that there was an imbalance of residential use vis-à-vis marine related uses, with the result that there was insufficient provision for a waterfront harbour and marine related uses, and the area reserved for residential use was excessive. Secondly, it was considered that lack of an integrated design approach and the exclusive use of the majority of the site area for residential use would seriously erode and weaken the existing W Land Zoning Objective. Third, having regard to the location of the development and the special character of the harbour area, it was considered that the proposed development failed to respond appropriately to the unique site context which required a high-quality distinctive and integrated mixed-use design approach.

18. That refusal of permission was appealed by the applicant to An Bord Pleanála on 21 March 2018.

19. On 28 June 2019, An Bord Pleanála ("*the Board*"), subject to certain conditions, granted permission for the proposed development. In so doing, they rejected an Inspector's recommendation to refuse permission. The Board considered that the proposed development would not be contrary to the requirements of SLO22 in the 2016-2022 County Development Plan, and the Board considered that the development was designed and detailed to take account of the provisions of the *"Planning System and Flood Risk Management Guidelines for Planning Authorities"* issued by the Department of the Environment in November 2009.

20. An organisation called Bullock Harbour Preservation Association challenged the validity of the Board's decision by way of judicial review proceedings which were commenced on 20 August 2019. On 1 September 2020 a consent order was made in those proceedings

following, it appears, a compromise being reached. By that order, the decision of the Board was quashed and remitted for further consideration.

21. On 31 December 2021 the application for planning permission was withdrawn by the applicant in accordance with section 140(1)(a) of the Planning Acts.

22. On 6 January 2022 a further planning application (the third) was made seeking permission for a mixed-use marine commercial, leisure/community, and residential based development at the applicant's lands.

23. On 2 March 2022, permission was refused in respect of the planning application. On that occasion, the refusal was premised on four reasons. Three of the reasons were similar but not identical to the reasons given for the refusal of the previous planning applications and the fourth reason was that the development was located in an area which had been identified to be potentially liable to flood events and significant wave overtopping, and in particular that part of the development was within "*Flood Zone A*" as described in the Strategic Flood Risk Assessment part of the 2016-2022 Dún Laoghaire Rathdown County Development Plan.

24. On 29 March 2022 the applicant appealed the planning decision to An Bord Pleanála. Ultimately, the Board effectively upheld the Council's decision. That matter is the subject of a separate set of judicial review proceedings, and they are not matters with which these proceedings are concerned.

25. In parallel with the specific applications being made in respect of the site, the local authority, as required by law, had commenced a review of the County Development Plan. That

process commenced on 3 January 2020 when the Council gave notice of its intention to review the 2016 plan.

26. Between 3 January 2020 and 28 February 2020, a process of public consultation occurred, and submissions and observations were invited from any interested parties.

27. Following the public consultation process, the Chief Executive of the Council prepared a report on the pre-draft consultation process and on 24 April 2020 that draft was submitted to the elected members of the Council.

28. The Chief Executive went on to prepare a Draft Development Plan in accordance with s.11(5) of the Planning Acts and the draft plan was submitted to the elected members for their consideration on 23 October 2020. In December 2020, at a series of special County Development Plan meetings, the Chief Executive's draft was considered by the elected members of the Council. On 18 December 2020, the Chief Executive's draft, as amended, was deemed to be the Draft Development Plan in accordance with s. 11(5)(c) of the Planning Acts.

29. As required, the Draft Plan was placed on public display from 12 January 2021 to 16 April 2021.

30. In the Draft Plan, Specific Local Objective No. 28 concerned Bullock Harbour. SLO28 essentially repeated SLO22 in the 2016 Plan and provides as follows: -

> *"That any residential development shall form part of a mixed use scheme which will include commercial marine based activity and public water based recreational uses*

and shall have regard to the special nature of the area in terms of the height, scale, architecture and density of built form".

31. On 16 April 2021, the applicant's solicitors wrote to DLRCC setting out their client's submissions on the Draft Development Plan.

32. The submissions commenced with the observation that the applicant understood *"[t]hat the Council and its councillors may be requested to remove 'residential use' from the classes of use 'open for consideration' on those lands.*

33. Even though the decision of An Bord Pleanála granting permission which had been made in June 2019 had been quashed by order of the High Court on 1 September 2020, the letter went on to assert, erroneously, that the question of proper planning had been decisively determined by An Bord Pleanála when granting that permission. Essentially the letter went on to state that any amendment to the plan in relation to or that affected the applicant's lands would amount to *"unlawful interference with the exclusive appeal jurisdiction of the Board".*

34. In July 2021, the Chief Executive prepared a report on the Draft Plan consultation process. The DLRCC Chief Executive noted the applicant's submissions in the report. The report from the Executive noted that the Draft Plan did not propose any changes to the uses "permitted in principle" or "open for consideration" on lands subject to the W Zoning Objective.

35. The report also noted that two separate submissions were made requesting the removal of residential use as "open for consideration" in the W Zoning Objective in Bullock Harbour.

Those additional submissions appear to have been made by Bullock Harbour Preservation Association and Sandycove and Glasthule Residents Association. Both submissions raised concerns about flooding, the fact that Bullock Harbour is a point of public access to the sea and the marine natural heritage in the area, and, in particular, the Bullock Harbour Preservation Association submission proposed that serious consideration must be given to not permitting residential development in the area.

36. The response from the Executive was that they did not agree that residential should be excluded. The Executive concluded that suitability of residential or other uses for the site should be assessed through the *"development management process"*, in other words by addressing specific planning applications if and when they were made. The Executive also noted that the development management process would ensure, through a site-specific Strategic Flood Risk Assessment (*SFRA*), whether any uses proposed were compatible with any flooding concerns regarding the site.

37. It should be noted that the Chief Executive's report was considered and noted by the elected members.

38. A special meeting of the County Council was held in the Royal Marine Hotel in Dún Laoghaire to consider amendments to the Draft Plan on 18 October 2021.. The court had sight of a transcript of the relevant deliberations and a formal set of minutes arising from that meeting.

39. It is apparent from the minutes that a series of individual motions were submitted concerning the removal of residential development from the list of developments as open for consideration at Bullock Harbour. At the meeting those motions were withdrawn and in their

place a motion (Motion 61) was proposed jointly from the floor. The terms of the motion were that the planning authority pursuant to s. 12(6) of the Planning and Development Act 2000 (as amended) ("*the 2000 Act*") resolved to amend the draft development plan as follows: -

> *"To amend page 309, in table 13.1.14*
>
> *Include a "b" symbol beside Residential and Residential Institution.*
>
> *Where "b" denotes not permitted in principle or open for consideration in Bullock Harbour."*

40. The reason was agreed by the ward councillors who proposed and seconded the motion, and the reasons stated in the minutes are as follows: -

> *"This particular location is not an appropriate location for residential, and to protect the heritage and recreational amenity of the area."*

41. The minutes go on to note that, following discussion, members of the DLRCC Executive stated that they did not support the motion, but that the motion was agreed it appears unanimously.

42. It is apparent from the transcript that the motion was addressed by a number of councillors and was supported by all seven ward councillors in Dún Laoghaire. There was a considerable overlap in the reasons given by all the various members. The first councillor to speak was Councillor Melissa Halpin and she stated: -

> *"I think that all of us since we debated this in our last County Development Plan and we put in a very important, specific local objective for Bulloch Harbour and we looked at the zoning of Bulloch Harbour and we believed that the local -- the specific local objective would actually protect Bulloch from unreasonable development and the kind*

of plans that we then saw come in and in fairness and all respect to the Planners in the Planning Authority here in Dún Laoghaire, permission was refused but unfortunately An Bord Pleanála didn't see the specific local objective as being strong enough in protecting the harbour and protecting a very special area that is Bulloch from the kind of really over the top development that was then pushed through. Many people all around the area are still fighting to protect Bulloch Harbour and I think that the, hopefully the safest way we can do this is by not allowing residential development in the W zoning from Bulloch Harbour and I hope that our colleagues here -- I'm delighted that all parties in the Dún Laoghaire Ward have supported this. I'm very grateful for how everyone has been willing to work together on this. So, thanks very much".

43. Next, Councillor Juliette O'Connell proposed two reasons in support of the motion, which she stated were based on the fact that she lived in proximity to the harbour: first, the need to preserve the unique area, and second, a concern about rising sea levels and the effect of weather conditions and climate.

44. Next, Councillor Lorraine Hall noted that the *"controversial development"* was refused planning permission twice by Dún Laoghaire Rathdown County Council. She referred to the process before An Bord Pleanála and then noted that *"Bulloch Harbour Preservation Society led by Dr. Susanne McDonald have fought a long battle to halt this development due to, quite frankly, dangerous over flooding, flooding and overtopping that takes place on this site and instead to have the site developed in a safe and sustainable way that protects and promotes the maritime and historical context of the harbour. This particular water front (sic) site at Bulloch Harbour, is not an appropriate location for residential development and that's why we have come together, all Ward Councillors in the area, to propose this motion…".*

45. Councillor Justin Moylan also referred to the development that had been proposed by the applicant and the events involving An Bord Pleanála. He referred to the need to preserve Bullock Harbour.

46. Councillor Mary Fayne referred to a desire to stop residential building in Bullock Harbour on the basis that *"[i]t was never suitable for anything that was planned for, that was applied for in the planning and it got dangerously close."*

47. Finally, Councillor Tom Kivlehan indicated his view that Bullock Harbour was not a suitable site, having regard to rising sea levels and climate change, and that it was totally unsuitable for residential development. He also noted a desire to preserve Bullock Harbour for future generations and that he did not want to lose the harbour to total flooding of the area.

48. Following the speeches from the floor, an unidentified speaker, who it appears was a member of the DLRCC Executive, indicated that the reasons should be summarised and given. It was agreed that the reasons were that the particular waterfront site was not an appropriate location for residential development and to protect the heritage and recreational amenity of the area. The transcript notes that the DLRCC Executive remained of the view that the development management process would be the best way to assess proposed developments that were open for consideration and also matters relating to Strategic Flood Risk Assessment.

49. Following that meeting on 21 October 2021, the elected members amended the Draft Plan and those amendments were put on public display from 11 November 2021 to 17 January 2022.

50. As part of that consultation process, in January 2022 the applicant made further submissions to the Council. The applicant's submissions were submitted by Doyle Kent and comprised two reports. The first was from Doyle Kent themselves, which dealt with planning matters, and the second from KHSK Economic Consultants, which was an economic report.

51. The essential arguments made by Doyle Kent were that the changes proposed by the councillors were not appropriate in terms of the proper planning and sustainable development of the area. That was particularly in the context of national planning policy strongly favouring the reuse of brownfield sites in urban areas, and it was asserted the applicant's property constituted such a site. In relation to policy changes that had been made or proposed in relation to wave overtopping, it was suggested that this was a matter that should be addressed on an application specific way through the planning process. The report set out in detail the reasons why Doyle Kent asserted the proposed changes to SLO28 should not be made, and, in particular, the reasons why residential development should be permitted as part of a mixed use development. It was asserted that *"[t]he rationale for the removal of 'residential' from 'open for consideration'"* had not been set out. In addition, it was asserted that the changes were unlawful as they appeared intent to convey a prejudgment on the part of elected members in respect of any future application, and as *"perhaps, a warning that no such applications will be entertained"*. The report also noted that the application of the change in the *"open for consideration"* land use matrix had been applied singularly to their client's property at Bullock Harbour. In those premises, it was submitted that *"it is not reasonable that the property of one individual could be selected in a development plan making process without very clear planning justification"*. The report concluded by noting that the only viable potential development driver for the site must include a significant residential element. The report asserted that they did not

consider that their client's interest had received any or any reasonable consideration by the elected members.

52. The economic report from KHSK noted that Bullock Harbour is a challenging location for the development of new commercial activities. In effect, it endeavoured to identify possible commercial marine related activities that might be undertaken in the harbour and to assess the probabilities that such activities could be sustained. The report concluded that there was little prospect that the development of non-residential spaces would provide any return to a developer and that a significant level of associated residential development would be needed to provide the required levels of cross-subsidisation of any infrastructure – whether commercial or community.

53. Later in January 2022, the DLRCC Chief Executive prepared a report on the submissions made on the various proposed amendments, and a special Council meeting was held on 8 February 2022 to consider the proposed amendments to the draft plan and the Chief Executive's report. At that meeting, the elected members agreed that they noted the proposed amendments and the Chief Executive's report.

54. The Chief Executive's report at item (xi) in Chapter 3.7.1.8.5 notes the submission made by the applicant and summarises that submission, in my view, succinctly and accurately. The recommendation made by the Chief Executive was to omit the proposed amendment on the basis that it would be better to address the suitability of residential and other uses for the site through the development management process. Also, the development management process would allow for a site specific SFRA to address whether any uses proposed were

compatible with any flooding concerns about the site. In that regard, the Chief Executive's report in part agreed with what was submitted by the applicant.

55. However, it is clear that the Chief Executive did not accept all the contentions of the applicant. In particular it was clear that the Executive disagreed with the assertions in relation to the singling out of the applicant's property and the assertion that no proper planning reasons had been given. The note from the Executive included a reminder that in the commentary in relation to the motion on the meeting on 18 October 2021 the following issues had been raised: -

- First, protection from unreasonable development,
- Second, current SLO considered not strong enough,
- Safest way to protect Bullock Harbour is by not allowing residential development in the "W" zoning in Bullock Harbour,
- Concern around coastal erosion,
- Ensuring continuation of public accessibility,
- Dangerous flooding and overtopping,
- Promotion of maritime and historical context at the harbour,
- Not an appropriate location for residential development,
- Rising sea levels and climate change concerns rendering it unsuitable for development,
- Preservation of Bullock Harbour for future generations.

56. The note concluded *"Specific reasons given was that the waterfront site was not suitable for residential development and also to protect the heritage and recreational amenity"*. The report also goes on to consider the KHSK report and, effectively, summarises

the contents and conclusions of that report. The Executive noted the issues raised and also noted that the report was similar, if not identical, to one submitted with a then recently lodged planning application and, given its close connection to an application pending before the planning authority for decision, it was not considered appropriate to comment on the report.

57. On 9 March 2022 the Chief Executive's report was considered by the elected members at a special County Development Plan meeting. Again, the court has had the benefit of being able to consider both the minutes and the transcripts from those meetings.

58. As this case concerns a challenge, *inter alia*, to the reasons given for the decision to amend the draft development plan and to reconfigure SLO28, it is necessary to set out precisely what was said by the councillors and recorded in the transcript.

59. The meeting began with the members being reminded by Louise McGauran, a member of the Executive and senior planner with the respondent, that the view of the Executive was that it would be preferable if the suitability of residential or any other use of the site would be assessed through the development management process and also that that process is appropriate to address any site specific SFRA as to whether any use proposed is compatible with flooding concerns about the site. Ms McGauran also reminded the members that, if they were not going to proceed in accordance with the Chief Executive's recommendation, they should give planning reasons when they speak.

60. The first councillor to address the meeting was Councillor Hall and she stated:-

"*I want to disagree with the Managers (sic) proposal here. My primary concern here relates to the dangerous flooding and overtopping that takes place in Bulloch Harbour.*

The Council's own Strategic Flood Risk Assessment specifically flags the fact that both tidal and coastal flooding occurs at Bulloch Harbour. It specifically refers to flooding in Bulloch during the winter storms in 2014 and to Storm Emma in 2018 when a large number of properties were flooded and it specifically states that significant wave overtopping has been observed in Bulloch Harbour. I think it's very important that we consider the occurrence and impact of climate change here and the climate emergency that we're currently living through. Sadly instances of storms and flooding are becoming much more frequent due to climate change and the impact of storms in Bulloch Harbour means that huge waves crash against the rocks projecting very large bodies of water and debris up to 30 metres into the air, blown inshore and dropped on site, where these proposed houses are proposed. So, I think nobody here has any problem with the harbour being developed in a safe and sustainable way and in such a way that respects the harbour but I do not believe that this is a safe or appropriate place for residential development and on that basis and on the basis of the Council's own observations in their Strategic Flood Risk Assessment, I'd like to reject the Manager's proposal here."

61. Next, Councillor Halpin stated: -

"...in the interest of time, I mean, I won't rehearse arguments around Bulloch Harbour and what we've discussed here before, but just cite some planning reasons why I believe the residential should be removed from Bulloch Harbour, because residential on a site that is subject to flood risk and significant wave overtopping it would constitute a vulnerable use. The recent applications for residential on this site have actually showed the need for an emergency plan of escape for residents that proves that this is a vulnerable use of the site to have residential. The current zoning only includes

residential in the open for consideration, which as I understand it, the open for consideration means that residential would be considered if all things were equal but all things are not equal in Bulloch Harbour. There is significant wave overtopping and flood risk in this area. The site is ideally suited to recreational, community, tourism and maritime use to fit with the zoning objective. The reason the zoning objective is what it is, is because that is what is suited to the site and it should remain that way. Allowing residential would undermine this unique public amenity and would in my opinion contradict the SLO which seeks that all development should respond to the unique site context. So, I just want to add those in as reasons why I believe that we should ensure that residential is not permissible."

62. Councillor Moylan spoke next, and noted: -

"Flooding is the major issue. Bulloch Harbour is zone W and the overall intention of that is as waterfront. The subtext or open for consideration includes residential. However, I believe that that is incompatible with appendix 16, the Strategic Flood Risk Assessment, where it explicitly states in Section 2.5, page 5, "the sequential approach and justification test". And in that it says:

> *'Where possible, development in areas identified as being a flood risk, should be avoided. This may necessitate de-zoning lands within the plan boundary. If de-zoning is not considered appropriate, then it must be ensured that permitted uses are water compatible or less vulnerable such as open space and that vulnerable uses such as residential are not permitted in a flood risk area.'*

In the same document on page 11, under "Summary of Flood Sources", that's Section 3.3.2, title, "Flooding". It acknowledges:

> *'The eastern county boundary is subject to flood risk from the Irish Sea'.*

It goes on to specifically cite Bulloch Harbour and the overtopping as a result of Storm Emma in 2018 and the winter storms of 2014. In the following Section 3.3.3, "Residual Risks from Flooded Defence Overtopping or Breach', it identifies:

> *'Overtopping may become more likely in future years due to the impacts of climate change.'*

On that basis, I believe the amendment agreed at draft stage is justifiable and without any prejudice omitting residential from open for consideration under the W zoning at Bulloch Harbour is consistent with the recommendations under the Strategic Flood Risk Assessment. On that basis I would like to have the amendment in October to be retained in the plan."

63. Next, Councillor Connell spoke and she stated: -

"...My main concern is the unsuspecting buyers or the people dwelling in these houses if there is any houses developed in this area. I just couldn't vote for something knowing that someone not from the area would end up living there and a child would be sleeping with waves belting up against the window at night time. I just don't think it's fair or just. So, that's one of the main reasons I wanted to mention tonight. I also just, very

quickly, want to strongly reiterate as I did in October about accessibility and preserving public assets such as Bulloch Harbour in the area."

64. Finally, Councillor Fayne stated: -

"I too, thank you, support that the amendment would be retained. This long battle with Bulloch is going on and on, hopefully it can be put to bed because it is so unsuitable for residential development. I mean, I walk down there every day with my dogs and the sea level, it's very unpredictable. Bulloch is very unpredictable and we've all seen photos and a movie of the storms that have happened down there and it's just really -- let's just hope that this ends soon because it's just not suitable."

65. Following confirmation that that was the case, the Cathaoirleach noted that the views of the Council members were unanimous.

66. For completeness, the minutes of the same meeting note that the summary of submissions set out in the Chief Executive's report was considered and the response of the recommendation of the Chief Executive was considered (these have been set out above). It was also noted that, on 18 October 2021, motion 61 from the floor had been agreed and the items set out on bullet points in the Chief Executive's report were also set out.

67. The minutes go on to summarise the contributions by Councillors Hall, Halpin and Moylan, and their contributions were, to my mind, summarised accurately and properly. The minutes do not refer to the contributions made by Councillors O'Connell and Fayne, and the minutes note that *"[t]he Chief Executive's recommendation to omit proposed amendment number 239 FELL as it was unanimously agreed by the members that they disagreed with the*

executive's response and recommendation on pages 114 - 116 of the Chief Executive's Report".

68. Finally, to complete the narrative, on 23 February 2022 the applicant wrote to the Office of the Planning Regulator (*OPR*) making a complaint about the conduct of the Council in consideration of the Draft County Development Plan. There is a number of elements to the complaint. First, it is complained that at the meeting on 18 October 2021 because motions had been withdrawn and replaced by a motion signed by the seven ward councillors, which was not made visible to members of the public or, it was asserted, read out by the Chair, the motion was not visible to members of the public and this was considered to amount to a fundamental flaw in procedure. Second, a complaint was made that the change in the open for consideration land use matrix was applied singularly to Bullock Harbour and not to any of the other W Zoned lands. On foot of that it was submitted that it was not reasonable that the property of one individual would be selected in the Development Plan making process without a very clear planning justification. Third, it was complained that the alterations to the Draft Development Plan conveyed a prejudgment on the part of the elected members in respect of any future application. Fourth, it was asserted that consideration of flooding was a highly complex and technical process, and members were not qualified to make assessments which were properly best left at the development management stage.

69. The response of the OPR was set out in a letter dated 22 April 2022. The OPR reminded the applicant that, pursuant to ss. 31AM-AP of the 2000 Act as amended, the role of the OPR was to independently evaluate statutory plans to ensure they were consistent with national and regional planning and the relevant legislation. The OPR also noted that elected members of the local authority are responsible for making a development plan and in

that regard are restricted to considering the proper planning and sustainable development of the area together with any relevant policies or objectives of the Government or any Minister of the Government.

70. Where, having regard to the relevant reports, the members' reasoning behind approving the amendment were stated and where the omission of residential use from the use categories under the Zoning Objective did not preclude development at this location, with a number of uses left open for consideration, and respecting the function of elected members in making the Development Plan and grounding of decisions made in that context in planning reasons, the OPR did not believe that the matters raised could be examined as a complaint under section 31AU of the 2000 Act.

71. On 6 April 2022, the Council published notice of the making of a new plan in accordance with section 12(12) of the Planning Acts.

THE LEGAL FRAMEWORK

72. Sections 11 and 12 of the Planning and Development Act 2000 regulate the making of a development plan. In that regard, it has been clearly established that the making of a development plan is a matter for the elected members following proper consideration of a draft plan and the Chief Executive's report.

73. It was common case that in making a development plan, the members are restricted to considering the proper planning and sustainable development of the area to which the plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of Government.

74. Significantly, for the purposes of this application, s.10(8) of the 2000 Act also states that there is no presumption in law that any land zoned in a particular development plan shall remain so zoned in any subsequent development plan. In that regard in *Killegland v. Meath County Council & Ors* [2023] IESC 39, Hogan J. noted at paragraph 56 that:-

> *"…it is bears remarking that it is clear from the express language of s.11(8) of the 2000 Act that there can be no expectation as such that a particular zoning of land in a given development plan will remain inviolate. Accordingly, any such zoning is liable potentially to be changed via this democratic process at some future stage when the next development plan is adopted."*

75. The relevance of the *Killegland* judgment to the current proceedings is established by the opening line of the decision of Hogan J. as follows:-

> *"Where the elected members of a local authority propose to de-zone land already zoned for residential development by the making of a new development plan what is the extent to which they are obliged to give reasons for their decision?"*

76. *Killegland* arose out of the adoption by Meath County Council of a development plan for the period 2021 - 2027. Certain lands owned by the applicant company were downzoned from residential to community infrastructure while at the same time lands owned by the notice party were rezoned from rural to residential. A central issue in the case was the extent and the need to give reasons for the de-zoning. The Killegland lands had been purchased in May 2021 and previously had been zoned residential. When the Draft Development Plan was first put on display it was proposed to retain the preexisting zoning in respect of the Killegland lands. Following a public consultation process, the Chief Executive recommended that there should

be no further change to the proposed zoning. In September 2020, a motion was brought by certain elected members which proposed changing the zoning of the Killegland lands from residential to green space and community infrastructure. The reasons given by the councillor sponsoring the motion was that de-zoning of the site was critical to the development of a park in the area. The motion was passed by the elected members. In October 2020, the Chief Executive published a second report recommending no change to the zoning. The reason given by the Chief Executive was that the site would support the consolidation and development within the built up area of Ashbourne, which was said to be in accordance with national policy. A core point made by Killegland was that it had been singled out unfairly for de-zoning and that the de-zoning had occurred against the advice of the Council officials. The Council members took the view that the site should be preserved for community use as part of a proposed park and suggested that lands owned by the notice party would be more appropriate for residential use.

77. At a special planning meeting on 21 January 2021, the elected members of the Council voted in favour of the change of zoning as proposed in the motion. In the transcript of the meeting, the sponsoring councillor elaborated on the reasons why the site would be appropriate for park use and also noted that the lands had been retained with the residential zoning since 2001 and no attempt had been made to develop them. There was also significant public support in the form of submissions supporting the proposed motion. In a similar way to the situation in this case, the applicant in *Killegland* had submitted an application for permission to undertake residential development, and permission had been granted on 22 October 2021 by reference to the earlier iteration of the Development Plan. That application was the subject of an appeal which was allowed by An Bord Pleanála on 21 September 2023, but it was indicated by the

Board that it had acted in error in allowing the appeal on the grounds that the lands were now rezoned.

78. In the High Court, with regard to the reasons argument, the court stated that the principle regarding the giving of reasons in this context was a requirement to give the main reasons for the main issues, and those reasons could be gathered if not from express statements then from documentation expressly referred to or from the context of the decision. In terms of the making of submissions by interested parties, including the applicant, Humphreys J. had found that there was no requirement to engage with the submissions in a discursive sense. The court reasoned that the nature of the Council decision was a result of a collective or deliberative assembly and therefore a more flexible approach to the formal imposition of a requirement to set out reasons was warranted. On appeal, the appellant asserted that it was not sufficient to ascertain the rationale for the decision from the minutes or transcripts of meetings as they were not regularly published or made available and that debates and discussions are not a sufficient source of reasons. They rejected the contention that they "*well knew*" the reasons for the decision. In addition, the appellant contended, by reference to *Balz v. An Bord Pleanála* [2020] 2 ILRM 637 and *Connelly v. An Bord Pleanála* [2018] 2 ILRM 453, that there was a need to engage more properly with the submissions of the landowners. In addressing the arguments on the adequacy of reasons, Hogan J. made a number of important observations regarding the general context that applies in this situation.

79. First, as noted above, he stated that it was clear from the express language of s.10(8) of the 2000 Act that there can be no expectation as such that a particular zoning of land in a given development will remain inviolate. Accordingly, any such zoning is liable potentially to be changed *via* the democratic process at some future stage when the next development plan is

adopted. Secondly, the court noted that the power to make a development plan is a function of the elected members. When the Council exercises those powers it acts as of necessity as a deliberative assembly. It follows that as observed by Lynch J. in *Malahide Community Council Limited v. Fingal County Council* [1997] 3 IR 383 at 397: -

> *"…Any court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature."*

80. Hogan J. considered that *"[t]hese sentiments now apply with even greater force following the subsequent adoption of Article 28A.1 of the Constitution in 1999 with its recognition of "the role of local government in providing a forum for the democratic representation of local authorities in exercising and performing at local level powers and functions conferred by law…"*

81. Second and proceeding from that, Hogan J. noted at paragraph 59: -

> *"59. Given the deliberative quality of the decision-making process the reasons for a particular decision may not necessarily be as neatly packaged and presented as would be in the case where, for example, reserved functions were discharged by the Council qua planning authority. The duty on the part of the elected members when passing a resolution under their executive powers was nonetheless summarised by Finlay C.J. in P & F Sharpe Ltd. v. Dublin City and County Manager [1989] IR 701 at 720–721 as involving "an obligation to ensure that an adequate note was taken, not necessarily verbatim but of sufficient detail to permit a court upon review to ascertain the material on which the decision had been reached.""*

82. The court then went on to consider the authorities on the requirement to give reasons in the context of the Development Plan. In that regard, the court noted that the leading authority was the decision of Clarke J. (as he then was) in *Christian v. Dublin City Council* [2012] 2 IR 506. In that case, the elected members decided to alter the zoning of lands of various educational and religious institutions to remove the possibility of housing developments being open for consideration. As noted by the Supreme Court, Clarke J. indicated that elected members in general were not required to formulate reasons in respect of the more general policy making elements of the Development Plan by which he meant the overall strategy and principle means designed to implement that strategy, which involved the making of policy choices. However, at para. 81 of the judgment Clarke J. did note that the situation altered where specific aspects of the Development Plan affected individual rights. In that scenario Clarke J. observed:-

> *"However, it seems to me that when a development plan gets down to the nuts and bolts in a way which has the potential to specifically affect the rights of individuals, both those who may wish to develop their own lands or those who may have their own interests interfered with by the development of neighbouring lands, then it seems to me that it is necessary to give at least some reasons for the precise means of implementing the overall strategy or policy adopted. The extent of the reasons required to be given will depend on the nature of the specific provisions of the development plan under consideration."*

83. That requirement to give reasons becomes more acute when the elected members depart from the recommendations of officials with professional expertise in the area of planning and zoning. While the members have an absolute entitlement to take a different view to that of the Executive, a person affected, and the court, must be able to find the reasons for that departure. Clarke J. summarised the position at para. 84 as follows: -

"To summarise the position at least at the level of principle, it seems to me that reasons are required for at least elements of the development plan (i.e. those which cannot reasonably be described as being simply policy choices). The reasons may be found in the development plan itself. Where, however, the development plan is the subject of significant amendment and where the rationale for the relevant amendment (consistent with the other provisions of the development plan) is not to be found in a manager's report, then there is an obligation on those proposing the amendment to either refer to the reasons for the amendment in the resolution by which the amendment is effected or in other documentation or materials specifically referenced in the amendment resolution."

84. The Supreme Court in *Killegland* agreed with the observations made by Clarke J. and, in that regard, Hogan J. noted: -

"67. Given, however, that in making a change of this kind to the development plan the councilors are going against the advice of the Chief Executive and the planning officials, the reasons for such a decision should be properly evidenced and justified. Accordingly, the reasons for such a decision should either be clear from the resolution itself or from the documentation before the councilors when the making of the resolution was discussed. In exceptional cases it may be sufficient to show that the reasons for the decision were well understood."

85. Having established the general parameters for the court's inquiry, the court went on to consider the specific situation in respect of the changes to the Killegland land zoning. Hogan J. framed the task of the court as addressing a series of questions: Is there a documentary record which sufficiently explains the rationale for the decision of the elected members? If so, are

those reasons consistent with the requirements of the 2000 Act? Were reasons given and, if so, did they adequately explain the rationale for the de-zoning decision?

86. In regard to the first question, the court was satisfied that there was clear evidence that the councillors proposing the change had explained the reasons for their decision on many occasions. While the reasons were expressed in different ways and at different times and that there was no single written expression of the view no one could really have been in any doubt as to the reasons given for the de-zoning. In that case the court was satisfied that the reasons contained in the minutes of the meeting and the motion papers filed in support of the resolution were adequately set out.

87. The next question was whether the reasons given were valid planning reasons or whether irrelevant considerations were taken into account.

88. In considering the question of whether irrelevant considerations were taken into account it is important to consider what type of considerations have been characterised as relevant in the context of planning decisions. In that regard, in *Killegland* the court drew attention to *Flanagan v. Galway City & County Manager* [1990] 2 IR 66 where Blayney J. noted that the Council member proposing the motion requiring the County Manager to grant a retention planning permission had indicated that if the application was refused the applicant would have to emigrate, and at the end of his speech that member noted that five people were employed by the applicant for retention permission. These were deemed to be irrelevant considerations in matters that should not have been taken into account.

89. Similarly in *Griffin v. Galway City and County Manager* (HC, 31 October 1990), the members took into account irrelevant factors including personal considerations affecting the applicant. It should be noted that in that case the personal considerations were very specific to the applicant in that case where it had been noted that the applicant *"found it attractive and almost essential to live on his holding, and that the 'breeding of livestock' was of national importance"*. Blayney J. noted that these were considerations which were wholly personal to the applicant and were put forward to influence the decision on the resolution and did influence it. In that case none of the speakers who spoke in favour of the motion referred to the Development Plan issue which was a central issue from the perspective of the County Manager.

90. In *Farrell v. Limerick County Council* [2010] 1 ILRM 99, the councillors had gone against the advice of elected officials and rezoned the applicant's lands in the course of making a development plan. The County Manager's advice was that the proposed rezoning would be inconsistent with particular heritage and environmental issues. In that case, the High Court noted that the members had not engaged in any serious discussion on the environmental impact of the proposed rezoning, and the court considered in that case that there had been a failure to outline any planning based reason for rejecting the advice of the County Manager.

91. In *Killegland*, Hogan J. distinguished *Farrell* on the basis that in *Killegland* there was no suggestion that the decision to de-zone had been adopted for irrelevant personal reasons, nor was there any suggestion that the proposed de-zoning would be inconsistent with the proper planning and development of the area or that it would jeopardise existing heritage conservation or environmental objectives. Unlike the situation in *Farrell*, in *Killegland* the reasons given for disregarding the advice of the officials were for the most part planning-based reasons.

92. Moreover, even if non relevant considerations were taken into account this would not necessarily vitiate a decision if those considerations were marginal. In *Killegland* there was a suggestion that part of the motivation for the actions of the councillors was a belief that the lands were in the ownership of the Roman Catholic Church. That was potentially problematic, as noted by Hogan J. The court was clear that planning and zoning decisions should generally speaking be blind as to issues of ownership. Importantly, however, Hogan J. noted that the considerations mentioned above *"were not absolutely central to the de-zoning decision*. *On the facts of the present case, they were really at best marginal considerations, and they cannot be said to have thereby vitiated the overall decision to de-zone."*

THE PLEADINGS

93. I have already set out the relief that was claimed in the action. The Statement of Grounds of the applicant was verified by an affidavit of Ms Hazel Jones, a Strategic Planning Director of Bartra Capital Property Management Limited, an associated company of the applicant, which was sworn on 3 May 2022. A further verifying affidavit of Mr Michael Flannery, a director of the applicant, was sworn on 4 May 2022.

94. A Statement of Opposition was filed on behalf of the respondent on 19 January 2023 in which all of the allegations made by the applicant are denied and a substantial response is set out. The opposition of the respondents was grounded on an affidavit of Ms Louise McGauran, Senior Planner and an official of DLRCC, which was also sworn on 19 January 2023. Following the initial exchange of affidavits, Ms Jones swore a second affidavit on 28 February 2023 to which Ms McGauran replied by way of a second affidavit on 15 May 2023.

95. In addition to the core pleadings, just over 7,800 pages of exhibits were placed before the court.

THE ARGUMENTS

96. As set out above, Ground 1 in the Statement of Grounds was that the decision of the elected members of DLRCC to amend SLO28 was not adequately reasoned or explained. The applicant placed considerable emphasis on the reference by Hogan J. in *Killegland* at para. 67 of the judgment that *"the reasons for such a decision should be properly evidenced and justified".* The applicant asserted that the import of the judgment was that the reasons should not simply be stated but that the reasons themselves have to be justified and properly evidenced.

97. In that regard, it was submitted that the elected members did not explain their reasons for rejecting the submissions made by the applicant or the evidence produced by the applicant regarding proper planning and sustainable development, and the elected members did not explain why they rejected the Chief Executive's views that the question of residential development on the applicant's site was more appropriately a matter to be dealt with through the development management process.

98. The applicant accepted that the level of detail to be given in reasons depends on the nature of the decision, but they argued that the required level of reasoning also depends on the effect of the decision on the landowner and the input that the landowner made as part of the decision making process. The applicant asserted that it was incumbent on the decision-maker, the elected members in this case, to treat the submissions that were made and analyse them in a way that demonstrates that if they did not accept them and they did not accept their own planners' views, they must provide reasons that are properly evidenced and justified.

99. In terms of what type of reasons or explanations should have been given, the applicant asserted that the elected members did not engage with the fact that the plan itself makes provision for assessments of flooding and wave over-topping concerns in the context of individual planning applications. Second, they asserted that the elected members did not engage substantively or qualitatively with the Chief Executive's recommendations and, thirdly, they did not engage with the applicant's expert evidence which dealt with those issues in terms that were submitted to the Council as part of the consultation process.

100. By way of brief summary, in respect of the obligation to give reasons, the Council relied very heavily on the decisions in *Killegland* and *Christian.* Their argument was that at the outset it was necessary to consider the overall process. The actual process of making a development plan involved the elected members coming together to review an enormous amount of documents, often taking multiple votes and multiple resolutions into the evening time. Hence, the standard of reasoning must be viewed from that context. The question to be presented is can the court glean from the commentary the rationale of the elected members?

101. The Council asserted that there was no doubt whatsoever as to why the elected members made their decision. The submission by the solicitors for the applicants anticipated to a very large extent submissions made by the local associations expressing concerns about flooding. The applicant also had made submissions through Doyle Kent supported by the KHSK report following which there was a further meeting. It is clear that this was a case where the applicant was fully aware of what was being discussed and why it was being discussed.

102. The respondents highlighted the submissions that were made by Bullock Harbour Preservation Society and Dalkey Community Council. It was pointed out that there was no dispute that there is a level of flood risk at Bullock Harbour. Hence, there was an evidential basis for the decision taken by the elected members. The SFRA in the Draft Plan identified the potential for wave overtopping, the members' own anecdotal and personal observations which were set out in the transcript, the submissions from the Community Council and Resident Association groups and also to some extent the submissions made on behalf of the applicant themselves which identified the potential for debate around the flooding issue and indicated that that is best left to the development management process.

103. The court's view is that when the Supreme Court referred to the need for decisions to be evidenced and justified in *Killegland*, this was not a requirement for the provision of the type of reasoning contended for by the applicant here. That is evident from Hogan J.'s analysis of the evidence in that case. It can be recalled that Hogan J. framed the essential approach by asking three critical questions:

- Is there a documentary record which sufficiently explains the rationale for the decision of the elected members?
- If so, are those reasons consistent with the requirements of the 2000 Act?
- Were reasons given and, if so, did they adequately explain the rationale for the de-zoning decision?

104. Moreover, Hogan J. also put those questions in the context of the important deliberative functions of the elected members.

105. I consider that the rationale for the amendment decision was clear in this case. The ultimate decision needs to be considered in its legislative context, but also in the context of the overall process. From the time when the Draft Plan, with the original version of SLO28, was published in January 2021, it was very clear that the applicant was acutely aware of the issues that it was facing in Bullock Harbour. At that stage the applicant already had made two planning applications that had been unsuccessful at the local authority stage. The applicant made submissions in the letter from its solicitors in April 2021. That letter expressly anticipated that the elected members may consider removing residential uses from the "open for consideration" status in Bullock Harbour.

106. At the meeting on the 18 October 2021, the elected members who spoke explained why they considered residential use should not be permitted in Bullock Harbour. The reasons given were expressed in different ways, but the main reasons related to an opinion that the area was not appropriate for residential development and there was emphasis on the concerns about flooding. The gravamen of the reasons was accurately summarised in the minutes as being that the "*particular location is not an appropriate location for residential, and to protect the heritage and recreational amenity of the area."* At that point, and well before a final decision was made, the rationale for the course of action must have been clear to the applicant.

107. Subsequently the various reports from the Chief Executive clearly recorded and accurately summarised the submissions that were made not only by the applicant but also by local groups. The applicant's submission on the planning choice to be made was premised on an accurate understanding of the concerns that had been expressed by the elected members, and clearly directed to attempting to address those concerns.

108. I consider that the Chief Executive in the report on the Draft Plan from January 2022 accurately summarised the various submissions – and accurately asserted that the October 2021 amendment decision invoked planning reasons. That report was considered by the elected members and the proposed amendments and the Chief Executive's report were noted by the elected members on 8 February 2022. There was no evidence to suggest that the elected members had not considered the applicant's submissions.

109. It has to be understood that, in fact, the approach adopted by the applicant in its submissions was relatively straightforward. Its main planning point was that the expressed concerns of the elected members were best addressed in the context of the development management process. In that regard, it was clear that the DLRCC Executive shared that view. However, the elected members were entitled to alter the planning status of the lands, and were entitled to differ from the views expressed by the Executive. It is important to note that although the Executive recommended a different course to that proposed by the elected members, it did not raise any concern that the course proposed by the elected members was in any sense unlawful or not open to the members.

110. The reasons given by the elected members at the meeting of the 9 April 2022 were very clear. Although naturally the elected members who spoke articulated their views in different ways, there was a consistent theme or explanation why they had formed the view that (a) the site was not suitable for residential development, and (b) why they considered that residential use should be ruled out rather than left to be considered in an individual planning application as part of the development management process. I am satisfied that while the discussion and reasons were not expressed by direct or express reference to the submissions of the applicant,

it was very clear that the elected members had engaged with the essential thrust of those submissions, and that the principal reasons were valid planning reasons.

111. In those premises the court is fully satisfied that (a) there was a proper and full documentary record which sufficiently explained the rationale for the decision of the elected members; (b) that the principal reasons were consistent with the requirements of the Planning Acts; and (c) that the reasons given adequately explained the rationale for the decision to change the zoning to remove residential use.

112. The applicant also sought to argue that its view on the adequacy of reasons was highlighted by the fact that the amendment removed the option of residential use but, because of the way the amendment was framed, the members left the provision of *"Assisted Living Accommodation"*, as open to consideration. The applicant asserted that by leaving assisted living accommodation open to consideration, having regard to the reasons that were given, was incongruous and, on that argument, called into question the adequacy of the reasons given and highlights the lack of engagement by the members with the underlying facts.

113. In that regard they drew an analogy between the situation in the current case and the situation that obtained in *Christian v. Dublin City Council* where, in general terms, residential use was taken out of the zoning for the particular sites, but social and affordable housing remained as an objective.

114. In summary, the approach adopted by the Council was that the elected members took a view in respect of residential accommodation, but that did not mean that they were also bound to apply the same approach to the issue of assisted living or that it gives rise to any irrationality.

The submissions had been made by the public and the question of assisted living had not been addressed by the applicant. The members were exercising their own powers conferred on them by the Planning Acts to make their own decisions.

115. The Council sought to distinguish the situation in the current case regarding assisted living accommodation to the situation that obtained in *Christian*. Effectively in *Christian,* Clarke J. was concerned by the fact that if residential use was ruled out then clearly social and affordable housing should not have been included. However, the Council argued in this case that ruling out residential use and not ruling out assisted living accommodation does not give rise to the same difficulty.

116. I agree with the approach adopted by the Council. This was not a sufficiently analogous situation to what occurred in the *Christian* case. In *Christian* there was an overwhelming problem presented by the absence of adequate reasons. That problem was exacerbated or illustrated by the fact that social and affordable housing simply should not have been permitted to remain as a potential use if all residential use was ruled out. This was because social and affordable housing comprised a subset of residential use. That stark incongruity is absent from this case. As noted by the Council, here there was no debate about assisted living accommodation, and that use amounts to a separate planning objective. It is true that it is hard to imagine how assisted living accommodation use could be permitted in light of the views expressed by the elected members. However, that question will have to be addressed in the context of any future planning application as part of the development management process, and the court must proceed on the basis that any such application if it is made will be dealt with on its own terms and in the proper manner.

117. I will address Grounds 2 and 3 together as they both concern the related questions of whether relevant considerations were not taken into account and whether the elected members took into account irrelevant considerations.

118. With regard to Ground 2 – failing to have regard to relevant considerations – the applicant pointed to the following matters: -

- First the determination of the Council's planning officer in February 2018 that residential use was consistent with proper planning and sustainable development.
- The evidence in the economist's report about the necessity to have a mixture of residential and other uses in order to make the site viable.
- The failure to have regard to the fact that concerns about flood and wave overtopping were capable of being dealt with as part of the development management process.
- The provisions that were to be made in relation to the rock outcrop area along the foreshore being a heritage protection matter.
- How assisted living accommodation was still left on the table in relation to the Council making a *"joined up"* decision that made sense.

119. Ground 3 related to the taking into account of irrelevant considerations. The applicant came very close to arguing that in fact this was more a case of prejudgment or bias on the part of the elected members. Bias was not specifically pleaded in this case and the court has some concerns about attempts to introduce a bias claim under the rubric of taking account of irrelevant considerations. Nonetheless, the argument made on behalf of the applicant was that it is clear from the various submissions and discussions made by the elected members that there was a desire or motivation on the part of the members that the existing and historic disputes about the extent to which residential use should be permitted in Bullock Harbour was to be

"put to bed". The applicant highlighted that it was apparent, in particular, from the minutes of the 18 October 2021 meeting that there was clear knowledge of the planning application's process and it pointed towards a desire to ensure that the planning application process was not going to be successful or an appeal being successful which demonstrated an intention to interfere with that process.

120. In terms of relevant and irrelevant considerations, the Council argued that there was nothing personal in the sense that that term was used in previous authorities regarding the situation concerning the applicant, albeit that their lands were especially affected by the amendments. Moreover, the Council argued that this was a very different situation to that discussed in the caselaw where decisions were struck down because irrelevant considerations were taken into account.

121. Here, it seems clear that the applicant is incorrect to contend that the elected members ignored or failed to take into account the matters summarised above. It is clear from the documentary record that the elected members were fully aware of the view that any question of residential development could be addressed in the development management process. There was no requirement that the elected members had to address the specific submissions in a detailed or discursive sense or respond to those submissions seriatim. The transcript makes clear that the members were aware of the Chief Executive's recommendations and that they had noted the report that summarised the various submissions that had made regarding Bullock Harbour.

122. Importantly, the view of the Executive was not that there was disagreement about the potential difficulties presented by residential development, but rather that those concerns were best addressed in the context of individual applications. The elected members made a valid

policy choice that it was better to deal with the question of residential development at a broader policy level instead of leaving the question to the development management process. In doing so, the court is satisfied that they had regard to and took into account the necessary relevant considerations.

123. The applicant's argument that the elected members took irrelevant considerations into account was not made out. In that regard, the applicant placed considerable emphasis on the contention that some of the elected members when they spoke at the meetings referred to the planning disputes concerning the various applications that had been made. In the first instance, as was the case in the *Killegland* case, I am satisfied that those matters clearly were not central to the decision. They were framed by the members as ancillary to the overall point that there were substantial planning reasons why residential development was not appropriate at Bullock Harbour. Second, this situation is markedly different from the situations in the *Flanagan* and *Griffin* cases. In those cases, the motivation and reasons given for the impugned decisions were framed by reference to factors that were not related to the planning issues. Here the central reasons were very clearly based in concerns about the proper planning and sustainable development of the Bullock Harbour area. The fact that a particular site has been the subject of planning disputes suggests that there were planning reasons why a view could be taken that any points of contention about the area should be resolved at a broad policy level.

124. Finally, I am not persuaded that there was any evidence that this decision was in any sense motivated by personal animus to the applicant. The fact is that any decision to alter the zoning status of an area may well impact on a particular landowner. That impact cannot lead to an inference that the decision was personal, and far more compelling evidence would be required to demonstrate a personal motivation.

125. Ground 4 was grounded in asserted failures to comply with ss. 10(2) and 12(11) of the Planning Acts. The applicant asserted that what was decided did not reflect a broader concern about permissible residential development in areas with the County identified as having flooding risks, but was instead focussed on a particular area for a particular purpose, where the applicant asserted that it would have a unique affect on the lands that were in the applicant's ownership.

126. The applicant highlighted that there were other lands in Objective W that had not been rezoned to prevent residential development. In addition, the Council retained as open for consideration *"Assisted Living Accommodation"* at Bullock Harbour. From this the applicant asked the court to infer a discriminatory effect which was not a proper zoning objective.

127. In response, the respondent argued essentially that this decision was made by reference to the decision was made by reference to the particular characteristics of the site. Different zoning considerations applied to other areas that fell within Objective W, and in the case of Bullock Harbour there were express submissions by the public to change the zoning in the context of residential use.

128. I am not persuaded that the applicant is correct in arguing that the Council adopted a discriminatory approach to the zoning of Bullock Harbour. Other than referring to the fact that other areas zoned Objective W had not been the subject of similar amendments, the applicant did not adduce any cogent evidence to suggest discrimination.

129. It was apparent from the evidence that insofar as Bullock Harbour was concerned, there was a high level of concern from public groups and the ward councillors about residential development. The applicant, for understandable commercial reasons, disagreed and agitated to keep residential development open for consideration. The fact that the alternative argument won out is not evidence of discrimination.

130. As noted about, the evidence did not establish that the decision was motivated by personal concerns about the applicant. There is an important difference between a decision being made about lands that affect a particular person where that decision is grounded in planning and development concerns about the site, and a decision that is motivated by or informed by the identity of the person who will be affected.

131. Here, the focus clearly was on the expressed concerns about the suitability of the site for residential development and not about the identity or characteristics of the person who wished to engage in that development.

132. In addition, while it is undoubtedly clear that the decision impacted on the commercial viability of the applicant's holdings on the site, it is not accurate to assert that they were uniquely affected or singled out. The applicant had acquired most of the potentially developable land in Bullock Harbour, but, as noted above, it was not the only landowner affected by the decision. Other persons owned other plots or pieces of land within the harbour area.

133. In the premises and for the reasons set out above, the court will refuse the application for judicial review.

134. As this judgment is being delivered electronically, I will list the matter before me for final orders, including any issue in relation to costs, at 10.30 on the 17 October 2024. My provisional view – and it is solely provisional – is that the respondent has successfully defended the application and therefore should be entitled to their costs. In the event that either party wishes to argue for a different costs outcome, they are to notify the other party in writing on or before the 3 October 2024, and each party should exchange and file short written submissions (maximum 2000 words) on or before the 10 October 2024.