THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW
In the matter of Section 50 of the Planning and Development Act 2000 (as amended)
2022/939 JR

Between

MOUNT SALUS RESIDENTS' OWNERS MANAGEMENT COMPANY LIMITED BY GUARANTEE
Applicant

and

AN BORD PLEANÁLA,
THE MINISTER FOR HOUSING LOCAL GOVERNMENT AND HERITAGE,
IRELAND, THE ATTORNEY GENERAL
and
THE PLANNING REGULATOR
Respondents

and

ALANNAH SMYTH
and
DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL
Notice Parties

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED 15 JANUARY 2025

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INTRODUCTION

1. This judgment concerns the statutory powers of the 5th Respondent ("the OPR"[1], "the Office") and the 2nd Respondent ("the Minister"), in combination and in effect, to direct the amendment of a development plan. I hope I may be forgiven for suggesting that the legislative scheme governing both the making of a development plan and the making of such ministerial directions seems a paradigm example of the complexity of the Planning Acts described (albeit in passing) by Hardiman J in **Oates**[2] as "*notorious*". Generally as to this judgment, I confess to taking some shelter, not for the first time, in the Supreme Court's description of the Planning Code as "*almost impossibly complex*"[3] a "*statutory maze*",[4] and "*confusing almost to the point of being impenetrable*"[5] and in the recent reference by Hogan J to "*the complexities of our planning laws and … how difficult it is often in practice to apply this corpus juris*."[6] More specifically,

[1] Office of the Planning Regulator.
[2] Oates v District Judge Browne [2016] IESC 7, [2016] 1 IR 481.
[3] Waltham Abbey v An Bord Pleanála [2022] IESC 30 (Supreme Court, Hogan J, 4 July 2022).
[4] O'Connell v The Environmental Protection Agency and Ors [2003] 1 I.R. 530.
[5] An Taisce v McTigue Quarries Ltd [2018] IESC 54 (Supreme Court, MacMenamin J, 7 November 2018).
[6] Krikke & Ors v Barranafaddock Sustainable Electricity Limited [2022] IESC 41 (Supreme Court, Hogan J, 3 November 2022, §1).

Humphreys J in an **FoIE** case,[7] recently and with reason, described the procedures for making a development plan as complex and the resultant flow-chart as "*quite labyrinthine*" such that a comprehensive account is impractical. Nonetheless, he very usefully set out the 19 "*basic*" steps required – including those relating to the role of the OPR and the possibility of ministerial directions as to development plan content. By reference to the steps identified in the Development Plan Guidelines, I recently, in **Pat O'Donnell**,[8] attempted a similar exercise with similar diffidence. I am conscious that the complexity in this instance results in part from legitimate impulses both to ensure full consultation with all stakeholders and to interpose the OPR as a national, non-political and strategic actor - as here relevant, primarily as a mechanism for facilitating ministerial policing of the legality of development plans. Yet I cannot avoid the impression that the complexity also derives from a legislative anxiety to stop only just short of establishing a right in the Minister to simply impose his planning judgements on elected members of planning authorities as to the content of their development plans. Whether I am correct in those observations is in the end not central: the complexity subsists and must be negotiated. However, I hope it may excuse, at least in part, the length of this judgment.

THE IMPUGNED DECISIONS & SOME FACTUAL MATRIX

2. This judgment concerns the validity of the following "Impugned Decisions":

- two statutory recommendations by the OPR to the Minister ("the OPR Recommendations") dated respectively 6 April 2022 ("the OPR's s.31AM(8) Recommendation enclosing a Draft Direction") and 17 June 2022 ("the OPR's s.31AN(4) Recommendation to Issue a Direction") recommending the deletion of certain content of the 2022 Development Plan as made by the 2nd Notice Party, Dún Laoghaire Rathdown County Council ("DLRCC").

- a statutory draft direction by the Minister dated 12 April 2022 ("the Draft Ministerial Direction") and a statutory direction by the Minister, dated 28 September 2022 ("the Ministerial Direction"[9]) requiring DLRCC to delete that content of that Development Plan.

The content deleted is, essentially, the 0/0 Objective[10] of the Development Plan, the objective of which is to protect the architectural heritage of the areas of Killiney and Dalkey to which it applies (the "0/0 Objective Areas").

[7] Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §50 et seq. This case was decided after trial of the present case. The State asked that I consider it. I indicated to the parties that I would consider it in writing this judgment and gave the parties liberty to make brief written submissions on foot thereof. None have ensued.
[8] Pat O'Donnell & Co Ltd v Dublin City Council & Uniphar 2024 [IEHC] 671 §12.
[9] The Direction records that it "may be cited as the Planning and Development (Dún Laoghaire-Rathdown County Development Plan 2022-2028) Direction 2022".
[10] See below.

3. The Applicant ("Mount Salus") impugned primarily the decision of an Bord Pleanála ("the Board"), dated 1 November 2022, to permit the 1st Notice Party ("Ms Smyth") to construct a detached two-storey, three-bedroom house on a site at Torca Road, Killiney Hill, Dalkey, County Dublin. The Mount Salus residential development is nearby. The permission was granted despite the recommendation of the Board's inspector that it be refused for reasons including that the proposed development would adversely affect the character of the Vico Road Architectural Conservation Area ("ACA"). An earlier proposal had been rejected for, *inter alia*, the same reason and contravention of the 0/0 Objective. The 1st Respondent ("the Board") has conceded *certiorari* on the basis that it erred in interpreting certain content of the 2022 Development Plan. Ms Smyth has indicated that she does not oppose *certiorari*. It is agreed that the matter should be remitted to the re-decision of the Board.

4. In addition to *certiorari* of the Board's decision, Mount Salus in Core Ground 6 of the Amended Statement of Grounds dated 3 January 2023 seeks certain declaratory reliefs as to the Impugned Decisions. Their significance lies in the basis on which, as to the 2022 Development Plan, the planning permission to be quashed would be considered on its remittal to re-decision by the Board. It is agreed that I am to decide the Core Ground 6 issue as to the validity of the Impugned Decisions, as that will determine whether, in making its remitted decision, the Board will consider the 2022 Development Plan with or without the 0/0 Objective described below. It is agreed that whether the 0/0 Objective applies is capable of affecting the Board's decision. This judgment is limited to decision of the Core Ground 6 issue. The Board, DLRCC and Ms Smyth did not participate in the hearing of that issue. The OPR and the Minister defended the proceedings as to that issue.

5. Killiney Hill is a prominent and steep hill on the coast south of Dublin and is in the functional area of DLRCC, which is in turn part of the Dublin Metropolitan Area ("DMA").[11] What follows here is a very general description. Much of Killiney Hill, especially its upper slopes, is a public park and a popular walking area. The village of Dalkey lies north of the hill and hosts a DART station. The hill falls south east to, successively, Vico Road, the Dublin to Bray DART line,[12] cliffs, and the sea south of Sorrento Point. The northern and north-eastern slopes of the hill, facing the sea to the east, are occupied in considerable part by substantial Victorian residences in large grounds. Ms Smyth's site is in this area. The area is scenic, with sea views – indeed those observations can be made, in varying degrees, of much of the locales affected by the 0/0 objective. Generally, those slopes of the hill lie in the Vico Road – Sorrento Point ACA. The village of Killiney lies south of Killiney Hill and roughly north east of Cherrywood – a notable residential development area. Killiney also hosts a DART station. It is clear that, *ceteris paribus* and if one ignored their heritage value, to the considerable extent that the lands relevant to this case lie within 1km of a DART station, the 2022 Development Plan would encourage their residential development at a minimum (and high) density of 50 units per hectare.[13]

[11] The DMA is described in the National Planning Framework and a Metropolitan Area Strategic Plan (MASP) is set out accordingly in the Eastern & Midland Regional Assembly Regional Spatial & Economic Strategy 2019-2031.
[12] In fact it is more properly called the 'DART/rail line' which runs south to Rosslare. But as it is agreed that it is, at very least, predominantly the DART which serves the 0/0 Objective Areas, I will call it the DART Line.
[13] Development Plan p83.

6. It may assist to clarify that:

- the 2022 Development Plan dated 21 April 2022, as published by DLRCC after it was made, initially did not reflect the deletions mentioned above as the Minister had, by that time, only issued a Notice of Intention to make a Direction and a draft Ministerial Direction dated 12 April 2022. So, the text to which the Minister objected remained in the 2022 Development Plan as initially published.

- at or shortly after its initial publication, the 2022 Development Plan as published was supplemented by an advisory note by DLRCC that the Plan would, by reason of the draft Ministerial Direction and as provided by statute, take effect *pro tem* subject to those deletions.

- later again, after the Ministerial Direction dated 28 September 2022 had issued, DLRCC republished the 2022 Development Plan, again dated 21 April 2022,[14] having effected the deletions required by the Ministerial Direction.

It is not always readily apparent on the face of the 2022 Development Plan, and especially from excerpts of the Plan, which version one is looking at and some care is needed in that regard.

7. As Figure 1 below illustrates and very roughly, the northern and eastern two thirds of DLR[15] is generally characterised in by urban settlement – actual and zoned.

Public Transport in the DLRCC Area

8. Public transport in the DLRCC area consists essentially of three elements: the urban bus network, the Luas and the DART line. The Luas is a light rail service, with capacity accordingly, running from Dublin city centre via the north west of the DLRCC area and, notably given Figure 1 above, Ballyogan and Cherrywood, to a terminus at Brides Glen - roughly south, south west of Killiney. The DART line is a heavy rail line, with capacity accordingly, which runs south from Dublin city centre generally down the east coast. I can take judicial notice that the DART line is amongst the most important transport corridors[16] in the DMA of which DLR forms part. So too, for that matter, is the Luas line.

9. On a very rough view of the maps before me, the 0/0 Objective affects less than a quarter of the length of the DART corridor as it runs through the DLRCC area.[17] As stated, the DART stations relevant to the 0/0 Objective Areas are at Dalkey and Killiney. The 0/0 Objective Areas from Sorrento Point south abut the DART line. On the maps before me, the 0/0 Objective Area:

- between Dalkey and Sorrento Park lies roughly between 500m and 1km from Dalkey DART station.

[14] Confusingly but correctly as, by statute, the deletions were retroactive.
[15] Dún Laoghaire Rathdown.
[16] By "corridor" I understand the area identified in policy as being served by the transport mode in question.
[17] This can be roughly discerned from the Index to the Development Plan maps which appears on each Development Plan map.

- East and north of Dalkey run along the coast between 500m and 1km from Dalkey DART station. In this area the DART line runs inland at some distance from the coast.
- abuts Killiney DART station.

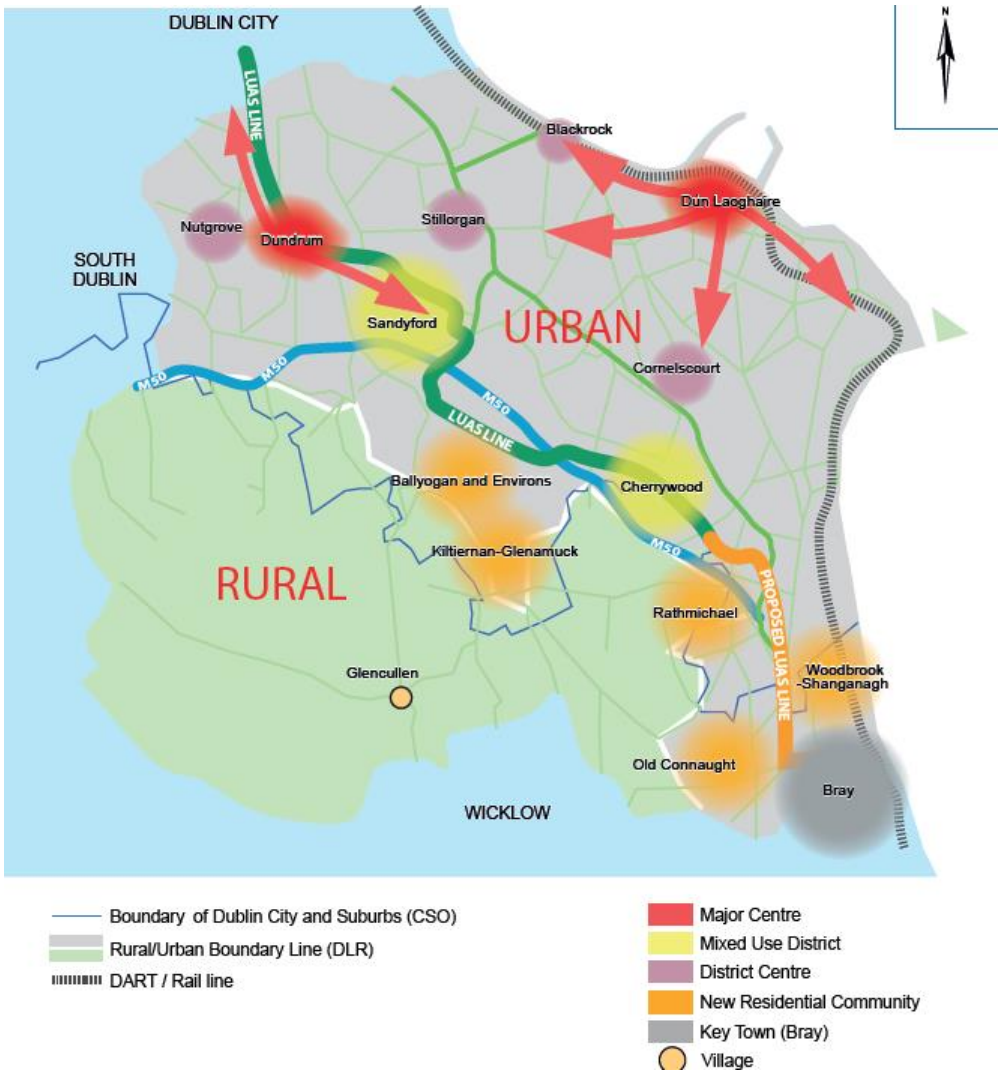

Figure 1 – DLR Urban/Rural Divide, Settlements, DART Line and Luas Line[18]

MINISTER'S POSITION AS TO THE LEGAL REGIME

10. I ultimately understood the Minister's position at trial,[19] as to the legal regime governing his power to direct planning authorities as to the content of their development plans, to be as follows:

[18] Development Plan Figure 2.9: Core Strategy Map.
[19] See transcript day 3 pp 15 & 30, 46 & 103. My use of the word "ultimately" may reflect my shortcomings rather than any on the part of counsel for the Minister.

i. S.10(1) PDA 2000[20] requires that development plans set out an overall strategy for the proper planning and development of the area to which it applies. To qualify as a proper and lawful such strategy, an overall strategy must comply with the mandatory requirements of s.10 PDA 2000,

ii. By s.10(1A) PDA 2000, development plans must be consistent as far as practicable with development objectives set out in the NPF[21] and the applicable RSES.[22] This is repeated at various points in the PDA 2000. For example, s.31AM(16)(i)(iii) PDA 2000 refers to the "*the necessity of ensuring*" that a development plan "*will be consistent with*" development objectives of the NPF and RSES. The Minister says that the starting point is that all development plan objectives must be consistent with all NPF objectives.

iii. In making development plans, elected members of planning authorities are statutorily obliged to ensure that they are so consistent.

iv. The PDA 2000 vests the assessment whether the plan is so consistent initially in the elected members but thereafter in the OPR and ultimately, by s.31(1)(ba) PDA 2000, in the Minister.

v. The Minister in making that assessment is entitled to form his opinion as a matter of evaluative planning judgement.

vi. If the Minister forms the opinion that a development plan is consistent with NPF and RSES development objectives, he is not entitled to nonetheless impose, by direction to the planning authority, his planning judgement as to his preferred means of consistency of that development plan with such objectives. Counsel for Mount Salus made a similar point in submitting that *"if the development plan does achieve government policy in a way that the Regulator doesn't like, that doesn't allow the Regulator to intervene."*[23] However that agreement flatters to mislead as, in practical terms and as will be seen, thin partitions divide a planning judgement as between means of consistency of a development plan with such objectives from a planning judgment as to inconsistency with such objectives.

vii. If the Minister forms the opinion that a development plan is not consistent as far as practicable with NPF and RSES development objectives, in breach of s.10(1A) PDA 2000, he may issue a ministerial direction accordingly requiring, as to any such inconsistency, correction of that development plan.

viii. As
- s.10(1) PDA 2000 requires that development plans set out an overall strategy for the proper planning and development of the area to which it applies and
- as a proper such strategy must comply with s.10 PDA 2000,

if the Minister forms the opinion that a development plan is inconsistent with NPF and RSES development objectives in breach of s.10(1A) PDA 2000, then he may also form the opinion that it fails

[20] Planning and Development Act 2000 as amended.
[21] Project Ireland 2040, National Planning Framework, February 2018. Part II Chapter IIA PDA 2000 provides for the National Planning Framework.
[22] Regional Spatial & Economic Strategy. Part II Chapter III PDA 2000 provides for RSESs. The RSES relevant here is the Eastern & Midland Regional Assembly Regional Spatial & Economic Strategy 2019-2031.
[23] Transcript day 2 p50.

to set out an overall strategy in breach of s.10(1) PDA 2000 and may issue a ministerial direction accordingly requiring correction of that development plan.

ix. Such a ministerial direction, as to inconsistency with NPF and RSES development objectives and the absence accordingly of an overall strategy for the proper planning and development of the area, issued under s.31 PDA 2000, is judicially reviewable as to its merits, only for irrationality.

11. It follows that, as inconsistency of a development plan with NPF and RSES development objectives is illegal as in breach of s.10(1A) PDA 2000, the Minister's position was that the validity of a ministerial direction based on an evaluative planning judgment finding such inconsistency depends on the existence of a ministerial opinion that the development plan was tainted by illegality. As Humphreys J said in **FoIE**,[24] the OPR and the Minister are, in this respect, law enforcers, not lawgivers.

12. Accordingly, the proposition above that "*Such a ministerial direction, issued under s.31 PDA 2000, is judicially reviewable only for irrationality*" must be carefully understood. When the Minister submitted[25] that "*The statutory scheme allows the Minister and the OPR to substitute their view of the merits for the elected members*"" [26] It must be understood that the merits in question are not as between options all consistent with NPF and RSES development objectives. The merits in question are of an opinion that the option chosen by the planning authority is inconsistent with those objectives and is illegal in consequence. It is in that particular and somewhat unusual sense (unusual in that issues of legality are generally for the court and reviewable for correctness) that the merits of the Minister's decision must be understood.

13. In truth, it does not seem to me that much of the foregoing as to the law was much in dispute. The real difficulty of the case arises because many NPF and RSES development objectives "*pull in different directions*" [27] such that the tensions between them must, inevitably in many factual matrices, be resolved by the planning authority, at least in the first instance. This is a function of the reality that very many planning policies represent choices having opportunity cost. A field zoned and developed for apartments desirable from a planning point of view as contributing to meeting housing targets cannot be used for playing fields desirable from a planning point of view as contributing to provision of amenities - and *vice versa*. In this case, and speaking crudely, certain lands in the Killiney/Dalkey area along the DART line are simultaneously

- suited to large scale, high density, residential development in virtue of their proximity to the DART line consistently with planning policy objectives of compact urban residential development along transport corridors.
- unsuited to such development in virtue of their architectural heritage value, the protection of which is consistent with other planning policy objectives.

I use the word "crudely" as all in fact agree that

[24] Friends of the Irish Environment v Minister for Housing, the OPR and DAA [2024] IEHC 588 §125 & 126 & 138 – citing the passages cited above from Tristor §6.14 & 7.19.
[25] Transcript day 3 p123.
[26] Transcript day 3 p123.
[27] Tesco Stores Limited v Dundee City Council [2012] UKSC 13 – albeit speaking of development plans.

- residential development unrestrained by considerations of architectural heritage would be inappropriate.
- at least some residential development of these lands should be possible.

In other words, all agree that compromise and reconciliation is inevitable of the planning policy objectives competing as to those lands and the difference between the parties is one of balance and degree as to the proper compromise of those objectives.

14. Counsel for the Minister summarised his position as to the facts of this case as being that the Minister was rationally entitled, on the material before him, to his view that

- in DLRCC's making its Development Plan 2022[28] an OPR recommendation had not been implemented and
- the Plan was not consistent with NPF objectives and thereby was in breach of, *inter alia*, s.10(1A) PDA 2000 and thereby also lacked an overall strategy for the proper planning and sustainable development of DLRCC's functional area in breach of s.10(1) PDA 2000. [29]

15. In practice, the need for compromise and reconciliation of NPF and RSES objectives is common and inevitable. So, while the Minister may be strictly correct in saying that the starting point is that all development plan objectives must be consistent with all NPF objectives,[30] the observation is often not of great practical assistance in the real world. Like the plans which von Moltke said don't survive contact with the enemy, this absolutist starting point does not long assist in the complex, multifactorial, even messy and inevitably somewhat subjective, business of making development plans and the compromises they inevitably require. And as resolutions in development plans, as they relate to particular lands, of competing NPF and RSES objectives often necessarily involve compromise of one or more of those objectives, whichever objective the planning authority prefers or towards which it tends the balance, its choice, at least in principle, exposes it to the accusation of illegal inconsistency with the other: as to the reconciliation of policies pulling in different directions, they are at risk of being damned if they do and damned if they don't. In that circumstance the difference between consistency as far as practicable with NPF and RSES objectives and inconsistency with such objectives seems to me to become, at least in some cases, wafer-thin.

16. It might be thought that in present circumstances of housing crisis, the 'right' answer as to consistency with the NPF would obviously, ubiquitously, invariably and inevitably favour housing over architectural heritage. But that is not so. First it must be remembered that the 'wrong' answer is not merely wrong in a general qualitative sense - it is illegal by virtue of s.10(1A) PDA 2000. Second, and as here, the issue is often one of balance and degree of compromise as between competing objectives. Third, it is easy to think of examples where the answer would very sensibly not be housing – indeed such an answer would be absurd: could the Minister by direction upset, as illegally inconsistent with NPF objectives for compact development on transport corridors, a development plan prohibition of housing development on Stephen's Green (by which I mean the Green itself) in virtue of the Luas station beside it? The answer is to hand: the

[28] The Dún Laoghaire-Rathdown County Development Plan 2022 – 2028.
[29] Transcript day 3 p129
[30] Transcript day 3 p.46. Emphases added.

Supreme Court held in **Killegland**[31] that it was lawful to not zone an infill urban site for housing, despite NPF and RSES objectives tending to such a zoning, as Meath County Council had taken a rational view that the site was required as part of the entrance to a public park. Such judgments may be made and such balances effected. Indeed, Killegland is a telling example: the site was not merely not zoned for housing, it was positively dezoned from housing.

17. The Minister instanced **Killegland** in disavowing a proposition that in no circumstances can elected members decide there should be no infill development in a particular area.[32] I cannot see that there can be in principle (as I understand the Minister to suggest at least at points in his submissions,) a logical, workable or bright line distinction between a single site and a larger area. If the proposition is disavowed as to single sites it must also be disavowed as to larger areas.

18. As will be seen, part of the solution is found in the law that s.10(1A) PDA 2000 requires consistency with NPF objectives only "*as far as practicable*" and more of it lies in the law, as stated in **Killegland,** that the consistency required is, at least typically, general as opposed to detailed, specific, comprehensive or ubiquitous.

19. Finally, it assists to mention at this point that the Minister emphasised the presumption of NPO11[33] of the NPF in favours of infill development in urban areas. It took some teasing out at trial[34] but ultimately the Minster's position seems to have been that a development plan presumption against infill development in the urban areas generally of a development plan area was impermissible (a point not really disputed) but he conceded that that a presumption against infill development in a discrete identified urban area might be permissible if justified by reference to the s.10(1A) PDA 2000 concept of practicability. This was an inevitable concession given examples such as St Stephen's Green and given **Killegland** upheld the de-zoning of an urban infill site from residential to zone it for the entrance to a public park.

ZONING, SLO130, THE 0/0 OBJECTIVE AND ITS DELETION

Zoning & the Presumption of the 0/0 Objective

20. A stated, the relevant concern of the Ministerial Direction dated 28 September 2022 was to delete the "*0/0 Objective*" from the 2022 Development Plan.[35] All the lands with which we are concerned are coloured pale yellow on the development plan maps[36] to signify that they are zoned "*A*" – "*To provide*

[31] Killegland Estates Ltd v Meath County Council [2023] IESC 39. See detailed consideration of this case below.
[32] Transcript day 3 p51.
[33] NPO stands for National Policy Objective as stated in the NPF.
[34] Transcript day 2 pp. 21, 108 et seq and 128.
[35] The Ministerial Direction also required deletion of other content relating to the percentages of 3-bed units in apartments required in Build To Rent developments. That is not here relevant.
[36] See figures below.

residential development and improve residential amenity, while protecting the existing residential amenities". Zoning definitions in the Development Plan adopt the familiar practice of listing development types respectively "*Permitted in Principle*"[37] and "*Open for Consideration*".[38] Ordinarily, in areas zoned "*A*", residential development is permitted in principle.[39]

21. Obviously, general zoning yields to more localised and specific objectives. Generally, the 0/0 Objective Areas are in ACAs characterised by extensive, not intensive, residential development. In the purely physical/spatial sense (planning considerations apart), the grounds of at least an appreciable number of such residences have potential for infill development.[40] The 0/0 Objective provided, in essence and with exceptions, that in the 0/0 Objective Areas, "*no increase in the number of buildings will normally be permitted*".[41] I accept that, as the State and the OPR submit, 0/0 Objective, alters the presumption as to residential development in the 0/0 Objective Areas from "Permitted in Principle" to, in the specific case of a proposed development which would increase the number of buildings in the 0/0 Objective Areas (which must, in reality, mean very many potential proposed developments), to what I would term "Not Normally Permitted".[42]

SLO130

22. I will set out below the full text of the 0/0 Objective but it will provide context to first set out SLO130,[43] which was not deleted from the 2022 Development Plan by the Ministerial Direction and still applies to all 0/0 Objective Areas. In that sense, SLO130 represents common ground as between DLRCC and the Minister. SLO130 establishes a specific local objective in respect of the same areas as the 0/0 Objective Areas:[44]

> *"To ensure that development within this objective area does not*
> *(i) have a significant negative impact on the environmental sensitivities in the area including those identified in the SEA Environmental Report, and/or*
> *(ii) does not significantly detract from the character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements."*

[37] It seems to me, if perhaps pedantically, that this phrase is to be understood as "Permissible in Principle". §13.1.3 of the Development Plan states that "Land uses designated under each zoning objective as 'Permitted in Principle' are, subject to compliance with the relevant policies, standards and requirements set out in this Plan, generally acceptable."
[38] §13.1.4 of the Development Plan states that "Uses shown as 'Open for Consideration' are uses which may be permitted where the Planning Authority is satisfied that the proposed development would be compatible with the overall policies and objectives for the zone, would not have undesirable effects, and would otherwise be consistent with the proper planning and sustainable development of the area."
[39] Development Plan Table 13.1.2.
[40] Murphy v An Bord Pleanála & Clonkeen [2024] IEHC 186 §181 et seq records that "infill development" is not a defined term in the planning code or Planning Policy. While the issue was discussed at trial (Day 2 p14) on reflection it seems to me on perusal of the maps that, at least in the areas in question and at least generally, development in the grounds of large houses could, be described as "infill".
[41] Dún Laoghaire-Rathdown County Development Plan 2022 §12.3.7.8.
[42] This phrase is not a quotation from the Objective.
[43] SLO stands for Specific Local Objective.
[44] See CE Report 27/5/22 p28.

23. It should be said that the protection of 0/0 Objective Areas and ACAs also and importantly derives from the statutory protection of ACAs and Protected Structures and from various other heritage protection objectives of the Development Plan.[45] But it is fair to say that SLO130 came to be emblematic in the proceedings of all the protections remaining after deletion of the 0/0 Objective and I will refer to it in that sense in this judgment.

24. Counsel for the Minister submitted at trial, though perhaps it was not intended as a precise submission, that if SLO130 applied and the 0/0 Objective did not, residential development in the areas in question would be open for consideration. It seems to me that the correct position is that such development would remain permissible in principle - albeit subject to the terms of SLO130.[46] His requirement was that planning applications be assessed by planning decision-makers on a case-by-case basis. It seems to me that in reality such an approach is inevitable under both the 0/0 Objective and SLO130, the difference being the starting presumption. In a very real sense, the Elected Members of DLRCC (the "Elected Members") would start with architectural protection. The OPR and the Minister assert that the law requires them to start with housing development close to a transport corridor (or, more accurately, that the OPR and the Minister are entitled to the opinion that that is what the law requires). For now, I simply observe that both architectural protection and housing development close to transport corridors are required by s.10(1) and (2) PDA 2000 as elements of an overall strategy and as Development Plan objectives[47] and as national and regional planning policy by the NPF and the RSES.

25. Clearly, understood in the context of the ACAs and amenities of the lands to which to which it applies, even SLO130 represents a considerable restraint on development in those areas – including the relevant parts of the DART corridor which passes through and/or serves the ACAs and the 0/0 Objective Areas. Indeed, that is a point which the OPR and the Minister emphasise. So, the principle of protection of the 0/0 Objective Areas – to "*ensure*" that their environmental sensitivities do not suffer significant negative impact and that their character does not suffer significant detraction - was and is not in dispute. In essence, all that was in dispute between DLRCC and the Minister is whether the 0/0 Objective, in pursuit of that agreed principle, came at too high a price in terms of discouraging residential development in the DART corridor.

The 0/0 Objective

26. The 0/0 Objective, as stated in the initially published 2022 Development Plan, read as follows:

[45] Including Development Plan objectives HER8: Work to Protected Structures; HER13 Architectural Conservation Areas; HER14: Demolition within an ACA; HER16: Public Realm and Public Utility works within an ACA. HER19 Protection of Buildings in Council Ownership; HER21: Nineteenth and Twentieth Century Buildings, Estates and Features: HER22: Protection of Historic Street Furniture and Public Realm; HER24: Protection of Coastline Heritage.

[46] Development Plans typically distinguish, in zoning, between developments permissible in principle and those merely open for consideration.

[47] I will consider S.10(2) below. Here I merely note that it requires that development plans include objectives for, inter alia, "(g) the preservation of the character of architectural conservation areas;" and "(n) the promotion of sustainable settlement and transportation strategies …".

> *"12.3.7.8[48] 0/0 Zone*
> *Locations have been identified on the Development Plan maps where no increase in the number of buildings will normally be permitted. Such locations include areas in the vicinity of the coastline, where density controls are considered appropriate in the interests of preserving their special amenity.*
>
> *Many of these locations are however, within close proximity of the DART line where higher densities would normally be permitted and promoted. Small scale, sensitive infill development may be considered in these areas on suitable sites where such development would not detract from the character of the area either visually or by generating traffic volumes that would cause potential congestion issues which would, in turn, necessitate road widening or other significant improvements. Aspects such as site coverage and proximity to boundaries, impacts on drainage, loss of landscaping, the existing pattern of developments, density and excavation impacts will also be critically assessed in determining applications for residential development in the 0/0 Zone."*[49]

27. The following content – §4.3.1 of the initially published 2022 Development Plan, in effect supplemental to the 0/0 Objective - was also deleted on foot of the Ministerial Direction:[50]

> *"Notable Character Area Exclusions*
> *There are significant parts of Dalkey and Killiney characterised by low density development. Some of these areas have been identified as areas where no increase in the number of residential buildings will normally be permitted (i.e. the '0/0' zone).*
>
> *However, much of this area lies close to the DART line where higher densities would, in normal circumstances, be encouraged. Sensitive infill development will, however, be considered on suitable sites as determined by the Planning Authority. Such sites should:*
> - *Be located within a 10 minute walk of a DART station …*
> - *Development shall not detract from the unique character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements (refer also to Section 12.3.7.8)."*

28. Notably, while premised on a principle that an additional number of buildings will not be permitted, the 0/0 Objective and §4.3.1 explicitly recognised the desirability of, and allowed for, infill residential development on the DART corridor on a case-by-case basis and subject to considerations as to the character of the area and traffic issues - which are undeniably legitimate planning considerations. Indeed, those considerations are common to the 0/0 Objective and SLO130. There was argument at trial as to what this means as to density. In my view the words "*where higher densities would, in normal circumstances, be encouraged*", imply that the provision for infill development which follows includes the possibility of medium

[48] Note: The Ministerial Draft Direction of 12 April 2022 referred to this content as "Section 12.3.8.8". But it is the same content. See pp3 & 4 of the Ministerial Direction of 28 September 2022.
[49] Emphasis added.
[50] Deletion was also required of
- the 0/0 zone objective, including symbol and boundary of objective areas from maps 3, 4, 7 and 10;
- the text 'No increase in the number of buildings permissible' and associated symbols from maps 1-14;

and higher density infill development as long as it is sensitive and small scale. This is also apparent from the very purpose of the allowance, which is to realise the benefit of the DART line. Low density development would not serve that purpose in any worthwhile degree. Further, the juxtaposition of the phrase "*no increase in the number of residential buildings will normally be permitted*" and the word "*However*", make it clear that the infill development contemplated could take the form of additional buildings. As a matter of interpretation of the Development Plan (a matter of law and for the court) the OPR's interpretation - that it is unclear whether the Plan envisages additional buildings where infill is permissible on suitable sites[51] - is wrong.

29. While the location of Ms Smyth's site somewhat focussed the case on Killiney Hill and the ACA in which it is situate, the Ministerial Direction affects, and the declarations sought would affect, other 0/0 Objective Areas. In my view, the case must be considered as to the entire of the 0/0 Objective Areas. They are depicted in figures below – though I caution that these figures are not to the same scale and should be used only for rough comparisons of the areas depicted. Of those areas, the following may be said:

- Broadly, the 0/0 Objective affected, in varying degrees, a segment of the DART corridor running south from the southern edge of Loreto Dalkey to the southern stretch of Seafield Road, Killiney, including multiple ACAs and Dalkey and Killiney DART stations.[52]

- The 0/0 Objective Area running south from the southern edge of Loreto Dalkey to Sorrento Park north applied to a long narrow strip between Coliemore Road and the coast. The strip in question is generally "*one house deep*", as it were, fronting onto the coast.

- Further north, the 0/0 Objective applied to a small area overlapping with part of the Sandycove Point ACA. However, this small area was confined to Sandycove Point itself and was some distance from the DART line. It is impossible to conceive, nor was it argued, that it contributed significantly to the considerations which prompted the actions of the OPR and the Minister.

- The largest 0/0 Objective Area, by quite some margin, lies on the coast south of Killiney Hill. It comprises much of the eastern part of Killiney and includes Killiney DART Station.[53] It generally, but not precisely, coincides with the Killiney ACA but it is not apparent that anything turns in these proceedings on any differences of area of application of those designations.

- More generally, the 0/0 Objective Areas and the ACAs overlap considerably, though not precisely. For example, the 0/0 Objective Areas included some lands in the vicinity of Killiney Hill south of and outside the Vico Road – Sorrento Point ACA. Conversely, much of that ACA in the vicinity of Sorrento Point was not covered by the 0/0 Objective – which is generally confined to the area of Sorrento Terrace and a short stretch of coastline to its west. It is not apparent that anything turns on such differences for purposes of these proceedings.

[51] OPR's s.31AM(8) Notice dated 6 April 2022 – Recommendation enclosing a Draft Direction.
[52] In fact Dalkey Station is not in a 0/0 Objective Area but it serves most of the northern 0/0 Objective Areas.
[53] See 2022 Development Plan maps 7 & 10.

- As the OPR notes, many dwellings in the 0/0 Objective Areas are Protected Structures.[54] So they, including their curtilages, in the words of s.51 PDA 2000, "*form part of the architectural heritage*" and "*are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest*" and are worthy of protection as such.

As I have said, DLRCC, the OPR and the Minister all subscribe to the principle of protection of the architectural heritage of the 0/0 Objective Areas – though they differ as to what such protection requires.

30. As to residential development in the DART Corridor, in logic what must matter in planning terms is not proximity to the DART line but proximity of access to the DART line – in other words, access to a DART station. As will be seen from Figure 2 below, none of the 0/0 Objective Areas are contiguous to Dalkey DART station. That is not to say that the 0/0 Objective Areas should not be considered to have good access to it or to say that they should not be considered as lying within the DART Corridor. And as concerns opportunity to amplify the utility of Dalkey DART station, it may be that, of the areas served by that station, those in the 0/0 Objective Areas, characterised by extensive development, are likely to have better spatial potential for infill residential development. On the other hand, as Figures 2 and 3 below clearly depict, predominantly the greater part of the residentially zoned area served by Dalkey DART station is entirely unaffected by the 0/0 Objective.

NB - Ignore references to Figures 2, 3 and 4.[55]

Figure 2 – Overview of 0/0 Objective Areas and DART line[56]

- The light yellow shading represents residential zoning.
- The 0/0 Objective Areas are shown by dotted red lines.
- The DART is shown as black line. Comparison with Figure 1 above allows an impression that very roughly 25% of the length of the total DART line in the DLR area is affected by the 0/0 Objective.
- DART stations are shown as black dots. Dalkey station is to the north: Killiney Station is to the south.

[54] Within the meaning of Part IV, Chapter 1 PDA 2000.
[55] They refer to Figures to the OPR's s.31AM(8) Notice dated 6/4/25 – not to Figures 2, 3 and 4 below.
[56] Excerpt of Figure 1 to the OPR's s.31AM(8) Notice dated 6/4/25.

Figure 3 – 0/0 Objective Areas – North

Extract from Development Plan Map 4

- The 0/0 Objective Areas are identified by the 0/0 symbol and outlined thus: .
- Killiney Hill is generally the green area in the lower left quadrant. Dalkey lies to its north and Killiney to its south. Dalkey DART Station is circled in red. The DART Line is depicted by a thick grey line.
- The small 0/0 area overlapping part of the Sandycove Point ACA is off the map to the north.
- ACAs are outlined thus: .

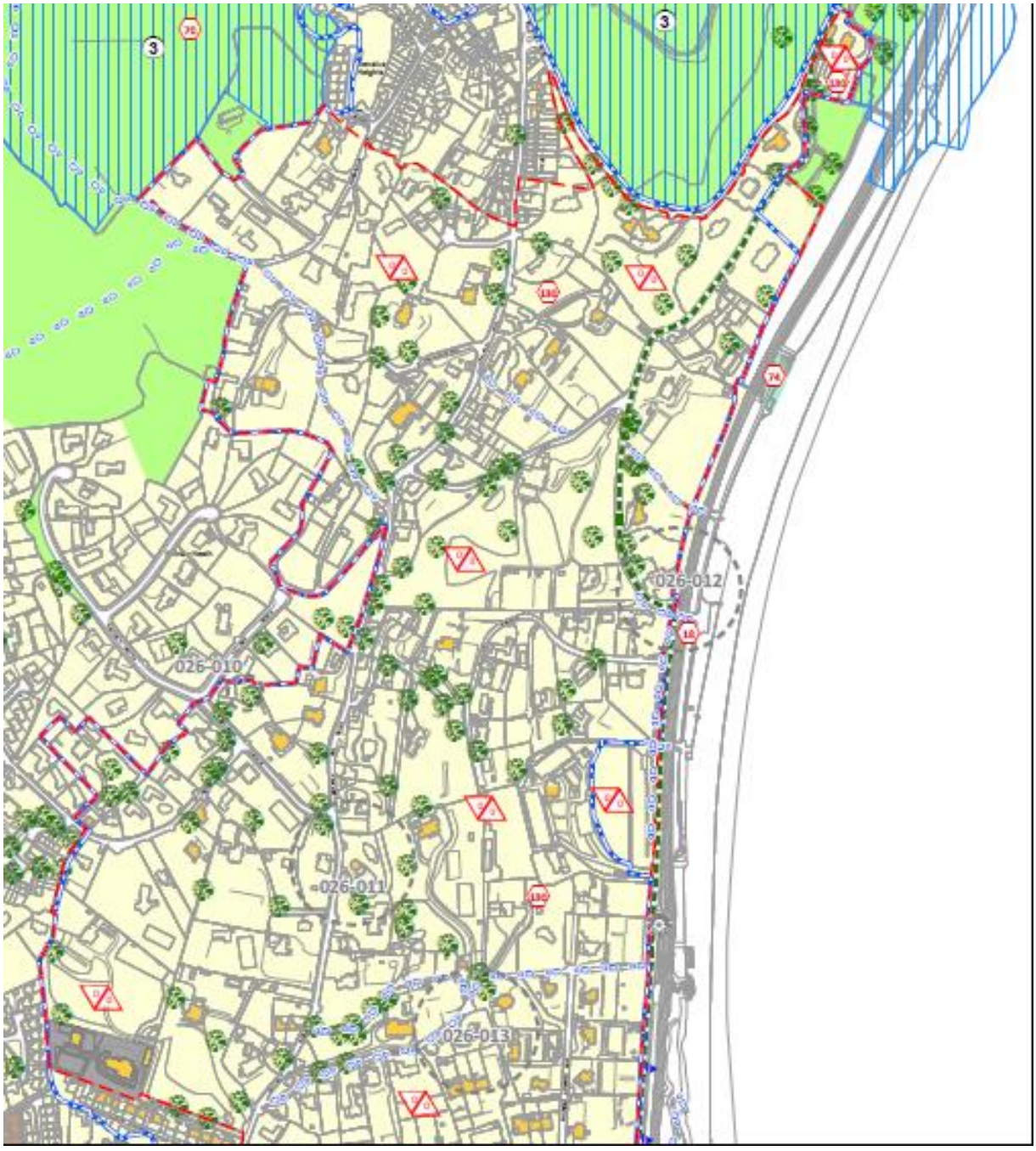

Figure 4a – 0/0 Objective Areas – South

Extract from Development Plan Map 7

- The legend is as per Figure 1.
- This figure depicts most of the 0/0 Objective Areas south of Killiney Hill and comprising the eastern part of Killiney Village. Killiney DART Station lies towards the bottom of the figure.
- The southern extremity of the 0/0 Objective Areas is shown on Figure 2b below.

Figure 4b – 0/0 Objective Areas - South

31. As has been seen, the Elected Members of DLRCC consider that the protection of the amenities of the 0/0 Objective Areas requires that, subject to exceptions, there should normally be no additional buildings in those areas. The OPR and the Minister consider that,

- the required protection is adequately supplied by various aspects of the 2022 Development Plan – notably SLO130 and the ACA designations – and that individual development proposals should be considered on their merits having regard to those protections and without the presumption against development inherent in the 0/0 Objective.[57]

- the 0/0 Objective was too restrictive of development – to an extent which rendered the 2022 Development Plan inconsistent with national policy (using that term compendiously – see further below).

Hence, the OPR Recommendations and the Ministerial Direction.

[57] See the s.31AM(8) Recommendation enclosing a Draft Direction to the Minister dated 6/4/22. The other aspects of the 2022 Development Plan that the OPR and the Minister consider provide protection to the amenities in the area are:
- the objectives for the preservation of the character of architectural conservation areas (Objectives HER13, HER14, HER16),
- the record of protected structures in accordance with section 51(1) PDA 2000, the objectives for the protection of structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest (including objective HER8),
- the objectives to protect buildings and other structures, which may not be subject of formal protections under the Act (including objectives HER19, HER21, HER22),
- the objectives to protect coastal heritage and amenities (including objective HER24),
- the inclusion of specific local objectives 'to protect trees and woodlands.

SUBSTANTIVE AIMS OF THE DELETIONS

32. As will be seen, amongst the OPR/Ministerial objections to the 0/0 Objective is that "applying it to lands in the Dublin suburbs, along DART high capacity public transport corridor, is contrary to government policy." They rely primarily on NPO3b[58] and RPO3.2[59] as favouring increased residential density along public transport corridors - including in the interest of maximising the return on public transport investment. Clearly, it is impossible that occasional one-off housing development in the 0/0 Objective Areas could have the necessary critical mass to enhance, in any strategically worthwhile degree, recourse to or return on investment in public transport. Only multi-unit developments of at least some size and density could do that.

33. Returning to §12.3.7.8 "*0/0 Zone*" in the Development Plan, one finds:

- that locations where no increase in the number of buildings will normally be permitted are, at least near the coast and the DART line, locations "*where density controls are considered appropriate*".
- recognition, "*however*", that close to the DART "higher densities would normally be permitted and promoted". In those locations "*Small scale, sensitive infill development may be considered in these areas on suitable sites where such development would not detract from the character of the area either visually or by generating traffic volumes that would cause potential congestion issues which would, in turn, necessitate road widening or other significant improvements*."

34. As to this text, I have held above that the exception to the 0/0 Objective allows additional buildings. As to density, two interpretive views are possible of this juxtaposition in Objective 0/0, of the "*normal*" promotion of high density close to the DART line and the allowance of the possibility of small scale development.

- The Minister and OPR argue that the 0/0 Objective rules out high density residential development close to the DART line.
- Alternatively, and notably by the use of the word "*however*", one could read the 0/0 Objective to the effect that the possibility of small scale development close to the DART is a response to the stated norm of high density development close to the DART ("*where higher densities would normally be* permitted") and so as acknowledges the possibility of small scale, high density development close to the DART .

35. Discussion on this issue at trial strayed somewhat from any evidential, much less expert evidential, basis. Perhaps that was my fault. The Minister submitted that small scale, high density development would require greater height – which would be unacceptable at this location. I accept his submission that significant height would likely be unacceptable. But, as the Minister invites me to infer that high density would require greater height, I think I may properly say that, as I understand, height is not the only means of increasing density. Good design can achieve it. And density and scale are different concepts. No doubt putting it a little crudely, "*scale*" describes the overall size of the development, whereas density describes the number of units or occupants within that overall size. Again putting it crudely, one would describe the

[58] NPO stands for National Policy Objective as stated in the NPF. NPO3b reads: "Deliver at least half (50%) of all new homes that are targeted in the five Cities and suburbs of Dublin, Cork, Limerick, Galway and Waterford, within their existing built-up footprints."
[59] RPO stands for Regional Policy Objective. RPO 3.2 of the Eastern and Midland Regional Assembly RSES 2019 seeks Compact Growth of urban areas.

scale of a development in metrics such as m^2 (floorspace) or m^3 (volume or massing) or m (height), whereas one would describe its density in metrics such as units/m^2, units/m^3, bedspaces/m^2 or bedspaces/m^3.[60] So, just as one can have large scale at low density[61] one can have small scale at high density.[62] So, at trial, I tended to disagree with the Minister and inclined to the view that the 0/0 Objective allowed consideration of small scale, high density, even if not high, development close to the DART . On reflection, I remain of that view.

36. So, on that view, to what in substance do the OPR and the Minister object in the 0/0 Objective and what, in practical substance, are they trying to achieve? They agree that the architectural and associated heritage characteristics of the 0/0 Objective Areas require protection. They agree that SLO130 should apply to "ensure" such protection. They can hardly object to the requirements that development be sensitive to the particular sensitivities of the location, that it not detract from the character of the area and that it not cause congestion. And as these are suburban areas, at very least the great majority of potential developments would be "*infill*".

37. So it seems that what the OPR and the Minister object to is

- the presumption of the 0/0 Objective against development in that "*no increase in the number of buildings will normally be permitted*" – i.e. the starting point of analysis.
- the limiting of exceptions to that presumption to "*small scale*" development.

It follows that their substantive aim is to delete the presumption and the words "*small scale*" so as to admit the possibility of "*non-small scale*" and higher density development. These terms are imprecise and relate to a spectrum of development size. But, broadly, the OPR and the Minister appear clearly to envisage the possibility of at least what may roughly be called "*medium scale*" development at higher density in the 0/0 Objective Areas.

38. Also, and logically, they must envisage, <u>despite SLO130</u>, a sufficient quantum of such development to make a worthwhile contribution to realising the benefit of the DART. Otherwise, from their point of view and from a practical point of view, their dispute with DLRCC was not worth the candle – unless "*pour encourager les autres*". Indeed, it seems that this was the case at least in part: the OPR gave as a reason for Recommendation #4 that *"The 0/0 provisions could set a precedent for other development plans".*[63] Clearly, a plan provision, <u>otherwise legal</u>, could not reasonably be thought illegal and hence to merit a recommendation or direction merely because that legal provision might encourage other planning authorities to adopt similar legal provisions or, for that matter, similar but illegal provisions. However, assuming the plan provision <u>otherwise illegal</u> by reference to s.31AM(8)(a) and (b),[64] precedential effect could, it seems to me, properly be relevant to the question, set by s.31AM(8)(c), whether a ministerial

[60] In this observation I seek to elucidate the concepts rather than suggest formal or technical units of measurement.
[61] e.g. a large mansion/country house in its own large grounds.
[62] e.g. a small block of small apartments.
[63] OPR Submissions §25(3) citing p.10 of its s.31AM(8) Notice to the Minister dated 6 April 2022 and enclosing a draft direction.
[64] "(8) Where subsequent to any consideration for the purposes of subsection (7), the Office is of the opinion that —
(a) the development plan or the variation of it, as the case may be, has not been made in a manner consistent with the recommendations of the Office,
(b) that the decision of the planning authority concerned results in the making of a development plan, or its variation, in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned, …".

direction under s.31 "*would be merited*". But this demonstrates that the determination of legality is distinct from any consideration of precedential effect.

39. On that view, the underlying substantive planning issues appear to resolve, at least in general terms, to the question who, as between DLRCC on the one hand and the OPR and the Minister on the other, is in law entitled to exercise the planning judgements as to whether, in the 0/0 Objective Areas,

- there should be a presumption against development in that "no increase in the number of buildings will normally be permitted".
- only "*small scale*" development should be open to consideration.
- at least "*medium scale*" development at higher density in the 0/0 Objective Areas, at a quantum sufficient to make a worthwhile contribution to realising the benefit of the DART, is reconcilable with adequate protection of the Architectural Protection Areas and their Protected Structures and amenities generally.
- the 0/0 Objective "*could have unintended consequences for considering the proper planning and sustainable development of the area into the future such as in relation to legitimate prospects to deliver additional housing, including public housing, on sites that may present opportunities for infill/ redevelopment in an area highly accessible with excellent public transport, community facilities and environmental amenities*".[65]
    - As, in a complex document such as a development plan (itself part of a highly complex context) and absent perfect prescience, some risk of unintended consequences is all but inevitable, it follows that this reason implies that the incremental degree of such risk, as posed by the 0/0 Objective as compared to the position created by SLO130, is considered by the OPR unacceptable as a matter of planning judgement.
    - However, I would also observe that, as the effect of the 0/0 Objective is confined to the 0/0 Objective Areas, the consequences described by the OPR seem to me not unintended but intended by DLRCC as, in the view of the Elected Members, justified by the protection of architectural heritage

INTERPRETATION OF MINISTERIAL DIRECTIONS AND OPR RECOMMENDATIONS – GENERAL NOTE

40. **Tristor**[66] is authority that ministerial directions under s.31 PDA 2000[67] are to be interpreted, both generally and as to the Minister's stated reasons for making the direction, on a "*common-sense appraisal*" of substance rather than form. The court is to ask "*what the real reason is*" for the direction.[68] Not least given the close relationship, within the scheme of the PDA 2000, between ministerial directions and the OPR recommendations which inform, result in and are a necessary precondition of ministerial directions, it seems to me to follow that OPR recommendations and the reasons they record should be interpreted on a similar common-sense appraisal of substance rather than form.

[65] OPR Submissions §25(4) citing p.10 of its s.31AM(8) Notice to the Minister dated 6 April 2022 and enclosing a draft direction.
[66] Tristor Ltd v Minister for the Environment, [2010] IEHC 397, [2012] 3 ICLMD 78, Clarke J §6.10.
[67] Planning and Development Act 2000 as amended.
[68] Clarke J.

LOCAL/NATIONAL BALANCE OF POWER IN PLANNING POLICY-MAKING – CLARITY REQUIRED

41. At a basic level, Mount Salus' case is about the interpretation of the law as to the division of powers to determine the content of local planning policy (in the form of development plans) as between local and national organs of state – the planning authority locally on the one hand and the OPR and the Minister nationally on the other.

42. Very broadly and over time, the starting point was – indeed remains - local control. But the recent trend has been to nationalise planning powers generally, at appreciable expense of local control. That trend is not politically uncontroversial – but it is not for me to join in that controversy. This partial nationalisation has taken statutory form[69] and, also pursuant to statute, the form of many plans, policies, guidelines and the like – promulgated in a hierarchy at national, regional and local levels via such as:

- at national level, Government policies, the NPF, ministerial planning guidelines issued under s.28 PDA 2000 (to which planning authorities must "*have regard*") and SPPRs[70] (with which planning authorities must "*comply*"),
- at regional level, RSESs, and
- at local level, primarily, development plans and local area plans made by planning authorities for their functional areas.

The centralisation of power has been further apparent in increased powers of An Bord Pleanála to grant permissions in material contravention of development plans and to grant some planning permissions at first instance.[71]

43. The foregoing does not purport to be a complete list. Indeed, it is sobering to note that those entering the arcane world of planning and environmental law and practice – one theoretically friendly to lay public participation – and leaving aside a plethora of lengthy EU Directives and Regulations, the PDA 2000 and statutory instruments,[72] must face, as Humphreys J has recently noted,[73] no less than 76 national guidance documents issued over the past 26 years. Just as sobering, he considered it necessary to divide them into five categories grouped as to the varying degrees to which they are legally binding.

44. The Minister submits that national plans and policies setting the framework for proper planning and sustainable development in the State are futile unless applied consistently across the State. While that submission is understandable as a very general proposition, it pitches the argument too high and alarmingly. There are many levels of disappointment short of futility and there are many degrees of consistency short of

[69] I broadly agree with the State when, in its written submissions, it lists as illustrative examples of the trend: the insertion in the PDA 2000 of s.10(1A) and (2A) as to the requirements of the core strategy in a development plan; s.11(1A) as to the nature and purpose of reviews of development plans; s. 12(18) as to planning authorities' obligation to ensure consistency of development plans with the national and regional development objectives; s.27(1) as to planning authorities' obligation to ensure consistency of development plans and local area plans with RSESs; s.28(1A)&(1B) requiring planning authorities to append to a draft development plan and development plan a statement addressing its consistency with Ministerial s.28 guidelines; s. 28(1C) introducing Special Planning Policy Requirements, with which planning authorities must comply, into S.28 guidelines, and the establishment of the OPR.

[70] Specific Planning Policy Requirements in Planning Guidelines and issued under s.28(1C) PDA 2000.

[71] In the now-abandoned Strategic Housing Development system and in the case of Strategic Infrastructure Development.

[72] The unofficial consolidation of the Planning and Development Regulations 2001 to 31 March 2024, prepared by the Department of Housing, Local Government and Heritage, now runs to 671 pages.

[73] Cork County Council v Minister for Housing [2021] IEHC 683 §89.

strict compliance. Such frameworks and guidelines inherently imply not merely response to local conditions but appreciable local agency and choice as to the content of that response. That said and though the task of adopting a development plan remains ultimately with the elected members of the planning authority, the scope of their discretion as to the terms in which to adopt it has been progressively more circumscribed over time.

45. Notably for the purposes of this case, this circumscription has been in part achieved by amending the PDA 2000 such that s.10(1A) and (2A), s.12(18) and s.27(1) require that the development plan, its core strategy, its housing strategy and its development objectives be consistent, as far as practicable, with NPF and RSES development objectives. It has also been notably apparent in the role of the OPR and the Minister in policing (via a complex mechanism described below) that requirement and, in the case of the Minister, acting on the recommendation of the OPR, directing planning authorities to achieve such consistency. The OPR is a relatively recent innovation. It has many functions.[74] But prominent amongst them are those of

- evaluating and assessing development plans and draft development plans – not least strategically as to their consistency with national policy,[75]
- making recommendations to planning authorities in the development plan making process "*as it considers necessary to ensure effective co-ordination of national, regional and local planning requirements by the relevant planning authority*."[76]
- advising the Minister of its opinion that a development plan is inconsistent with the OPR's recommendations, especially where, in its opinion, such inconsistency would affect the overall strategy for proper planning and sustainable development of the area concerned and advising the Minister to issue a direction to the planning authority accordingly.[77]

46. Accordingly it can be, and is in this case, important to discern what form and degree of consistency with national policy[78] is required and the distribution, as between planning authorities on the one hand and, on the other, the OPR and the Minister, of the power to decide whether a development plan achieves that consistency. As will be seen, that consistency is achieved via a lengthy, iterative, and highly interactive process as between the planning authority, the OPR and the Minister and involving also the public and other consultees. Development plans were memorably described by MacGrath J as an "*amalgam of influences*".[79] Generally it can be said that:

- national policy[80] tends to be high level and so admits of a variety of means of carrying it into effect in local conditions – each of which means can be said to be consistent with national policy.
- planning authorities can choose between such means and are not subject to national control in that regard.

[74] S.31P PDA 2000.
[75] Using that term compendiously.
[76] S.31AM(3)(a) PDA 2000.
[77] See generally s.31P and s.31AM PDA 2000.
[78] Again using that term compendiously.
[79] Kenny v An Bord Pleanála [2020] IEHC 290.
[80] Again using that term compendiously.

- national control may be engaged only where the planning authority fails in its development plan to achieve the required consistency with national policy.[81]

47. In the context of what may often be broad, general and flexible policies, many of which promote principles on a vast array of subject-matters which may in varying degrees be countervailing, consistency of a development plan with national policy can come in varying degrees. In that context, the Minister says, and I generally agree, that much as constitutional rights are first to be harmoniously interpreted and reconciled and only failing that possibility prioritised in a hierarchy (**Gilchrist**[82]), the starting assumption in considering national and regional planning policy is that it is a coherent and internally consistent suite such that, at least ordinarily, all its objectives are to be reconciled and achieved. But is also recognised that while incoherence between planning policies is found only reluctantly, tensions between them are inevitable. See generally in these regards **Fernleigh**[83] and **Mulloy**.[84] Policies may be countervailing in a general sense and/or as applicable to particular locations. And, as Humphreys J is wont to observe, "*There are no solutions, only trade-offs*."[85] In some cases priorities are explicit: for example and relevant here is NSO1[86] of the NPF as to "*Compact Growth*". It provides *for "carefully managing the sustainable growth of compact cities, towns and villages"* and states, *inter alia*, that *"… achieving effective density and consolidation, rather than more sprawl of urban development, is a top priority."*

48. So, whether in making those trade-offs a development plan has tipped into failure to achieve that consistency with national and regional policy is a subject on which judgements may be required of different organs at different points in the process of making a development plan. And those judgements may be such that opinion may legitimately vary – not least as between the local authority on the one hand and, on the other, the OPR and the Minister. In particular, and as relevant to this case, the disagreement is not at heart whether, crudely, the policy of compact development in public transport corridors should outweigh the policy of protection of architectural heritage. It is whether, in pursuit of both policies and reconciling them, the 0/0 Objective is an excessive, unnecessary and, as the Minister explicitly said, unreasonable protection of architectural heritage (given the other protections of that heritage) at the unacceptably damaging expense of the policy of compact development in a significant public transport corridor, such as to amount, on an overview of both policies, to inconsistency with NPF and RSES objectives and so to a failure to adopt an overall strategy and to a Plan tainted by illegality.

49. These considerations, and the subtlety and room for legitimate disagreement as to the substance the judgements involved, highlight the importance of identifying, at the heart of this case,

- what degree of consistency of a development plan with national policy[87] is required?
- who ultimately gets to make the decision whether a development plan is consistent with national policy?

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[81] Again using that term compendiously.
[82] Gilchrist v Sunday Newspapers [2017] IESC 18, [2017] 2 IR 284. Also Irish Times Ltd v Ireland [1998] 1 IR 359.
[83] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §§47, 74, 110.
[84] Mulloy v ABP & Knockrabo Investments [2024] IEHC 86 §97.
[85] Stapleton v ABP & Savona [2024] IEHC 3 §98 citing North East Pylon Pressure Campaign Ltd v An Bord Pleanála [2016] IEHC 301; An Taisce v An Bord Pleanála [2021] IEHC 254; Duffy v Clare County Council & McDonagh [2023] IEHC 430; Reid v An Bord Pleanála, Ireland & Intel #7 [2024] IEHC 27.
[86] NSO stands for National Strategic Outcome as stated in the NPF.
[87] Using that term compendiously.

and

- by what standard a court may review such decisions?

TRISTOR (2010) – ALTERATIONS TO THE BALANCE OF POWER

50. **Tristor**[88] sought *certiorari* of the Minister's direction to DLRCC, made pursuant to s.31 PDA 2000, to delete its development plan designation of Tristor's lands as a district retail centre. The parties differed as to the applicable standard of judicial review. Tristor argued that the court should consider whether the Minister was correct in substance. The Minister argued that the court should only interfere with the direction if it was irrational. I will return to that issue in due course.

51. For now, I draw attention to the introductory remarks of Clarke J as to a long-standing political issue:

> *"There has been much debate over the years as to the extent to which it is appropriate to involve political decisions makers (both at local and national level) and professional planners (again at both local and national level) in making final decisions in the planning process. …*
>
> *The extent to which it is appropriate that particular functions in the planning process are conferred on political decision makers or professional planners and the extent to which those decisions should be made either locally or nationally are primarily questions of policy to be determined by the Oireachtas and set out in relevant legislation. Subject to determining the proper interpretation of any such legislation and, if raised, considering whether such legislation is within the bounds of what is constitutionally permissible, it is no function of the courts to seek to second guess the policy decisions made by the Oireachtas in that regard.*
>
> *This case principally concerns one such question of construction. It has traditionally been the case that the making of development plans has been a function allocated by legislation to political decision makers. By and large the formulation of a development plan is a matter which is conferred, (by the PDA 2000) … on the relevant planning authority with the decision ultimately resting on the elected members of that planning authority. However, s. 31(1) of the (PDA 2000) confers on the Minister … a role in relation to the formulation of development plans. At the heart of these proceedings is a dispute between the parties as to the extent of that role …".*[89]

52. Presaging **Spencer Place**,[90] Clarke J said in **Tristor**:

[88] Tristor Ltd v Minister for the Environment [2010] IEHC 397, [2012] 3 ICLMD 78.
[89] §1.1.- 1.3.
[90] See below.

> *"If it were the intention of the Oireachtas to give the Minister the widespread powers which the Minister asserts, it seems to me that the language of the section would have been expressed in very different terms."*[91]

> *"… (for) … the Minister to have a wider power to interfere with draft development plans … (it is) … incumbent on the Oireachtas to set out precisely how and in what circumstances such a power can be exercised."* [92]

SPENCER PLACE (2020) & CORK COUNTY COUNCIL (2021)

53. Collins J in **Spencer Place**[93] was considering the imposition in planning guidelines,[94] to which planning authorities ordinarily need only have regard, of SPPRs with which they must comply even where they conflict with the development plan.[95] While the precise context was different to the present context, the imposition of SPPRs raised an issue very similar to one central in this case – the statutory transfer of planning power from the local to the national. Collins J emphasised the importance of development plans as *"…. a critical element of the planning regime in the State"* and as *"an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan …".*[96] One may add reference to the description by McKechnie J in **Byrne**[97] of a development plan as the planning authority's *"representation in solemn form, binding on all affected or touched by it – that it will regulate private development in a manner consistent with the objectives stated in the plan".* It is no surprise therefore, that Collins J described development plans as "*the primary reference point*" for assessment and determination of planning applications. Collins J referred also to the legislative allowance for material contravention of development plans – described recently as exceptional in law, if not so much in practice – **Ballyboden TTG**.[98] Having reviewed the legislation as to SPPRs, Collins J said the following:

> *"27. These amendments to the PDA are undoubtedly significant. They permit locally-adopted development plans to be overridden by the Minister, which clearly impacts on the balance between central and local control of planning and development policy and decision-making. As Clarke J noted in Tristor - in the context of section 31 of the PDA which permits the Minister to require planning authorities to take "specified measures" in relation to the contents of their development plan - issues of this kind have been the subject of debate over many years. These issues - political versus professional decision-making, national versus local policy making - are, as Clarke J observed, primarily matters of policy to be determined by the Oireachtas and it is not for the courts to seek to second guess the policy choices made by the Oireachtas.*

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[91] §6.14
[92] §7.19.
[93] Spencer Place Development Company Limited v Dublin City Council [2020] IECA 268, [2020] 10 JIC 0202.
[94] Issued under s.28 PDA 2000.
[95] Notably s.28(1C) PDA 2000.
[96] Citing McCarthy J for the Supreme Court in Attorney General (McGarry) v Sligo County Council [1991] 1 IR 99 at 113.
[97] Byrne v Fingal County Council [2001] 4 IR 565.
[98] Ballyboden TTG v An Bord Pleanála [2022] IEHC 7 §238. Also Kimmage Dublin Residents Alliance CLG v An Bord Pleanála [2024] IEHC 261.

> *28. On the other hand, it appears to me to be entirely proper and necessary to construe the terms of such legislation carefully. Clearly, effect must be given to such legislation in accordance with its terms. But those affected by such legislation – and planning legislation obviously engages the interests of the community generally, potentially in very significant ways - are, in my view, entitled to expect clear words where the Oireachtas is legislating in this area. While it is within the competence of the Oireachtas to amend the PDA so as to confer on the Minister additional powers that impact on existing planning structures and processes, it should do so clearly and precisely and the courts should avoid giving such legislation effect beyond what is clearly provided for. It is essential that the respective competencies of all of the actors involved – Minister, planning authorities and ABP – should be clearly delineated. In other words – so it appears to me - where the Oireachtas legislates to transfer competence from planning authorities to the Minister, it should do so in clear terms and not by a sidewind: ….[99] While the Oireachtas may be entitled to empower the Minister to issue SPPRs which have the effect of overriding the provisions of existing planning schemes, ….. any such power requires to be conferred by clear statutory language."*

54. It seems to me notable that Collins J did not frame his view merely as to the statutory provisions at issue in that case: he did so by reference to s.31 and **Tristor**. Despite the amendment of s.31 since Tristor, it is clear that the principles stated by Collins J are general to statutes altering the balance of planning power from local to national government and they apply to s.31 as amended.

55. Humphreys J cited this passage in a **Cork County Council case**[100] in observing of the Minister's reliance, in issuing a s.31 ministerial direction, on planning guidelines to which planning authorities were required only to have regard when making development plans, and in quashing the direction on that account, that:

> *"85. Ultimately, the practical functioning of local government must draw a clear and workable distinction between matters that local authorities are required to have regard to and matters that are mandatory, …*
>
> *86. … the court cannot allow "have regard to" obligations to be elevated by stealth or in effect, directly or indirectly, into what would amount in practice to mandatory obligations, because to do so would undermine a distinction central to the orderly functioning of the planning code."*

56. In summary,

- the courts will effect a decision of the Oireachtas to transfer elements of control of planning from the local to the national.
- the courts will avoid giving such legislation effect beyond that for which it clearly provides.

[99] Citing Minister for Industry & Commence v Hales [1967] IR 50.
[100] Cork County Council v Minister for Housing [2021] IEHC 683.

- ministerial directions cannot transform “have regard to” obligations into “must conform to” obligations.

CHRONOLOGY & RELIEFS CLAIMED

57. While the ultimate issue for decision here is the validity of the Ministerial Direction, it is necessary to describe in some detail the statutory scheme which led to it. I accept the Minister’s submission that the basis on which he reached his statutory opinions is discerned from his Direction read with the other documents each of which forms part of the statutory procedure.[101] The statutory scheme within which the OPR makes recommendations and the Minister gives directions as to the content of development plans amounts to a complex and sequential 5-handed dance between the elected members of the planning authority, the chief executive of the planning authority, the public and other consultees, the OPR and the Minister. As the statutory procedure results in a series of sequential events, it is convenient, and I hope explicatory, to combine the initial description of that statutory scheme with the chronology of events which, in this case, resulted in the Ministerial Direction.

58. As a general and high-level observation, and as to the making of a Development Plan, the scheme is typically and broadly characterised by 4 stages:

- First: initial consultation with the public and other interested bodies, in practice accompanied by an Issues Paper or the like with a view to lending structure to the consultation.
- Second: preparation and publication of a draft plan, followed by further public consultation.
- Third: the elected members’ adoption of material amendments to the draft plan, again followed by public consultation.
- Fourth: the making of the Development Plan.

These stages are characterised by repeated opportunities for the OPR to be heard by the planning authority and obligations on the planning authority to give the OPR reasons for any non-acceptance of its recommendations. Those reasons are intended to inform and assist the OPR in performing its functions.

59. Very general principles informing the statutory scheme are that,

- having consulted the public and all others entitled to be consulted and having had regard to all matters to which they are required to have regard and complying with all obligations by which they are bound, the elected members are entitled to determine the content of the development plan.
- as to such content, the OPR is entitled to advise and make observations and recommendations to the elected members and, if needs be, to the Minister.

[101] Written Submissions §19 & 22.

- the Minister, on foot of an OPR recommendation and if he disagrees with the terms in which the development plan is adopted and considers certain statutory requirements to be satisfied, may issue directions to the planning authority in effect amending the development plan.[102]

60. Much of the effect of the statutory scheme is indicated in the chronology below. It is largely found in:

- Ss. 9, 10, 11 and 12 PDA 2000 as to development plans and their content.
- s.31 PDA 2000 as to ministerial directions regarding development plans.
- Part IIB, Chapter III PDA 2000 as to "Evaluation and assessment" by the OPR. s.31AM relates to its evaluation and assessment of development plans. The shoulder note to s.31AN somewhat blandly promises "*Provisions consequential to s.31AM*". In fact, s.31AN provides the procedural mechanism, including procedures to be followed by the elected members, the CE of the planning authority, the OPR and the Minister, which lead to ministerial directions made under s.31. S.31AN(11) also provides for the self-executing effect of such directions.

61. It is clear that the statutory machinery at issue in this case represents an appreciable rebalancing of power, as to the terms in which a development plan may be adopted, from local to central government. That occurred progressively from 2000, when s.31 PDA 2000 first allowed ministerial directions as to the content of development plans, and via amendments primarily in 2010[103] and 2018.[104] That rebalancing has effect in practice not merely where the Minister exercises that power but merely because the decisions of elected members of planning authorities, in adopting development plans, will be informed, in greater or lesser degree, by the knowledge that the Minister, advised by the OPR, may exercise such a power. Accordingly, it is particularly important that the relevant actors understand the scope and limits of that power in a practical sense which will assist their decision-making.

CHRONOLOGY

62. Given the sequential nature of the statutory scheme and the "domino" effect described in the Cork County Council case,[105] and though at the undeniable cost of some repetition in this judgment and though also in advance of a detailed consideration of the statutory scheme, pleadings and the case law, it seems to me necessary to set out the chronology of events in some detail and useful in elucidating the issues to comment on those events in the chronology itself.

[102] Formally, directions require the planning authority to amend the development plan but in substance they are self-executing and themselves operate to amend the plan.
[103] Planning and Development (Amendment) Act 2010.
[104] Planning and Development (Amendment) Act 2018.
[105] Cork County Council v Minister for Housing [2021] IEHC 683 - see below.

63. It may assist the reader to initially note that the OPR made three submissions to DLRCC, under s.31AM(1)&(2) PDA 2000, relevant to the Ministerial Direction as follows:

- 28 February 2020 - on DLRCC's Development Plan Issues Paper.
- 16 April 2021 - on DLRCC's Draft Development Plan.
- 24 December 2021 - on DLRCC's Proposed Amendments to the Draft Development Plan.

As the Minister submits, each OPR Submission addressed questions of the consistency of the 0/0 Objective with national and regional policy objectives as to compact growth along public transport corridors.[106] Notably, that of 16 April 2021 on DLRCC's Draft Development Plan introduced what I describe below as "Recommendation #4", the substance of which ultimately underlies the Ministerial Direction.

Date	Event	Comment
2016	**DLRCC made its Development Plan 2016 – 2022** • It included an objective for a '0/0 Zone' where no increase in the number of buildings will normally be permitted especially in locations close to public transport where government policy supports higher densities.[107]	• I infer that the 0/0 Zone, at least generally, was the same as the 0/0 Objective Areas or that any difference is irrelevant for present purposes.
3/1/20	**DLRCC issued its Development Plan 2022 – 2028 Issues Paper for public consultation**.	This is the start of the statutory process of review of the existing development plan and preparation of a new development plan.[108]
28/2/20	**The OPR made a submission to DLRCC as to the content of its Issues Paper.** • It addressed population targets[109] and housing delivery and notes DLRCC's proposed Housing Need and Demand Assessment. It identified as key issues: • The necessity that the new development plan provide strategic direction to ensure that DLR[110] contributes to the targeted population growth of the DMA of which DLR is part.	Issued under s.31AM(1)(a) and (2) PDA 2000.

[106] Minister's Written Submissions §33.
[107] Ch 8 of the Development Plan 2016, p178. See OPR submission to DLRCC 28/2/20 as to the content of DLRCC's Issues Paper of 3/1/20,
[108] S.11 PDA 2000.
[109] In the context of MASP: Dublin Metropolitan Area Strategic Plan.
[110] Dún Laoghaire/Rathdown – the functional area of DLRCC.

Date	Event	Comment
	• The necessity that the Plan provide the strategic direction to ensure that NPF and RSES objectives are achieved. • Over-concentration of residential development in particular areas,[111] whereas many areas with brownfield development potential close to, *inter alia*, the DART rail line and public transport corridors (where government policy supports higher densities) had stagnated or were in population decline. This was "*especially in the context of current residential building trends and the opportunities that are beginning to manifest in relation to brownfield development along the corridors above.* • Accordingly, it suggests that DLRCC "reconsider" the 0/0 Zone by reference to its proximity to public transport.	
4/20	**DLRCC CE[112] Report to the Elected Members on Pre-Draft Development Plan Consultation.** • It recommended that the OPR Submission of 28/2/20 that DLRCC "*reconsider*" the 0/0 Zone would be considered in preparing the Draft Development Plan ("the Draft Plan").	Issued under s.11(4) PDA 2000.
	The DLRCC Draft Development Plan 2022 - 2028 • It came into being via the procedures set out in s.11(4)&(5) PDA 2000. • It included the 0/0 Zone.[113]	Essentially, these procedures allow the elected members to decide the content of the Draft Development Plan.
12/1/21 to 16/4/21	The Draft Development Plan, • was on public display for public consultation – which ensued.	
16/4/21	**OPR s.31AM(1) Submission to DLRCC on Draft 2022 Development Plan - 16/4/21**	Made under s.31AM(1)(b) and (2) PDA 2000.

[111] Nutgrove, Stillorgan, Blackrock and Cornelscourt – none of which are relevant to this case.
[112] Chief Executive of DLRCC.
[113] §12.3.8.8.

Date	Event	Comment
	• OPR Recommendations "*relate to clear breaches of the relevant legislative provisions, of the national or regional policy framework and/or of the policy of Government, as set out in the ministerial guidelines under section 28. As such, the planning authority is required to implement or address recommendation(s) ... to ensure consistency with the relevant policy and legislative provisions*."[114]	• This passage might be understood as overstating the coercive status of OPR recommendations. A recommendation, in ordinary language, is just that. It is clearly different to the concept of a direction – with which it may properly be contrasted as they appear in the same statutory context. • The scheme of the PDA 2000 is clearly one in which only the Minister can issue a direction requiring the planning authority to comply. S(he) does so only if (s)he agrees with the OPR's recommendation – with which (s)he may disagree. • Nonetheless, there is no doubt that the Planning Authority must achieve "*consistency with the relevant policy and legislative provisions"*. • The reference to s.28 ministerial guidelines, to which local authorities need merely have regard, was misplaced in an assertion of binding recommendations –see the **Cork County Council** case.[115] • That said, no relief is sought with respect to this OPR submission and no plea is made of flawed reliance on ministerial guidelines.
	Overview[116] • DLR, wholly within the DMA[117] and largely within Dublin city and suburbs, with high quality public transport and accessibility infrastructure, will be critical to achieving the NSOs of the NPF, including NSO1 (compact growth) and NSO2 (sustainability).	• S.10(2)(n) PDA 2000 requires that *"a development plan shall include objectives for … the promotion of sustainable settlement and transportation strategies in urban … areas … in particular, having regard to location, layout and design of new development;"*

[114] OPR submission p2.
[115] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.
[116] OPR submission p2 et seq.
[117] Dublin Metropolitan Area.

Date	Event	Comment
	• In general, the OPW supports the Draft Plan's overall approach to sustainable settlement and transport strategies, (citing s.10(2)(n) PDA 2000[118]*)* such as focus on compact growth, infill/brownfield development and consolidation within or contiguous to the existing built-up area. • However, the OPW is concerned at excessive population and housing supply targets and resultant excessive residential zoning of land. It suggests a particular focus, *inter alia*, on infill/brownfield lands near high quality transport. • NPO 3a and 3b of the NPF target at least 40% of all new housing to be built in existing built-up areas on infill and/or brownfield sites. The challenge is to deliver infill/brownfield development at locations well served by high quality public transport as part of the transition to a low carbon economy.	• NSO2 in fact relates to "Enhanced Regional Accessibility". Its relevance is difficult to discern. • Recommendation #4, with which we are concerned,[119] first appears in §2 of this OPR Submission - headed *"Compact growth, regeneration and tiered approach to zoning"* and under sub-heading §2.2. *"Infill and brownfield development."* §2.2 does not invoke s.10(2)(n) PDA. Nor does Recommendation #4. • Notably, and as to quantum, the OPR thought DLRCC's population targets were too high and resulted in excessive zoning of land for residential development. • It is easy to infer that a focus, *inter alia*, on compact growth, infill/brownfield development and consolidation within the existing built up area and near high quality transport would necessarily include the lands subject to the 0/0 Objective. • Accordingly the OPR's support of the Draft Plan's overall approach to sustainable settlement and transport strategies, suggests that its objection to the 0/0 Objective is to particular, as opposed to general, non-compliance of the Draft Plan with the NSOs of the NPF.

[118] 10(2) "… a development plan shall include objectives for … (n) the promotion of sustainable settlement and transportation strategies in urban and rural areas including the promotion of measures to—
(i) reduce energy demand in response to the likelihood of increases in energy and other costs due to long-term decline in non-renewable resources,
(ii) reduce anthropogenic greenhouse gas emissions and address the necessity of adaptation to climate change, taking account of the local authority climate action plan … in particular, having regard to location, layout and design of new development."
[119] The OPW cites s.10(2)(n) PDA in, specifically, §2 of the Submission headed "Compact growth, regeneration and tiered approach to zoning" and §2.1 sub-headed "Compact growth" - which relates to zoning and resulted in Recommendation #3 which cites s.10(2)(n) PDA. The OPW cites s.10(2)(n) PDA under heading §4 "Sustainable transport and movement" which resulted in Recommendation #7.

Date	Event	Comment
		• This is relevant to the application to the facts of the law as stated in **Killegland**[120] - which is authority that only general consistency of a Development Plan with at least some NPF and RSES objectives is required by law.
	§1.3 Residential Land Supply & OPR Recommendation #2[121] • In recommending a review of the zoning provisions of the Draft Plan having regard to s.10(2A) PDA 2000,[122] the NPO3 requirement for compact growth and the approach to zoning required by NPO72 (a-c), the OPR noted "*in general, the favourable location of lands proposed to be zoned for residential development under the draft Plan, in terms of compact growth and potential for implementation of an integrated land use transport approach consistent with the 10 minute settlement concept supported in the RSES".*	• Recommendation §2 fell away later in the process as the OPR was satisfied with DLRCC's response.[123] • As I understand, the 10-minute settlement concept includes s close and easy access to public transport. • However, Mount Salus cites this content, in my view correctly, as o recording the OPR's general satisfaction with the Draft Plan as to compact growth close to public transport. o implying that the OPR's objection to the 0/0 Objective is to particular, as opposed to general, non-compliance of the Draft Plan with the NSOs of the NPF. • See note above as to **Killegland**.
	§2.2. Infill and brownfield development[124] • The OPR acknowledges the very positive approach in the Draft Plan to the promotion of infill and brownfield development. • The Draft Plan also demonstrates an evidence-based approach to determining infill/windfall sites, to contribute to compact growth, representing 30% (165.86ha) of the total area (553.28ha) of land proposed for residential development under the core strategy.	• Infill and brownfield development is very much the type of development at issue in the 0/0 Objective Areas. • This content, though it does not imply specific satisfaction as to the 0/0 Objective Areas, acknowledges the general compliance of the Draft Plan with policy as to infill and brownfield development. • See note above as to **Killegland**.

[120] Killegland Estates Ltd v Meath County Council [2023] IESC 39. See detailed consideration of this case below.
[121] OPR submission pp7 & 8.
[122] S.10(2A) PDA 2000 requires, inter alia, that a core strategy provide information to show that the development plan and the housing strategy are consistent with the NPF, the RSES and SPRs and that it meet certain requirements as to residential zoning.
[123] See OPR submission 24/12/21 p2.
[124] OPR submission p11 et seq.

Date	Event	Comment
	§2.2. Infill and brownfield development[125] • The Draft Plan proposes to continue[126] the 0/0 Objective for parts of Killiney and Dalkey, along the DART line. • These areas largely but not wholly correspond to the ACAs. A significant proportion of their dwellings are Protected Structures.	• I have repeated the heading here to emphasise that the 0/0 Objective was analysed by reference to the issue of the Draft Plan provision for infill and brownfield development.
	• The Urban Residential Development Guidelines,[127] Apartment Design Standards[128] and the Building Heights Guidelines[129] state Government policy favouring sustainable settlement patterns to underpin the efficiency of public transport services and maximise the return on public transport investment by higher residential density along public transport corridors.	See note above as to • the **Cork County Council** case[130] and impermissible OPR reliance on non-mandatory guidelines. • the absence of a plea in this regard.
	• The 0/0 Objective, on lands in Dublin suburbs (NPO3b and RPO3.2) on the high capacity public transport corridor of the DART line, is contrary to government policy.[131] • The Draft Plan provisions as to conservation of ACAs and Protected Structures provide strong policy protection for the conservation of the special character of the area concerned, having regard to the Architectural Heritage Guidelines.[132] • In this context, the limitations for which the 0/0 Objective provides are not justified in terms of consistency with NPO3 and RPO3.2.	• See note above as to **Killegland**. • NPO3b and RPO3.2 say nothing explicit about location of housing on public transport corridors. They relate to gross quantum of housing development, in percentage terms, in Dublin city and suburbs. • This content clearly accepts the premise of protection of ACAs and Protected Structures. It follows that it accepts the need for restraint of what would otherwise be the full scope for development in the 0/0 Objective Areas.

[125] OPR submission p11 et seq.
[126] The 0/0 Objective was in the previous, 2016, Development Plan.
[127] Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) May 2009.
[128] Sustainable Urban Housing: Design Standards for New Apartments (2018).
[129] Urban Development and Building Heights - Guidelines for Planning Authorities - December 2018.
[130] Cork County Council v Minister for Housing [2021] IEHC 683 – See below.
[131] NPO3b: "Deliver at least half (50%) of all new homes that are targeted in the five Cities and suburbs of Dublin, Cork, Limerick, Galway and Waterford, within their existing built-up footprints."
RPO3.2: "Local authorities, in their core strategies shall set out measures to achieve compact urban development targets of at least 50% of all new homes within or contiguous to the built up area of Dublin city and suburbs and a target of at least 30% for other urban areas."
[132] Architectural Heritage Protection Guidelines for Planning Authorities, 2011

Date	Event	Comment
	OPR Recommendation #4 – 0/0 Zoning - 16/4/21[133] as to the Draft Development Plan 2022,[134] was that: • "Having regard to the national and regional policy objectives to implement compact growth within Dublin city and suburbs, including NPO3b and RPO3.2, • and to the Sustainable Residential Development Guidelines[135] which provide for increased residential density along public transport corridors, including in the interest of maximising the return on public transport investment, • the planning authority is required to omit 0/0 zone objective from the plan as an unnecessary restriction on sustainable development."	• Thereafter the OPR has persisted in Recommendation #4. In substance, it resulted in the Ministerial Direction and is at the heart of these proceedings. • Note that the policy of increased residential density along public transport corridors is sourced from the Sustainable Residential Development Guidelines 2009. In this regard, see note above as to o the **Cork County Council** case[136] and impermissible OPR reliance on non-mandatory guidelines. o the absence of a plea in this regard. • Notably Recommendation #4 does not assert unlawfulness in terms of breach of s.10(2)(n) PDA which requires development plan objectives for "*the promotion of sustainable settlement and transportation strategies … in particular, having regard to location, layout and design of new development.*" • Indeed, Recommendation #4 does not assert illegality in terms. The word "*unnecessary*" is consistent with a mere difference of evaluative planning judgment and does not per se imply unlawfulness. As a matter of ordinary language and depending on context, that which is unnecessary may nonetheless be acceptable or even desirable. There is a great difference between something merely "*unnecessary*" as a matter of difference of planning judgement and something unlawful.

[133] For clarity, this recommendation was set out in the OPR's notice of s.31AM(1) Submission to DLRCC on Draft 2022 Development Plan dated 16/4/21.
[134] OPR submission p13.
[135] In slightly different terms but again a reference to the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) May 2009.
[136] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.

Date	Event	Comment
		• In addition and while there is no plea of reliance on non-mandatory guidelines, it is impossible to interpret Recommendation #4 as a whole without inferring that use of the word "*unnecessary*" is at least considerably informed by the citation of the Sustainable Residential Development Guidelines. That this is misconceived is established by Tristor and the Cork County Council case. • Further, that the 0/0 Objective is an unnecessary restriction on sustainable development is not of itself an assertion that the Plan, <u>as a whole, is generally</u> inconsistent with national and regional policy objectives, including NPO3b and RPO3.2 – as to which see **Killegland**.
7/21	**DLRCC CE report to the Elected Members on Draft Plan Consultation.** The CE reported on the OPR's submission of 16/4/21[137] and recommended as follows:	• *Inter alia*, s.12(4) PDA 2000 requires the CE to recommend <u>how</u> OPR recommendations should be addressed in the development plan.
	• The Draft Plan would provide "20,664 to 23,254 homes within or contiguous to the boundary of Dublin City and Suburbs" which was *"not only consistent with, but significantly exceeds the policy provisions of NPO3b and RPO3.2".*	• It is not apparent that, at any time from this point, anyone has disputed that the Development Plan meets the requirements of NPO3b and RPO3.2, as to quantum of housing – though the target was later reduced to 18,515. Indeed, the OPR has acknowledged as much.[138]
	• Applying the "0/0 Objective" over the widest area – that to which it already applies – would provide the greatest protection to sensitive areas including architectural and archaeological amenity	• The Apartment Design Guidelines,[141] cited by the OPR in other respects, describe sites within reasonable walking distance of high capacity urban public transport stops (such as DART or Luas)

[137] CE Report §2.1.7 Infill and brownfield development.
[138] See below: OPR submission to DLRCC on the Proposed Amendments to the Draft Plan - 24/12/21 states that as to the Development Plan Area generally, it was "satisfied that a reasonable basis has been set out in your authority's draft Plan for the quantum of zoned development that appropriately reflects the housing target … and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport." See also Transcript Day 3 p13 & preceding discussion.
[141] Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities 2020.

Date	Event	Comment
	and views already protected under other Plan objectives and ecological heritage (including the protected Dalkey Coastal Zone and Killiney Hill pNHA[139]). • However, close to public transport, where government policy supports higher densities, this application of the 0/0 Objective would not contribute towards objectives for sustainable mobility, minimising GHG[140] emissions by transport, compact growth, efficient land use, and optimising the use of existing infrastructure. • Development that could be sustainably accommodated in the area could be pushed to areas less well serviced, causing unnecessary potentially significant environmental adverse effects. • Conversely, deleting the 0/0 Objective, would provide the least protection of those sensitive areas. • Another option would be to delete the 0/0 Objective only within 10 minutes' walk of a DART station.	as being *"up to 10 minutes or 800 - 1,000m"* away. • In that light, one may wonder how much of the ACAs would fall outside 1km radii of the Dalkey and Killiney DART stations. I suspect little enough. However, nothing turns on the observation. • It is said here, by the DLRCC executive (which supported the views of the OPR) that the 0/0 Objective would not contribute towards objectives of sustainable mobility and the like. However in a sense that is blaming the objective for being itself. It clearly does not set out to achieve those objectives but nonetheless recognises the possibility of exceptional and limited development close to DART stations. The Elected Members later emphasise that its application is limited spatially to a small area and as will be seen, the true question is whether the Plan, as a whole and as to the entire Plan area, is consistent with those objectives of sustainable mobility and the like.
	The CE recommends • compliance with OPR Recommendation #4, to omit the 0/0 Objective. • adoption of new Specific Local Objective ("SLO") to ensure that development in the relevant areas does not significantly o negatively impact their environmental sensitivities. o detract from the character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements.	• The recommended SLO in due course became SLO130 of the Development Plan 2022. • The Minister cites this report content as supportive of the rationality of the view taken by the OPR and the Minister on the basis that the CE didn't think it impracticable to protect the relevant heritage without the 0/0 Objective.[142] However that the CE's view was reasonable doesn't imply that the

[139] Proposed Natural heritage Area under the Wildlife Act 1986.
[140] Greenhouse gas.
[142] Transcript Day 3 pp. 122 & 123.

Date	Event	Comment
		Elected Members' view was unreasonable – which assertion, as will be seen, underlies the Minister's decision.
12/10/21	**The Elected Members of DLRCC adopted Proposed Amendments to the Draft Plan**.[143] *Inter alia* they: • decided not to effect OPR Recommendation #4 to omit the 0/0 Objective. • rejected the CE's recommendation of 7/21 to like effect. • added, as SLO130, the additional SLO which the CE had recommended. Their resolution reads: "*That this Council, in the best interest of maintaining the highest level of protection to sensitive high amenity areas, (*resolves*)[144] to retain the 0/0 zoning as set in the Draft Plan and to insert the recommended SLO as set out …(in) … the Chief Executive's Report."*	• I do not have the minutes of the Elected Member's meeting which records their resolution. This record of the Elected Members' decision is taken from their notice thereof, dated 17/11/21, to the OPR. The Elected Member's reasons for this resolution were given in that notice.
11/11/21 to 17/1/22	DLRCC put its Proposed Material Alterations to the Draft Plan on public display for public consultation – which ensued.	
17/11/21	**DLRCC served on the OPR a Notice:** • Recording its refusal to follow OPR Recommendation #4. • Stating the Elected Members' reasons for refusal as including the following: o There is a clear conflict between the 0/0 Objective which looks to protect the area and the national objective to increase densities. o DLRCC would uphold the proposed new SLO but[145] cannot imagine that	• By s.12(5)(aa) PDA 2000[148] the Elected Members were obliged to notify the OPR and the Minister of their reasons for non-compliance with an OPR recommendation. • In substance, this notice is repeated in the Notice of 21/3/22 in which DLRCC gives its reasons for rejecting the OPR's Recommendation #4 when making the Development Plan.

[143] See Appendix to DLRCC Report 17/11/21.
[144] The word "resolves" is omitted from the record to hand but is clearly to be understood.
[145] The text says "bit" but the typo is obvious.
[148] 12(5)(aa) – "where a planning authority, after considering the draft plan, chief executive's report, and a submission, observation or recommendation from the Minister or the OPR, decides not to comply with any such recommendation, it shall so inform the OPR and the Minister by notice in writing which shall contain reasons for the decision."

Date	Event	Comment
	ABP would uphold the SLO over Regional and National policy. o A Ministerial Circular[146] remarks that "*towns and their contexts are clearly not all the same, and planning policy and guidance are intended to facilitate proportionate and tailored approaches to residential development*". o Therefore, it is reasonable to require the highest level of protection to a very small area. o The current plan has not protected the area. o It is useful to retain the 0/0 Objective. • The Notice further states: *"For the full narrative of the reasons given by the Members it is recommended that the relevant webcast be viewed.* [147] *It should be noted that the minutes of the meetings have not been agreed."*	• I do not have the webcast cited nor any minute (agreed or not) of the Elected Member's meeting which records their reasons. I will return to this issue in considering below the DLRCC Notice of 21/3/22.
24/12/21	**<u>OPR's s.31(AM)(3) Submission to DLRCC on Proposed Amendments to Draft Plan - 24/12/21</u>** • The OPR again recommended omission of the 0/0 Objective as unjustified. • The OPR again stated[149] that its recommendations "*relate to clear breaches*" which recommendations "*the planning authority is required to implement or address*." • The clear breaches alleged included breaches of s.28 Guidelines.	• See note above as to the difference between recommendations and directions. • See note above as to o the **Cork County Council** case[150] and impermissible OPR reliance on non-mandatory guidelines. o the absence of a plea in this regard.
	The OPR's introduction, observations and overview included the following:	• While the wording is not entirely precise, reading this content as a whole

[146] The notice identifies Circular NRUP 02/2021 of September 2021. In fact Circular NRUP 02/2021 is dated April 2021 and is titled "Residential Densities in Towns and Villages, as set out in Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (2009)".
[147] A weblink is given.
[149] OPR Submissions p3.
[150] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.

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	• The OPR considered the Draft Plan "*generally consistent*" with, *inter alia*, NPF and RSES policies an • it had "*recommended changes to enhance its alignment with national and regional policies in the aforementioned, and for consistency with, inter alia, the NPF Implementation Roadmap …".*[151]	in a common-sense non-technical manner, it seems to me to record not merely general consistency with NPF and RSES policies but that the OPR recommendations were intended to "*enhance*" that general consistency (by removing a specific inconsistency) not to remedy a general inconsistency. • Given the context is one of the OPR's assertion of "*clear breaches" and* recommendations *"the planning authority is required to implement or address.*" It bears observing that **Killegland** is authority that only general consistency of a Development Plan with at least certain NPF and RSES objectives is required by law. In such instances the OPR has no power to recommend (and so indirectly require by Ministerial Direction) a planning authority to "*enhance*" a pre-existing general consistency where only general consistency is required.
	As to Recommendation #4, the OPR stated[152] that • it *"appreciates the desire to protect these areas from unacceptable forms of development".* • Much of the area is an ACA and SLO130 introduced further controls. • it *"remains of the view that the heritage and amenity of these areas is fully protected by these and other objectives within the draft Plan and that the limitations on further residential development by way of the zero/zero zoning objective is not consistent with*	• Here it is clear that there is no difference of principle between DLRCC and the OPW as to the need for protection of the heritage and amenity of the 0/0 Objective Area. It follows that the OPR accept some degree of inhibition of compact residential development along the DART line in that area. • What lies between them is the degree of that protection and inhibition. • In short, the OPR and DLRCC have different views of what o "*full*" protection means in substance - in terms of both outcome to be

[151] OPR Submissions p1.
[152] OPR Submissions p3.

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	providing homes for people in well-serviced areas."	achieved and measures required to achieve it. ○ development should be permitted in the 0/0 Objective Areas. If they didn't differ in these respects, they would not have differed at all. • As stated above, the OPR has persisted in Recommendation #4. In substance, it resulted in the Ministerial Direction.
	§1.2 Core Strategy, Population and Housing Targets - 24/12/21[153] • The OPR accepts the DLRCC housing targets and, "*noting the anticipated housing yield and the corresponding quantum of zoned land needed to accommodate same, as set out in the revised core strategy, the OPR "considers that this quantum is acceptable and reasonable."* • *"Taking all of the above into account, the Office is satisfied that a reasonable basis has been set out in your authority's draft Plan for the quantum of zoned development that appropriately reflects the housing target … and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport.* • *The Office is therefore generally satisfied that the Core Strategy is consistent with the recommendations of the Office, as submitted by the planning authority in its section 12(5)(aa) notice."*	
	Comment 64. A pause for particular comment is appropriate here as to issues of considerable importance to the case. a. Mount Salus pleads and emphasises[154] this content of this OPR submission as rendering it *"wrong in law, illogical, unreasonable, and inadequately reasoned"* to also conclude that the 0/0 Objective *"is inconsistent with national and regional policy objectives to implement compact growth within Dublin city and suburbs",* in particular as to residential density along transport corridors. b. In doing so they emphasise that in **Killegland**, the Supreme Court held that only general, not detailed, consistency with precatory NPOs was required.	

[153] OPR Submissions p4 et seq. Emphases added.
[154] See for example, Transcript Day 3 p178 et seq.

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	c. In my view, reading this OPR submission as a whole, this content at §1.2 must be read in the context of the introductory statement, cited above, that the OPR considered the draft Plan generally consistent with NPF and RSES policies. d. It also must be read as OPR acknowledgment that, as to the Development Plan Area generally, the draft Plan provides an adequate quantum of zoned land – and specifically a quantum so located as *"will enable a focus on developing land best located in terms of infrastructure and public transport."* e. The OPR's evident dissatisfaction with the 0/0 Objective is clearly and fundamentally related to the need to develop land "*best located in terms of infrastructure and public transport"* – but is equally clearly a dissatisfaction specific and limited to the 0/0 Objective Areas. f. The parties disagree as to the meaning of the OPR's view here. The OPR say the words "*Taking all of the above into account"* signify that its general satisfaction was predicated on carrying Recommendation #4 into effect. g. I cannot so read it. Reading it objectively, "*Taking all of the above into account*" clearly refers to "*your authority's draft Plan"* – a draft plan explicitly based on including the 0/0 Objective. The OPR clearly took what it considered the good with the bad of that draft Plan and formed a general conclusion. The OPW's use of the present tense records that it was already satisfied "*generally*". As to what "*the above*" consisted of, this was the OPR's response to DLRCC's express refusal to effect Recommendation #4. The OPR did not withhold its general satisfaction by reason of that refusal. It expressed its general satisfaction despite that refusal. Reconciling its specific dissatisfaction with its general satisfaction implies that the OPR's dissatisfaction is specific to the 0/0 Objective Areas and does not undermine its general satisfaction on this issue. h. There may have been many ways in which the OPR could have expressed the meaning for which it now contends. It could, for example, have said, *"But for DLRCC's rejection of Recommendation #4, the Office would be generally satisfied …".* Or it could have said *"By reason of DLRCC's rejection of Recommendation #4, the Office is not generally satisfied …".* These examples are illustrative only. i. I am conscious that many utterances suffice which might have been said better – no doubt including much in this judgment. But in my view and in this instance these examples are illustrative that the meaning for which it now contends is not what the OPR objectively said. I do not think that the principle of reading a document to validate rather than invalidate it can save this passage from what it does say. Perhaps the OPR, perhaps understandably, did not anticipate Hogan J's analysis in **Killegland** to the effect that many NPOs and RPOs are merely precatory and compliance with them need only be general and so was happy to note general consistency while seeking to insist	

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	on specific consistency as to the 0/0 Objective Areas in the belief that it was entitled to do so. But whatever the reason it does not alter the meaning of what the OPR said – which must be interpreted on XJS Principles objectively as if by a reasonable intelligent layperson.[155] j. Finally, I reject the submissions for the Minister and the OPR that Mount Salus incorrectly emphasise this passage from the OPR's s.31(AM)(3) Submission out of context – not least as it is not repeated in the OPR's later documents. On the contrary, this appears to me a highly significant passage. Its non-repetition in the OPR's later documents is simply explained in that, they and the Minister, naturally enough, were embarked at that point in a process of identifying the flaws in the plan rather than its virtues.	
	OPR's s.31(AM)(3) submission to DLRCC on Proposed Amendments to Draft Plan - 24/12/21 – continued.	
	<u>§2. Compact Growth (0/0 Objective) - 24/12/21</u> • OPR Recommendation §4 is that the 0/0 Objective is inconsistent with o national and regional policy of compact growth in Dublin suburbs, including NPO3b and RPO3.2, o the Urban Residential Guidelines 2009 as to increased density along public transport corridors, and o the strategic approach of the draft Plan to contribute to climate change mitigation strategy of compact growth focused on transportation corridors and travel minimisation.	• The OPR's general satisfaction must be read in the context of its dissatisfaction with DLRCC's failure to effect OPR Recommendation §4 and *vice versa*. • That said, the OPR's assertion of inconsistency with NPO3b and RPO3.2 is specific to the 0/0 Objective Areas. In my view, it does not assert general inconsistency of the draft Plan with those objectives. • See note above as to o the **Cork County Council** case[156] and impermissible OPR reliance on non-mandatory guidelines. o the absence of a plea in this regard.
	• The OPR agrees with the DLRCC[157] that "the draft Plan, as amended, has not been complied with."	• In terms, this makes no sense. The words *"draft Plan, as amended,"* are clearly misplaced. • It is not possible to precisely infer the correct words with certainty but the general point is clear enough. It is

[155] Grafton Group PLC v An Bord Pleanála [2023] IEHC 725 citing, inter alia, Re XJS Investments Limited [1986] IR 750, Tennyson v Dún Laoghaire [1991] 2 IR 527, Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, Eoin Kelly v An Bord Pleanála [2019] IEHC 84 and Navan Co-ownership v An Bord Pleanála [2016] IEHC 181.
[156] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.
[157] Citing its S.12(5)(aa) notice of 17/11/21.

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		agreement that Recommendation #4 has not been complied with and probably with the DLRCC's assertion of "*a clear conflict between the 0/0 objective which looks to protect the area and the national objective to increase densities.*"[158]
1/22	**DLRCC CE Report to the Elected Members on the Proposed Amendments to the Draft Development Plan.** • The CE advised that the Members' rejection of OPR Recommendation #4 to omit the 0/0 Objective could not be revisited by the Elected Members.	The parties agree that OPR Recommendation #4 could not be revisited at this point in the process as there was no motion to effect it.[159]
10/3/22	**The Elected Members adopted the 2022 Development Plan** • including the 0/0 Objective.	• S.12(11) PDA 2000 provides that *"in making the development plan … the members shall be restricted to considering the proper planning and sustainable development of the area …, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government."* • By s.12(18) PDA 2000 "*statutory obligations*" includes the obligation to ensure that the development plan is consistent with the national and regional development objectives specified in the NPF, RSES and any SPPRs.
		• As stated earlier the Plan was initially published[160] including the 0/0 Objective. • The Plan took effect 6 weeks later.[161]
21/3/22[162]	**DLRCC served on the OPR a Notice** under s.31(AM)(6) PDA 2000 advising:	• S.31(AM)(6), read with s.10 PDA 2000, requires that, where the DLRCC declines to follow an OPR recommendation, this

[158] DLRCC Notice dated 17/11/21 under s.12(5)(aa) PDA 2000.
[159] See the CE report of 27/5/22 p28 & transcript day 1 p102.
[160] S.12(12) PDA 2000.
[161] S.12(17) PDA 2000.
[162] Incorrectly dated 21/3/21.

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	• That it had made the 2022 Development Plan. • That it had refused to follow OPR Recommendation #4 to delete the 0/0 Objective. • Of the Members' reasons for that refusal – as including, o *"There is a clear conflict between the 0/0 objective which looks to protect the area and the national objective to increase densities."* o They would uphold the proposed new SLO[163] but cannot imagine that An Bord Pleanála would uphold the SLO over regional and national policy. o The Ministerial Circular[164] … remarks that *"towns and their contexts are clearly not all the same, and planning policy and guidance are intended to facilitate proportionate and tailored approaches to residential development".* o Therefore, it is reasonable to require the highest level of protection to a very small area. o Current Plan has not protected the area. o Useful to retain the 0/0 objective. • This Notice also stated: *"For the full narrative of the reasons given by the Members it is recommended that the relevant webcast and minutes of the Council meeting be viewed."*[165]	Notice must state the reasons why consistency with NPF and RSES objectives was not practicable. • DLRCC's reasons are identical to the reasons stated in its notice of 17/11/21. • On the evidence before me, I take DLRCC's reasons to be those recorded here.[166] • I will consider below the legal significance of these reasons.

[163] i.e. SLO 130.
[164] The notice identifies Circular NRUP 02/2021 of September 2021. In fact Circular NRUP 02/2021 is dated April 2021 and is entitled "Residential Densities in Towns and Villages, as set out in Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (2009)".
[165] A weblink to the minutes was given.
[166] I do not have the minutes of the DLRCC meetings of 12/10/21 or 10/3/22 – nor do I have the relevant webcasts or a transcript thereof. They are not exhibited. But no party disputes the record I do have of the DLRCC's reasons – i.e. the notices of 17/11/21 and 21/3/22.

OPR'S S.31AM(8) RECOMMENDATION TO THE MINISTER ENCLOSING DRAFT DIRECTION - 6/4/22 – "FIRST DOMINO"

6/4/22	OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22	Comment
	The s.31AM8 Recommendation • explicitly invoked the OPR Submissions of 16 April 2021, 24 December 2021 and "Recommendation #4" as to the 0/0 Objective,[167] and The s.31AM8 Recommendation, *inter alia*,[168] • advised that a ministerial direction under s.31 PDA 2000 was merited. • enclosed a draft Direction – primarily for deletion of the 0/0 Objective from the 2022 Development Plan.	• Mount Salus seeks declaratory relief as to the validity of this Notice.[172] • The **Cork County Council** case is authority that, as the "*first domino*", if a s.31AM(8) Recommendation is invalid, so too is a Ministerial Direction ultimately based on it.[173]
	• advised of the OPR's opinion that, by reason of the inclusion of the 0/0 Objective for *"significant parts of Killiney and Dalkey where no increase in the number of buildings will normally by permitted, thereby restricting infill development and increased residential density along the DART railway corridor over and above restrictions that are reasonably applied to protect the heritage, character and amenity of the county",* the Development Plan was not consistent with OPR recommendations which had required specific changes to, o ensure consistency with, *inter alia*,[169] ▪ NPO3b, NPO11 and NPO35[170], ▪ RPO3.2 and RPO4.3,[171] as to compact growth and intensification of infill/brownfield development, o "*have regard to*" the Urban Residential Guidelines 2009 which provide for increased	• By s.31AM(7) PDA 2000, on receipt of a s.31AM(6) Notice[174] the OPR must consider whether the development plan as made *"is, in the OPR's opinion, consistent with any recommendations made by the [OPR]".*[175] • By s.31AM(8) PDA 2000, where the OPR "*is of the opinion*" that: o the development plan is inconsistent with the OPR recommendations, o fails to set out an overall strategy for the proper planning and sustainable development of the area, and

[167] OPR s.31AM(8) Recommendation p.3 and p6 et seq at §1.1 under the heading: "0/0 zone objective - Recommendation 4".
[168] OPR s.31AM(8) Recommendation p.1, 2 & 22 et seq.
[169] DLRCC had also refused to implement OPR Recommendation #1 of the OPR submission on the material alterations to the Draft Plan to omit Material Alteration 160 which introduced a requirement for certain percentages of 3-bed apartment units in Build To Rent (BTR) developments. That is irrelevant to these proceedings.
[170] of the NPF.
[171] of the RSES.
[172] Amended Statement of Grounds Relief D.3A.
[173] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.
[174] i.e. that of 21/3/22 from DLRCC advising the OPR that it had made the 2022 Development Plan and had refused to follow OPR Recommendation #4 to delete the 0/0 Objective.
[175] S.31AM(7) PDA 2000.

6/4/22	OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22	Comment
	residential density in existing urban areas and along public transport corridors. • The OPR advised that the 0/0 Objective for significant parts of Killiney and Dalkey, o is not necessary to the elected members' stated purpose or reasonable having regard to other comprehensive provisions in the Development Plan for the protection of the heritage, character and amenities of the functional area. o having regard to the location of the 0/0 Objective Area in an urban area well serviced by public transport, would undermine the Development Plan core strategy and other objectives that promote compact and infill growth and alignment with high quality public transport.[177] o is unreasonably restrictive. • The OPR advised o that the DLRCC's reasons for rejecting OPR Recommendation #4 that it delete the 0/0 Objective do not ▪ adequately justify its decision. ▪ explain how the Development Plan sets out an overall strategy for the proper planning and sustainable development of the area. o that in consequence, the 2022 Development Plan failed to set out an overall strategy for the proper planning and sustainable development of the area contrary to s.10(1) PDA 2000.	o in consequence a ministerial direction under s.31 would be merited, the OPR must recommend to the Minister that (s)he act under s.31 and provide a draft ministerial direction accordingly. • Mount Salus stresses that the opinions listed above as essential to the validity of the OPR's s.31AM(8) Recommendation enclosing a Draft Direction are cumulative, not alternatives. • Here we see the centrality of specified NPOs and RSOs. This s.31AM(8) Notice invoked NPO11 and RPO4.3 for the first time in the process. • The wording of this s.31AM(8) Notice was somewhat unclear as to what exactly the OPR intended to be the significance of its reference to, and reliance on, the Urban Residential Guidelines 2009. The wording I have set out reflects my understanding of the wording in the Notice. But, clearly, the invocation of the policy of increased residential density along public transport corridors is grounded in the 2009 Guidelines rather than in the NPF or the RSES. • However, see note above as to

[177] Citing Development Plan Objectives CS11 (achieve compact growth), PHP18 (infill/ brownfield development), and T1 (alignment of land use and zoning with high quality public transport).

6/4/22	**OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22**	**Comment**
		○ the **Cork County Council** case[176] and impermissible OPR reliance on non-mandatory guidelines. ○ the absence of a plea in this regard. • Significantly we also see assertions that the Elected Members' adoption of the 0/0 Objective is not reasonable or, to use its synonym, is irrational.
	In explaining that opinion, the OPR, noted, 8 "*factors*"[178] i. NPO3b, NPO11, NPO35, RPO3.2 and RPO4.3 ii. The Development Plan core strategy and policy objectives CS11 (compact growth) and PHP18 "*infill/brownfield development*". iii. that a significant proportion of the urban area was within 1km of the DART and was well served by public transport and the Urban Residential Guidelines 2009 provision for increased residential density in existing urban areas and along public transport corridors. iv. the Development Plan policy objectives as to the preservation of the character of the ACAs, the protection of protected structures, and buildings, structures not statutorily protected, coastal heritage and amenities, trees and woodlands.[179] v. (Omitted – irrelevant)[180]	See notes above as to • the Urban Residential Guidelines 2009. • the **Cork County Council** case[182] and impermissible OPR reliance on non-mandatory guidelines. • the absence of a plea in this regard.

[176] Cork County Council v Minister For Housing [2021] IEHC 683 – see below.
[178] P19 et seq.
[179] Including Development Plan objectives SLO130 and HER8: Work to Protected Structures; HER13 Architectural Conservation Areas; HER14: Demolition within an ACA; HER16: Public Realm and Public Utility works within an ACA. HER19 Protection of Buildings in Council Ownership; HER21: Nineteenth and Twentieth Century Buildings, Estates and Features: HER22: Protection of Historic Street Furniture and Public Realm; HER24: Protection of Coastline Heritage.
[180] SPPR 8(i) of the Apartment Guidelines 2020 – this relates to the other recommendation.
[182] Cork County Council v Minister For Housing [2021] IEHC 683 – see below.

6/4/22	**OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22**	**Comment**
	vi. The CE reports on Draft Plan Consultation and material alterations to the draft Development Plan. vii. Ss 10, 12(11), 12(18) and 28 PDA 2000. viii. The OPR's statutory obligations. The OPR continues: • In light of the foregoing, the Office considers that the Development Plan o has not been made in a manner consistent with the Office's recommendations and o fails to set out an overall strategy for the proper planning and sustainable development of the area.[181]	
	The OPR also stated that • the allowance by the 0/0 Objective of possible small scale, sensitive infill development was *"vague and subject to an overall approach that no additional buildings will normally be permitted … it is not clear what the Plan actually proposes in the relevant areas."*[183] • "*The plan as made is therefore internally inconsistent between on the one hand an objective that there would be no net increase of buildings in significant areas and on the other hand that infill development may be permitted on suitable sites."*[184] • "*It is not clear how the plan …would reconcile such opportunities*[185] *with the objective of no net increase in the number of buildings*."[186]	• I respectfully disagree with these observations - see comment below.
Comment • While the allowance in the 0/0 Objective of the possibility of exceptional development may sensibly be called "*vague*", I cannot see that this sets it apart from many – even typical - provisions of		

[181] P22
[183] P9 & 10
[184] P10.
[185] i.e. "prospects to deliver additional housing, including public housing, on sites that may present opportunities for infill/redevelopment in an area highly accessible with excellent public transport, community facilities and environmental amenities."
[186] P10.

6/4/22	OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22	Comment

development plans which allow the possibility of development exceptional to general policies to be considered on a case-by-case basis.

- If vagueness is a criticism in a policy document such as a development plan, it seems equally applicable to SLO130 in its criterion of "*significance*" – a concept well-established to be not "*hard-edged*".[187]

- However, in my view, the criticism is not correct of either SLO130 or the 0/0 Objective if the criticism is taken as impugning their legality. Otherwise, it speaks to a difference of planning judgment as opposed to illegality.

- Also, what the 0/0 Objective in fact says is that "*no increase in the number of buildings will normally be permitted*".[188] As a matter of interpretation, as the possibility of small scale, sensitive infill development is clearly an exception, it follows that this possibility, where it exists, is not, at least generally, constrained by or subject to the "*normal*" exclusion of "*increase in the number of buildings"*. The alternative interpretation - that the possibility of such development depends on the demolition of existing buildings in the 0/0 Objective Areas - is clearly implausible given the protection of architectural heritage on which all are agreed.[189] It is clear that the aim of no "*increase in the number of buildings"* is not expressed in absolute terms.

- As a matter of interpretation of the Development Plan - a matter of law for the court - I must respectively disagree with the OPR's assertion of internal inconsistency. The relevant text is nothing more unusual than an ordinary statement of a general principle ("*no additional buildings … normally")* subject to an exception (the possibility of *"small scale, sensitive infill development on suitable sites").* Indeed, the exception is prefigured in the principle itself - in the word "*normally*". Such a formula is an unobjectionable commonplace of development plans.

- As a matter of interpretation of the Development Plan, the assertion of lack of clarity as to how the plan would reconcile housing opportunities[190] with the objective of no net increase in the number of buildings is clearly erroneous.
  - First, it is based on the erroneous assertion of internal inconsistency just described.
  - Secondly, the formula used is no different to many provisions in development plans for case-by-case analysis of proposals for development exceptional to a normal principle, where the plan envisages the possibility of such exceptions. That is of the very stuff of planning judgement by planners in development management. Indeed, the words "*small scale, sensitive infill development on suitable sites"* give very appreciable guidance to the planners in that regard – as

[187] Shadowmill v ABP & Lilacstone [2023] IEHC 157.
[188] Dún Laoghaire-Rathdown County Development Plan 2022 §12.3.7.8.
[189] Which is not to say that demolition will not be permissible in some instances – for example of buildings which, though in the 0/0 Objective Areas, are of little or no heritage value.
[190] i.e. "prospects to deliver additional housing, including public housing, on sites that may present opportunities for infill/redevelopment in an area highly accessible with excellent public transport, community facilities and environmental amenities."

6/4/22	**OPR's s.31AM(8) Recommendation to the Minister enclosing Draft Direction - 6/4/22**	**Comment**
	does the identification of the need for critical assessment of *"Aspects such as site coverage and proximity to boundaries, impacts on drainage, loss of landscaping, the existing pattern of developments, density and excavation impacts".*	

Date	Event	Comment

12/4/22	**<u>Minister's Notice to DLRCC - "Notice of Intention to issue a Direction" - 12/4/22</u>**
	
	The Minister
	• stated that that he had formed the opinion[191] that:
	  ○ DLRCC had failed to implement OPR recommendations,
	  ○ the 2022 Development Plan
	  ▪ fails to set out an overall strategy for the proper planning and sustainable development of the area,
	  ▪ is inconsistent with objectives of the NPF and RSES, and
	  ▪ is non-compliant the PDA 2000,
	  ○ and in consequence a ministerial direction under s.31 would be merited.
	
	• enclosed a draft Ministerial Direction[192] to delete the 0/0 Objective from the 2022 Development Plan. It was in the form proposed by the OPR.
	
	• stated his reasons for so doing.
	
	• required the DLRCC CE to
	  ○ publish the draft Ministerial Direction
		Served under s.31(3) & (4) PDA 2000, consequent on the OPR's s.31AM(8) Recommendation of 6/4/22.
		
		• Mount Salus' Grounds, Relief D.3A, seek declaratory relief as to the validity of this Notice of Intention to issue a Direction
		
		• By s.31AN(1) PDA 2000, the Minister must consider the OPR's s.31AM(8) Recommendation and if he agrees with it he must issue a notice under s.31(3) & (4) PDA 2000.
		
		• By s.31(6) PDA 2000, this Notice prevented the 0/0 Objective from coming into effect.
		
		• While adopting the OPR's Recommendation, the Minister did not repeat its reliance on the Urban Residential Guidelines 2009.[193] It is reasonable to infer that the Minister took this course conscious of the Cork County Council case – but nothing now turns on that.
		
		• The Minister's reasons in this notice and draft direction are repeated in the

[191] Referred to in s.31(1) PDA 2000.
[192] S.31(4)(b) PDA 2000.
[193] The Minister did rely on the Apartment Guidelines 2020 but as to Recommendation #1, which is not here relevant and then only SPPR8(i) thereof as to dwelling mix. S.10(1A) requires that development plans be consistent, as far as practicable, with SPPRs - with which s.28(1C) PDA requires compliance.

Date	Event	Comment
	○ invite submissions and observations thereon, and ○ report to the Minister on those submissions and observations.	Ministerial Direction of 28/9/22 – see below.
21/4/22	DLRCC's 2022 Development Plan took effect. At about this time DLRCC published an advisory note that the 0/0 Objective would not take effect – by reason of the draft Ministerial Direction of 12/4/22.	The 2022 Development Plan was initially published including the 0/0 Objective. I am unsure when exactly the advisory note ensued but nothing turns on that.
21/4/22 to 4/5/22	DLRCC published the draft Ministerial Direction of 12/4/22, and the Minister's reasons for issuing it, for public consultation – which ensued.	Published under s.31(7) PDA 2000.
16/5/22	The Elected Members of DLRCC considered the draft Ministerial Direction and agreed a summary of their views.[194] The anonymised individual views of 16 Members are set out in the DLRCC CE report of 27/5/22. • Only 2 members wanted to accept the Direction and delete the 0/0 Objective. • 8 wanted to retain the 0/0 Objective simpliciter. • 5 proposed various forms of compromise as to the area to be affected, while retaining the 0/0 Objective. • 1 took no view.	• Members may make a submission on the Draft Direction directly to the OPR and copy it to the Minister.[195] None did so but their views are recorded in the CE report of 27/5/22. • The Minister says[196] that ○ the members' views are numerous & varied – not unified. ○ they differ as to whether the 0/0 Objective should be retained. ○ they differ in their reasons. ○ some of their reasons do not reflect proper planning considerations. ○ some members appear to envisage, incorrectly, that local consistency with national policy objectives is not required by law. • In my view, while the Minister's comments as to the members' reasons may have some technical validity, there is no denying that, overall, the members overwhelmingly opposed deleting the 0/0 Objective and took that view for the

[194] As recorded in the DLRCC CE Report 27/5/22 and the OPR's recommendation of 17/6/22 to the Minister that he issue a direction.
[195] S.31(10) PDA 2000.
[196] Minister's Submissions §79.

Date	Event	Comment
		simple reason that they considered that its protection of the 0/0 Objective Areas was necessary. There is in truth no real mystery as their essential reasons, however variously expressed.
27/5/22	**DLRCC CE Report & Recommendation to Issue a Direction** • to the Elected Members, the OPR and the Minister[197] and • on consultations as to the draft Ministerial Direction. It • summarised the public's submissions[198] and the views and recommendations of the Elected Members on the draft Ministerial Direction, and • recommended effecting the draft Direction.[199]	Issued under s.31(8) & (9) PDA 2000. • The recommendation is that of the CE, not of the Members. • The CE is not at large as to his/her recommendation. Despite the views of the Members, by s.31(9)(d) PDA 2000, he/she must "*make recommendations in relation to <u>the best manner in which to give effect</u> to the draft direction."*[200]
17/6/22	**<u>OPR's s.31AN(4) Notice to Minister – Recommending Direction - 17/6/22</u>** • This notice repeated the OPR's 31AM(8) Recommendation of 6/4/22 to delete the 0/0 Objective and repeated its reasons for so recommending. • It concluded that it saw "*no basis to materially amend the recommendation*" and enclosed a Draft Direction. [201]	• Under s.31AN(4) PDA 2000, the OPR must consider the DLRCC CE Report under s.31(8) and any submissions by DLRCC members[202] and either: ○ (i) recommend to the Minister that he issue the direction with or without minor amendments or, ○ (ii) appoint an inspector[203] (irrelevant here). • In Mount Salus' Grounds, Relief D.3 seeks declaratory relief as to the validity of this s.31AN(4) Recommendation. • Mount Salus submits that there is in this recommendation a lack of reasoning to explain how the OPR concluded there was an absence of an overall strategy

[197] S.31(8) PDA 2000.
[198] 3 supported the draft direction – 7 opposed it. See also the OPR's recommendation of 17/6/22 to the Minister that he issue a direction.
[199] subject to a minor amendment for clarity.
[200] Emphasis added.
[201] OPR s.31AN(4) Recommendation 17/6/22 p7.
[202] There were none, but their views were recorded in the CE Report.
[203] S.31AN(4) PDA 2000.

Date	Event	Comment
		rather than merely an overall strategy with which it disagrees. • The Cork County Council case is authority that, by a 'domino effect', if the OPR's s.31AN(4) Recommendation to Issue a Direction is invalid, so too is the Ministerial Direction based upon it.[204]
	The Recommendation to issue a direction elaborated, addressing also the public's and the elected members' submissions on the draft direction, as follows: • It noted a submission that the Plan can meet the national policy objectives (e.g. NPO3b) without omission of 0/0 Objective. • As to the availability of land outside the 0/0 Objective Area to meet compact growth objectives of the NPS and RSES, it asserted that those objectives refer to the delivery of "*at least 50%"* of all new homes targeted for the Dublin suburbs within their existing built up footprints, "*and not a minimum target*".[205] • The OPR repeated its *"view that the proposed restriction of development within the built up footprint of these parts of Dalkey and Killiney along a high quality public transport corridor is inconsistent with the national and regional objectives for compact growth."*[206]	• The OPR did not repeat its reliance on the Urban Residential Guidelines 2009. It is again reasonable to infer that the OPR took this course conscious of the Cork County Council case. However, as the issue wasn't pleaded nothing turns on it. • As will be seen, as to even this limited extent of the OPR's consideration of the issue of consistency with the relevant NPO and RSES objectives it erred in law as to their interpretation.

[204] Cork County Council v Minister for Housing [2021] IEHC 683 – see below.
[205] OPR s.31AN(4) Recommendation 17/6/22 p5.
[206] Ditto.

COMMENT ON OPR'S S.31AN(4) RECOMMENDATION TO ISSUE A DIRECTION

65. This content of the OPR's s.31AN(4) Recommendation to Issue a Direction merits particular comment. As will be seen, it is clearly a reference to NPO3b and RPO3.2. The 50% figure relates, not to the DLRCC area discretely, but to "*the built up area of Dublin city and suburbs*". That area is spread across four planning authority areas – effectively the DMA.

66. The phrase "*not a minimum target*" is at best clumsy as a "*minimum*" is conceptually very different from a "*target*". But the general meaning is tolerably clear in the context of the words "*at least*". Presumably it should have said that 50% is "*a minimum, not a target*" or similar. Mount Salus is correct in submitting that

- "*at least 50%*" sets a minimum, though aspiring higher; and
- there is no non-compliance unless the total falls below 50%.

I add that the minimum relates to the entire DMA.

67. Importantly, the content implies OPR's acceptance that DLRCC's required contribution (whatever it may be) to the 50% figure was met. There is no suggestion to the contrary. Rather, it seems to me, the OPR is trying here to move the goalposts and misinterpreting NPO3b and RPO3.2 in so doing.

68. In any event, **Killegland** is authority that, the terms of NPO3b are precatory – aspirational - and the requirement of consistency with NPO3b is general only. As its content is essentially the same, it follows that the same is true of RPO3.2. Indeed, as it encompasses four planning authority areas without allocating the obligation as between them, NPO3b is a good illustration of why the requirement of compliance is general only and considered precatory. It is incapable of direct application per se to any individually of the four planning authority areas.

69. Even ignoring its precatory nature and given the words "*at least*", while delivery beyond 50% may be desirable, I cannot see that it can, on any reasonable view of NPO3b or RPO3.2, be a legal obligation of planning authorities that they provide accordingly in their development plans.

70. Recommendations and directions are concerned with illegality of development plans and not with mere differences of evaluative planning judgment as between legally compliant alternatives. In effect, this observation by the OPR repeats the legal errors made by way of ministerial and OPR attempts in the Tristor and Cork County Council cases to insist on Development Plan compliance with guidelines when no requirement of compliance existed.

71. I now resume the chronology and the remaining relevant text of the OPR's s.31AN(4) Recommendation to Issue Direction.

Date	Event	Comment
17/6/22	**OPR Notice to Minister – ("s.31AN(4) Recommendation to Issue Direction") continued** • As to site-specific issues, the OPR cited[207] *"extensive and reasonable provisions in the Development Plan to provide sufficient safeguards"* such as: ○ SLO 130. ○ §12.10 as to Drainage, Flood Risk and Coastal Erosion. ○ *Objective PHP18: Residential Density to increase housing supply and promote compact urban growth through consolidation and re-intensification of infill/brownfield sites having regard to proximity and accessibility considerations, and development management criteria set out in Chapter 12.* ○ *Objective PHP19: Existing Housing Stock – to densify built-up areas by small scale infill development having due regard to the amenities of existing established residential neighbourhoods.* ○ *§12.3.7.7 – Infill development shall respect the height and massing of existing residential units and retain the physical character of the area including features such as boundary walls, pillars, gates/ gateways, trees, landscaping, and fencing or railings. This shall particularly apply to those areas that exemplify Victorian era to early-mid 20th century suburban 'Garden City' planned settings and estates that do not otherwise benefit from ACA status or similar.*	• The listing of "*site-specific issues*" confirms that the issue between the OPR and DLRCC was not as to the principle of protection of the ACAs and suggests that the issue between them was a difference of evaluative planning judgement as to the degree of protection required and the correct balance between that protection and compact development along the DART transport corridor. • I confess I was unable to discern the relevant protection afforded by §12.10. While they do provide safeguards (no less "*vague*" than those criticised by the OPR) the thrust of Objectives PHP18 and PHP19 is clearly to promote development. • In any event, it is clear that the OPR and the Minister consider that the reduced degree of protection they envisage will open the area up for considerable residential development: anything less would clearly make no worthwhile difference to realising the potential of the DART line by compact development along it. It is difficult to see that the OPR and the Minister could have thought their dispute with DLRCC worthwhile for anything less. • It follows that the views of the OPR and the Minister as to the sufficiency of the protection of the 0/0 Objective Areas shorn of the 0/0 Objective imply very different perceptions to those of DLRCC members of what the substantive outcomes of the "full" protection of those areas should be.

[207] OPR s.31AN(4) Recommendation 17/6/22 p5 & 6.

MINISTERIAL DIRECTION - S.31(16) PDA 2000 - 28 SEPTEMBER 2022

72. By s.31AN(4A), the Minister must consider the OPW's s.31AN(4) Recommendation and,
- if he agrees, must issue the direction[208] with or without minor amendments.[209]
- if he does not agree, must publish his reasons for not so agreeing and, *inter alia*, lay them before the Oireachtas.

73. On 28 September 2022, the Minister issued to DLRCC the **Impugned Ministerial Direction** under s.31(16) PDA 2000. It
- directed, *inter alia*, deletion of the 0/0 Objective[210] from the 2022 Development Plan.
- was in the form of the OPR's draft Direction save for *"minor amendment to clarify the specific subsections of section 31 that apply to each Statement of Reason."*[211] Otherwise, it stated the Minister's reasons in terms of the Minister's draft Direction.

74. In Mount Salus' Grounds, Relief D.3 of the Grounds seeks declaratory relief as to the validity of this Ministerial Direction.

75. For reasons which will become apparent, I think it useful to note that the High Court judgment in **Killegland** issued in July 2022, only shortly before the Minister's Direction and the Supreme Court judgment in **Killegland** issued in December 2023 – after the Minister's Direction.

76. The Minister, in his written submissions in these proceedings,[212] summarises his Impugned Direction as based on three reasons corresponding to §§1, 2 and 3 respectively of his Direction:

- **Reason 1** consists in his opinion that the Development Plan fails to
  - implement the OPR recommendations to delete the 0/0 Objective, and
  - "set out an overall strategy for the proper planning and sustainable development of the area".

- **Reason 2** consists in his opinion that
  - the '0/0 Zone' is inconsistent with NPF and RSES objectives, and
  - there was consequently non-compliance with s.10(1A) PDA 2000.

[208] Within 6 weeks of receipt of that recommendation.
[209] S.31AN(4A) PDA 2000.
[210] And associated Plan content.
[211] Covering letter 28/9 22 from the Minister to DLRCC enclosing the Ministerial Direction. The letter is largely repetitive of the reasons set out in the Ministerial Direction and the requirement to effect it.
[212] Submissions §18 & 140.

- **Reason 3** consists in his opinion that the Development Plan fails to "set out an overall strategy for the proper planning and sustainable development of the area".[213]

77. I observe that the recital of these reasons, assists in demonstrating the very considerable and significant substantive overlap between the reasons proffered. In truth and importantly, there is one underlying substantive reason: inconsistency with NPF and RSES objectives. It is in reality in virtue of this alleged inconsistency that the allegations of failure to OPR recommendations and of failure to set out an overall strategy and of non-compliance with s.10(1A) PDA 2000 are made.

78. The Minister's reasons, as stated in the Direction, for the deletion of the 0/0 Objective, are as follows:

Minister's Direction 28/9/22 - Reasons	**Comment**
I have omitted here text relevant to the separate direction,[214] not challenged and so irrelevant to the direction to delete the 0/0 objective.	It is unfortunate, as tending to lack of clarity, that the reasons for both directed deletions were combined. However, in the end, nothing turns on that observation.
§I. Pursuant to s.31(1)(a)(i)(II)[215] and s.31(1)(b)[216] PDA 2000 • The OPR is of the opinion that the Development Plan: o is not consistent with its recommendations and o fails to set out an overall strategy for the proper planning and sustainable development of the area.	• What matters for the purpose of s.31(1)(a)(i)(II) and s.31(1)(b) is not the OPR's opinion but the Minister's. In that respect, the citation of the OPR's opinion is beside the point. • However, in the absence of a pleaded challenge on the issue and looking to the substance rather than the form of **§I** of the Direction, it is to be inferred that the Minister agrees with and adopts the OPR's opinions as his own. • **§I** of the Direction, as to overall strategy, is essentially conclusionary. It does not explain why the conclusion was reached. Those reasons are found in what follows and in the substance of the OPR Recommendation.
§II. Pursuant to s.31(1)(ba)(i)[217] and s.31(1)(c)[218] PDA 2000	• It seems to me that the word "including" in **§II** of the Direction must be ignored. The Minister

[213] The repetition of the assertion of absence of an overall strategy is the Ministers'.
[214] Delete the following text after the first paragraph of section 12.3.3 Quantitative Standards for All Residential Development from the adopted Development Plan: "That the requirement for certain percentages of 3-bed units in apartments shall apply to Build To Rent developments to accord with mix on page 233".
[215] "31(1) Where the Minister is of the opinion that — (a) a planning authority, in making a development plan, … has failed to — (i) implement a recommendation made to the planning authority by — (II) the Office of the Planning Regulator under section 31AM …".
[216] "Where the Minister is of the opinion that— (b) … the plan fails to set out an overall strategy for the proper planning and sustainable development of the area, …".
[217] "31(1) Where the Minister is of the opinion that— (ba) a plan is not consistent with — (i) the national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy …".
[218] "31(1) Where the Minister is of the opinion that - (c) the plan is not in compliance with the requirements of this Act, …".

Minister's Direction 28/9/22 - Reasons	**Comment**
• Contrary to s.10(1A) PDA 2000,[219] the Development Plan is inconsistent with policy objectives of the NPF and the RSES, including NPO3b, NPO11 and NPO35, and RPO3.2 and RPO4.3 as to implementation of compact growth and intensification of infill/brownfield development.	must identify all NPF and RSES Objectives on which he relies. • As will be seen, none of the NPF and RSES Objectives on which he relies explicitly invoke compact residential development along, specifically, existing transport corridors. The closest is RPO4.3 in requiring the coordination of *"future development areas"* with *"delivery of key … public transport projects."*
• The Development Plan would undermine its own strategy and other objectives[220] that promote compact and infill growth and alignment with high quality public transport systems.	• It is not apparent to me how the alleged undermining of the strategy and objectives of the Development Plan falls within the prohibitions of s.31(1)(ba)(i) and s.31(1)(c).
• The 0/0 Objective for significant parts of Killiney and Dalkey is <u>not necessary or reasonable</u> having regard to the comprehensive Development Plan provisions for the protection of the heritage, character and amenities of DLRCC's functional area. • The 0/0 Objective is <u>disproportionate,</u> especially in the context of SLO 130.	• These seem to me to be important elements of the Minister's reasons. • These concepts of reasonableness and proportionality have obvious echoes in the law of judicial review as to irrationality and can hardly have been invoked, as reasons for the statutory Direction, unconscious of those echoes. • It seems to me that they were invoked conscious of the necessity to not merely disagree with the merits of the Plan including 0/0 Objective as compared to the merits of the Plan excluding 0/0 Objective but to express a ministerial opinion that including 0/0 Objective amounted to an illegality.
§III. Pursuant to s.31(1)(ba)(i)[221] … s.31(1)(c)[222] and 31(1)(b)[223] PDA 2000 • The 2022 Development Plan:	• Here we find the substantive reason for the conclusion that the Development Plan fails to set out an overall strategy. The words "*and so*" relate that conclusion directly to the paragraphs just above.

[219] S.10(1A) requires that a Development Plan include a "core strategy which shows that" its development objectives "are consistent, as far as practicable, with" NPF and RSES objectives.
[220] Citing Development Plan Objectives CS11 (achieve compact growth), PHP18 (infill/ brownfield development), and T1 (alignment of land use and zoning with high quality public transport).
[221] "31(1) Where the Minister is of the opinion that— (ba) a plan is not consistent with — (i) the national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy …".
[222] "31(1) Where the Minister is of the opinion that - (c) the plan is not in compliance with the requirements of this Act, …".
[223] "31(1) Where the Minister is of the opinion that - (b) in the case of a plan, the plan fails to set out an overall strategy for the proper planning and sustainable development of the area, …".

Minister's Direction 28/9/22 - Reasons	**Comment**
○ is inconsistent with NPF and RSES "*requirements*", contrary to s.10(1A) PDA 2000,[224] ○ would undermine the Development Plan Core Strategy and other objectives promoting compact and infill growth and the alignment with public transport systems, ○ and so[225] fails to set out an overall strategy for the proper planning and sustainable development of the area.	• Clearly, the determination of inconsistency with the NPF and RSES "*requirements*" identified in §2 above was essential to the conclusion that the Plan fails to set out an overall strategy for the proper planning and sustainable development of the area.
§IV. • The DLRCC CE has recommended[226] that the draft Direction be effected without amendment.[227]	

RELIEFS CLAIMED BY MOUNT SALUS

79. The reliefs claimed in the Amended Statement of Grounds,[228] as now relevant, include the following declarations of invalidity:

- §3A - of the OPR's s.31AM(8) Recommendation, dated 6 April 2022, enclosing a Draft Direction.
- §3A - of the Minister's Notice, dated 12 April 2022, of Intention to issue a Direction.
- §3 - of the OPR's s.31AN(4) Recommendation, dated 17 June 2022, to Issue a Direction.
- §3 - of the Ministerial Direction dated 28 September 2022.

I will refer to these four documents collectively as the "Impugned Decisions".

80. As will be seen, the first in time of these Impugned Decisions is the OPR's s.31AM(8) Recommendation dated 6 April 2022 enclosing a Draft Direction. Humphreys J in the **Cork County Council case**[229] described the OPR's s.31AM(8) Recommendation as the "*first legally critical step*" *– the first domino*".

[224] The development plan core strategy must show that the plan's objectives are consistent, as far as practicable, with national and regional development objectives set out in the NPF and the RSES.
[225] Emphasis added.
[226] By his report dated 27/5/22.
[227] Except to clarify that the final numbering has altered so that the relevant section under '0/0 Zone' (Chapter 12) is 12.3.7.8 and not 12.3.8.8 as stated in the draft Direction.
[228] Dated 31 January 2023.
[229] Cork County Council v Minister for Housing [2021] IEHC 683 §§26 & 27.

STATUTORY SCHEME

81. Much of the statutory scheme has been prefigured and footnoted above. However, given its complexity, and given also it is not laid out in the PDA 2000 in a chronological sequence, it is useful to extract some relevant content below. In what follows, I have underlined certain content for emphasis.

Ss.9 – 12, & s.20 PDA 2000

82. **S.9 PDA 2000** obliges planning authorities to make development plans every six years. S.9(6) PDA requires that development plans

> *"shall in so far as is practicable be consistent with such national plans, policies or strategies as the Minister determines relate to proper planning and sustainable development."*[230]

However, the **Cork County Council case**[231] is authority that s.9(6):

- does not require consistency with ministerial planning guidelines issued under s.28 PDA 2000, and
- is not self-executing: it requires ministerial identification of the specific national plans, policies or strategies in question – to avoid "*intolerable uncertainty in the law*".

83. **S.10 PDA 2000,** as to the content of development plans is important. It requires, *inter alia*, that

> *"(1) A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question.*
>
> *(1A)*[232] *The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy ….*
> *…….*
> *(1D) The written statement referred to in subsection (1) shall also include a separate statement which shows that the development objectives in the development plan are consistent, as far as practicable, with the conservation and protection of the environment.*
>
> *(2) … a development plan shall include objectives for —*
> *(a) the zoning of land" (inter alia for residential use).*
> *(c) the conservation and protection of the environment including, in particular, the archaeological and natural heritage;*

[230] Emphasis added.
[231] Cork County Council v Minister for Housing [2021] IEHC 683 §50 et seq.
[232] Inserted by the Planning and Development (Amendment) Act 2010.

(d) the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population;
(e) the preservation of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest;
(f) the protection of structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest;
(g) the preservation of the character of architectural conservation areas;
…….
(j) the preservation, improvement and extension of amenities and recreational amenities;
…….
(n) the promotion of sustainable settlement and transportation strategies in urban … areas …. in particular, having regard to location, layout and design of new development;
(o) the preservation of public rights of way .. to places of natural beauty or recreational utility …
(p) landscape, ….”[233]

(2A) … a core strategy shall —
(a) provide relevant information to show that the development plan and the housing strategy are consistent with the National Planning Framework and the regional spatial and economic strategy …
(d) in respect of the area in the development plan proposed to be zoned for residential use or a mixture of residential and other uses, provide details of—
(i) the size of the area in hectares,
(ii) how the zoning proposals accord with national policy that development of land shall take place on a phased basis, ...”

84. What does it mean to say, by reference to s.10(1), that a development plan complies, or not, with the requirement to set out an overall strategy? Without more, the requirement would be hopelessly general and would be one with which only the most wilfully delinquent local authority could fail to comply.

First, it seems to me that the development plan is to be the overall strategy rather than merely contain an overall strategy distinctly identified. This view is also consistent with s.11(1A) PDA 2000 – see below as to the strategic nature of plan making.

Second, I accept the Minister's argument, relying on **Tristor**[234] that an overall strategy compliant with s.10(1) is one which complies with the remaining requirements of s.10. So, an overall strategy must contain at least[235]

[233] S. 10(3) PDA 2000 allows that a development plan may indicate objectives for any of the purposes referred to in the First Schedule. Though it touches on much similar subject matter to the list above, is not necessary to recite any of its content here.
[234] See below
[235] I do not need here to consider whether this list is exhaustive.

- as required by s.10(1A), a core strategy showing consistency as far as practicable with NPF and RSES development objectives.
- as required by s.10(1D), a statement showing consistency as far as practicable with *"the conservation and protection of the environment".*
- as required by s.10(2), objectives of the types listed in that sub-section.
- as required by s.10(2A), a core strategy addressing various requirements which may be somewhat inadequately summarised as relating to population, housing and residential zoning targets.

85. **S.11 PDA 2000** prescribes the process, including consultation with the public, of preparation of draft development plans. S.11 *inter alia*,

- envisages "*enabling the incorporation of the National Planning Framework and a regional spatial and economic strategy into a development plan*".[236]
- requires that the:

  > *"preparation of a new development plan … shall be strategic in nature for the purposes of developing —*
  > *(a) the objectives and policies to deliver an overall strategy for the proper planning and sustainable development of the area of the development plan, and*
  > *(b) the core strategy,*
  > *and shall take account of the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government."* [237]
- requires that, at the appropriate juncture in the process, the elected members "*issue directions to the chief executive regarding the preparation of the draft development plan and any such directions shall be strategic in nature, consistent with the draft core strategy, and shall take account of the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government, and the chief executive shall comply with any such directions."*[238]

S.11 appears to me to confirm my understanding of s.10(1) PDA 2000 - that the development plan <u>is</u> the overall strategy as opposed to the overall strategy being a distinct sub-part of the development plan. Accordingly, the objectives and policies in the development plan are elements of the overall strategy. This appears to me to be a view consistent with **Tristor** which required that the overall strategy be a proper one in the sense of containing the objectives required by s.10(2) PDA 2000.

86. **S.12 PDA 2000** is lengthy and complex. It prescribes the process, including consultation with the public, of making development plans. It provides, *inter alia*, that:

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[236] S.11(1)(b) PDA 2000.
[237] S.11(1A) PDA 2000.
[238] S.11(4)(d) PDA 2000.

- "In making the development plan …. the members shall be restricted to considering the proper planning and sustainable development of the area to which the development plan relates, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or any Minister of the Government."[239]
- In s.12, "*statutory obligations*" includes the obligation to ensure that the development plan is consistent with the NPF and RSES development objectives and any relevant SPPRs.[240]
- The Minister or the OPR may make such recommendations, in relation to a draft development plan, as they consider appropriate.[241]
- The chief executive is to report to the elected members on the consultation as to the draft development plan and therein,
  - respond "*to the issues raised, taking account of any directions of the members …, the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives of the Government or of any Minister of the Government …*"[242] and
  - summarise the observations, submissions and recommendations of the OPR.[243]
- where a planning authority, after considering the draft plan, chief executive's report, and a submission, observation or recommendation from the Minister or the OPR, decides not to comply with any such recommendation, it shall so inform the OPR and the Minister by notice in writing which shall contain reasons for the decision.[244]

CHAPTER IIA, PART II, S.23 & S.27 PDA 2000 – NPF & RSES

87. **Ss.20A, 20B and 20C PDA 2000** establish the NPF, *inter alia*, as a broad national plan for strategic planning and sustainable development - including an objective to secure the co-ordination of RSESs and development plans. Its concerns include:

- the identification of nationally strategic development requirements as to cities, towns and rural areas and as to employment, future population change, and associated housing and commercial development requirements.
- national infrastructure priorities – including as to public transport.
- conservation of the environment and its amenities, including the landscape, and archaeological, architectural and natural heritage.
- sustainable settlement and transport strategies.

88. **S.23 PDA 2000**, as to the content of RSESs, *inter alia*, requires that they provide a strategic planning and economic framework in accordance with the principles of proper planning and sustainable development

[239] S.12(11) PDA 2000.
[240] S.12(18) PDA 2000.
[241] S.12(2A) PDA 2000.
[242] S.12(4)(b)(iii) PDA 2000.
[243] S.12(4)(ba) PDA 2000.
[244] S.12(5)(aa) PDA 2000.

to support the regional implementation of the NPF and the Government's economic policies and objectives. Regional spatial strategy concerns include, *inter alia*,

- the location of employment, retail, industrial and commercial development and housing, and the provision of transport, including public transport.
- the preservation and protection of the environment and its amenities, including the archaeological, architectural and natural heritage and landscape.
- sustainable settlement and transport strategies.

89. **S.27 PDA 2000** requires that planning authorities ensure that their development plans[245] are "*consistent with*" the applicable RSES and empowers the Minister to require, by direction,[246] that a development plan "*comply with*" the RSES. The use in s.27 of the different phrases "*consistent with*" and "*comply with*" is unfortunate. There may be no difference in meaning but, as to any difference, in my view "*consistent with*" prevails. First, it accords better with the scheme of the Act as reflected in the sections described above. Second, the primary obligation of s.27 is created by s.27(1) which requires consistency and the Minister's power to require compliance seems to me best understood as a mechanism for securing the primary obligation of consistency in case of default by the local authority. I do not read the section as laying down a requirement of consistency and yet superimposing on it a ministerial power to require of a planning authority, whose plan is already consistent with the RSES, that it go further and achieve any greater level of compliance with the RSES.

PART IV, CHAPTER II PDA 2000 – ACAs

90. As has been noted, **s.10 PDA 2000**, requires, *inter alia*, that development plans include objectives for

> *"(d) the integration of the planning and sustainable development of the area with … cultural requirements …*
> *(f) the protection of structures, … of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest;*
> *(g) the preservation of the character of architectural conservation areas;"*

91. **S.81 PDA 2000** requires that development plans include objectives:

> *"to preserve the character of a place, area, group of structures or townscape, taking account of building lines and heights, that —*
> *(a) is of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest or value, or*
> *(b) contributes to the appreciation of protected structures,*

[245] and Local Area Plans.
[246] Made under s.21 PDA 2000.

if the planning authority is of the opinion that its inclusion is necessary for the preservation of the character of the place, area, group of structures or townscape concerned and any such place, area, group of structures or townscape shall be known as and is in this Act referred to as an "architectural conservation area".

92. **S.82 PDA 2000** provides that:

- (1) works to the exterior of a structure in an ACA shall be exempted development only if they would not materially affect the character of the area.
- (2) consideration, including by the Board, of planning applications for development of land in an ACA "*shall take into account the material effect (if any) that the proposed development would be likely to have on the character of the*" ACA.

S.31, S.31AN & S.31AM PDA 2000 – BROAD SUBJECT-MATTERS

93. Given the complexity of the statutory scheme, and bearing in mind that they are not determinative of statutory content, it may assist to briefly recite, for introductory purposes and in slightly edited form,[247] and if at the cost of some repetition, the shoulder notes of the statutory provisions listed below and some comment thereon.

PDA 2000	**Shoulder note**	**Comment**
PART II - Plans and Guidelines - Chapter IV - Guidelines and Directives		
S.31	Ministerial directions regarding development plans.	s.31 specifies • the circumstances in which the Minister may issue directions and notices of intention to issue a direction. • the effect of such directions and notices. As appears hereafter, s.31 has been significantly amended over time.
PART IIB – OPR[248] - Chapter III - Evaluation and assessment by OPR		
S.31AM	Evaluation and assessment by OPR of matters relating to development plans.	S.31AM also provides, *inter alia*, that • following such evaluation and assessment, the OPR may make observations, submissions and recommendations to the planning authority as to the content of its development plan. • in the case of planning authority rejection of OPR recommendations, the OPR may, under s.31AM(8), recommend to the Minister that (s)he issue a direction to the

[247] Primarily, I have substituted "OPR" for "Office" and "Office of the Planning Regulator".
[248] Part IIB PDA 2000 was inserted by the Planning and Development (Amendment) Act 2018 on foot of recommendations by the Tribunal of Inquiry into Certain Planning Matters and Payments (the Mahon Tribunal). The OPR was established in April 2019.

PDA 2000	Shoulder note	Comment
		planning authority in terms of an enclosed draft direction as to the content of its development plan.
S.31AN	Consequential Provisions to section 31AM	This innocuous and uninformative shoulder note obscures the fact that s31AN provides complex procedures, *inter alia*, for • Ministerial consideration of OPR recommendations that (s)he issue a direction to the planning authority • Ministerial notices in reaction to OPR recommendations, including notices under s.31 of Intention to Issue a Direction. • Content of s.31 Notices. • OPR recommendations to the Minister, under s.31AN(4) and following consultations on foot of ministerial s.31 Notices of Intention to Issue a Direction. • Ministerial actions on foot of such OPR recommendations under s.31AN(4).

S.31AM PDA 2000

94. **S.31AM(1)&(2) PDA 2000** require the OPR to evaluate draft development plans, "*at least at a strategic level*",[249] and empower it to make observations or submissions thereon. Thereby, the OPR must "*endeavour to ensure*" that it

> *"… addresses the legislative and policy matters relating to development plans as follows:*
> *"(a) matters generally within the scope of section 10;*[250]
> *(b) consistency of the development plan with the (NPF and RSES);*
> *(c) to (e) …. ".*[251]

Mount Salus correctly summarises this evaluative function of the OPR as being to address all matters that should be included in a development plan, including its consistency with the NPF and RSES.

95. By **s.31AM(3) PDA 2000**, the OPR's observations or submissions *"shall"* include such recommendations

> *"as it considers necessary to ensure effective co-ordination of national, regional and local planning requirements by the relevant planning authority in the discharge of its development planning functions".*

[249] S.31AM(1) PDR 2000.
[250] S.10 relates to content of development plans – see above.
[251] S.31AM(2) PDR 2000.

The OPR emphasises:

- First, that by the word "shall" s.31AM(3) imposes an obligation upon it.
- Second, the words *"as it considers necessary"* to ensure the matters set out.

96. By **s.31AM(4) PDA 2000,** the reports of the CE to the elected members on the OPR's observations or submissions shall, *inter alia*, outline his/her *"recommendations as to the manner in which the issues raised by and recommendations of the OPR should be addressed, taking account of the proper planning and sustainable development of the area".*

97. By **s.31AM(6) PDA 2000**, where the planning authority has adopted a development plan and in so doing has decided not to comply with an OPR recommendation, the CE shall so inform the OPR and state the reasons for the planning authority's decision. The Minister submits and I accept that this requirement of reasons is, *inter alia*, to assist the OPR's assessment of whether the requirement of consistency with NPF objectives has been met.

98. Thereupon, **S.31AM(7) PDA 2000** requires the OPR to consider whether the development plan is, in the OPR's opinion, consistent with its recommendations.[252]

S.31AM(8) PDA 2000

99. Importantly, by **S.31AM(8) PDA 2000**, and where the OPR "*is of the opinion that*"—

> *"(a) the development plan … has not been made in a manner consistent with the recommendations of the Office,*
> *(b) the decision of the planning authority concerned results in the making of a development plan, … in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned,*
> *and*
> *(c) as a consequence of paragraphs (a) and (b), the use by the Minister of his or her functions to issue a direction under section 31 would be merited,*
>
> *then the Office shall issue, … a notice to the Minister containing —*
> *(i) recommendations that the Minister exercise his or her function to take such steps as to rectify the matter in a manner that, in the opinion of the Office, will ensure that the development plan, … sets out an overall strategy for proper planning and sustainable development, and*
> *(ii) a proposed draft of a direction ….."*

[252] S.31AM(7) PDA 2000.

The OPR emphasises the words "*is of the opinion that*" and the obligation imposed on the OPR by the words "*shall*".

100. Mount Salus emphasises that, in some contrast to the criteria in the alternative available to the Minister in issuing a direction under s.31(1) PDA 2000,[253] the S.31AM(8) criteria for the OPR's issuing a valid recommendation to the Minister are narrower and cumulative. For the OPR to issue recommendation, Mount Salus says, it must cumulatively, not alternatively, satisfy its conditions. In particular, non-compliance with an OPR recommendation is necessary but insufficient: the OPR must be of the opinion that the development plan *"fails to set out an overall strategy".* This is not disputed.

101. As the competence in setting out an overall strategy is and has historically been that of the planning authority in making its development plan, Mount Salus emphasises, as applicable to the OPR (I accept it is applicable) and as it relates to transfer of power from the local to the national, the view of Collins J in **Spencer Place** that

- it is essential that the respective competencies of all actors be clearly delineated.
- the courts should avoid effecting such legislation beyond its clear provision.

102. I observe that to make a recommendation to the Minister under s.31AM(8) PDA 2000 enclosing a draft direction, the OPR must be of the opinion that the development plain is tainted by the specific illegality consisting of a breach of s.10 PDA 2000, by way of failing to set out an overall strategy for the proper planning and sustainable development of the area. It does not suffice to ground a S.31AM(8) notice that the OPR merely disagree with the planning authority's choices, within the law, as to setting local planning policy by means of its development plan.

S.31AN & S.31 PDA 2000

103. **S.31AN PDA 2000** requires the Minister to consider the OPR recommendation and draft direction issued under s.31AM(8). Where (s)he agrees with the OPR (s)he must issue a notice to the planning authority under **s.31(3) & (4) PDA 2000** – i.e. notice of his/her intention to issue, and enclosing a draft of, a direction and requiring the CE to report to the OPR on submissions as to the draft direction and make "*recommendations in relation to the best manner in which to give effect to the draft direction."*[254] By **s.31AN(4) PDA 2000** the OPR, on considering that report of the CE and any submissions to it, must either

- recommend to the Minister that he or she issue the direction with or without minor amendments or,
- for stated reasons, appoint an independent inspector to further consider the matter.[255]

[253] See below.
[254] S.31(9) PDA 2000. See also s.31(3), (7) & (8) PDA 2000 for the sequence leading to s.31(9).
[255] It is not necessary on present facts to consider the possibility of appointment of and the resultant role of an inspector. But broadly, the Inspector receives submissions and reports to the OPR, which thereafter makes a recommendation to the Minister.

The OPR may not, at this point, recommend that no direction issue.

104. It is clear from the structure of s.31AN(4) that the OPR's essential function at this point is in reality to consider whether the CE report and/or submissions materially change its view from that expressed in its s.31AM(8) Notice and either to confirm its recommendation that the minister issue the draft direction or set in motion the further consideration of the matter via an inspector. It follows that if the OPR takes the former course, as it did here, then its s.31AM(8) notice remains crucial to any ministerial direction which may issue.

105. **S.31AN(4A) PDA 2000** requires the Minister, if he/she agrees with the OPR recommendation to do so, to issue a direction under **s.31 PDA 2000**. S.31AN(4A) PDA 2000 reads:

> *"The Minister shall consider a recommendation of the Office[256] under subsection (4)(a) that he or she issue a direction with or without minor amendments and —*
> *(a) where the Minister agrees with the recommendation, the Minister shall, …… [257] issue the direction under section 31 with or without minor amendments, …".*

S.31(16) PDA 2000 as relevant, reads as follows:[258]

> *"Where paragraph (a) of section 31AN(4A), …. … applies to a matter to which this section relates, then the Minister shall issue a direction accordingly."*

106. **S.31(1) & (2) PDA 2000** provide for the issuing of ministerial directions. In their original form, they provided that "*Where the Minister considers*" that any draft development plan or development plan,[259]

> *"fails to set out an overall strategy for the proper planning and sustainable development of the area" of a planning authority,*
> *or otherwise significantly fails to comply with this Act,*
> *the Minister may, for stated reasons, direct the authority to take such specified measures as he or she may require*
> *to ensure that the development plan, when made, is in compliance with this Act*
> *and the planning authority shall comply …"*

107. Clearly, the overarching criterion here for the making of a Direction was significant failure of the development plan to comply with the PDA 2000. Notably, in 2000, s.31 PDA 2000 stated no requirement of consistency with national policies. Specifically, s.31 stated no requirement of consistency with the NPF, the

[256] i.e. the OPR.
[257] There is a reference here to s.31AN(16) which all parties have absolved me from considering.
[258] Though perhaps unnecessarily given the imperative terms of S.31AN(4A) PDA 2000 just cited.
[259] S.31(1) & (2) PDA 2000 in its original form related respectively to draft development plans and development plan. Any differences between the subsections are not here relevant.

RSES and/or SPPRs as, at that time, they did not exist and s.10 PDA 2000 had not yet been amended to require that Development Plans be consistent with them.

108. The relevant content of s.31 PDA 2000, as much amended,[260] is now as follows:

"(1) Where the Minister is of the opinion[261] that —

(a) a planning authority, in making a development plan, …… has failed to —
(i) implement a recommendation made to the planning authority by — ….
(II) the Office of the Planning Regulator under section 31AM …,

(b) … the plan fails to set out an overall strategy for the proper planning and sustainable development of the area,

(ba) a plan is not consistent with—
(i) the national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy,[262]
…

(c) the plan is not in compliance with the requirements of this Act,

or …

then, subject to compliance with the relevant provisions of sections 31AM and 31AN … the Minister may in accordance with this section, for stated reasons, direct a planning authority to take such specified measures as he or she may require in relation to that plan.

(2) Where the Minister issues a direction under this section the planning authority, …. shall comply with that direction …

(3) Before he or she issues a direction under this section, the Minister shall, no later than 6 weeks after a plan is made, issue a notice in writing to a planning authority consequent on a recommendation being made to him or her by the Office of the Planning Regulator under section 31AM(8) …

(4) The notice referred to in subsection (3) shall, for stated reasons, inform the planning authority of —

(a) the forming of the opinion referred to in subsection (1),

[260] As relevant, primarily by the Planning and Development (Amendment) Act 2010 Planning and Development (Amendment) Act 2018.
[261] Emphasis added.
[262] Inserted (22 October 2018) by Planning and Development (Amendment) Act 2018 (16/2018), s.21(b), S.I. No. 436 of 2018.

(b) the intention of the Minister to issue a direction (a draft of which shall be contained in the notice) to the planning authority to take certain measures specified in the notice in order to ensure that the plan is in compliance with the requirements of this Act and sets out an overall strategy for the proper planning and sustainable development of the area,

(c) those parts of the plan that by virtue of the issuing of the notice under this subsection shall be taken not to have come into effect, been made or amended under subsection (6), and …".

109. In essence, and as applicable to this case:

- To issue a direction under s.31, the Minister must be "*of the opinion*" that the 2022 Development Plan:
  - fails to implement an OPR recommendation made under s.31AM;[263]
  - fails to set out an overall strategy for the proper planning and sustainable development of the area;[264]
  - is not consistent with the objectives set out in the NPF or the RSES;[265]

  or
  - is non-compliant with the PDA 2000.
- It is not disputed that these four criteria are alternatives – satisfaction of any one will support a ministerial direction.
- The Minister must state his reasons for issuing the direction.

110. Of some note, while s.31 PDA 2000 entitles the Minister to issue a direction if the plan fails to set out an overall strategy, s.31 says nothing of the core strategy. But

- s.10(1A) PDA 2000 requires that a core strategy show that the objectives in the development plan are consistent, "*as far as practicable*", with NPF and RSES objectives and SPPRs.
- by s.31(1)(c), the Minister may issue a Direction where (s)he is of the opinion that the Plan is non-complaint with the PDA 2000 (including s.10(1A))
- s.31(1)(ba), as a distinct matter, entitles the Minister to issue a direction if the plan is not consistent with NPF and RSES objectives and SPPRs.

So on a holistic reading of s.31 and s.10, the words, "*as far as practicable*" and reference to the core strategy do not explicitly appear but must be read into s.31(1)(ba).

111. Also notable is that, whereas what might be called the "catch-all" of s.31 was originally whether the minister considered that the development plan *"otherwise significantly fails to comply with this Act*" the amended up-to-date version dispenses with the qualifier of significance: the equivalent phrase is "*the plan is not in compliance with the requirements of this Act".*

[263] s.31(1)(a)(i) PDA 2000.
[264] s.31(1)(b) PDA 2000.
[265] s.31(1)(ba) PDA 2000.

112. **S.31(17) PDA 2000** provides that a ministerial direction under s.31(16) takes immediate effect and is automatically incorporated into the plan.

NPF, RSES & URBAN RESIDENTIAL DEVELOPMENT GUIDELINES 2009

URBAN RESIDENTIAL DEVELOPMENT GUIDELINES 2009

113. The Urban Residential Development Guidelines 2009[266] are repeatedly invoked by the OPR earlier in the process but they are latterly absent. Those Guidelines state that it is "*important*" that, to maximise the return on the State's very substantial investment in public transport, "*land use planning underpins the efficiency of public transport services by sustainable settlement patterns – including higher densities – on lands in existing … transport corridors*" – particularly close to rail stations. *Inter alia*, the capacity of public transport should be taken into account in considering appropriate densities. While capacity issues may require closer attention in specific planning applications, it seems to me inevitable that in making development plans a commuter heavy rail corridor such as the DART line would, at least generally, be an obvious candidate for the higher densities contemplated by the 2009 Guidelines. The 2009 Guidelines,[267] referring to urban and suburban areas[268] proximate to existing public transport corridors, state that planning authorities should "*consider*" policies which would permit more intense residential usage, subject to design safeguards. It seems to me that, at least in general terms, this guideline content can be applied to the 0/0 Objective Areas. But it was not suggested nor, on the facts, could it have been suggested, that DLRCC did not "*consider*" policies which would permit more intense residential usage along the DART Line in the 0/0 Objective Areas.

114. In any event, as I have observed, it is unsurprising that these 2009 Guidelines did not feature in the Minister's stated basis for his Direction. DLRCC was obliged by statute only to have regard to such guidelines and was not obliged to render the 2022 Development Plan consistent therewith. That was the basis on which the ministerial direction was quashed in the **Cork County Council** case in November 2021.[269] Humphreys J, citing **Brophy**[270] (to the effect that "*guidelines are guidelines, not prescriptive or mandatory instruments*"), **Spencer Place**[271] (to the effect that statutory transfers of power from the local to the national must be clear) and **Tristor**,[272] concluded that the Minister and the OPR had erred in considering that they could deduce breach of the statutory requirement for an overall strategy in the development plan from its inconsistency with non-binding guidelines. And as I have observed, no challenge to the Impugned Decisions is pleaded on the basis of their invocation of Guidelines.

[266] Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) May 2009. §5.8.
[267] P44.
[268] Other than inner suburbs.
[269] Cork County Council v Minister For Housing [2021] IEHC 683 – see below.
[270] Brophy v An Bord Pleanála [2015] IEHC 433, [2015] 7 JIC 0306, Baker J.
[271] Spencer Place Development Company Ltd. v Dublin City Council [2020] IECA 268, [2020] 10 JIC 0202, Collins J.
[272] Tristor Ltd v Minister for Environment, Heritage and Local Government [2010] IEHC 397, [2010] 11 JIC 1103, Clarke J.

115. Nonetheless, it is notable that in the OPR Recommendations, until reference to them was abandoned, it was in references to the 2009 Guidelines, as opposed to the NPF and the RSES, that the invocation of housing development along public transport corridors was found and, as has been seen, it is the 2009 Guidelines that one finds the most explicit invocation of housing development along public transport corridors. The Ministerial Direction itself does invoke housing development along public transport corridors but cites no source – perhaps given the decisions in the Cork County Council case.[273] So, one may inquire, where, other than in the 2009 Guidelines, the Minister derived his reliance on the policy of compact dense development along transport corridors?

NPF

116. Mount Salus says that the Respondents' reasoning is inadequate to explain the alleged links between the elimination of the 0/0 Objective and each of the NSOs and NPOs of the NPF and RPOs of the RSES on which the Impugned Decisions rely and that they rely on no evidence to support that reliance. Accordingly, their conclusions are unreasoned, irrational and illogical. Much of my commentary which follows here is informed by **Killegland**,[274] which I consider in more detail later in this judgment.

117. The 10 NSOs of the NPF are expressed, as one would expect, at a high level of generality. They are usefully listed[275] and are first found[276] under the heading "Shared *Goals – Our National Strategic Outcomes*", introduced by the text: *"Our ambition is to create a single vision, a shared set of goals for every community across the country".* The ambition of national conformity, at least at a high level, is apparent. NSO1 and NSO7 are relevant here. But, given the sense attributed in Killegland to the concept of "targets"[277] it bears observing that the concepts of "vision" and "goals" are similarly redolent of a high level of generality rather than of binding detail. The NSOs are elaborated later in the NPF.[278] Though it is not precisely stated, the method of the NPF is that the 10 NSOs are given more specific expression in, and are to be achieved via, 75 National Policy Objectives (NPOs - many divided into sub-NPOs).

118. The OPR's s.31AN(4) recommendation to issue a Direction dated 17 June 2022 and the Ministerial Direction do not invoke any NSOs. The OPR's

- submissions on the Draft Plan dated 16 April 2021 invokes NSO1 and NSO2 (the latter, I think, mistakenly.)
- s.31AM(8) Notice enclosing a draft direction dated 6 April 2022 indirectly invokes NSO1 in that it invokes NPO3b which in turn invokes NSO1.

In any event, as arguably relevant to the interpretation of the NPOs on which the Ministerial Direction was based, I will briefly set out those NSOs.

[273] Cork County Council v Minister for Housing [2021] IEHC 683.
[274] Killegland Estates Ltd v Meath County Council [2023] IESC 39. See detailed consideration of this case below.
[275] NPF p13.
[276] At §1.3.
[277] See detailed consideration of this case below.
[278] NPF p139 et seq.

NSO1 – Compact Growth

119. NSO1 reads as follows:

> *"Carefully managing the sustainable growth of compact cities, towns and villages will add value and create more attractive places in which people can live and work. All our urban settlements contain many potential development areas, centrally located and frequently publicly owned, that are suitable and capable of re-use to provide housing, jobs, amenities and services, but which need a streamlined and co-ordinated approach to their development, with investment in enabling infrastructure and supporting amenities, to realise their potential. Activating these strategic areas and achieving effective density and consolidation, rather than more sprawl of urban development, is a top priority."*[279]

120. The later elaboration of NSO1[280] states, *inter alia*,

> *"From an urban development perspective, we will need to deliver a greater proportion of residential development within existing built-up areas of our cities, … Combined with a focus on infill development, integrated transport and promoting regeneration and revitalisation of urban areas, pursuing a compact growth policy at national, regional and local level will secure a more sustainable future for our settlements and for our communities."*

Further elaboration[281] includes to

- enable urban infill development that would not otherwise occur;
- ensure transition to more sustainable modes of travel (walking, cycling, public transport).

121. As Mount Salus submits, I accept that there is no evidence that

- DLRCC's new homes target cannot be met, at least in quantum terms, by consolidation within the urban footprint of its functional area outside the areas subject to the 0/0 Objective.
- DLRCC's new homes target cannot be met, at least in quantum terms, by lands zoned in its functional area, with the benefit of public transport, outside the areas subject to the 0/0 Objective.
- the 0/0 Objective Areas have a quantum of development potential such as renders them significant to the achievement of those targets.
- the 0/0 Objective, by displacing to elsewhere development which would otherwise occur in the 0/0 Objective Areas, would risk or appreciably contribute to urban sprawl.

[279] NPF p14
[280] NPF p139 et seq.
[281] These are criteria for proposals for funding under the Urban Regeneration and Development Fund but, in context, must be taken to reflect aims of NSO1.

122. Indeed the evidence is to the contrary – as I have said, the OPR has accepted that the Development Plan's housing strategy generally sets adequate housing targets for the DLRCC area – the "*quantum is acceptable"* and *"will enable a focus on developing land best located in terms of infrastructure and public transport."*[282] As it was a conclusion drawn by the OPR, I need not interrogate its basis, but I imagine that it was in considerable part informed by the LUAS service of the Cherrywood SDZ and the Ballyogan LAP areas.[283]

NSO4 - Sustainable Mobility

123. I think the OPR's erroneous invocation of NSO2 may have been intended to refer to NSO4. Generally it proposes to "Expand attractive public transport alternatives to car transport to reduce congestion and emissions and enable the transport sector to cater for the demands associated with longer term population and employment growth in a sustainable manner…". This to be achieved by identified measures, none of which are obviously relevant to the present case – though the general high level favouring of public transport is clear.

NSO7 – Enhanced Amenity and Heritage

124. The OPR and the Minister did not rely on NSO7 or refer to it in their Recommendations or Direction, but Mount Salus pleads their failure to consider it.[284]. *Inter alia*, NSO7 states:

> *"We will conserve, manage and present our heritage for its intrinsic value and as a support to economic renewal and sustainable employment."*[285]

The general description of this NSO reads:

> *"This will ensure that our cities, towns and villages are attractive and can offer a good quality of life. It will require investment in well-designed public realm, which includes public spaces, parks and streets, as well as recreational infrastructure. It also includes amenities in rural areas, such as national and forest parks, activity-based tourism and trails such as greenways, blueways and peatways. This is linked to and must integrate with our built, cultural and natural heritage, which has intrinsic value in defining the character of urban and rural areas and adding to their attractiveness and sense of place."*[286]

125. NSO7 establishes that built, cultural and natural heritage has intrinsic value in defining the character of urban areas and in adding to their attractiveness and sense of place and that their conservation is an element of the NSOs of the NPF with which Development Plans must be consistent. Put simply, conservation

[282] OPR's s.31(AM)(3) Submission to DLRCC on Proposed Amendments to Draft Plan - 24/12/21 §1.2 Core Strategy, Population and Housing Targets.
[283] See further below as to quantified housing targets.
[284] Amended Statement of Grounds §6.8.
[285] NPF p146.
[286] NPF §1.3.

and protection of architectural heritage, including ACAs and protected structures, is consistent with national planning policy – specifically, NSO7 of the NPF.

NPO3b – Favour Urban Development

126. The Minister's Direction cites NPO3b:

> *"Deliver at least half (50%) of all new homes that are targeted in the five Cities and suburbs of Dublin, Cork, Limerick, Galway and Waterford, within their existing built-up footprints."*

127. NPO3b in terms addresses only quantum of new homes required in the footprint of the five Cities and suburbs. It is, in terms, no more specific than that as to location. One may fairly read NPO3b in the context of NPO2a, which reads: *"A target of half (50%) of future population and employment growth will be focused in the existing five cities and their suburbs."* The introductory text to NPO3b describes it as a "target".[287] Achievement in quantum terms of DLR's share of that 50% target (whatever that share may be[288]) within the DLRCC area is, at least and on any view, consistent with NPO3b. Consistency is all the law requires of a development plan and is all the Minister is entitled to impose by direction. In my view, similar observations apply as are made above as to NSO1. There is no evidence or basis apparent in the Impugned Decisions that the 0/0 Objective imperils the attainment of NPO3b in the DLRCC area. Mount Salus rightly emphasises that there is no suggestion anywhere that DLRCC has failed to zone sufficient land to meet its share of the 50% targeted in NPO3b.

128. I accept the accuracy of Mount Salus' plea that there is no evidence before me, or apparently before the OPR and the Minister, of even roughly the number of dwellings that might be built in the ACAs[289] without contravening the Plan protections remaining absent the 0/0 Objective, or of the proportion in which such a number would contribute to reaching relevant housing targets as compared, for example, with the target of 8,000 homes in the Cherrywood SDZ[290] 4,000 in the Ballyogan LAP[291] area (both on the Luas line) and the overall target for DLR of 18,515 homes.[292] Clearly, such an assessment would have had to be by way of estimate - likely a rough estimate - but there is none. As I have said, the OPR generally accepts the Plan housing strategy - including as to its realising the benefits of public transport.

129. The Minister and OPR are correct that, as the OPR are recorded above as having made the point in the process, the words "*at least*" imply that the 50% target is a minimum and is consistent with the view that an even greater compact development is desirable. However, that does not imply that failure to do better

[287] NPF p.28.
[288] The DMA encompasses multiple planning authorities and their functional areas and opportunities may differ as between them.
[289] The plea incorrectly refers to the ACA singular but nothing turns on that in this context.
[290] Strategic Development Zone within the meaning of Part IX PDA 2000.
[291] Local Area Plan – see Table 2.16: Local Area Plan-Making Programme.
[292] Development Plan Table 2.11. There was some lack of clarity at trial whether the actual net target is 18,515 or 15,225 homes. The higher figure seems to me correct but I do not consider that it makes any difference for present purposes.

than 50% is inconsistent with NPO3b or unlawful accordingly. Nor does it say anything as to DLR's share of that 50% set for the DMA. **Tristor** and the **Cork County Council** case are authority that only breach of mandatory obligations may support a s.31 direction.

130. As relevant to the analysis in **Killegland**, it bears observing that the introductory text to all of NPOs 3a, 3b and 3c includes the following:

> *"A preferred approach would be compact development that focuses on reusing previously developed, 'brownfield' land, building up infill sites, which may not have been built on before and either reusing or redeveloping existing sites and buildings. … In the long term, meeting Ireland's development needs in housing, employment, services and amenities on mainly greenfield locations will cost at least twice that of a compact growth-based approach. Accordingly, subject to implementation of sustainable planning and environmental principles, the National Planning Framework sets the following urban development targets: …".*[293]

131. Mount Salus emphasises that,

- NPO3b is a "*target*" – not an obligation – a point made by Hogan J in **Killegland**[294] in describing the associated NPO3c as "*aspirational* " and "*precatory*".
- attainment of NPO3b is *"subject to implementation of sustainable planning and environmental principles".* Those principles include protection of architectural heritage.

132. It can hardly be doubted that the sustainable planning and environmental principles to which this introductory text refers, as indeed NSO7 confirms, include the protection of architectural heritage and amenity. I do not think the words "*subject to*" crudely subordinate attainment of NPO3b to "*sustainable planning and environmental principles*". Indeed, NPO3b is itself an expression of a principle of sustainability – that of compact urban development. But the words "*subject to*" do recognise that various "*sustainable planning and environmental principles"* may be in tension and may require reconciliation by "*trade-off*" and compromise and, where the need arises in a given circumstance, preference of one over another. Clearly, the "*urban development targets"* are in this sense explicitly subject to sustainable planning and environmental principles. Equally clearly, in a given circumstance, the sustainable planning and environmental principles to which the development targets are *"subject"* may include the protection of architectural heritage and amenity.

133. None of this is at all surprising. It is exactly what one would expect in a National Planning Framework which seeks to express, at a high level of generality, many of the factors which contribute to multifactorial judgements in planning matters – judgements in which, as it were, apples and oranges (both desirable) must

[293] NPF §2.6 Securing Compact and Sustainable Growth. Emphases added.
[294] Killegland Estates Ltd v Meath County Council [2023] IESC 39. See below.

be compared and balanced and choices must be made as between policies in tension, in conflict or even irreconcilable. I will return to this issue below.

134. I confess that on re-reading the State's written submissions I am struck by the paucity of analysis of how precisely it is alleged that DLRCC's Development Plan, and specifically the 0/0 Objective, is inconsistent with NPO3b. After all, NPO3b is a centrepiece of the Impugned Decisions. Perhaps however this is not surprising in the context:

- that the earlier OPR documents relied on the 2009 Guidelines for the principle of compact residential development along transport corridors.
- of the omission of those Guidelines from the reasons in the Ministerial Direction (no doubt in light of the Cork County Council case)
- that there is no suggestion that the quantum of housing zoned falls short of DLRCC's share of the 50% target set by NPO3b.

135. For all that, and just as I have considered that the sustainable planning and environmental principles to which the introductory text cited above refers encompass the protection of urban heritage and amenity, I think it right, reading the NPF holistically, to see those principles, and hence NPO3b, as encompassing the principle of compact development along transport corridors. Also, other elements of the introductory text[295] at least suggest such a view. Clearly, the point of NPO3b, NPO3b and NPO 3c, all of which explicitly seek to concentrate development within existing built up footprints, is to realise the sustainability benefits of compact development. In that regard, the introductory text refers to

- the importance of the location of future development.
- the detriments of urban sprawl, including high levels of car dependence.
- the difficulty (and by implication the desirability) of providing good public transport.
- the climate implications of higher transport demand.
- compact development's potential to contribute to modal shift to and the viability of public transport.[296]
- access to public transport as part of a "key" focus, in creating more compact development, on urban quality of life.

In addition, I consider below the explicit treatment of transport corridors in the NPF.

136. So, though somewhat hesitantly, I interpret NPO3b as encompassing espousal of compact development along transport corridors. But also, and applying **Killegland**,[297] NPO3b can only be a very general/high level precatory presumption with which general consistency is required - analysed at overall county-wide level. No evidence, analysis or reasoning is apparent in any of the OPR or ministerial materials that the 0/0 Objective imperils the achievement of NPO3b across the generality of the DLRCC Development Plan Area.

[295] NPF §2.6 Securing Compact and Sustainable Growth.
[296] i.e. 'to use the car less.'
[297] See below.

NPO11 – Urban Infill/ Brownfield Development

137. The Minister's Direction cites NPO11:

> *"In meeting urban development requirements, there will be a presumption in favour of development that can encourage more people and generate more jobs and activity within existing cities, towns and villages, subject to development meeting appropriate planning standards and achieving targeted growth."*

138. NPO11 is in very general/high level terms. The brief introductory text, headed "*Achieving Urban Infill/ Brownfield Development*",[298] is once again expressed in targeting terms. It

- "*targets a significant proportion of future urban development on infill/brownfield development sites within the built footprint of existing urban areas*."
- "*means encouraging more people, jobs and activity generally within our existing urban areas*" via "*well-designed, high quality development*" – this is *"provided that development meets appropriate standards to achieve targeted levels of growth".*

Though it does not mention transport corridors, applying the same reasoning as I have applied to NPO3b, I am hesitantly prepared to read NPO11 as espousing compact development along transport corridors.

139. For reasons I explain below as to NPO35, it would be absurd to suggest that NPO11 requires a presumption in favour of development of the type it describes to be ubiquitously effected – for example as to development proposed in all amenity areas, environmentally sensitive areas, sports pitches, public parks and the like. Applying **Killegland**,[299] NPO11 can only be a very general/high level precatory presumption with which general consistency is required - analysed at overall county-wide level.

140. Also, when effecting NPO11, the first task is the identification of the "*urban development requirements*" to be met. In this context, it appears to me relevant to note again the OPR's general satisfaction, as to population and housing targets analysed at overall county-wide level, that DLRCC's *"draft Plan for the quantum of zoned development that appropriately reflects the housing target … and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport."*[300] On that basis, it is difficult to see that the OPR or the Minister analysed at overall county-wide level the question, posed by NPO11, whether "*urban development requirements*" of the Development Plan Area relevant to the issue of compact development along transport corridors were rendered unmet by the 0/0 Objective. No evidence, analysis or reasoning is apparent in any of the OPR or ministerial materials that the 0/0 Objective imperils the achievement of NPO11 across the generality of the DLRCC Development Plan Area.

[298] NPF §4.5.
[299] See below.
[300] OPR's s.31(AM)(3) Submission to DLRCC on Proposed Amendments to Draft Plan, 24/12/21, §1.2 Core Strategy, Population and Housing Targets.

NPO35 – Increase Residential Density

141. The Minister's Direction cites NPO35:

> *"Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights."*

142. NPO35 appears, with other NPOs, in a section of the NPF headed "*Housing*".[301] It favours compact development in existing settlements over urban sprawl – located *inter alia* to support sustainable development, maximise quality of life through accessing services, ensure more efficient use of land, allow for greater integration with existing infrastructure, increase efficiency and sustainability in the use of public infrastructure and encourage the use of public transport.[302] It refers to the "*infill/brownfield targets set out in NPOs 3a, 3b and 3c*"[303] However, and again, NPO35 is in quite general and high-level terms. It would be absurd to suggest that NPO35 states an absolute requirement to be ubiquitously effected – that all amenity areas, all environmentally sensitive areas, all parks even, would be subjected to the requirement for increased residential density, and that local authorities could not adopt a nuanced and proportional approach to increasing density overall, whilst also pursuing other legitimate (even mandatory) objectives of proper planning and sustainable development (including objectives of those kinds set by national and regional policy).

143. It necessarily follows that compliance with NPO35 is required, falls to be effected and must be analysed at overall county-wide level. No evidence, analysis or reasoning is apparent in any of the OPR or ministerial materials that the 0/0 Objective imperils the achievement of NPO35 across the generality of the DLRCC Development Plan Area.

NPO52 – Environment

144. The OPR and the Minister did not rely on NSO52 or refer to it in their Recommendations or Direction, but Mount Salus pleads their failure to consider it.[304] It reads

> *"The planning system will be responsive to our national environmental challenges and ensure that development occurs within environmental limits, having regard to the requirements of all relevant environmental legislation and the sustainable management of our natural capital."*

[301] NPF §6.6.
[302] NPF p. 92.
[303] NPF p. 93.
[304] Amended Statement of Grounds §6.8.

For the avoidance of doubt, architectural heritage is part of the environment to which NSO52 applies: see **MRRA**[305] and the **EIA Directive**.[306]

NPO60 – Heritage

145. The OPR and the Minister did not rely on NPO60 or refer to it in their Recommendations or Direction, but Mount Salus pleads their failure to consider it.[307] It reads

> *"Conserve and enhance the rich qualities of natural and cultural heritage of Ireland in a manner appropriate to their significance."*

I accept that ACAs and Protected Structures form part of Ireland's cultural heritage and that other buildings may do.

Transport Corridors in the NPF

146. Notably, surprisingly even, the NPOs cited above as those on which the Minister relied, do not mention transport corridors or compact and sustainable development along transport corridors. Nonetheless I have stated my willingness to consider them as encompassing those concepts. In doing so I intimated that I would consider explicit reference in the NPF to such concepts. **NPO53 -** which the Minister did not invoke in the Ministerial Direction (nor did the OPR in its Recommendations) - reads:

> *"Support the circular and bio economy including in particular through greater efficiency in land management, greater use of renewable resources and by reducing the rate of land use change from urban sprawl and new development."*

The narrative supporting text to NPO53 espouses support for "*More energy efficient development through the location of housing and employment along public transport corridors, where people can choose to use less energy intensive public transport, rather than being dependent on the car*."

Notably also, the NPF identifies "*Key future growth enablers for Dublin*" as *including "Progressing the sustainable development of new greenfield areas for housing, especially those on public transport corridors, such as … Cherrywood …"*.[308] This is clearly a reference to the key importance of the Luas corridor, and Cherrywood SDZ is the largest[309] residential development area in DLR and, no doubt, one of the largest in the

[305] MRRA v An Bord Pleanála & Lulani [2022] IEHC 318 – generally and §
[306] Recital 16 and Annex IV §4 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU.
[307] Amended Statement of Grounds §6.8.
[308] NPF p37.
[309] Development Plan Table 2.11.

DMA. The NPF refers to the DART, but also the Luas as "*strategic infrastructure required to sustain growth*".[310]

RSES - RPO3.2, COMPACT GROWTH & RPO4.3, CONSOLIDATION AND RE-INTENSIFICATION

147. The Impugned Decisions cite RPO3.2 and RPO4.3

RPO3.2 – Compact Growth

148. RPO3.2 reads:

> *"Local authorities, in their core strategies shall set out measures to achieve compact urban development targets of at least 50% of all new homes within or contiguous to the built up area of Dublin city and suburbs and a target of at least 30% for other urban areas."*

149. RPO3.2 is the RSES articulation of NPO3b and similar observations may be made here as I have made as to NPO3b. Also, Humphreys J in **Killegland**[311] described RPO3.2 as *"a general statement which does not preclude departure from it for objective reasons."*

150. The OPR correctly points out[312] that Mount Salus has not expressly pleaded legal error by reference explicitly to RPO3.2. However it would be unreal and unfair to shut out Mount Salus' arguments as to RPO3.2. I decline to do so as

- RPO3.2 is the RSES articulation of NPO3b,
- error as to NPO3b is pleaded,
- RPO3.2 is repeatedly pleaded in Mount Salus' factual particulars,
- the OPR itself submits that Mount Salus' arguments as to RPO3.2, are "*in virtually identical terms to the Applicant's arguments based on NPO 3b"*[313] – so it is at no unfair prejudice in this regard.

151. Mount Salus rightly emphasises that,

- whereas NPO3b applies the 50% criterion to the footprint of the five Cities and their suburbs, RPO3.2 applies it, arguably more broadly in geographic scope, to an area within or contiguous to the built up area of Dublin city and suburbs. While the OPR took issue with the argument, in my view, nothing here turns on the distinction. On either view, DLR is only one of four functional areas for which the NPO3b criterion is cumulatively set and the RPO3.2 criterion is not confined to the existing built urban footprint – it extends to contiguous areas also.

[310] RSES p36.
[311] Killegland Estates v Meath County Council & Giltinane [2022] IEHC 393.
[312] OPR Written Submissions §65.
[313] OPR Written Submissions §68.

- no-one suggests that the lands zoned in Development Plan for residential development falls short of whatever DLR's share should be of that 50% targeted in NPO3b and RPO3.2.

RPO4.3 – Consolidation and Re-Intensification

152. RPO4.3 reads:

> *"Support the consolidation and re-intensification of infill/brownfield sites to provide high density and people intensive uses within the existing built up area of Dublin City and suburbs and ensure that the development of future development areas is co-ordinated with the delivery of key water infrastructure and public transport projects."*

The accompanying narrative is introduced by the following: "The RSES supports continued population and economic growth in Dublin City and suburbs, with high quality new housing promoted and a focus on the role of good urban design, brownfield redevelopment and urban renewal and regeneration. There is an opportunity to promote and improve the provision of public transport and active travel and the development of strategic amenities to provide for sustainable communities."

153. For similar reasons as to those I have given as to RPO3.2, I reject the OPR's pleading objection as to Mount Salus' reliance on RPO4.3 – save that here the correlation is to NPO35. OPR itself submits that Mount Salus' arguments as to RPO4.3, are "*in virtually identical terms to the Applicant's arguments based on NPO35"* [314] – so it is at no unfair prejudice in this regard.

154. Like NPO35, RPO4.3 is in general and high level terms. It relates to two distinct issues: the second relates to future development areas and future delivery of public transport projects. Clearly, that does not relate to the 0/0 Objective Areas: whatever their housing potential, all agree they requires significant protection of their ACAs and no one describes them as future development areas in the sense in which that term is used here in contrast to the existing built-up area of the DMA. Neither is it suggested that public transport is for delivery in the 0/0 Objective Areas – the DART is already there.

155. By **Killegland** standards,[315] the first part of RPO4.3 is clearly expressed in general, precatory and aspirational terms and only general compliance with it is required. In my view, Mount Salus is correct in submitting that compliance with RPO4.3 is to be effected as a general matter across the DLR area. It does not require the consolidation and re-intensification of all locations which, physically, could be used as infill/brownfield sites regardless of the need to balance that aspiration with other legitimate planning considerations such as the protection of cultural heritage.

[314] OPR Written Submissions §70.
[315] See below.

156. All that said, I think that counsel for the Minister was correct in general when he observed[316] that, as the RPOs on which the Minister relied in making his Direction largely implemented the NPOs on which he relied, regard to the RPOs does not much add to or subtract from the case from either side's point of view.

PLEADINGS - GROUND 6 – INVALIDITY OF MINISTERIAL DIRECTION AND OPR RECCOMENDATIONS

MOUNT SALUS' PLEADINGS & SOME COMMENTARY THEREON

157. The last amended Statement of Grounds[317] pleads as Core Ground 6 that:

> *"The Board Decision[318] is invalid because it is based on a Draft Direction and Direction of the Minister and Recommendations of the OPR that*
> - exceeded the powers conferred on them by Sections 31, 31AM, and 31AN PDA 2000,
> - misdirected themselves in law,
> - were inadequately reasoned, and
> - were unreasonable and irrational,
>
> and therefore invalid."

I express a view below, *en passent*, on certain aspects of Mount Salus' pleas.

158. The particulars of Core Ground 6, recite the statutory context, which I have set out above.[319] Mount Salus pleads, correctly, that interpretation of the NPF is a matter of law. It pleads that **s.20C PDA 2000**[320] does not empower the NPF to set binding rules overriding planning authorities' discretion as to individual areas within their functional areas. As a bald statement that is superficially correct. But it is of limited relevance as the real issue is the undoubted statutory requirement of s.10(1A) PDA 2000 that the development plan objectives be, as far as practicable, consistent with NPF development objectives.

159. Mount Salus attacks the Minister's Direction directly and indirectly. It does so indirectly on the basis that that the pleaded invalidity of the OPR's Recommendations undermines the legal basis for the issue of a ministerial direction. For this they

- rely on the **Cork County Council case**[321] as to the 'domino effect'.
- emphasise the narrower permissible legal basis for an OPR recommendation as compared to that permissible for a ministerial direction. Specifically, they emphasise that a legally valid opinion of the OPR that the development plan fails to set an overall strategy for the proper planning and sustainable development of the area is essential to the validity of an OPR recommendation.

[316] Transcript Day 3 p.30.
[317] Dated 3 January 2023.
[318] i.e. the Impugned Decision of the Board to permit Ms Smyth's Proposed Development, of which certiorari is to be granted.
[319] Amended Statement of Grounds §6.1, citing ss. 12, 20C (matters to be addressed in the NPF), 31, 31AM, and 31AN.
[320] As to matters to be addressed in the NPF.
[321] Cork County Council v Minister for Housing [2021] IEHC 683. See below.

Error of Law: No Overall Strategy in 2022 Development Plan[322]

160. Mount Salus pleads that the Minister and the OPR erred in law in concluding, for the purposes of s.31(1)(b) PDA 2000, that the 2022 Development Plan failed to set out an overall strategy for the proper planning and sustainable development of the area. The particulars of this plea are that:

- the OPR specifically stated in its submission[323] to DLRCC that it was *"satisfied that a reasonable basis has been set out … for the quantum of zoned development that appropriately reflects the housing target …. and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport."*
- So, it was "*wrong in law, illogical, unreasonable, and inadequately reasoned*" to also conclude that the 0/0 Objective, "*is inconsistent with national and regional policy objectives to implement compact growth within Dublin city and suburbs*", in particular in relation to residential density along transport corridors.

Discussion of this Plea

161. I observe that

- reading that OPR Submission of 24 December 2021[324] as a whole, that pleaded content must be read in the context of the OPR's introductory statement, cited above, that the OPR considered the Draft Plan generally consistent with NPF and RSES policies. It must also be read in the context of the specific NPOs and RSOs on which the OPR and the Minister rely in concluding that the Development Plan failed to set out an overall strategy.
- general satisfaction does not preclude specific dissatisfaction. Conversely, specific dissatisfaction does not undermine express general satisfaction.
- **Killegland**[325] is authority that only general consistency of a Development Plan with NPF and RSES objectives is required by law.
- Mount Salus stresses this content as necessarily implying general OPR satisfaction with
  - the quantum of residential zoning in the Plan.
  - that quantum as sufficing to "*enable a focus on developing land best located in terms of infrastructure and public transport."*

  That, Mount Salus says necessarily expresses the OPR's general satisfaction as to quantum and location of zoned land on transport corridors.
- I generally agree with that analysis.

162. Mount Salus argues that this reasoning necessarily implies OPR acceptance that maintaining the 0/0 Objective is not inconsistent with NPF and RSES policies. In the particular sense, I disagree given OPR's

[322] Amended Statement of Grounds §6.2.
[323] The OPR submission in question is clearly that of 24 December 2021 on the proposed amendments to the Draft Plan.
[324] Some of this content is already set out above.
[325] Killegland Estates Ltd v Meath County Council [2023] IESC 39. See below.

explicit dissatisfaction with DLRCC's rejection of the OPR's Recommendation #4 that the 0/0 Objective be deleted. However, that is not the end of the matter. **Killegland** is authority that consistency in the particular sense, with NPF and RSES policies – at least those expressed in precatory terms - is not required of Development Plans. Only general consistency is required. It follows that whether the OPR's recommendation is "*illogical ……. and inadequately reasoned*" is to be considered by reference to the question of such general consistency - including by reference to the entire Development Plan Area.

163. The Minister and OPR submit that the standard of general consistency is not pleaded.[326] That so-called absence is perhaps unsurprising as the amended Statement of Grounds predated the Supreme Court decision in Killegland. I do not think it was necessary for Mount Salus to further amend the grounds to plead this standard. It had pleaded,

- that it was "*wrong in law, illogical, unreasonable, and inadequately reasoned*" to a conclude that the 0/0 Objective "*is inconsistent with*" the relevant NPF and RSES objectives.
- the OPR's expression of satisfaction that the Plan had set out a reasonable basis as to quantum of housing zoning as enabling a focus on land best located in terms of public transport.

In my view, those pleas suffice for their purpose. In pleading the concept of inconsistency they necessarily invoked the standard or degree of consistency required by the PDA 2000. Mount Salus did not need to amend its pleadings to invoke the clarification in Killegland of that required standard or degree of consistency.

Scope of Objective 0/0, NPO35 & Application of 2009 Guidelines[327]

164. Mount Salus pleads that:

a. The 0/0 Objective sets a general presumption against development in an ACA, and is based on the character of the ACA.
   - The parties are agreed on this.

b. NPO35[328] does not require increased density or infill development in all parts of a development plan area: it does not preclude protection of certain parts in accordance with development plan objectives required by s.10(2)(c), (e), (g), (j) and (o) PDA 2000.[329] If it does preclude such protection, it is invalid as contrary to those provisions.
   - In my view, this plea is correct. NPO35 is valid on the basis pleaded. It also clearly implies that the question of compliance with NPO35 must be considered on a general county-wide basis.
   - That said, the 0/0 Objective, while presuming against, does not preclude, increased density or infill development in the 0/0 Objective areas. Indeed, as I have held, it expressly contemplates the possibility.

[326] Transcript Day 3 p.129.
[327] Amended Statement of Grounds §6.3 & 6.4.
[328] Increase residential density.
[329] s.10(2)(c), (e), (g), (j) and (o) PDA 2000 list necessary objectives in development plans.

c. Objective 0/0 does not prohibit increased density along transport corridors (generally in the DLRCC functional area).[330] Rather it limits increased density "*at this point, on this transport corridor, in this highly scenic location, in an ACA*". Mount Salus pleads[331] that the 0/0 Objective Areas are small and a very small proportion of the lands in the county.
   - In my view, these pleas are important.
   - Mount Salus is correct in drawing attention to the fact that the 0/0 Objective affects
     - *"this transport corridor"* only - not the generality of all transport corridors in the Development Plan Area which, notably, include the Luas
     - a segment only, by my reckoning about a quarter, of the DART transport corridor, and not the generality of that corridor, as it passes through the Development Plan Area. Indeed, given predominantly the greater part of the residentially zoned area served by Dalkey DART station is entirely unaffected by the 0/0 Objective, the estimate of a quarter may in reality be generous to the OPR and the Minister.
   - These pleas invoke the Elected Members' assertion that the 0/0 Objective affects a *"very small area".* Given Figures 1 and 2 above I must accept that the 0/0 Objective Areas are a very small proportion of the lands in the county.
   - Of course, I cannot take judicial notice that the areas covered by the 0/0 Objective are small in the sense of being insignificant from a planning point of view in terms of their potential for residential development. National and regional policy clearly favours infill and brownfield development – especially along the important transport corridor which is the DART line. And of its nature, such development is somewhat piecemeal, opportunistic, unpredictable and diffuse as to location. And, for example, I cannot take judicial notice that opportunities for infill development in the appreciable 0/0 Objective Area east of Killiney village are insignificant from a planning point of view. These are matters for expert evaluative planning judgement.
   - These pleas invoke
     - the principle that assessment of compliance with the relevant NPOs and RPOs must be made on a general county-wide basis.
     - the view that the part of the DART corridor which passes through or serves the 0/0 Objective Areas may be particularly assessed by the OPR and the Minister but cannot be isolated for purposes of such assessment from contextual assessment having regard to the Development Plan Area generally and its transport corridors generally.
   - Those principles, which I accept for reasons I will elaborate, considerably assist Mount Salus' point that, having satisfied elsewhere in the County its obligations as to quantum of housing which (per the OPR[332]) "*will enable a focus on developing land best located in terms of infrastructure and public transport*", the 2022 Development Plan cannot be impugned as generally inconsistent with national policy in that respect. Further and as I have noted, the OPR accepted that the Development Plan, including the 0/0 Objective, was generally consistent with the NPF and the RSES and that the OPR recommendations were intended to "enhance" general consistency (by removing a specific inconsistency), not to remedy general inconsistency.[333]

[330] These words do not appear in the plea but they clearly reflect its sense.
[331] Amended Statement of Grounds §6.4.2 – for the avoidance of doubt it was confirmed at trial that this plea remained live – Transcript Day 2 p12.
[332] OPR's s.31(AM)(3) submission to DLRCC on Proposed Amendments to Draft Plan - 24/12/21 - §1.2.
[333] See note in chronology as to OPR's s.31(AM)(3) Submission to DLRCC on Proposed Amendments to Draft Plan, 24/12/21.

d. The Ministerial Direction contains no evidence that developments in the Vico ACA[334] could or would appreciably assist in increasing infill developments, meet appropriate planning standards, in particular having regard to those standards as formulated by DLRCC and considered appropriate by it.
   - The plea as to "*evidence*" is not useful – other than in a very high-level, non-technical or general sense. While targets can be evidence-based what is at issue here is, in the end, a multifactorial, evaluative, planning judgement encompassing a considerable policy element. It is obvious that areas characterised by very extensive development (as the maps readily reveal) may present what the OPR described as "*the opportunities that are beginning to manifest in relation to brownfield development along the corridors above."*[335]

Conservation and Protection of Environment, Heritage, Landscape and Architecture[336]

165. Mount Salus pleads that:

a. Conservation and protection of the environment, heritage, landscape and architecture are
   - important objectives of the PDA 2000.
   - functions conferred by the Oireachtas on local authorities.
   - matters within s.10 PDA 2000 for which the OPR must provide in reviewing a draft plan.[337]
   - the matters to which the Objective 0/0 relates.
     - In my view, these pleas are indisputable – save to observe that these matters are not functions of local authorities exclusively.

b. In preparing its recommendation, the OPR failed to have any, or adequate, regard to DLRCC's environmental protection obligations in formulating the 2022 Development Plan, and / or failed to give any or any adequate reasons in relation thereto.
   - The pleas that the OPR failed to have any regard to DLRCC's environmental protection obligations or failed to give reasons are clearly baseless. As the chronology above demonstrates, the OPR, and for that matter the Minister, clearly placed the deletion of the 0/0 Objective in the context of the adequacy (as they saw it) of other protections of architectural heritage in the 2022 Development Plan and the law – notably, though not exclusively, SLO130 and the ACA and Protected Structure designations themselves.
   - The plea as to adequate regard to DLRCC's environmental protection obligations raises matters of planning judgement as to consistency with national and regional policy and of who is to exercise that judgement.

[334] Sic. presumably the Vico Road – Sorrento Point ACA.
[335] OPR Submission 28 February 2020, on Development Plan Issues Paper.
[336] Amended Statement of Grounds §6.5.
[337] For the purposes of Section 10(2)(c), preservation of the character of the landscape for the purposes of Section 10(2)(e), preservation of the character of ACAs for the purposes of Section 10(2)(g), preservation, extension and improvement of amenities and recreational amenities for the purposes of Section 10(2)(j), and preservation of public rights of way for the purposes of Section 10(2)(o).

NPO3b & NPO11[338]

166. I have above considered Mount Salus' plea as to NPO3b.[339] As to NPO11[340] Mount Salus pleads that the Ministerial Direction contains no evidence, stated or verifiable fact, or adequate reasoning suggesting that developments in the "Vico ACA"[341] could or would

- could or would encourage jobs, activity and growth, such as should preclude restrictions on development in the Vico ACA.
- could or would meet appropriate planning standards, in particular those standards formulated and considered appropriate by DLRCC.

167. In my view, this plea errs in its narrow focus on the "Vico ACA". Nor, even considered as to the entire of the 0/0 Objective Areas, is the question one of simple preclusion of restrictions on development in the ACAs. Both sides envisage restraint on development in order to protect architectural heritage in the 0/0 Objective Areas. As I have said, they differ as to

- what constitutes "full" protection of architectural heritage in the 0/0 Objective Areas – in terms of both outcome to be achieved and measures required to achieve it.
- the adequacy of the development plan and other legal protections of the architectural heritage in those areas, other than the 0/0 Objective, to fully protect that architectural heritage.
- the correct degree of restraint on development required to protect architectural heritage.

168. Nor, in my view and while people are entitled to differ on the issue, is specific evidence or sophisticated reasoning required for a broad, evaluative, policy judgement that, in useful degree, residential development in the 0/0 Objective Areas on the DART line would or could encourage jobs, activity and growth. However, it is clear that occasional one-off housing or, for that matter, occasional one-off blocks of apartments, would not do so and that the OPR and the Minister must be assumed to envisage critical mass and scale of housing development in the 0/0 Objective Areas at a quantum sufficient to make a worthwhile contribution to realising the benefit of the DART and thereby encourage jobs, activity and growth in worthwhile degree. It is in that light in particular that it can be said that the parties differ as to what constitutes "full" protection of architectural heritage in the 0/0 Objective Areas in terms of outcome and measures required.

[338] Amended Statement of Grounds §6.6 & 6.7
[339] "Deliver at least half (50%) of all new homes that are targeted in the five Cities and suburbs of Dublin, Cork, Limerick, Galway and Waterford, within their existing built-up footprints."
[340] "… presumption in favour of development that can encourage more people and generate more jobs and activity within existing cities, towns and villages, subject to development meeting appropriate planning standards and achieving targeted growth."
[341] Sic.

Countervailing Environmental Objectives[342]

169. Mount Salus pleads that the OPR and the Minister failed to have any, or adequate, regard to

- the environmental policies of the NPF – NSO7, NPO52 and NPO60,
- the balance between them and NPO3b, NPO11 and NPO35 on which the OPR and Minister relied, or
- the compliance of the 0/0 Objective with NSO7, NPO52 and NPO60,

and accordingly the OPR and the Minister

- misdirected themselves in law,
- failed to give any or adequate reasons in relation thereto,
- and drew irrational conclusions.

ISSUES NOT PLEADED

170. Mount Salus did not plead that the Impugned Decisions were invalid for reliance on any allegation of inconsistency of the Development Plan with ministerial guidelines issued under s.28 PDA 2000. It is important to note that fact as leading cases on this area of the law – **Tristor**[343] and the **Cork County Council case**[344] were concerned with that issue. The ministerial directions in those cases were quashed for reliance on alleged inconsistency of the Development Plan with ministerial guidelines. While, as will be seen, these decisions remain important to the present case, it is also important to bear in mind that the specific issue in those cases is not pleaded in the present case. But that is not to suggest that Mount Salus should have so pleaded or would successfully have done so.

171. Mount Salus also did not plead that the Impugned Decisions were invalid for reliance on an allegation of failure to implement an OPR recommendation.[345]

MINISTER'S & OPR'S POSITIONS

172. The Minister's and OPR's positions largely overlap and it does not seem to me useful to much distinguish the one from the other. I have tried to set out their broad principles out in the introduction to this judgment. Beyond traverses and the like, they notably also plead and argue as follows:

a. The legislature has conferred the function of (finally[346]) deciding whether development plans are consistent with NPF and RSES objectives on the OPR and the Minister, rather than on the planning authority.

[342] Amended Statement of Grounds §6.8.
[343] Tristor Ltd v Minister for Environment, Heritage and Local Government [2010] IEHC 397, [2010] 11 JIC 1103, Clarke J.
[344] §58 et seq. See below.
[345] By s.31(1)(a)(i) PDA 2000 a ministerial opinion of failure to implement an OPR recommendation, may support a ministerial direction.
[346] The word is not used but conveys the sense of the plea.

b. The trigger for the exercise of the Minister's s.31(1) jurisdiction to issue a direction is that the Minister be "*of the opinion"* that any of four criteria are met; That is to say that the plan
   - fails to implement an OPR recommendation made under s.31(1)(a)(i)(II)) PDA 2000.
   - fails to set out an overall strategy for the proper planning and sustainable development of the area (s.31(1)(b) PDA 2000).
   - is not consistent with the NPF and RSES development objectives (s.31(1)(ba)(i)) or
   - is not compliant with the 2000 Act (s.31(1)(c)).

c. The Minister relied on 3 distinct statutory bases under section 31(1): Reasons 1, 2 and 3 as set out above.[347]

d. Whether the Minister is "*of the opinion"* is a subjective criterion. The Court's review of such an opinion is limited to determining whether the opinion was held *bona fide*, is factually sustainable and is not irrational and the Court should be slow to interfere with a decision to issue a direction.

e. The Minister and the OPR did not misinterpret or fail to have regard to relevant environmental objectives. They expressly addressed DLRCC's justification for the 0/0 Objective.
   - I may as well say at this point that I accept this plea as correct.

f. The Minister and the OPR were entitled to the opinions that,
   - having regard to other protections in the Development Plan, the 0/0 Objective was neither necessary nor proportionate to the object DLRCC sought to achieve – of protection of the ACAs.
     - I observe that the Minister in fact decided that 0/0 Objective was not necessary "*or reasonable*" and was positively "*disproportionate*".
   - the Development Plan failed to
     - comply with the requirements of the PDA 2000.
     - implement a recommendation of the OPR.
     - set out an overall strategy for the proper planning and sustainable development of the area.

g. Alternatively, any invalid reason can be severed from the balance of those reasons.

h. The Minister and the OPR did not misinterpret NPO35 of the NPF and/or the Sustainable Urban Residential Development Guidelines 2009 as to the 0/0 Objective. The 2009 Guidelines did not feature in Mount Salus' written submissions.

i. The OPR did not fail to have regard to the environmental protection objectives of the planning authority and did not fail to give reasons for same, on the basis set out at §§39-46 of the OPR's submissions.

[347] Reason 1 – failure to implement an OPR recommendation and to set out an overall strategy for the proper planning and sustainable development of the area; Reason 2 – inconsistency with NPF and RSES development objectives; Reason 3 - inconsistency with NPF and RSES development objectives, thereby undermining the Core Strategy and other objectives of the Plan and failing to set out an overall strategy for the proper planning and sustainable development of the area.

j. The OPR did not fail to have regard to NSO7, NPO52 and NPO60 and did not fail to give reasons. The OPR had regard to the issues to which Mount Salus refers via these objectives, and the reasons behind the OPR's conclusions are clear.

k. Specifically as to the claim for a declaration of invalidity of the OPR's s.31AN(4) Recommendation dated 17 June 2022 to the Minister to Issue a Direction, the OPR submits that
   - under S.31AN(4), the OPR has only two choices: it may (a), recommend to the Minister to issue the direction, with or without minor amendments or (b) for stated reasons, and in specific circumstances, appoint an inspector. It may not at this stage of the process, recommend that no direction issue.
   - Mount Salus' challenge to the OPR's actions appears to relate to the s.31AM(3) and s.31AM(8) stages of the process, i.e.
     - OPR's s.31(AM)(3) submission to DLRCC on the Proposed Amendments to the Draft Plan – dated 24 December 2021.
     - OPR's s.31AM(8) Recommendation enclosing Draft Direction – dated 6 April 2022.

DISCUSSION & DECISION

173. As they are entitled, by s.31AM(8) and s.31 PDA 2000 respectively, to act on their respective opinions that a development plan is not consistent as far as practicable with NPF and RSES objectives and so fails to set out an overall strategy for the proper planning and sustainable development of the area concerned,

- the OPR and the Minister can substitute their planning judgements on those issues of non-consistency and failure for that of the planning authority,
- the Minister has the final say on those issues, and
- their decisions on those issues are judicially reviewable as to merit only for irrationality.

But other than as to their merit, such decisions are judicially reviewable on the other usual bases – for example, misdirection in law or misinterpretation of law or of relevant documents.

174. However, before I address those issues, I will consider certain other relevant issues.

ELECTED MEMBERS' REASONS FOR REJECTING RECOMMENDATION #4 AND MAINTAINING 0/0 OBJECTIVE

175. The Minister[348] and OPW argue, citing s.10(1A) PDA 2000,[349] that the Elected Members' reasons for rejecting the OPR's Recommendation #4 and maintaining the 0/0 Objective,

- were important to the "*proper functioning*" of his s.31 jurisdiction and his "*exercise of planning judgment*" and his "*broad zone of discretion*" in issuing the Ministerial Direction.

- positively assert inconsistency of the Draft Plan with the NPF and RSES in that they considered that *"There is a clear conflict between the 0/0 Objective which looks to protect the area and the national objective to increase densities."*

- fail to give reasons why it is not "*practicable*" to achieve such consistency – merely saying the "*0/0 objective"* is "*reasonable*" and "*useful*".

Interpretation of the Elected Members' Reasons

176. As to the interpretation of the Elected Members' reasons, in my view,

a. The words "*reasonable*" and "*useful*" taken literally and in isolation, fall short of asserting impracticability. So does DLRCC's reliance on "*the best interest of maintaining the highest level of protection".* As has been said in other cases – for example **CHASE**[350] - it is often a great pity from a practical point of view and creates unnecessary doubt and litigation where decision-makers do not take the usually simple course of using statutory wording to effect statutory decisions. Often it needlessly presents opponents with a stick with which to beat an impugned decision – even if ultimately ineffectually. However, it is not usually a legal obligation to use the precise statutory wording and the question in law is generally whether, by the words in fact used, the decision-maker made a valid decision by reference to the statutory wording.

b. In interpreting them it is in any event a mistake to excessively parse DLRCC's minuted reasons. They are overtly (no doubt inevitably) an incomplete account and synthesis of the Elected Members' reasons – which no doubt varied as between members. They are a record of a deliberative and political decision taken from a variety of points of view – albeit taken within considerable legal constraints. The reasons for such decisions often do not come as "*neatly packaged*" as the reasons underlying other public law decisions. Further, the Court only reluctantly invalidates the decisions of democratically elected bodies exercising political judgement. I derive support for these views from the Supreme Court in **Killegland**[351]

[348] Minister's Submissions §§55 & 56.
[349] 10(1A): "The written statement referred to in subsection (1) shall include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements specified in guidelines under subsection (1) of section 28."
[350] Cork Harbour Alliance for a Safe Environment v An Bord Pleanála [2021] IEHC 203 §469, citing, inter alia, Dublin County Council v Eighty Five Developments Ltd (No. 2) [1993] 2 IR 392, per McCarthy J at 402-403; Buckley v An Bord Pleanála [2015] IEHC 572 per Cregan J at §§105 and 144; and Alen-Buckley v An Bord Pleanála (No. 2) [2017] IEHC 541 (Haughton J).
[351] Killegland Estates Ltd v Meath County Council [2022] IEHC 393, [2023] IESC 39.

and, if less so, in **McGarrell**,[352] in which reasons for the adoption of a development plan de-zoning the applicant's lands passed muster though *"in some instances the reasons might perhaps have been more clearly explained".*

c. So, the Minster must have regard to their reasons and in doing so, must consider whether the Elected Members, whose decisions are properly political and whose reasons may not come "*neatly packaged*" on these issues, may imprecisely expressed their actual reasons or, even, have been right for reasons wrong or wrong in some respected and correct in others.

d. In any event, words are not to be taken in isolation and the Members' reasons are to be interpreted on XJS principles - not over-legalistically as if statutes but holistically, on a common-sense basis, as a matter of substance rather than form and as would be interpreted by an informed intelligent layperson – **Grafton**.[353]

e. In context, and to my mind importantly, the Elected Members explicitly record their view that, under the 2016 Development Plan, even the 0/0 Objective had "*not protected the area".* In that light, it was quite unsurprising and readily comprehensible that they would disagree with the OPR that its recommended protection - lesser on any view - would adequately protect the area.

f. Protecting ACAs, Protected Structures and the environment as it consists of both man-made and natural heritage, is very clearly an objective of national, regional and local policy. Indeed, by s.10(2) PDA 2000, objectives accordingly are mandatory in development plans. To my mind it is clear, on an overview of their reasons that the Elected Members

- considered their duties as to the policy objectives of compact development along transport corridors and as to protection of the environment.
- took the view that, in the particular circumstances of the 0/0 Objective Areas, full reconciliation of these objectives was not practicable and, as it were, something had to give.

So they made their choice for the reasons they gave.

g. I reject as unreal the Minister's objection[354] that DLRCC's Elected Members failed to engage with the various other heritage protections in the development plan which the OPR had cited.[355] I was not addressed on the correlations, or lack of them, between the heritage protections in the previous development plan and those in the new plan. But the legal regimes of the PDA 2000 as to protection of ACAs and Protected Structures had applied and it is safe to assume that a menu of at least broadly similar protections had been in the previous plan. That impression is amplified by the that the CE presented SLO130 as a novel protection, additional to those previously subsisting. Also, the question

[352] McGarrell Reilly Homes Ltd v Meath County Council [2023] IESC 40, Part VII.
[353] Grafton Group PLC v An Bord Pleanála [2023] IEHC 725 citing, inter alia, Re XJS Investments Limited [1986] IR 750, Tennyson v Dún Laoghaire [1991] 2 IR 527, Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7, Eoin Kelly v An Bord Pleanála [2019] IEHC 84 and Navan Co-ownership v An Bord Pleanála [2016] IEHC 181. These decisions are as to the interpretation of development plans but in my view apply equally to decisions making such plans. As to common sense interpretation see Camiveo Ltd v Dunnes Stores [2019] IECA 138. It related to interpretation of a planning permission, but, again, I think the principles apply here.
[354] Transcript Day 3 p124.
[355] Including Development Plan objectives SLO130 and HER8: Work to Protected Structures; HER13 Architectural Conservation Areas; HER14: Demolition within an ACA; HER16: Public Realm and Public Utility works within an ACA. HER19 Protection of Buildings in Council Ownership; HER21: Nineteenth and Twentieth Century Buildings, Estates and Features: HER22: Protection of Historic Street Furniture and Public Realm; HER24: Protection of Coastline Heritage.

before the members was not of rejecting the 0/0 Objective as a posited novel protection. It was, in effect, a question of deleting a protection which had existed in the previous plan as part of a menu of protections which, in the members' view, had already failed to protect the heritage value of the areas in question. It was not a question of adding, in the form of the 0/0 Objective, a belt to pre-existing braces. It was a question of removing the belt from a combination of protections which had failed under the previous plan and replacing it with, in the form of SLO130, a weaker belt. In that light, their view is readily comprehensible that past failure to adequately protect the heritage value of the areas in question would not be remedied but would persist and, likely, be exacerbated by the recommended replacement (in effect) of the 0/0 Objective by SLO130. There is no reason to consider that the Members, in their repeated insistence[356] on the 0/0 Objective, were not adequately conscious of, and had not engaged with, the cumulative adequacy of the other relevant heritage protections in the development plan.

h. Counsel for the OPR pressed that DLRCC merely didn't "*want*" to comply with national planning policy[357] - almost as if the Elected Members had behaved gratuitously and contumaciously. It is perfectly clear that they didn't. But even accepting his use of the word "want", counsel's observation is, at least as put, pretty meaningless. One must ask why they didn't want what the OPR wanted? The answer is obvious. Their planning judgement was that deleting the 0/0 Objective, even while adding SLO130, would leave the architectural heritage of the 0/0 Objective even more insufficiently protected against development damaging to it than had even the 0/0 Objective under the previous development plan. In my view, that amply amounts in substance to an assertion by the Elected Members of impracticability of compliance with the NPF objectives countervailing those related to protection of architectural heritage. Nor do I accept the OPR's submission that there was no "evidence" on which such a conclusion could have been based: the Elected Members were entitled to bring to bear their knowledge of their functional area and development of the 0/0 Objective Areas under the previous plan in making an evaluative multi-factorial judgement on the issue.

i. The Elected Members' view of a clear conflict with NPF objectives was in any event limited to specifically those objectives to increase densities. It did not preclude consistency with other NPF objectives – of which there are very many on a myriad of topics.

j. Another way of expressing the Elected Members' view, without altering its substantive meaning, would be to observe, as Mount Salus has done and is in my view entitled to do, that the 0/0 Objective is itself an expression of NPOs 52 and 60 and, for that matter, is an objective of a kind explicitly required by s.10(2) PDA 2000 and contemplated by s.10(1D) PDA 2000. On that basis, what is involved is not just a conflict between the 0/0 Objective and NPF and RSES objectives to increase densities but the resolution, as to specifically the 0/0 Objective Areas, of those objectives to increase densities with countervailing NPF and RSES objectives and mandatory overall strategy content (mandatory by s.10(2) and s.10(1D)) to conserve and protect the environment, including architectural heritage.

[356] Counsel for the Minister correctly acknowledged that the Elected Members clearly felt very strongly on the issue. Transcript pay 3 p125.
[357] Transcript Day 3 p.149.

177. I therefore interpret the Elected Members' reasons as asserting the necessity of the 0/0 Objective and the impracticability of consistency of the Draft Development Plan with certain limited aspects only of national and regional planning policy, as to a limited part of their functional area and as consistent with other and countervailing aspects of national and regional planning policy.

Relevance of the Elected Members' Reasons

178. However, there is another point. As I have said, the Minister and the OPR emphasise that the Elected Members themselves considered that "*There is a clear conflict between the 0/0 Objective which looks to protect the area and the national objective to increase densities."* But in my view any infirmity in the Elected Members' reasons is largely irrelevant to the validity of the Impugned Decisions – though it does not follow that any validity in their reasons is similarly irrelevant. Their decision and their reasons for it are not impugned in these proceedings. **Killegland's** essential point was that the council gave inadequate reasons for its decision. In **Killegland**, the council's decision was the impugned decision - the council's reasons were at issue and *certiorari* of its decision was sought accordingly. Here neither is the case. The Minister is not merely, as it were, quashing the Elected Members' reasons or their decision. He is also imposing his own decision, for reasons of his own. The legal validity at issue here is not of the Elected Members' decision and reasons but of the OPR's and the Minister's decision and reasons. The OPR and the Minister had to have regard to the Elected Members' reasons. But they are in law responsible for the validity of their own reasons for the Impugned Decisions

179. Further, in impugning their Impugned Decisions, Mount Salus is not bound by the Elected Members' reasoning. They are entitled to say that that the 0/0 Objective is an expression of NPOs 52 and 60 and that what is involved is the resolution of countervailing NPF and RSES objectives and, indeed, the resolution of countervailing statutory objectives.

180. In this context, the Minister's reliance on **Killegland**, to the effect that the planning authority in that case had demonstrated a "*clear objective reason*"[358] for departure from the relevant policy objective, is misplaced in the present case. That observation in **Killegland** is entirely sensible as, in that case it was the validity of the council's decision which was in issue. The Elected Members' reasons are not in issue before me.

Clear Objective Reasons

181. However, against the possibility that I am wrong in the foregoing, I will consider the criticism that the Elected Members failed, by analogy with **Killegland**, to express clear objective reasons for their decision.

[358] Killegland Estates Ltd v Meath County Council [2022] IEHC 393, §§ 61 & 156.

I repeat here my observation above as to the applicability of XJS principles. Killegland challenged the council's decision, in making a development plan, to de-zone its lands – which had been zoned residential. What the High Court described as a clear objective reason was *"mainly the need to facilitate community infrastructure on that particular site"* – "*to provide an entrance to a proposed linear park."* I confess I am not quite clear as to the sense in which the High Court described this as an "*objective*" reason – it clearly involved an evaluative judgement as to the requirements of proper planning and sustainable development and the preference adopted might even be described as subjective. The Supreme Court recorded the High Court's view but put its own view slightly differently. It held that there was *"a clear rationale explaining the reasons for the de-zoning of these particular lands."*[359] I do not suggest any fundamental difference between the two judgments or that the High Court was wrong, but I confess to preferring the Supreme Court's formulation. It appears to me more reflective of a valid evaluative planning judgement. But, in terms of that High Court judgment and in whatever sense the council's reason was clear and objective in **Killegland**, it seems to me that the reason here was analogous and in that sense just as clear and objective. The Elected Members' judgement was that the protection of the relevant amenities required the 0/0 Objective: essentially that even the 0/0 Objective in the 2016 Development Plan had failed to protect the 0/0 Objective Areas and, by necessary inference, the lesser protection recommended by the OPR and the CE would fail to do so. In terms of the Supreme Court's formulation, there was *"a clear rationale explaining the reasons for"* DLRCC's decision.

182. Thus viewed, it seems to me that the State's attack on the Elected Members' reasons – especially on their assertion of a clear conflict between the 0/0 Objective to protect the area and the national objective to increase densities - is ultimately a distraction from the real issues in the case. I accept the Mount Salus submission to that effect - indeed, the OPR seemed to accept that view.[360]

<u>Elected Members' Strategic Disagreement with Board</u>

183. Though it is strictly unnecessary given my views just expressed above, I think I should express my respectful disagreement with the argument by the OPR and the State that it was wrong of the Elected Members to reject OPR Recommendation #4 and to seek to protect the 0/0 Objective Areas by maintaining the 0/0 Objective on the specific bases that

- the protections of the previous Development Plan had not sufficed, and
- they should seek to stymie what they perceived as the Board's excessive willingness to grant permissions in the 0/0 Objective Areas in pursuit of national policies in preference to local policies.

184. As to the first point, the Elected Members are in my view, clearly entitled to learn from their experience of the effectiveness of the previous plan in formulating the new one. They are expected to bring to bear in their planning judgements, made in making and informing the terms of their new development

[359] Killegland Estates Ltd v Meath County Council [2023] IESC 39, §108.
[360] Transcript Day 3 p.186 & 187.

plan, their knowledge of their functional area and their experience of the history of the successes and failures, or the degrees of either, of planning policy in their functional area. It would be a dereliction of their duty, and they would be properly criticised, if they did not. That is an essential part of their statutory duty to pursue the proper planning and sustainable development of their functional area. I see no reason why that principle should not apply to the 0/0 Objective Areas. Indeed, it seems to me that a contrary view is unstateable.

185. As to the second point, it is important to remember that decisions on planning applications are discretionary and multifactorial. It is entirely predictable that trends will be discernible in planning decisions at local and Board level. Indeed, it would be disconcerting if trends were not discernible in a system which should demonstrate, at least broadly and generally, a reasonable degree of consistency and predictability of decision-making. Importantly, development plan-making is a both a political process and one effected at local level. No doubt also, development plans and planning decisions at local and Board level are, viewed broadly, part of a communication process as between the various and mutually respectful competent decision-makers. While planning authorities and the Board are not in an adversarial relationship, they are entitled to take different views on proper planning and sustainable development – indeed that is a premise of the appeal system. Though the statutory balance has, perfectly properly, been shifted over time in favour of centralised national policies and the Board, it is nonetheless far from a crude imbalance in favour of the central. The members of a planning authority are entrusted by statute with the responsibility and the power to express in the development plan locally informed judgements as to planning policy proper to their particular functional area. It follows in my view that, to the extent statute by conferring that responsibility and power permits, and in accordance with their judgements as to the proper planning and sustainable development of their functional area, such members are entitled to seek to influence decisions of the Board. After all, their development plans are documents to which the Board must have regard in deciding planning appeals. The statutory balance of powers between them, central government and the Board, is in part created explicitly by s.37 PDA 2000 which modestly[361] but entirely validly limits the power of the Board, in certain circumstances, to grant planning permission in material contravention of the development plan. The notion is naïve that elected members should, in exercising their proper political powers and framing their plan, be bound to disregard that balance of powers and whatever capacity they may properly have to influence in a general sense decision-making outcomes in planning permission applications and appeals. Indeed a raison-d'etre of a development plan is to influence in a general sense planning decision-making outcomes and its influence and modest restraint on the Board's decisions is perfectly valid. Nor does the notion seem to me to serve any proper or useful purpose and I reject it.

DEVELOPMENT PLAN §5 - INTEGRATED LAND USE AND TRANSPORT

186. The Elected Members cannot be accused, (nor, in fairness were they) of ignoring, in the Development Plan they adopted, which included the 0/0 Objective, the importance of compact development

[361] Not least, s.37(2) provides that even where a planning authority has decided to refuse permission on material contravention grounds, the Board may grant permission where it "considers" that permission should be granted "having regard to" the applicable RSES, s.28 Guidelines, s.29 policy directives the statutory obligations of any local authority in the area, and any relevant Government or Ministerial policy.

along public transport corridors or the specific relevance of the DART Line and of the NPF and RSES in that regard. Only a brief account can be set out here. The Elected Members by their Plan espouse

- a settlement strategy for the Core Strategy supporting the "*overarching Development Plan Vision*" via a compact growth agenda, increased integration between land-use and transportation, and increased sustainable mobility and an asset-based approach to spatial development focusing employment and housing growth on existing and future transport corridors,[362] and
- "integrating land use and transport policy, thus promoting compact growth and ensuring that people can easily access their homes, employment, education and the services they require by means of sustainable transport. A holistic approach to transport is required with the aim to reduce dependency on the private car in favour of walking, cycling and public transport".*[363]*

187. Development Plan Policy Objective T1 is to "*actively support sustainable modes of transport and ensure that land use and zoning are aligned with the provision and development of high quality public transport systems. (Consistent with NSO 1, NPO 26 of the NPF, 64, RPO 4.40, 5.3, 8.1 and Guiding Principles on Integration of Land Use and Transport of the RSES)"* [364] The accompanying text:

- describes consolidation of development into areas well served by sustainable modes of travel, including ready access to public transport, as "*fundamental*" to land use planning, as reflecting NSO1 which promotes compact growth and as a central and reoccurring theme throughout the Plan.
- recognises the fundamental link between mobility and land use to reduce car-reliance and ensure more sustainable patterns of travel, transport and development. It records that essential to this is the integration of spatial planning policies with key mobility requirements, mainly through such mechanisms such as higher development densities and mixed-use development within walking and cycling distance of high quality public transport corridors.
- recites the identification in the DMA Strategic Plan (MASP), as set out in the RSES, of two strategic residential and employment corridors in DLR - the North-South Corridor along the DART line; and the Metrolink[365]/Luas Green Line Corridor. It anticipates that further growth will be supported at Ballyogan and Cherrywood by capacity enhancements to the Luas Green Line and improvements to the network.[366]

188. Other Development Plan objectives expand on these principles – including under the heading "*Promoting Modal Change*".[367] The "*overarching policy approach of the Plan*" is described as centred on promoting, *inter alia*, compact communities where people have options to use public transport.[368] This will include the Luas Green Line Capacity Enhancement Project (Though I understand some elements are no longer in prospect.) and good quality bus infrastructure with *"the capacity needed to move large volumes of*

[362] §2.4.2 DLR Settlement Strategy Statement.
[363] Development Plan §5.1.
[364] Development Plan §5.4.
[365] No longer in prospect but that does not undermine the designation as the Luas remains.
[366] I have omitted reference to certain capacity enhancements of which I am unsure. I have also omitted reference to Sandyford as it primarily a business district and its residential potential is not quantified in the Development Plan housing target Table 2.11.
[367] Development Plan §5.5.
[368] Development Plan p105.

people who travel to work, education, shops and leisure facilities"[369] via the BusConnects project, including Core Bus Corridors, high frequency Spine Routes[370] and high frequency Orbital Routes.[371] It will also include DART Line enhancement – though it is not apparent to me that any such enhancements will appreciably increase access from the 0/0 Objective areas to the DART and none such were drawn to my attention.

189. In context, it is thus clear that the Elected Members knowingly adopted the 0/0 Objective as a deliberate exception to their general and explicitly overarching policy approach of compact development coordinated with public transport. It is in this light that their reasons for making the exception as to what they explicitly term "*a very small area*" must be understood. Further, in light of Figures 1 and 2 above in particular, and while one might disagree with them in this respect, I cannot see how their characterisation of the 0/0 Objective Areas as "*a very small area*" could be described as unreasonable. And, as the characterisation is clearly relative to the Development Plan urban area generally and to the totality of its transport corridors, it is not apparent to me that the OPR or the Minister engaged with that characterisation. Further and as I have said, it is clear that, as between the Elected Members and the OPR/Minister, the disagreement is not as to the principle of the exception but as to its degree.

CORK COUNTY COUNCIL CASE (2021) – DOMINO EFFECT

190. Mount Salus emphasises its challenge to the OPR's s.31AM(8) Recommendation dated 6 April 2022 and its s.31AN(4) Recommendation dated 17 June 2022 on the basis that they are the necessary statutory preconditions to and triggers of the Minister's exercise of his power to issue his Direction. The **Cork County Council** case[372] is authority that if either the OPR's s.31AM(8) Recommendation or its s.31AN(4) Recommendation is invalid, so too is the Ministerial Direction based upon them. Adapting his terminology, I refer to this as the "domino principle".

191. I have repeatedly cited this case above. The facts were simple enough. The OPR, under s.31AM(8) PDA 2000, recommended to the Minister that he should issue a direction, in terms of a draft which it enclosed, cancelling Variation #2 of the Cork County Development Plan 2014 as to an objective for a retail outlet centre. It so recommended on the basis that Variation #2 failed to have "*sufficient regard*" to principles set out in Retail Planning Guidelines which had issued under s.28 PDA 2000. A headnote to the case[373] records that the council sought *certiorari* on four bases related to the OPR recommendation to the Minister – alleging that it incorrectly:

[369] Development Plan p106. Policy Objective T6: Quality Bus Network/Bus Connects states: "It is a Policy Objective to co-operate with the NTA and other relevant agencies to facilitate the implementation of the bus network measures as set out in the NTA's 'Greater Dublin Area Transport 2016-2035' and 'Integrated Implementation Plan 2019-2024' and the BusConnects Programme, and to extend the bus network to other areas where appropriate subject to design, environmental assessment, public consultation, approval, finance and resources. (Consistent with RPO 8.9 of the RSES)"
[370] Through the city centre.
[371] Not through the city centre.
[372] Cork County Council v Minister for Housing [2021] IEHC 683.
[373] [2021] 11 JIC 0502.

- (i) assumed that an updated joint[374] retail strategy was "required" by the retail planning guidelines;
- (ii) drew from a view of non-compliance with those guidelines a conclusion of lack of an overall strategy in the Development Plan;
- (iii) misapplied the concept of an overall strategy by considering a wider area than the functional area of the council concerned; and
- (iv) had regard to irrelevant considerations.

192. The headnote records Humphreys J as granting *certiorari* of the Minister's Direction

- on each of the four grounds pleaded and in any event on all four collectively,
- because the Minister's direction was premised on the prerequisite of a valid recommendation of a draft direction by the OPR. Absent a valid OPR recommendation, the direction must fall.

193. In a later judgment in the same case,[375] Humphreys J added to *certiorari* of the Minister's direction a declaration of invalidity of the Minister's s.31AN PDA 2000 notice to the council enclosing a draft direction., Humphreys J referred to his *"rejection of the State/OPR arguments on all four independent grounds of the decision."* He said that *"The State/OPR case, while understandable in policy terms was thin in legal terms throughout"* due to *"the combination of poorly worded documentation, a restrictive statutory framework and unfavourable precedents."* The "*restrictive statutory framework*" was, as relevant, the same as applies here. As to those precedents, the earlier judgment of Humphreys J is notable for its reliance on **Tristor**[376] as presenting "*a clear analogy*". Humphreys J said: *"The really crucial point is that the Minister in Tristor made an error quite similar to the one here."* The error was the Minister's belief that *"s.31 permitted him to impose, by direction, his own views on the proper planning and development of an area over those of the elected local representatives.*

194. In his first judgment in the case, Humphreys J said that

a. the OPR's s. 31AM(8) recommendation to the Minister enclosing a draft direction was the first critical legal step - the "*first domino*".[377] If that first domino fell so did the subsequent dominoes, such that the need to consider them did not arise.[378] He described an error in the OPR's s.31AM(8) recommendation as having "*contaminated everything thereafter*"[379] – the "*process went wrong at its conception*".[380]

b. the OPR's submission was erroneous that where s.31 envisages the Minister acting on foot of an OPR recommendation that means merely a purported recommendation, such that not challenging the

[374] As between Cork County Council and Cork City Council.
[375] Cork County Council v Minister for Housing [2021] IEHC 708 - staying the declaratory relief only, and that only pending application to the Court of Appeal for a stay pending appeal.
[376] See below.
[377] §§12, 26 & 27.
[378] §27.
[379] §41.
[380] §35.

recommendation means that one cannot contend later that it is not valid for the purposes of knocking out the subsequent and operative decision. Where a statute refers to a particular step, including as here a "*recommendation*", that means a valid step and here a valid OPR recommendation:

> *" … an invalid recommendation does invalidate the ultimate decision …" and "Certiorari follows because the ultimate making of the direction is premised on the necessary prerequisite of a valid proposed draft direction by the OPR. In the absence of a valid proposal the ultimate decision must fall. That would be the case anyway; but for good measure it is made express by the terms of s.31(1), which says that the direction can be made "subject to compliance with the relevant provisions of sections 31AM and 31AN …".*[381]

NARROWER LEGAL BASIS FOR OPR RECOMMENDATION THAN FOR MINISTERIAL DIRECTION

195. Mount Salus, in invoking the "domino reasoning" of the Cork County Council case, emphasises, as I have said earlier, the narrower legal basis permissible under s.31AM(8) PDA 2000[382] for an OPR recommendation to the Minister enclosing a draft direction as compared to the legal basis permissible under s.31(1) PDA 2000 for a Ministerial direction. Mount Salus argues that:

a. By s.31 PDA 2000, the Minister may issue a direction where of the opinion that any of the listed alternative statutory criteria are satisfied and must state his/her reasons for so doing. Those criteria, set by s.31 as alternatives but all of which the Minister invoked in his Direction in the present case, are that:
   - the planning authority, in making the Development Plan, failed to implement an OPR recommendation,
   - the Development Plan is not consistent with NPF and RSES development objectives,
   - the Development Plan fails to set out an overall strategy for the proper planning and sustainable development of the area and
   - the Development Plan is non-complaint with requirements of the PDA 2000.

b. But, on the domino reasoning of the **Cork County Council** case and regardless which alternative(s) the Minister invokes, the validity of the Ministerial Direction is predicated on the validity of the OPR's notice to the Minister enclosing a draft direction, issued under s.31AM(8) PDA 2000 and dated 6 April 2022, which prompted the Ministerial Direction.

c. By s.31AM(8) PDA 2000, the OPR may issue such a notice only if it is of the opinion that <u>cumulatively:</u>
   - (a) the Development Plan is not consistent with the OPR's recommendations;

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[381] §§79 & 78.

[382] (a) the development plan or the variation of it, as the case may be, has not been made in a manner consistent with the recommendations of the Office,
(b) that the decision of the planning authority concerned results in the making of a development plan, or its variation, in a manner that fails to set out an overall strategy for the proper planning and sustainable development of the area concerned, and
(c) as a consequence of paragraphs (a) and (b), the use by the Minister of his or her functions to issue a direction under section 31 would be merited.

- (b) the Development Plan fails to set out an overall strategy for the proper planning and sustainable development of the area;
  and
- (c) in consequence of (a) and (b), a ministerial direction under s.31 "*would be merited*".

196. No-one disputes that the criteria of s.31AM(8) PDA 2000 are cumulative[383] and that in the OPR's s.31AM(8) Notice, criterion (a) is satisfied. But Mount Salus says that:

- criteria (a) and (c) are satisfied. That is necessary but insufficient to the validity of a notice under s.31AM(8) PDA 2000;
- criterion (b) is not satisfied. The OPR was not in law entitled to its opinion that the Development Plan fails to set out an overall strategy for the proper planning and sustainable development of the area;
- as criterion (b) is not satisfied, the OPR was not in law entitled to issue a notice under s.31AM(8) PDA 2000 – which notice is invalid; and
- on the domino reasoning of the Cork County Council case, absent a valid notice under s.31AM(8) PDA 2000, the Minister had no jurisdiction to issue the Ministerial Direction and so that Direction is invalid.

I accept that reasoning if, indeed, criterion (b) is not satisfied.

197. As I understand and as to the Impugned Decisions,

- the OPR's opinion that, in breach of s.10(1) PDA 2000, the Development Plan fails to set out an overall strategy for the proper planning and sustainable development of the area is based on its opinion that in breach of s.10(1A) PDA 2000, the development objectives in the Development Plan are not consistent, as far as practicable, with NPO3b, NPO11 and NPO35, and RPO3.2 and RPO4.3.
- the Minister's opinion in these regards is substantively the same.

198. As Mount Salus accepts that the Minister can rely on alternative bases for his Impugned Decision, and I accept that premise without so finding, Mount Salus concentrates its fire on the OPR's Impugned Decision - to the validity of which its opinion as just described above is essential. However, without disregarding that logic, as the opinion in question is shared by both the OPR and the Minister, I will consider it as held by both. Also, and as will be seen, the actual content of the Minister's reasons for his opinion overlaps greatly such that they are, in my view, not severable.

PLANNING POLICIES & OBJECTIVES IN TENSION - TRADE-OFFS & RECONCILIATIONS – DISCRETION

199. I have mentioned this topic already. Mount Salus submits that the OPR and the Minister erred in law in failing to appreciate the degree of DLRCC's discretion in balancing the many planning policy objectives it must balance in adopting its Development Plan.

[383] As to the OPR's position, see Transcript Day 2.

200. It is perfectly clear that policy favouring residential development may, as to a particular location or area, be in tension with, or even irreconcilable with, heritage protection. It is understandable, to put it at its lowest, in a housing crisis to strongly favour residential development. Yet no-one would suggest demolishing St Patrick's Cathedral in Dublin to build houses. The example is ridiculous but it illustrates the principle. There is no automatic result of policies irreconcilable as to a particular location: housing is not a trump card ubiquitously effective. Nor is architectural heritage. There are no trump cards unless binding policy or law identifies them as such. Absent such binding policy or law, it does not inevitably, or even generally, follow that architectural heritage must prevail over urgent housing need – or, for that matter, *vice versa*. Rather, in such a context, the choice of such a trade-off, compromise or preference as between effecting the protection of urban heritage and amenity as one of the planning and environmental principles to which the development targets are *"subject"*[384] and effecting NPF development objectives, is a matter of planning judgement. The resulting decision, whether it favours residential development or heritage protection or compromises between them, is not at all necessarily or obviously inconsistent with national planning policy generally or the NPF in particular.

201. In my view such an analysis, though expressed differently, is essentially similar to the analysis of the Supreme Court in **Killegland** in requiring general rather than particular or detailed consistency of a development plan with, at least, many NPOs. Short of irrationality, the choices, trade-offs and compromises as between policies in tension, as made by planning authorities in making their development plans, do not amount to inconsistency with policy in breach of s.10(1A) PDA 2000. In that light, the question generally becomes one, not of inconsistency with the NPF or RSES, but of whose planning judgement prevails – the planning authority's or the OPR/Minister's – as between different reconciliations of policies in tension when both suggested reconciliations are generally consistent with development objectives of the NPF and/or the RSES.

202. It is obvious on the facts of this case that, as to the 0/0 Objective Areas, the legitimate planning interest in and policy of maximising compact residential development on transport corridors is, at least, in tension with the legitimate planning interest in and policy of preserving the architectural heritage of the Killiney and Dalkey areas. To illustrate the point by its reduction, again, to absurdity, high rise apartment blocks occupying the entirety of the grounds of every large Victorian house in the 0/0 Objective Areas would maximise efficient exploitation of the DART line. It would also destroy the area's architectural heritage and fatally undermine the protection of its protected structures. On the other hand, preserving every large Victorian house and its grounds in aspic - precisely intact in perpetuity - could very well squander valuable opportunities for compact residential development on the DART line which, in truth and in the views of many, could be developed at little or acceptable cost in architectural heritage and be done acceptably in the present housing crisis. Reconciliation of this tension, whatever the precise substance of that reconciliation, was an inevitable task of DLRCC as plan-makers.

[384] NPO11.

203. It is authoritatively and long acknowledged – recently in **Kenny**[385] - that

> *"development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another."*
>
> *Their "application to a given set of facts requires the exercise of a judgment and that these matters fall within the jurisdiction of planning authorities rather than the courts."*
>
> *"The task of reconciling different strands of policy on the facts of a particular case has been entrusted to the planning decision maker."*
>
> *"Reconciling potentially conflicting policy on wind energy strategy and visual impact in the Plan was a matter for the Board to consider, with the benefit of the Inspector's reports, in the context of the facts arising from the proposed development and what would be proper planning and sustainable development in the area."*
>
> *"… the Plan, … contains potentially conflicting or contradictory objectives or policies when applied to a proposed development. It was entirely appropriate that the Inspector and the Board should seek to reconcile these conflicts in investigating and deciding the appeal."*

204. In **Navan Co-Ownership**[386] McGovern J, as to what he termed the application of conflicting policies to a given set of facts, cited Lord Reed in **Tesco v Dundee**[387] and **William Davis**.[388] Lord Reed said that "*As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. … Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgement can only be challenged on the ground that it is irrational or perverse"*. Lord Reed's reference to irreconcilable policies has been repeatedly cited in Irish cases since **Navan Co-Ownership**. In **Eoin Kelly**[389] Barniville J cited it to the effect that "*provisions of planning documents such as a development plan or statutory guidelines often contain broad statements of policy, some of which may be mutually irreconcilable, and may be framed in language where the application of the relevant provision to a given state of facts requires the exercise of planning expertise and judgement itself*." In **Tesco**, Lord Hope held similar views: that "*it was not unusual for development plan polices to pull in different directions"* and the proposition was untenable *"that if there was a breach of any one policy in a development plan a proposed development could not be said to be 'in accordance with the plan' … the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided."* [390] The decisions in a **Ballyboden TTG** case[391]

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[385] Kenny v An Bord Pleanála [2020] IEHC 290 (MacGrath J), citing Navan Co-Ownership v An Bord Pleanála & Ors [2016] 9 IEHC 181; in turn citing Tesco Stores Limited v Dundee City Council [2012] UKSC 13; William Davis Ltd v Secretary of State of Communities and Local Governments [2013] EWHC 3058; and Alen-Buckley v An Bord Pleanála & Ors [2017] IEHC 541.
[386] Navan Co-Ownership v An Bord Pleanála & Ors [2016] 9 IEHC 181 §15.
[387] Tesco Stores Limited v Dundee City Council [2012] UKSC 13.
[388] William Davis Limited v Secretary of State for Communities and Local Governments [2013] EWHC 3058 (Admin).
[389] Eoin Kelly v An Bord Pleanála [2019] IEHC 84.
[390] §34.
[391] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.

and in **Jennings**[392] are in similar vein. In **Four Districts**[393] Humphreys J, citing Lord Reed, put it well when he said that:

> *"Tension between two provisions of a development plan is almost inevitable because plans seek multiple objectives, much like anybody managing anything complicated. Such tension should not be equated with conflict … . Conflicting objectives only arise if reconciliation isn't possible – and it normally is."*

He said that tension between two general policy provisions normally creates a "*zone of discretion*" for the decision-maker. And *"In short, resolution of conflict of two general provisions is a matter of judgement."* As Humphreys J, untypically, did not say in **Four Districts**, "*there are no solutions, only trade-offs*".[394]

205. These decisions were concerned with tensions and conflicts within development plans and with decisions on specific development proposals. But if these observations can be made of development plans, a fortiori they can be made of policies higher in the hierarchy, such as the NPF. Such higher policies, at least generally, express policy at a higher level of generality than do development plans and do so on a wider range of planning issues and with essentially the same potential for tensions between them and necessity of reconciliation of those tensions.[395] It is obvious that, in the democratic processes leading to the making of a development plan, similar tensions and requirements of trade-off and reconciliation arise as between countervailing planning policies and objectives laid down at national and regional level and, indeed, by law and more generally, as between different aspects of proper planning and sustainable development. It appears to me to follow that decisions by a planning authority in making a development plan and seeking to reconcile general policy provisions and development objectives of the NPF or RSES in tension cannot, if made within the zone of discretion described in **Four Districts**, be illegal as inconsistent with the NPF or RSES.

206. The PDA 2000 itself, at s.10(2) and also at s.81, mandatorily requires development plan objectives for the preservation of the character of architectural conservation areas, the protection of structures of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest and the preservation of amenities. Yet s.10 also requires development plan objectives for the promotion of sustainable settlement and transportation strategies, *inter alia* to combat climate change. There can be no doubt that this includes compact residential development on public transport corridors. The facts of the present case illustrate the unsurprising reality that particular local conditions – in this case ACAs and protected structures in an important transport corridor – yield such tensions. The seeds of tension are sown and need for trade-offs and reconciliations is apparent even in the PDA 2000 itself – not least in s.10(2).

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[392] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14.
[393] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.
[394] See North East Pylon Pressure Campaign Ltd v An Bord Pleanála [2016] IEHC 301; An Taisce v An Bord Pleanála [2021] IEHC 254; Duffy v Clare County Council & McDonagh [2023] IEHC 430; Reid V An Bord Pleanála, Ireland & Intel #7 [2024] IEHC 27.
[395] Indeed, in England and Wales, Tesco v Dundee was applied to the interpretation of the National Planning Policy Framework ('the NPPF') in Hunston Properties v St Albans CC and DC [2013] EWCA Civ 1610, [2014] JPL 599, [2014] 1 EGLR 79, [2013] All ER (D) 122 (Dec).

207. One might say that such trade-offs and reconciliations are the stuff of plan-making as most planning choices have opportunity cost: a field developed for apartments desirable from a planning point of view cannot be used for also-desirable agriculture or playing fields - and *vice versa*. Those trade-offs and reconciliations are repeatedly identified in the case law as, par excellence, matters of evaluative planning judgement for planning authorities and as matters not for the courts. Another way of expressing that distinction is to say that, as to the substance of those trade-offs and reconciliations and save in the case of irrationality, they are not matters of law and so are not for the courts to decide in judicial review.

208. That being so, it follows that, save in the case of irrationality, those trade-offs and reconciliations by planning authorities making development plans do not, in their substance, generate illegalities. Indeed, **Killegland** turns on that very point. As will be seen, **Tristor**[396] is and remains authority that, short of illegality in a development plan, the Minister cannot make a s.31 direction. Applying **Spencer Place**, if the Oireachtas intended that, by s.31, the Minister could issue directions if (s)he merely disagreed with evaluative planning judgements by a planning authority in a Development Plan short of illegality, it could have done so – but it had to say so clearly by statute. That it has not done so cannot be ignored. These three cases combine to mean that the Minister cannot issue a direction

- to amend a lawful development plan merely because (s)he prefers his/her evaluative planning judgement to the planning authority's on the issue in question;
- to amend a development plan unless to correct what in his/her opinion is an illegality in the plan;
- overruling the merits of a planning authority's reconciliation of development objectives of the NP and/or RSES which are in tension or countervailing unless of the opinion that the planning authority's reconciliation was irrational.

TRISTOR (2010)

Tristor - Introduction

209. I have earlier set out the views of Clarke J in **Tristor** that the courts should not enter into the political controversy as to the distribution of power in the making of planning policy as between local and national organs and as it relates to the functional area of a planning authority. The courts accept, as they must, the will of the Oireachtas in that regard. But, as Collins J says in **Spencer Place**, the courts should consider such power to be transferred from local to national organs only to the extent the Oireachtas has made its intent clear.

210. It remains to discern what Clarke J in **Tristor** made of that transfer of power in the case of s.31 PDA 2000. As recorded above, at issue was the validity of and *certiorari* of a ministerial direction under s.31 that DLRCC reverse its designation in its development plan of Tristor's lands at Carrickmines as a district retail centre. The parties differed as to the applicable standard of review of that direction.

[396] See below.

211. It is important to say that the relevant statutory scheme, including s.31, is much altered since 2010. But the essential idea of the ministerial direction survives. S.31 in 2010 required that for the Minister to issue a direction he must "*consider*" that "*a draft development plan fails to set out an overall strategy for the proper planning and sustainable development of the area or otherwise significantly*[397] *fails to comply with"* the PDA 2000. As now applicable, s.31 as amended requires that, for the Minister to issue a direction, he must be "*of the opinion*" that one of listed criteria is satisfied – two of which are that the plan "*fails to set out an overall strategy for the proper planning and sustainable development of the area"* or is inconsistent with development objectives of the NPF and/or RSES. As has been seen, those legal bases underlie the Minister's Direction in the present case.

212. The judgment in **Tristor** is complex. In that context and at risk of restating the obvious, it may be useful to express my view that s.31, in its original form, was concerned always and only with illegality in a Development Plan.

- First, the words *"fails to set out an overall strategy for the proper planning and sustainable development of the area"* clearly refer back to the legal obligation of planning authorities, imposed by s.10 PDA 2000, to set out such a strategy in their development plans.
- Second, the words "*or otherwise*" suggest that failure to set out such a strategy is a species of significant failure to comply with the PDA 2000.
- Third, the explicit remedy and purpose of a ministerial direction is to "*ensure that the development plan … is in compliance with"* with the PDA 2000. As Clarke J said in **Tristor**,

> *"What the Minister is entitled to do is to specify the measures that need to be taken to ensure that any failure to comply with the Act is remedied."*

213. At least one headnote writer has understood Clarke to hold that s.31 *"did not require a breach of the Act, but that the Minister consider there to have been a breach of the Act."*[398] On the other hand, Browne does not express such a view.[399] However, and as to the formation of such an opinion, it is also important to note, though it is obvious, that discerning illegality has three elements – being the necessity to:

- First, discern what the law is. One cannot say the law has been broken if one does not know what it is. So, one must first interpret the law.
- Second, discern the facts and circumstances alleged to represent a breach of that law and/or relevant to the question whether there has been such a breach.
- Third, discern whether those facts and circumstances amount to a breach of that law.

214. Though Clarke J didn't frame it precisely this way in **Tristor**, I think it useful to point out that, broadly, each of these three questions may be in dispute in judicial review. And so it is necessary to apply a

[397] As noted above, this criterion of significance has been deleted from the PDA 2000.
[398] [2012] 3 ICLMD 78.
[399] Browne, Simons on Planning Law, 3rd ed'n, §1.503 et seq.

standard of review to the impugned decision in respect of each such dispute. Perhaps because the approach taken is routine, even where a decision-maker has interpreted the law to inform its decision, we don't tend to think of questions of interpretation of law by the Courts as involving application of a standard of review.

215. The Minister and **Tristor** posited different interpretations of s.31. The Minister's interpretation was part of and underlay his impugned direction. Clarke J did not defer to the Minister's interpretation of s.31 or ask if it was rational. He decided which interpretation was right. He reviewed for correctness and error the view of the law the Minister had taken in making his direction. To call this, as Clarke J did, a question of interpretation is perfectly correct. Clarke J framed it as a question distinct from that of standard of review – which in a considerable sense it is. But as, to make his decision, the Minister had had to take a view of the law, and to make his decision Clarke J had to review that decision of the Minister, answering the question of interpretation does involve the application of a standard of review to the Minister's view of the law and to an element of his decision-making. This is quotidian in judicial review: even a decision reviewable as to merit only for irrationality must be based on a correct interpretation of the law and the court in judicial review will interrogate erroneous interpretation of law. It will do so for correctness and "de novo" as that phrase was deployed in **Four Districts** in preference to the phrase "full-blooded".[400]

216. Yet when Clarke J spoke of standard of review, he was, understandably, referring to review,

- not of error of law or of the question whether the Minister had misdirected himself in law, which, as it arose in that case, he termed a question of interpretation of law,
- but of error as to whether the relevant facts and circumstances amounted to or disclosed a breach of that law. On that latter issue, the Minister's decision – his opinion - was reviewable, as to merit, only for irrationality.

<u>Tristor – Overall Strategy #1 - Interpretation of s.31</u>

217. Clarke J considered the key question in the interpretation of s.31.[401] to be the meaning of the words "*fails to set out an overall strategy for the proper planning and sustainable development*" of the development plan area or "*otherwise significantly*[402] *fails to comply with*" the PDA 2000. He said that, in a sense, the real issue was whether s.31, on its correct construction, allows the Minister to take a view as to whether the strategy in a development plan is a "*proper*" strategy. He also, and apparently synonymically, used the words "*qualifying*" and "*permissible*". I would add the synonym "*lawful*".

218. As to what is a proper strategy, and looking at the matter negatively,[403] Clarke J held that s.31 did not allow the Minister to issue a direction simply because he disagreed with the strategy in the development

[400] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.
[401] As to which the parties in differed - Tristor §6.
[402] As noted above, this criterion of significance has been deleted from the PDA 2000.
[403] i.e. asking what is not a proper strategy.

plan.[404] Many different strategies might be consistent with proper planning and sustainable development or with planning policies. Clarke J held that if the strategy set out in the development plan can be reasonably described as an overall strategy for the proper planning and sustainable development of the area, the Minister may not impose another strategy simply because he prefers it.[405] He held that the PDA 2000 did not entitle the Minister *"to impose, by direction, his own views on the proper planning and development of an area over those of the elected local representatives"*.[406]

219. Looking at the matter positively,[407] Clarke J's understanding of a "*proper*" strategy for proper planning and sustainable development of that required by s.10 PDA 2000.[408] As I have said, and as I read s.10, the development plan itself, considered as a whole, is to be the overall strategy. Clarke J considered that a proper or lawful overall strategy must contain the mandatory subject-types of development objective listed in s.10(2).[409] But, clearly, the specific content of such objectives may, and inevitably does, properly vary widely as between development plans. Somewhat out of sequence, it is convenient to observe here that the later insertion of

- s.10(1A) and (2A) had the effect that a "proper" overall strategy must (via the core strategy) also be consistent, as far as practicable, with NPF and RSES development objectives.
- s.10(1D) had the effect that a "proper" overall strategy must also be consistent, as far as practicable, with the conservation and protection of the environment.

Though the mandatory requirements of s.10 have changed since **Tristor**, counsel for the Minister correctly submits that the general proposition of **Tristor** remains good law: *"… to be a qualifying overall strategy, you have to be consistent with the mandatory requirements of section 10 in relation to the plan."*[410] Nor do those amendments alter the position, established in **Tristor**, that the combined effect of ss.31 and 10 leaves it to the planning authority to determine which of the many possible proper overall strategies consistent with s.10 are to be adopted in a development plan.

220. So, the question for the Minister, in exercising his power under s.31 to make a direction, is not whether he agrees or disagrees with the merits of the relevant council's strategy or merely thinks another strategy better. It is only if the strategy as set out is "*not at all a strategy for the proper planning and sustainable development of the relevant area*" that the Minister can intervene by s.31 direction on this basis. The words "*at all*" appear to reflect Clarke J's emphasis that mere disagreement with a proper strategy will not support a direction. Clarke J said:

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[404] §6.14. The judgment in Tristor also contains the following passage at §6.15: "There would, in my view, be a significant difference between permitting the Minister to give a direction under s.31, where the Minister considered that the strategy as set out is not a proper strategy, on the one hand, or is not at all a strategy for the proper planning and sustainable development of the relevant area, on the other hand. The former phraseology would entitle the Minister to take a view as to whether he agreed with the strategy. The second interpretation would require the Minister to go further and take the view that what was set out in the relevant Draft Development Plan was not a qualifying strategy at all. For the reasons which I have sought to analyse, I am satisfied that the former is the proper interpretation of the s.31." It is clear from the context that, in this last sentence, the word "former" is a drafting error. It should read "latter".

[405] Tristor §6.14.

[406] Tristor §7.19.

[407] i.e. asking what is a proper strategy.

[408] Tristor §6.15

[409] Tristor §7.19. The list in s.10(2) has been amended since Tristor but that does not alter the general point.

[410] Transcript day 3 p.86.

"A starting point for a consideration of that issue must the wording of the section itself. What the section says is that, in order that the Minister be entitled to give a direction on the first alternative basis, the Draft Development Plan concerned must "fail to set out" an "overall" strategy. It does not seem to me that that language implies an entitlement on the part of the Minister simply to disagree with the strategy contained within the development plan. It can hardly be doubted that there are many strategies which could be adopted which would be consistent with the statutory requirement contained in s.10 that the strategy concerned be an "overall strategy for the proper planning and sustainable development" of the relevant area. It seems to me that, on a proper construction of the combined effect of s.31(1) and s.10, it is a matter for the planning authority to determine which of the range of possible strategies that could be pursued are to be included in a development plan. Provided that there is a strategy set out, and that it is reasonably described as an overall strategy for the proper planning and sustainable development of the relevant area, then it does not seem to me that the Minister is entitled to impose an alternative strategy simply because the Minister may prefer it."[411]

"(It) … is necessary for the Minister to identify factors from which it could reasonably be concluded that the Draft Development Plan does not set out, such a strategy. It is not a question of whether the Minister agrees or disagrees with the strategy."[412]

"There must, in at least most cases, be many strategies which are strategies for the "proper planning and sustainable development" of a relevant area. The Minister is not entitled to second guess the views of a planning authority as to which of those "qualifying" strategies is to be selected. It is only if the strategy as set out is non qualifying, in that sense, that the Minister can intervene."[413]

"… the Minister asked himself the wrong question. … the Minister considered that s.31 permitted him to impose, by direction, his own views on the proper planning and development of an area over those of the elected local representatives. …. it does not seem to me that the Act entitles the Minister to do that. Rather, the Minister must ask himself whether there is a significant[414] *failure to comply with provisions of the 2000 Act other than s.10 or, in the context of s.10, must ask himself whether the plan actually has a strategy which is set out in it and which complies with the mandatory obligations provided for in s.10(2)*[415] *which apply to such plans …".*[416]

Tristor – Standard of Review of Ministerial Directions

221. As to standard of review other than of the Minister's interpretation of s.31,[417] Tristor argued that:

[411] §6.14.
[412] §6.15.
[413] §6.15.
[414] As noted above, this criterion of significance has been deleted from the PDA 2000.
[415] S.10(2) sets out the many subject-matters on which a development plan must contain objectives.
[416] §7.19.
[417] §5 of the judgment.

- failure to set out in the development plan an overall strategy for the proper planning and sustainable development of the area was a breach of s.10 PDA 2000;
- so, whether that or any other significant[418] breach of the PDA 2000 was in issue, non-compliance by the council with the PDA 2000 was a condition precedent to a s.31 direction;
- so, by a s.31 direction, the Minister in substance determines that there has been a breach of the PDA 2000;
- as what was in issue was illegality, the court should review whether the Minister was correct in substance – should substitute its own view whether there was an illegality.

222. Clarke J disagreed with Tristor and agreed with the Minister. However as I see it, he did not disagree:

- with the view I have expressed that s.31 was concerned always and only with illegality in a development plan;
- that it was a condition precedent to a s.31 direction that the Minister have formed the view that such illegality existed.

223. Clarke J said: "*If the Act were differently worded so that it was necessary that there be a breach before the Minister could issue a direction, then there might well be an argument in favour of Tristor's proposition."* However, Clarke J thought the word "*considers*" in s.31 to be "*decisive*" and held that s.31 "*does not require that there be a breach of the Act*." Rather, it "*requires that the Minister considers that there be a breach of the Act*." On that basis he said "*the Minister is entitled to form a view (within the bounds of the section) that the conditions necessary for the exercise of a discretion under s. 31 exist. That ministerial view is, of course, subject to judicial review*."[419]

224. I confess to finding the distinction between the existence of a breach and the Minister considering that there is a breach a little confusing. Perhaps it derives from the usual position in which only a court can determine the existence of illegality. It seems to me, respectfully, that the position may be more easily understood as one in which the existence of illegality is indeed a precondition to a Ministerial Direction and s.31 empowers the Minister to determine whether such illegality exists. In any event, the foregoing appears to justify the view of the headnote writer described above - as long as it is understood that it does not relate to the Minister's interpretation of law, which is reviewable as to substance for error and not merely for irrationality. The view relates only to the issue whether the relevant facts and circumstances disclose a breach of that law once that law has been correctly understood by the Minister for the purposes of making his decision.

225. Clarke J unsurprisingly held that the Minister's conclusion that there had been a breach of the PDA 2000 was subject to judicial review on ordinary judicial review principles - "*The ordinary judicial review standard*" applies.[420] So, he held that, in coming to that conclusion, the Minister must

[418] As noted above, this criterion of significance has been deleted from the PDA 2000.
[419] The excerpts above are from §§5.3 and 5.4 of the judgment but are reordered somewhat.
[420] §§5.4 & 5.7.

- Correctly interpret the applicable law,
- Correctly construe the materials available to him,
- consider all relevant factors and ignore irrelevant factors, and
- base his view rationally on those materials.[421]

To be clear, as I understand **Tristor**, while the Minister's opinion is reviewable as to its merit only for irrationality, it is essential to the validity of a s.31 direction that the Minister has acted on a correct understanding of the law and of the relevant materials. That that the rationality of the Minister's decision is predicated "*on the proper construction of any relevant documents"*[422] means that that his interpretation of those materials, like his/her interpretation of the law, is reviewable for error and not just for irrationality – see more recently **Four Districts**.[423] Indeed, as will be seen, that is what occurred in **Tristor**.

226. However, subject to those considerable limitations, Clarke J held that if the Minister rationally "*considers*" that a relevant illegality has occurred he may make a s.31 direction. In holding that the standard of review is the "*ordinary judicial review standard*", Clarke J is clearly holding that, once the Minister has acted on a correct understanding of the law and of the relevant materials, his opinion whether there has been a breach of the PDA 2000 is reviewable as to its substance only for irrationality. It must be said that my use of the word "*merit*" and the concept of irrationality are apt to confuse here as issues of "*merit*" and planning judgement are typically distinguished from issues of law in that, while the former are reviewable, as to merit, only for irrationality, the court is free to disagree with the decisionmaker on an issue of law. Here the "*merit*" consists in the Minister's opinion as to <u>whether the facts of the case amount to a breach of the law</u>. Clarke J is clear that the Minister's view <u>on that issue</u> is reviewable as to that merit only for irrationality.

227. Clarke J also considered that if the Minister alleges failure to set out an overall strategy for the proper planning and sustainable development of the area, he must identify factors from which it could reasonably be concluded that the development plan does not set out such a strategy. This reflects both the Minister's obligation (expressed in s.31) to give reasons for his decision and the position that the Minister's satisfaction that a qualifying strategy was not set out at all is reviewable, as to merit, only for irrationality.

<u>Tristor – Minister's Reasons</u>

228. In the end, however, Clarke J decided the case on a narrower basis than irrationality.[424] The Minister's reasons for his view that the Development Plan had failed to set out an overall strategy included that the designation of Tristor's lands at Carrickmines as a district retail centre

[421] §§5.4 & 5.6.
[422] §5.6.
[423] Recently Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.
[424] §7 of the judgment.

- did not accord with the hierarchy of retail centres in Dún Laoghaire Rathdown as set out in the Dublin Retail Strategy,[425] and
- was *"contrary to*" specified content of the Retail Planning Guidelines 2005.[426]

However, the Dublin Retail Strategy was a non-statutory document with "*no formal legal status*" and the Retail Planning Guidelines were s.28 Guidelines.[427] Clarke J said that DLRCC might properly have regard to them in making its development plan[428] but was not bound to comply with them. Accordingly, and as to each of the Dublin Retail Strategy and Retail Planning Guidelines 2005, *"failure to comply with it could not amount to a breach of the 2000 Act"* - either by way of failure to set out an overall strategy for the proper planning and sustainable development of the area or "*otherwise*". So, Clarke J considered that the Minister could not rely on such alleged failure to ground a direction. The Minister had made either of two errors of law:

- he construed s.31 as empowering him to issue a direction and impose his own view of proper planning and sustainable development if merely he differed from the council as to a matter of evaluative planning judgement of the substantive quality of the overall strategy in the development plan as compared to that which he advocated or
- he construed the law as required compliance with that Strategy and those Guidelines – when it did not so require

Accordingly his reasons could not support the Ministerial Direction.[429]

Tristor – Overall Strategy #2

229. I have considered above Clarke J's interpretation of s.31(1) PDA 2000 - of the meaning of the words "*fails to set out an overall strategy for the proper planning and sustainable development*" to the effect that the Minister is not *"entitled to impose an alternative strategy simply because the Minister may prefer it."* Clarke J continued: *"Rather, the Minister must ask himself whether there is a significant[430] failure to comply with provisions of the 2000 Act other than s.10 or, in the context of s.10, must ask himself whether the plan actually has a strategy which is set out in it and which complies with the mandatory obligations provided for in s.10(2)[431] which apply to such plans."*

[425] Retail Strategy for the Greater Dublin Area 2008 – 2016.
[426] Guidelines for Planning Authorities on Retail Planning 2005. Specifically, the retail centre "would be likely to adversely impact on the vitality of existing town centres" and "would be likely to exacerbate car-based traffic issues in and around the area".
[427] Guidelines issued by the Minister under s.28 PDA 2000 and to which, by s.28 and in the performance of their functions, planning authorities must have regard.
[428] In the case of the Retail Planning Guidelines was obliged to have such regard.
[429] Clarke J appears to have accepted that breach of the obligation imposed by s.28 PDA 2000 to have regard to the Retail Planning Guidelines would have been an illegality and so could have properly grounded a ministerial direction. However, the Impugned Direction had not alleged such a failure and so the Minister could not so plead in the proceedings. In any event such a proposition failed on the evidence. Clarke J said at §§7.14 & 7.15: "… taking a view of the Guidelines as a whole and also of all of the reasons set out in the resolution passed by the elected members, I find it difficult to see how it could be said that the elected members had not at least had regard to those Guidelines. … The Minister did not say that he had considered that Dún Laoghaire Rathdown Council had not even had regard to the Retail Planning Guidelines and, even if he had, it is difficult to see what materials were available, having regard to the express terms of the resolution passed by the elected members, for coming to such a view."
[430] As noted above, this criterion of significance has been deleted from the PDA 2000.
[431] S.10(2) sets out the many subject-matters on which a development plan must contain objectives.

230. It seems to me that Clarke J's logic must also encompass other mandatory content of development plans, including, as relevant to the present case, s.81 PDA 2000 which requires objectives to designate and protect ACAs and Protected Structures.

231. Having considered the reasons given by the Minister for his direction and having found them wanting as described above, Clarke J returned *"to the question of whether it can be said that the Minister was entitled to consider that an overall strategy had not been set out for the proper planning and sustainable development of the area."*[432] He first observed that

> *"That the Draft Development Plan sets out a strategy cannot, in my view, be doubted. It sets out a series of zoning objectives which, on their face, amount to a strategy."*

Given that making development plans is a core function of planning authorities and it is extremely unlikely that a planning authority will neglect to at least attempt an overall strategy, the starting point will in practice be, in almost all cases, that the Plan sets out what *prima facie* appears to be an overall strategy.

POST-TRISTOR AMENDMENTS OF SS.10 & 31 & CASELAW

232. After **Tristor**, s.10 was amended, as has been noted above, to introduce additional mandatory content of development plans. As counsel for the Minister observes, there have been considerable amendments as to plan-making – generally to promote plan-led development via a hierarchy of plans cascading from the national[433] via the regional[434] and the county[435] to the local.[436] Consistency is required of each with the plans higher in the hierarchy. In particular, the NPF, RSESs and the OPR did not exist when **Tristor** was decided. As has been seen, by s.10(1A) a "*core strategy*" is now required, which must show that the development objectives in the plan are consistent, "*as far as practicable*", with NPOs and RPOs.[437] Counsel for the Minister, correctly, describes this as a "fundamental" and "centralising" change.[438] S.31 was, likewise, amended[439] to allow the Minister to police compliance with requirements of the PDA 2000 which had not been in place when **Tristor** was decided - to expand the circumstances in which the Minister might issue a direction to include, *inter alia* and by s.10(1)(ba), circumstances in which the development plan was not consistent with NPOs and RSOs. The OPR has also been introduced since **Tristor** to regulate and enforce these processes. There is no doubt but that these changes have tended to nationalise power in the planning policy-making system.

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[432] §7.16.
[433] e.g. the NPF.
[434] e.g. RSES.
[435] e.g. Development Plans.
[436] e.g. Planning Schemes for Special Development Zones s and Local Area Plans.
[437] and with SPPRs. By S.10(1D) a "separate statement" is required, which must show that the development objectives in the plan are consistent, "as far as practicable", with the conservation and protection of the environment. But that is not at issue in this case. The list of mandatory development objectives set out in s.10(2) was also expanded but it was not suggested that any are relevant in this case.
[438] Transcript Day 3 p.73.
[439] By the Planning and Development (Amendment) Act 2018.

233. But I do not read these amendments as altering the fundamental position, identified in **Tristor**, that ministerial directions are concerned with policing illegalities in the form of breaches by planning authorities of the Planning Acts – they are not to be deployed merely to vindicate the Minister's view of what is more desirable in local planning policy as between lawful alternatives. Humphreys J has expressed the same view recently in **FoIE**.[440] I consider that the post-**Tristor** amendments of ss.10 and 31 PDA 2000 do not amount to the clear and precise statutory language stated by Collins J in **Spencer Place** to be essential to transfer from planning authorities to the Minister, and clearly delineate, competencies as to the ultimate determination of development plan policy as a matter merely of judgement as between different lawful policies. If, in the Minister's opinion, a development plan is consistent with NPOs and RSOs, the Minister may not impose his preference for a different form of consistency with NPOs and RSOs. I note that in 2021, in the **Cork County Council case**,[441] Humphreys J cited Collins J in **Spencer Place** in quashing a ministerial direction which had relied on s.28 planning guidelines to which planning authorities were required only to have regard when making development plans. The logic of Humphreys J's decision is that **Tristor** is still authority that mere differences of planning policy will not justify a ministerial direction – what is required by the combined effect of s.31(1) and s.10 is a reasoned ministerial opinion that there is illegality in the development plan.

234. As has also been seen, in s.31 the introductory phrase "*Where the Minister considers*" was amended to "*Where the Minister is of the opinion …".* It is not apparent, nor was it suggested, that this has altered the sense of the section or the standard of judicial review of the view (to use a neutral word) taken by the Minister. The Minister's view whether the development plan is in breach of the law remains reviewable as to substance only for irrationality. But, still and crucially, the Minister must first have correctly interpreted and understood the law and the relevant documents and is judicially reviewable as to the correctness of that understanding. The question is not merely whether the Minister reasonably interpreted the law – (s)he is reviewable for error in that regard. As to the merit of his/her opinion that there is a breach of the law – an illegality - (s)he is reviewable for irrationality only.

235. There is still no requirement of compliance with the non-SPPR content of planning guidelines. So these amendments would not have produced a different outcome in **Tristor**. So it proved in the **Cork County Council** case.[442] But, as I have said, no complaint of that kind is pleaded here.

236. Humphreys J has recently expressed the following views in **FoIE**.[443]

> *"While the statutory detail has changed since the decision in Tristor it hasn't changed so much that the basic point made by Clarke J. there no longer applies, namely that the Minister has to do more than simply disagree with the council as to what is the most desirable provision to make …"*

[440] Friends of the Irish Environment v Minister for Housing, the OPR and DAA [2024] IEHC 588.
[441] Cork County Council v Minister for Housing [2021] IEHC 683.
[442] §58 et seq.
[443] Friends of the Irish Environment v Minister for Housing, the OPR and DAA [2024] IEHC 588 §125 & 126 & 138 – citing the passages cited above from Tristor §6.14 & 7.19.

> *"Tristor remains good law insofar as concerns the central holding that "[i]t does not seem to me that that language implies an entitlement on the part of the Minister simply to disagree with the strategy contained within the development plan …"*
>
> Where *"there is no legal breach involved"* there is no *"valid legal basis for a direction".*[444]
>
> *"…. the OPR (and the Minister … acting on OPR recommendations) is in effect a law enforcer, not a lawgiver. The OPR doesn't have jurisdiction to create new planning rules, policies or decisions. The role is to police the implementation of existing planning law and binding policy."*[445]

I respectfully agree with Humphreys J as to all of the foregoing.

237. The criterion whether there is a legal breach "*involved*" requires further elucidation. Humphreys J considers[446] the observation of Clarke J that *"[p]rovided that there is a strategy set out, and that it is reasonably described as an overall strategy for the proper planning and sustainable development of the relevant area, then it does not seem to me that the Minister is entitled to impose an alternative strategy simply because the Minister may prefer it".* Humphreys J says "*But we need to pay close attention to the language being used there. What this says, and what it means, is that central government can't impose another strategy 'simply because the Minister may prefer it'. What this does not mean is that the test is simply whether there is anything that can reasonably be described as an overall strategy. Nor does it mean that the Minister can't intervene if the question of compliance is a mixed question of fact and law which involves evaluative judgement rather than either mere preference at one end of the scale (where intervention isn't permitted) or clear illegality at the other (which obviously does warrant a direction). The present case falls within that intermediate zone where there is a scope for evaluative judgement as to compliance with binding national policies, so in principle the Minister has a legitimate role."*[447] For reasons I note below, I do confess to wondering whether FoIE was in the intermediate zone. It seems to me to have been quite a clear case of illegality.

238. Essentially, I understand the foregoing in terms similar to my understanding of Tristor - i.e. the Minister must first correctly understand the law and the materials before him and is judicially reviewable for error in those regard. Thereafter, as to merit, it is his application of the law to the facts and circumstances of the case in discerning illegality which is reviewable as to merit only for irrationality. See also, for example, **Four Districts**.[448]

239. And, of course, as their interpretation is itself a matter of law, the Minister must also have correctly understood any relevant planning policies and guidelines – including the NPF and any applicable RSES - on

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[444] Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §139. I have altered the syntax here but not the sense. I have also inserted the word "for" omitted by way, clearly, of a typo.
[445] Emphasis added.
[446] Friends of the Irish Environment v Minister for Housing [2024] IEHC 588 §138. See footnotes above as to reference to this case.
[447] Emphases added.
[448] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.

which he relies in making his direction. The Minister's Direction is reviewable for error in this regard. As was said in **Spencer Place**: *"… the interpretation of SPPR 3, and of the Guidelines generally, is ultimately a question of law for the Court and, as a matter of law, the opinion of the Minister as to its appropriate interpretation has no special status or effect*."[449] One may also refer, by analogy, to **Redmond**[450] in which Simons J observed, as to the Board's obligation to have regard to a development plan, that it must first correctly answer the "*logically anterior question*" of its interpretation. On that basis, Farrell J in **Grafton**[451] recently repeated the orthodoxy that interpretation of a "*development plan is a matter of law to be determined by the Court*". Obviously, the same can be said for the NPF, the RSES and the NPOs and RPO's which they contain: the validity of a ministerial direction turns, in part, on the Minister having interpreted them correctly.

Cork County Council case (2021) – Tristor still the Law

240. The **Cork County Council case**[452] post-dated the amendments of ss.10 and 31 PDA 2000. It applied **Tristor** to the effect that non-compliance of a development plan with non-binding planning guidelines was not a proper basis for a ministerial direction as such non-compliance was not illegal.[453] Humphreys J said: *"The really crucial point is that the Minister in Tristor made an error quite similar to the one here."*[454] As observed earlier, there is no plea in the present case of invalid reliance by the OPR or the Minister on planning guidelines. However, it will be readily seen that **Tristor** remains relevant. The same underlying principle is at issue here. That principle is that a ministerial direction may not be based on a mere difference of opinion – of planning judgement – as between proper choices of planning policy. Only a Ministerial opinion of illegality will suffice. Humphreys J cited **Tristor** to that effect in his introduction to his judgment in the Cork County Council case and said, "*A similar logic applies here*".[455] In similar vein, Humphreys J later said: "*The fundamental point here is very similar to that discussed by Clarke J. in Tristor at para. 6.14. The concept of a lack of an overall strategy does not envisage a merits-based disagreement. The situation has to be one where the council did not have a strategy that could qualify as an overall strategy."*[456] By the word "*qualify*", I understand compliance with s.10 PDA 2000.

241. Cork County Council is also notable for the rejection "*for a host of reasons*" of an argument that the OPR was entitled to make a recommendation mandating something that would not otherwise be mandatory in planning law. Not least *"it would give the OPR a substantive policy-making role that would fundamentally recalibrate the balance of functions within the planning system. As Collins J. said in Spencer Place, any such change would need to be expressly articulated. This is particularly so where it would involve such a major*

[449] §89.
[450] Redmond v An Bord Pleanála [2020] IEHC 151 §27 (Simons J citing the UK Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; Navan Co-ownership v An Bord Pleanála [2016] IEHC 181; and Kelly v An Bord Pleanála [2019] IEHC 84). See also Heather Hill Management Company v An Bord Pleanála [2019] IEHC 450 §42.
[451] Grafton Group PLC v An Bord Pleanála [2023] IEHC 72 §23.
[452] Cork County Council v Minister for Housing [2021] IEHC 683.
[453] §58 et seq.
[454] §46.
[455] §§ 47 & 48.
[456] §63.

inroad into the jurisdiction and powers of local authorities."[457] Later, and in similar vein he said the OPR and the Minister had erred by "*trying to shoehorn the circumstances here into the s.31 process even though the council did not fail to comply with any requirement that was actually binding on it.*"[458] Thus, Humphreys J prefigured his pithy observation in **FoIE**[459] that, as to recommendations and directions, the OPR and the Minister are law enforcers, not lawgivers.

FoIE - Dublin Airport Noise Schemes case (2024)

242. Humphreys J in **FoIE**[460] decided a challenge to a ministerial direction to remove text from a Fingal County Council development plan which

- recorded the elected members' view that aircraft noise insulation schemes for homes near Dublin Airport were inadequate – primarily as their noise thresholds were too high, such that the geographical reach of the schemes was inadequate, and
- set an objective to expand the geographical reach of those schemes by reducing their noise thresholds.

243. The Minister's stated reasons for his impugned direction recorded that the development plan text in question

- conflicted with the separate and exclusive statutory provisions and processes for the regulation of airport noise and the making of the Dublin Airport Noise Action Plan by the ANCA[461] designated pursuant to the Environmental Noise Regulations,[462] and
- was inconsistent with NPO65.[463]

Though its application is not limited to airports, NPO65 is to:

> *"Promote the pro-active management of noise where it is likely to have significant adverse impacts on health and quality of life and support the aims of the Environmental Noise Regulations through national planning guidance and Noise Action Plans."*

244. Given these issues were outside the competence of the elected members, Humphreys J described the members' text, the removal of which the minister had directed, as "*fairly symbolic wording*" which "*did not in itself do anything*", nor could it bring a more demanding insulation scheme into existence.[464] He recently described the case as a "storm in a teacup"[465] – though he upheld the Minister's direction.

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[457] §56.
[458] §62.
[459] See below.
[460] Friends of the Irish Environment v Minister for Housing [2024] IEHC 588.
[461] Aircraft Noise Competent Authority. This authority was also Fingal County Council but operating as such under legislation distinct from the PDA 2000. Notably, the functions of the ANCA are exercised by the Chief Executive of the Council, not by its elected members.
[462] European Communities (Environmental Noise) Regulations 2018, as amended.
[463] National Policy Objective 65 of the National Planning Framework.
[464] §6.
[465] Coolglass Wind Farm v An Bord Pleanála [2025] IEHC 1.

245. Humphreys J concluded that the Ministerial direction was not based on an error of law as it was *"an evaluative judgment as to the application of NPO 65, that, on the facts, hasn't been shown to fall outside the zone of legitimate planning judgement by the Minister*". I would respectfully prefer to frame the issue as whether the direction had been shown to fall outside the Minister's zone of legitimate judgement as to whether the Plan was in breach of the law. It seems to me that the view of the Minister in his direction and the view of Humphreys J in that case are consistent with such a framing.

246. It seems to me that Humphreys J, though faced with an issue in, as he put it the "*intermediate zone where there is a scope for evaluative judgement as to compliance with binding national policies",* was faced with an issue towards the "*clear illegality*" end of the scale as he described it. After all, the Minister's reason essentially was that the content of Noise Action Plans for Dublin Airport were by legislation a matter exclusively for the ANCA[466] - and not for its elected members in exercising their powers to make a development plan. If I may respectfully say so and while I agree that the case was in one sense a storm in a teacup, on its facts the decision in **FoIE** seems unsurprising.

247. Before I leave **FoIE** I should note that, though an NPO[467] was at issue in that case, the decision of the Supreme Court in **Killegland**[468] as to the precatory nature of at least some NPOs does not seem to have arisen in argument. Obviously, I do not say that, on the facts of the **FoIE** case, **Killegland** should have arisen for argument. Not least, NPO65 as to noise action plans, when read in the context of the jurisdictional division of powers as between the elected members qua planning authority and the chief executive qua ANCA, could readily be read as non-precatory in nature and quite different in that sense to the NPO at issue in **Killegland**.

S.10(1A) PDA 2000 – INTERPRETATION

"As far as is practicable" - Caselaw

248. As Humphreys J said in **Protect East Meath**,[469] the requirement of s.10(1A) PDA 2000, that the core strategy of a development plan show that the plan's development objectives are consistent "*as far as practicable*" with NPF and RSES development objectives, is a not a "*have regard to*" obligation. It is a "*comply with*" obligation. So, a conclusion of non-compliance is a conclusion of illegality and, if valid, is capable of justifying a s.31 direction.

[466] in effect, the Chief Executive of Fingal County Council.
[467] National Policy Objective of the National Planning Framework.
[468] Killegland Estates Ltd v Meath County Council [2023] IESC 39.
[469] Protect East Meath Ltd v Meath County Council (No.2) [2023] IEHC 69 §19. §19 in fact reads that a core strategy must show "that the objectives of the plan are consistent as far as applicable with the NPF and the regional strategy" – but that "applicable" is a typo and should read "practicable" is obvious.

249. But the concept of compliance does not fully describe the requirement: one must also discern the substance and degree of the obligation with which compliance is required. That substance is one of "*consistency as far as practicable*" with objectives of the NPF and RSES. The words "*consistent, as far as practicable*" are important. They do not impose a requirement of absolute or rigid compliance or even of absolute or rigid consistency.

250. The parties didn't really argue whether the phrase "*consistent, as far as practicable*" imposed discrete and sequential tests of consistency and practicability or whether it imposed a single composite test. However, the Minister in effect posited a sequential test: he characterised the OPR's role as *"assessing whether there is compliance or if the elected members are saying we can't comply because it's not practical to do so, whether their reasons are valid."* I incline to the single composite test: discrete tests seem to me artificial and the words "*as far as*" imply a relativity linking the concepts of consistency and practicability. Impracticability does not excuse non-compliance: it delineates the degree of compliance required. When one adds the consideration that, as to at least many NPF and RSES objectives, the requirement is only of general consistency (**Killegland**[470]), and that the question is almost always context-specific, the argument for a composite test seems to me amplified. Thus, I do not think the OPR's argument particularly helpful in suggesting that the "*onus is on the party arguing in favour of non-compliance to show why consistency with the NPF/RSES is not "practicable"*[471] and its reliance on **Protect East Meath** overstates the point made in that case. In that case there was no dispute worth having but that there was non-compliance and that compliance was practicable. Humphreys J said that "*since compliance could be achieved simply by a mathematic exercise and a prioritisation of lands along the lines expressly articulated in the previous development plan, it is evident on the facts that there is no impracticability involved at all*."[472]

251. The word "*practicable*" in statutes, typically in phrases such as "*as far as practicable*" and "*as soon as practicable*" and "*reasonably practicable*", has received extensive judicial attention – notably in **O'Donovan**,[473] **McC**,[474] **Ruigrok**,[475] **Gillen**[476] and **Boyle**.[477] The word "*practicable*" has been described as imposing a "*demanding and somewhat unforgiving standard*"[478] and synonyms are used such as "*feasible*", "*doable*" and *"capable of being carried into action in a practical way, having regard to such practical difficulties as exist and may legitimately, having regard to the context and provisions of the Constitution generally …".* One may cite these cases for the proposition that, generally, the phrase "*as far as practicable*" lies somewhere on the spectrum between "*as far as is reasonable*" and "*as far as possible*" – being more demanding than the former and less so than the latter.

[470] Killegland Estates Ltd v Meath County Council [2023] IESC 39.
[471] OPR Written Submissions §19.
[472] §46.
[473] O'Donovan v AG [1961] IR 114, (1961) 96 ILTR 121.
[474] McC v Eastern Health Board [1997] 1 ILRM 349, [1996] 2 IR 296.
[475] Ruigrok v The Commissioner of An Garda Siochana [2005] IEHC 439.
[476] Gillen v The Commissioner of An Garda Síochána [2012] IESC 3, [2012] 1 IR 574.
[477] Boyle v Marathon Petroleum [1999] 2 IR 460.
[478] Gillen.

252. But the cases also establish that, as always in statutory interpretation (**A, B & C**[479]), much may turn on context. That was said by the Supreme Court as to the word "*practicable*" as long ago as **Re Equitable Insurance**.[480] In the present context, the meaning of "*practicability*" must be informed by its application to a

- Policy-making process. This is quite different to a more discrete, technical, calculable or physical requirement or a requirement invoking concepts of constitutional justice in adversarial disputes, such as the appointment of an investigating officer in a Garda disciplinary process in **Gillen**, expedition in disciplinary proceedings or worker safety as in **Boyle**, or the calculation of Dail membership ratios to constituency populations as in **Donovan**. And even in **Donovan**, though the test of practicability was failed on the facts, the phrase "*as far as practicable*" was considered *"distinct from any notion of mathematical accuracy*" and to require, in its particular context, a *"liberal, commonsense construction".*

- Requirement of consistency with policies which, *inter se* and inevitably, "*pull in different directions*"[481] – not least in their collective application to particular locations.

- Process of making a development plan characterised in very considerable degree by the making of evaluative multi-factorial planning judgements of the "apples and oranges" variety – not least as between policies which "*pull in different directions*".
- Requirement of consistency with NPF and RSES objectives which, not untypically, are framed in high-level, general and/or precatory terms, such that the obligation is one of general not detailed consistency (**Killegland**[482]).

- Requirement of consistency with NPF and RSES objectives as to which there may in a given respect be multiple means of consistency. And as **Tristor** makes clear, the planning authority can have its choice of those means and the Minister cannot interfere merely for disagreement with that choice.

- Deliberative democratic process of a local government organ having a status recognised by Article 28A of the Constitution (**Killegland**). As Humphreys J said in **Jones**:[483] "*The determination of land use objectives in a development plan is perhaps the single most significant policy function entrusted to elected local councils, … 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*."[484]

- Process of transfer of planning policy-making power from the local to the national which is expected to be expressed in clear terms and which should not be effected beyond those clear terms (**Spencer Place**).

253. In that context, I respectfully suggest that the "*demanding and somewhat unforgiving standard*" contemplated in **Gillen** may not have had in its contemplation a process so very different to a disciplinary

[479] A, B & C v Minister for Foreign Affairs [2023] IESC 10, [2023] 1 ILRM 335. Delaney v Personal Injuries Board & Ors [2024] IESC 10.
[480] Re Equitable Insurance & Butler [1970] IR 45 - albeit as to an issue of contractual, not statutory interpretation but in which O'Donovan was cited by the Court.
[481] Lord Hope in Tesco v Dundee, supra.
[482] Killegland v Meath County Council [2023] IESC 39 - see below.
[483] Jones v South Dublin County Council [2024] IEHC 301 §1.
[484] Jones v South Dublin County Council [2024] IEHC 301 §230.

process as the making of a development plan or the like of s.31 PDA 2000. The first recourse, as between policies pulling in different directions, is reconciliation. But that is not always possible and, in any event, reconciliation comes in degrees such that, often, the greater the consistency with the one policy, the less the consistency with the other. As Humphreys J might say, the planning authority is entitled to its "*trade-offs*".[485] In my view, the word "*practicable*" in the present context allows "*significant margin of appreciation*" to planning authorities so that, by their choices, they will not be placed in a Catch-22 – i.e. at risk of being, in respect of a conclusion of having descended into illegality as to the reconciliation of policies pulling in different directions, damned if they do and damned if they don't, depending on which of those policies the Minister considers at a particular point of time and as to a particular location, the more compelling (no doubt for legitimate planning reasons).

254. This view seems to me supported by the use of the same phrase in s.10(1D), PDA 2000. It requires a statement in the development plan showing consistency "as far as practicable" with the conservation and protection of the environment. The phrase is highly unlikely to have two different meanings in the same statutory section. A moment's reflection on the breadth of the meaning of the word "environment"[486] and on the scope and multi-factoriality of the considerations, evaluative judgements and compromises (many of an expert nature) required in the conservation and protection of the environment suffices to infer that, in the particular context of s.10 PDA 2000, the words "*as far as practicable*", while impressing the solemnity of its obligations on the Planning Authority, nonetheless confer on it an appreciable margin of appreciation in the choices it may make in meeting that obligation. And, of course, the requirement that a development plan show consistency as far as practicable with the conservation and protection of the environment incorporates a requirement to show consistency as far as practicable with the conservation and protection of architectural heritage such as that at issue in the 0/0 Objective Areas – see for example **MRRA**.[487]

255. Yet, whatever the degree of consistency required, practicability excludes *"mere matters of convenience"* – **Donovan** - and its requirements are not so lax, or for that matter nearly so lax, as to operate as a "*get-out-of-jail-free card*[488] *to allow the national and regional strategy to be contravened where compliance is not in fact impracticable*" - **Protect East Meath**. In that case, the planning authority had not "*demonstrated that compliance with regional policy objectives in this respect was even difficult let alone impracticable*." Humphreys J observed that *"no particularly valid reason has been offered for not complying with the policy objectives of the NPF, and we are certainly miles removed from a situation where such non-compliance has been shown to be justified by reference to the impracticability of doing so. Hence unfortunately the A2 zonings … were not adopted in compliance with s.10(1A) of the 2000 Act."*[489] But as I have said, on the facts of that case there was no dispute worth having but that there was non-compliance and that compliance was practicable.

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[485] e.g. Reid v Bord Pleanála [2024] IEHC 27 citing "Thomas Sowell's aphorism that there are no solutions, only trade-offs."
[486] As to which see, inter alia, TestBioTech v Commission, T-33/16, EU:T:2018:135, §§ 43 and 44; ClientEarth v European Investment Bank [2021] All ER (D) 99 (Jan), T-9/19, §118 – 120, Jennings v An Bord Pleanala [2022] IEHC 249 §52 et seq.
[487] Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 - generally and in particular §135 as to the fact that the EIA Directive and Regulations specify, as elements of the environment for EIA purposes, "cultural heritage" and "sites of historical (or) cultural … significance" "including Architectural … aspects and landscape" including "urban historical sites and landscape" and the "change in the appearance or view of the built or natural landscape and urban areas".
[488] This I imagine to be a reference to the well-known board game, Monopoly.
[489] Protect East Meath Ltd v Meath County Council (No.2) [2023] IEHC 69 §30.

Consistency with NPF & RSES Development Objectives – s.10(1A) and s.31(1)(ba) PDA 2000 Compared

256. As has been noted, by s.10(1A) PDA 2000 a development plan must include a core strategy showing consistency as far as practicable with NPF and RSES development objectives. Notably, s.10(1A) omits the definite article in requiring consistency with "*development objectives set out in the*" NPF and RSES. It does not require consistency with the "*development objectives set out in the*" NPF and RSES - much less with "all" such objectives. This strikes me as deliberate and unsurprising as reflecting the necessary flexibility, discretion and margin of appreciation in the planning authority in fashioning a development plan which must reconcile and accommodate NPF and RSES development objectives which may be in tension or which may require differentiated application to meet the specific circumstances of its functional area or of parts of its functional area. In my view, this analysis is of a piece with

- my analysis, set out above, of the requirement of consistency "*as far as practicable*",
- the analysis in **Killegland**[490] that, as to at least many NPOs and RPOs, the requirement is of general, not detailed, consistency.

257. On the other hand, s.31(1)(ba) PDA 2000 is in balder terms: it permits a ministerial direction where a plan is not consistent with *"the national and regional development objectives*" of the NPF and RSES. Here, and in contrast to s.10(1A), the definite article is included and the qualifier "*as far as practicable*" is absent. Faced with the difficulty of reconciling s.10(1A) and s.31(1)(ba) in these respects, it seems to me that I should have regard to

- the requirement of Collins J in Spencer Place that statutory provisions transferring competences from the local to the national be clear and be effected only to the extent of such clarity;
- the analysis in Killegland that the requirement is of general, not detailed, consistency;
- the reality that NPOS and RPOs are, *inter se*, at very least and often, in appreciable tension requiring reconciliation as applicable to particular locations;
- the analysis above as to the contextual meaning of the words "*as far as practicable*";
- the fact that it is s.10(1A) which imposes the substantive obligation on the planning authority by reference to which the legality or illegality of its development plan is to be considered.

In those lights, I consider that I should give greater weight to s.10(1A), such that it prevails as to any difference between it and s.31(1)(ba).

258. Accordingly, the Minister must, in forming the opinion of the existence of illegality in the development plan necessary to issue a direction in reliance on s.31(1)(ba), respect the margin of appreciation which s.10(1A) confers on the planning authority as to consistency with NPOs and RPOs.

[490] See below.

S.31 & S.31AM(8) PDA 2000 – "OF THE OPINION" – CASELAW

259. As has been seen, s.31 originally applied where the Minister "*considers*" certain circumstances to exist and Clarke J in **Tristor** thought the word "*considers*" decisive to the effect that the Minister's decision as to illegality of the development plan was reviewable, as to merit, only for irrationality. As amended, s.31 now applies where the Minister is "*of the opinion*" that certain circumstances exist. The same law as to the effect of the word "*opinion*" applies to the OPR's role. Specifically, s.31AM(8) permits the OPR to issue a notice to the minister enclosing a draft direction only where it is "*of the opinion*" that the criteria of s.31AM(8) are satisfied.

260. The meaning of the phrase "*of the opinion*" was elucidated in the **State (Lynch) v Cooney**[491] ("**Lynch**"). In that case, the Supreme Court upheld the constitutionality of s.31 of the Broadcasting Act 1960 on the basis that the minister's power was not absolute to direct RTÉ to refrain from broadcasting matter of which he was "*of the opinion"* that its broadcasting would tend to undermine the authority of the State.[492] The power was not absolute in the sense that its exercise was subject to judicial review – but only, as to merit, in that the opinion "*must be bona fide held and factually sustainable and not unreasonable*".

261. There have been varying views as to whether the word "*satisfied*" is synonymatic with the phrase "… *is of the opinion* …". In **PL**[493] the Court of Appeal held, citing **Lynch**, that *"Any opinion formed pursuant to the exercise of a statutory power must be 'bona fide held and factually sustainable and not unreasonable' and this phrase connotes 'a laxer and more arbitrary level of ... assessment' as compared with a statutory test which requires the decision maker to be 'satisfied'".* However, the weight of authority is to the contrary. Recently, Bradley J, in a **Sweetman** case[494] held the two formulae synonymatic and that, in both instances, the question for the court is whether the opinion is *bona fide* held, factually sustainable, and not unreasonable.[495] In **Waltham Abbey**,[496] Hogan J for the Supreme Court considered it long-established that the requirement that a decision-maker be "*satisfied*" of a certain state of affairs requires that the decision-maker discharge its power in a manner which is *bona fide*, factually sustainable and not unreasonable and has correctly defined the ambit of the statutory power. This formula seems the same as that applicable to an opinion. The Court of Appeal in **Used Car**[497] observed that the most significant feature of **Lynch** was its conclusion that a statutory power framed by reference to an opinion was no different, in terms of its amenability to review, than a power framed by reference to whether a Minister was "*satisfied*" of a particular matter. In any event, I doubt that any distinction between being "*satisfied*" and being "*of the opinion*" could often make a difference in practice in a particular case.

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[491] [1982] IR 337.
[492] In practice for many years, the power was used, in the context of the troubles in Northern Ireland, primarily to prohibit the appearance of spokespersons for and officials of Sinn Fein and the IRA from appearing in broadcast media.
[493] PL v Clinical Director of St. Patrick's University Hospital [2018] IECA 29 §35.
[494] Sweetman v The Environmental Protection Agency [2024] IEHC 55 - considering a provision that the EPA could issue an industrial emissions licence only if "satisfied" that the emissions would not cause significant environmental pollution.
[495] Citing Waltham Abbey & Ors v An Bord Pleanála [2022] IESC 30 per Hogan J §28; Kiely v Kerry County Council & Ors [2015] IESC 97 per McKechnie J §68 to 71; State (Lynch) v Cooney [1982] IIR 337 per O'Higgins CJ at page 380; Kiberd v Hamilton [1992] 2 IR 257 per Blayney J at 265.
[496] Waltham Abbey & Ors v An Bord Pleanála [2022] IESC 30.
[497] Used Car Importers of Ireland Limited v The Minister for Finance [2020] IECA 298 §171 et seq - considering a question as to the levying of Vehicle Registration Tax, the calculation of which depended on the "opinion" of the Revenue Commissioners as to the price the vehicle might reasonably be expected to fetch on an open market sale.

262. Murray J in **Used Car** made the observation I have just cited to point up his rejection of the suggestion that **Lynch** establishes a particular standard of review of the exercise of a power defined by the formation of an "*opinion"* as a precondition to such exercise. His reference to a "*particular*" standard of review must be understood as his rejection of an argument[498] by the applicant for judicial review that the requirement that an "*opinion*" be "*bona fide held and factually sustainable and not unreasonable*' represented a special and more demanding test than is ordinarily applied in judicial review – one requiring heightened scrutiny of the factual basis for the opinion and imposing a burden of justification on the decision-maker. In other words, Murray J states that, save in one respect, the ordinary standards of judicial review apply. The merits of the opinion are reviewable only for irrationality - a standard *"defined by … the limited scope for judicial intervention".*[499]

263. As to the requirement of factual sustainability Murray J, citing authority, appears to have interpreted it limited to the objective existence of any fact the existence of which was, on a proper interpretation of the statute creating the power the exercise of which is being considered, a jurisdictional pre-condition to the formation of the opinion and exercise of the discretion in question.[500] As to <u>such facts</u> ".. *the court must inquire whether those facts exist and have been taken into account …"* and once that objective criterion is satisfied the subjective "*evaluation of those facts"* is for the decision-maker, not the court.[501] I think that, in citing O'Higgins CJ in Lynch to the effect that *'… the Court's only concern is to enquire whether, in using his statutory powers, the Minister acted reasonably in accordance with the factual situation <u>as he saw it</u>',*[502] Murray J was referring to the factual situation other than as it related to facts being a jurisdictional pre-condition. As to the existence of such non-jurisdictional facts and as to the evaluation of all facts he considered that the decision-maker's judgment is reviewable as to merit only for irrationality. This understanding seems confirmed in that Murray J also observed that certain types of decision are not best viewed as predicated on the objective existence of any fact. They raise issues of *"approach and analysis rather than of fact per se"* and in such cases it is *"more apposite to look at … whether the decision maker acted 'reasonably in accordance with the factual situation as he saw it', whether 'the evidence was sufficient … to enable a Minister reasonably to form the opinion' and whether the decision maker misapplied his discretion 'through taking into consideration irrelevant matters of fact or through ignoring relevant matters'."* As to such decision, if I understand correctly, the criterion of factual sustainability does not arise for application: as to merit, the entire decision – as to fact discernment and fact evaluation and as to the application of evaluative judgment to the process of deriving a decision from the facts and other relevant matters – is reviewable only for irrationality.

264. It seems to me that, in the present case, the making of a direction under s.31 PDA 2000 falls into the category of *"approach and analysis rather than of fact per se"*. But so too does the Elected Members' decision to maintain the 0/0 Objective – while the word "opinion" or the like is not used in the description of their decision-making power, the whole point made by Murray J is that the ordinary standards of judicial

[498] Recorded at §174 et seq.
[499] §181.
[500] §176.
[501] Murray J, citing Lord Wilberforce in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014 at p. 1047.
[502] Emphasis added

review apply – that the exercise of a power predicated on an opinion was no more prone to review than the exercise of other differently phrased statutory discretions.

265. As to the opinion itself, Murray J cites Henchy J in Lynch as referring to "*the opinion or other subjective conclusion*" – indeed, Henchy J refers to the "*prescribed opinion*" as "*necessarily subjective*". In CIT,503 Hogan J held that the phrase "*in the opinion of the planning authority*"[504] involved some degree of subjective appraisal by the decision maker. Hogan J said that the principles that an "*opinion*" must be "*bona fide held and factually sustainable and not unreasonable*' had been emphatically restated by Fennelly J for the Supreme Court in **Mallak**.[505]

266. The precise meaning of the word "subjective" in a particular context can be difficult to pin down – perhaps the more so when subjectivity is permissible only to some degree. Not least, that prompts the inquiry: to what degree and within what resulting bounds? In one sense, the word means no more than to recognise that a decision or opinion may be personal to the decision-maker - so decision-makers may validly differ in the substance of their decisions or opinions. In another, the word may imply an entitlement to act on beliefs, attitudes and opinions instead of verifiable evidence.[506] It seems to me that, as to a s.31 direction the word applies in both senses – in the latter sense to a degree only. So the Minister in forming his opinion must act on evidence (construing that word broadly and as not confined to evidence which would be admissible in a court) where reasonably available and, where evidence is not reasonably available (s)he may act on beliefs and judgements based on expert, and indeed other, experience. This may be particularly so as to the prediction of future outcomes of possible courses of action. An example, in the present case, is the view that residential development in the 0/0 Objective Areas on the DART line would or could in useful degree, encourage jobs, activity and growth. Nonetheless of course, even as to decisions not raising issues of factual sustainability, the Minister must act *bona fide* and reasonably.[507]

<u>McCarthy Meats (2020)</u>

267. **McCarthy Meats**[508] sought to quash a ministerial direction made under s.31 PDA 2000 which resulted in the de-zoning of its lands in the Sallins Local Area Plan ("SLAP"). Notably, before the direction was made, the SLAP had zoned land for 1,123 housing units in Sallins, whereas the development plan target was 527. The Minister's direction stated his opinion that,

- Kildare County Council, in making the SLAP, had ignored or had not taken sufficient account of submissions to it by the Minister.

[503] Cork Institute of Technology v An Bord Pleanála & Cork City Council [2013] 2 IR 13.
[504] Article 157(1) PDR 2001.
[505] Mallak v Minister for Justice [2012] IESC 59, [2012] 3 IR 297.
[506] https://thelawdictionary.org/subjective/
[507] Citing The State (Lynch) v Cooney [1982] IR 337; and Kiberd v Mr Justice Hamilton [1992] 2 IR 257.
[508] McCarthy Meats v The Minister for Housing and Kildare County Council [2020] IEHC 371, [2020] 7 JIC 2707.

- the SLAP was in breach of ss. 19, 20[509] and 28[510] PDA 2000. S.19(2) required that an LAP be "*consistent with the objectives of the development plan, its core strategy, and any*" applicable RSES.

268. Heslin J pointed out, echoing **Tristor**,[511] that s.31(1)(a) does not require, before the Minister can issue a direction, that a planning authority has ignored or has not taken sufficient account of the Minister's submissions. Nor does s.31(1)(c) require that an LAP be non-complaint with the PDA 2000. S.31, rather, requires that the Minister be "*of the opinion*" that these criteria are satisfied.[512] The s.31 test is subjective, not objective.[513] The question for Heslin J was not whether he agreed with the Minister's opinion (though he did and that informed his answer to the correct question) but was whether the Minister was "*entitled to hold it*"[514] as it was "*a rational … view*" on the evidence before him. Heslin J clearly regarded the Minister's opinion, as to its substance, reviewable only for irrationality.[515] The Minister in the present case correctly describes this as the same approach as Clarke J had adopted in **Tristor.**[516]

269. Heslin J characterised the position in McCarthy as "*wholly different*"[517] to that in **Tristor** by reason of later amendments of the PDA 2000, including those which introduced requirements of consistency with NPOs and RPOs and, perhaps primarily, the ministerial power to make a direction in respect of a Local Area Plan where it was, in his opinion, inconsistent with the core strategy of the Development Plan in breach of s.19(2) PDA 2000. That Heslin J did not suggest that the Minister's power of direction now extended to mere differences of planning policy and that it remained confined to situations of illegality is confirmed by his description of *"the legal position which pertained, in particular, the requirements of s.19(2) and the extent of the Minister's power under s.31(1)(c)."* S.31(1)(c), as we have seen, relates only to illegality – where the plan is non-complaint with the PDA 2000.

270. However, on the facts there can be little doubt that Heslin J was, if I may respectfully say so, correct in discerning ample evidence that the SLAP breached s.19(2). Heslin J's own view that the SLAP represented a "*stark example of inconsistency*"[518] is easily understood where the SLAP had zoned land in Sallins for over double the number of housing units stipulated in the development plan housing target for Sallins. On those facts, the inconsistency was indeed stark and calculable. The facts were clear and compelled the answer. Heslin J's observation that *"The phrase "shall be consistent with" has an obvious meaning"* is entirely

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[509] S.20 restricted the members of the planning authority to considering the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.
[510] Which requires planning authorities to have regard to ministerial guidelines in the performance of their functions.
[511] As to the result, Heslin J distinguished Tristor as based on different facts and a different legislative regime – which did not allow of a direction in respect of an LAP.
[512] As I have stated above, for my part I would prefer to analyse s.31 as indeed requiring compliance with the PDA 2000 but as designating the Minister as the judge of such compliance.
[513] §179.
[514] §200.
[515] See also §200 et seq and §234 et seq.
[516] Transcript Day 3 p84.
[517] McCarthy §220.
[518] §201. That Heslin J agreed with the Minister as to the fact of inconsistency of the SLAP with the Development Plan is confirmed at §199 and 200 – though, of course, he did not thereby suggest that his agreement was required. At §200 Heslin J said: "The phrase 'shall be consistent with' has an obvious meaning and it is a matter of fact that the contents of the Sallins LAP, as adopted by the elected members, was inconsistent with the contents of the KCDP …".

understandable in that context and as it preceded **Killegland**. So, it does not seem to me that McCarthy sheds much light on the circumstances of the present case beyond that shed in **Tristor**.

Opinion as to Illegality – Restraint by the Minister

271. As I have said, though reviewable only for irrationality, the Minister's opinion necessary to making a s.31 direction must be an opinion as to illegality of the development plan. That is an unusual situation in that, by characterising the determination of legality as the merits of the impugned decision, it insulates the Minister in very considerable degree from the court's usual role as the ultimate arbiter of legality. Yet **Tristor** is also authority that the opinion must not be formed merely to advance mere disagreements with the planning authority as to making or effecting planning policy or as to planning judgements not amounting to illegalities. As the question whether the case is one of such a mere disagreement must be justiciable, it will be appreciated that the task for the court may, in at least some cases, be one of some delicacy.

272. **Killegland**[519] sheds additional light on the Minister's entitlement to form an opinion as to illegality. To support a s.31 direction, the Minister's opinion must be that the exercise of its statutory powers by a constitutionally recognised[520] democratic organ of local government was illegal. Remembering that judicial review by the courts is always concerned only with illegality, as is the Minister in issuing a direction, it seems notable that, in **Killegland**, both Humphreys J in the High Court and Hogan J in the Supreme Court expressed the following views.[521]

> *"… 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. This reflects the fact that there is room for evaluative assessment of different planning options and thus in some situations there is no completely objective solution to the question of balancing different development considerations."*[522]
>
> *"The decision at issue in the adoption of a development plan is inherently policy related and political, and a court must be very slow to interfere with that. Nonetheless the court is required to assess the legality of the decision."*[523]

So too, MacGrath J in **Kenny**:[524]

> *"… it is important that the court recognise the democratic process which was followed in the adoption of various plans (including) … the LAP and the Development Plan."*

[519] Killegland Estates Ltd v Meath County Council [2022] IEHC 393, [2023] IESC 39.
[520] Article 28A of the Constitution.
[521] Both citing Malahide Community Council Ltd v Fingal County Council [1997] 3 IR 383 at 398.
[522] Humphreys J in the High Court.
[523] Hogan J in the Supreme Court.
[524] Kenny v An Bord Pleanála [2020] IEHC 290.

To the foregoing one may add Humphreys J in **Protect East Meath #2**[525] to the effect that

> *"… a court should be slow to interfere with the democratic decision of local elected representatives when making a quasi-political collective decision such as the adoption of a development plan."*

273. In similar vein is the citation by Humphreys J in **Killegland**, in considering the ministerial power with which we are now concerned, of Denning MR who upheld a ministerial direction as to the sale of a council house.[526] Denning MR termed it

> *"a most coercive power in a minister of the Crown … if he considers that a local authority is not performing its duty, to declare that the authority is in default and to take steps to ensure that the function is properly performed." It "enables the central government to interfere with a high hand over local authorities …".*

Accordingly, he considered that *"Local self-government is such an important part of our constitution that, to my mind, the courts should be vigilant to see that this power of the central government is not exceeded or misused."*

274. Importantly, both Humphreys J and Hogan J in **Killegland** placed these views in a specifically constitutional context, adding that:

> *"The fundamental principle is that constitutional architecture lends itself to autonomy of local authorities, so if central government propose to interfere, the entitlement to do so has to be at least tolerably clear." - Humphreys J.*
>
> *"These sentiments[527] 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…" - Hogan J.*

275. The foregoing observations seem to me to chime, at least generally, with the views of Collins J in **Spencer Place**,[528] cited above, to the effect that the Oireachtas may certainly amend the PDA 2000 to confer on the Minister additional powers impacting on existing planning structures and processes and transferring power from local to national government, but the Oireachtas *"should do so clearly and precisely and the courts should avoid giving such legislation effect beyond what is clearly provided for. It is essential that the*

[525] Protect East Meath Ltd v Meath County Council (No.2) [2023] IEHC 69.
[526] In R v Secretary of State for the Environment, ex parte Norwich City Council [1982] QB 808, [1982] 2 WLR 580. The introductions of sale of, and tenant purchase rights as to, council houses was a great political controversy in the UK at that time. The court was at pains to emphasise the apolitical nature of its decision.
[527] i.e. those set out above as to judicial restraint in interfering with the democratic decision of the local elected representatives.
[528] Spencer Place Development Company Limited v Dublin City Council [2020] IECA 268, [2020] 10 ICLM 96.

respective competencies of all of the actors involved – Minister, planning authorities and ABP – should be clearly delineated."

276. As the Minister, in making a s.31 direction is, like the court in the situations envisaged by Humphreys and Hogan JJ, concerned not with mere planning disagreements as between options each consistent with NPF and RSES objectives, but with discerning the legality or illegality of a development plan framed by the democratic decision of the local elected representatives, who have a constitutional status and who are entrusted with making such decisions by the legislature, it seems to me to follow that the Minister must, as must a court:

- be very slow to interfere by way of s.31 direction - at least on grounds of irrationality of the planning authority's decision;
- respect the margin of appreciation in the planning authority, which I have identified above, as to the reconciliation of tensions between NPF and RSES development objectives;
- where possible, generally interpret a development plan with a view to its validity rather than its invalidity.

277. This consideration, it seems to me, tempers the latitude conferred on the Minister by the word "*opinion*". This is not a matter of rejecting the authorities cited above as to the standard of review of a statutory opinion. It is merely a matter of applying the uncontroversial principle that the word "*opinion*" must, like any other word in a statute, be interpreted in context. And here the constitutional and legal context suggests self-restraint in the Minister. That in turn suggests that the review of his opinion on grounds of irrationality – though it remains a high bar requiring demonstration of fundamental variance with reason and common sense - may be informed by the flexible response of the law of irrationality to circumstance. That flexibility was recognised in the Supreme Court in **Meadows**.[529] Indeed, the constitutional context in Meadows was one of fundamental rights. But there is, as has been noted, a constitutional context here too: one analogous to the separation of powers, at least in the form of a requirement of mutual respect as between central and local government.

278. In similar vein, *bona fides* are also essential: the Minister cannot deem a course adopted by the planning authority non-complaint as a subterfuge with the ulterior purpose of upsetting a decision with which, in reality, he merely disagrees as being the wrong choice as between compliant options. I hasten to say that *Mala fides* is not alleged in these proceedings - nor do I suggest that it could have been. Neither do I suggest that such an occurrence is in any degree generally likely in practice.

[529] Meadows v Minister for Justice [2010] 2 IR 701.

Rationality of Opinion that Development Plan is Irrational

279. While **McCarthy** and **FoIE** were clear cases, there is no doubt that in at least some circumstances the test posed by s.31 creates a difficult and subtle rule. In the present case, the Minister's direction was, importantly, grounded in this opinion that the 0/0 Objective was "*not … reasonable*" and was "*disproportionate*". The Minister's wording cannot have been accidental. It is the language of irrationality and is an opinion finding illegality in the specific form of irrationality. The Minister's opinion finding irrationality is itself reviewable as to merit only for irrationality. So, the question becomes – was it irrational of the Minister to find the 0/0 Objective irrational? And in each respect the same high bar test of irrationality applies – whether "*the decision impugned is fundamentally at variance with reason and common* sense." The delicacy of the court's intellectual task will be apparent.

280. In my view, it is important that sight not be lost by all – not least the courts, the OPR and the Minister – of the observation by Humphreys J in **FoIE**, which conforms to the views of Clarke J in **Tristor**, that the OPR and the Minister are, in the matter of issuing ministerial directions, law enforcers, not law givers. They are limited to policing the implementation of existing planning law (including binding policy) and may not simply direct their planning policy preferences. Thus viewed, planning authorities may make what local planning policy they please, and are not subject to ministerial direction in that regard, as long as in doing do they act consistently with the law (including binding policy).

281. Clearly, the requirements imposed by ss.10 and 31 PDA, that development plans be consistent with NPF and RSES objectives, in effect and as to the content of development plans render the NPF and the RSES binding policy for this purpose – though, as will be seen, the question remains as to how tightly they bind. And, clearly, policy may be binding in varying degrees depending on its terms.[530] Viewing binding policy as validly fettering the planning authority's discretion, and as was said in **Jennings**,[531] *"fetters, of their nature, can be looser or tighter and may afford more or less scope for judgement to the fettered decision-maker."*

Collection of the Foregoing

282. It will be seen from the foregoing analysis that, in my view, a delicate tripartite balance of mutual respect, deference and restraint is to subsist between local government, central government (in which I include both the Minister and the OPR) and the courts in the context of s.31 directions. In its application in practice other than in clear cases and as between differences of opinion as to merely permissible resolutions of tension between NPOs and RPOs on the one hand and inconsistency with NPOs and RPOs on the other hand, I confess to finding this a difficult area of the law. In that light, it seems to me useful to bear in mind the view of Collins J, as stated in **Spencer Place**,[532] that statutes which impact on the balance between

[530] As I have recorded above, Humphreys J considered it necessary to divide planning policies into five categories grouped as to the varying degrees to which they are legally binding: Cork County Council v Minister for Housing [2021] IEHC 683 §89
[531] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.
[532] Spencer Place Development Company Limited v Dublin City Council [2020] IECA 268, [2020] 10 ICLMD 96.

central and local control of planning and development policy and decision-making should do so clearly and precisely, such powers conferred on the Minister require to be conferred by clear statutory language and the courts should avoid giving such legislation effect beyond what is clearly provided for.

KILLEGLAND & MCGARRELL (2023) - CONSISTENCY WITH NPF – GENERAL, NOT UBIQUITOUS

283. I have repeatedly cited **Killegland** above. But as it seems to me an important case for present purposes I think it deserves more specific consideration. Oddly, or so it seems to me, it was mentioned in written submissions but not in detail. But it was included in the agreed list of authorities, Mount Salus opened it at trial *in extenso* and the Minister responded. The case did not involve a s.31 direction – it was a dispute between Killegland, a landowner/intending developer and Meath County Council as planning authority. But it did relate to the validity of development plan content in the matter of consistency with NPOs. At issue was, *inter alia*, whether the elected members' decision by de-zoning a (relatively) small infill site in an urban area,[533] and zoning it instead for use as part of an entrance to a public park, was inconsistent with NPO3c[534] and RPO3.2[535] and so was unlawful as in breach of ss.10(1A), 12(10) and 12(18) PDA 2000.

284. Correctly, the Minister's position in the present case[536] was that the same standard of judicial review as to their merit – the irrationality standard - applied to the impugned elected members' decision in **Killegland** as applies to the decisions of the OPR and the Minister impugned in this case. Logically, as I have already said, that same standard applies to the Minister's review of the merits of the Elected Members' decision in the present case to insist on the 0/0 Objective.

285. Hogan J, for the Supreme Court in **Killegland**, noted[537] that under the heading "*Securing Compact and Sustainable Growth*",[538] NPO3c stated a preference for compact development focused on brownfield land and infill sites as, long-term, mainly greenfield development would cost far more than compact growth and accordingly, and subject to implementation of sustainable planning and environmental principles, the NPF set listed urban development targets.[539] It is necessary to consideration of the issues in this case to observe that, while Hogan J is, of course and in substance, correct, the text he cites for the general preference for compact development is not internal to NPO3c, as the judgment in **Killegland** might be understood to suggest. In fact, the text appears in the introductory narrative to all of NPOs 3a, 3b and 3c. It applies just as much to NPO3b (with which this present judgment is concerned) as to NPO3c. It follows that, inasmuch as that text informed Hogan J's analysis of NPO3c, it equally informs analysis of NPO3b.

[533] A 0.84 ha site at Ashbourne.
[534] "Deliver at least 30% of all new homes that are targeted in settlements other than the five Cities and their suburbs, within their existing built-up footprints." The five Cities are identified in NPO3b - Dublin, Cork, Limerick, Galway and Waterford.
[535] RPO 3.2 of the Eastern and Midland Regional Assembly RSES 2019 as to Compact Growth. Set out above. The Ministerial Direction in the present case also relies on RPO3.2.
[536] Transcript Day 3 p.35.
[537] Killegland Estates Ltd v Meath County Council [2023] IESC 39 §94.
[538] NPF §2.6.
[539] I have set out this text already.

286. Also, and more generally, Hogan J provides an important analysis of the legal significance of the NPF and the requirement that development plans be consistent with its objectives. Having recited many provisions of the NPF, Hogan J echoed Humphreys J in the High Court, in observing that their *"overall effect",*

> *"… is to constrain to some degree the Council and the elected members so far as the making of development plans are concerned. Some allowance must, of course, be made for the large scale nature of this exercise and it would be unrealistic to expect perfect consistency or alignment with national planning guidelines or frameworks such as the NPF. The elected members are, nonetheless, not at large, and any such development plan[540] must align itself at least in general with certain national and local policy objectives."*[541]

Hogan J cites McDonald J in **Highlands Residents**,[542] to what Hogan J terms "*similar effect*", that s.10(1A) was *"clearly designed to ensure that the development objectives in a development plan are consistent, as far as practicable, with national and regional development objectives."*

287. Next, Hogan J considers "*the key question*": to what extent *"the operation of the NPF is intended to be prescriptive."*[543] Killegland argued that the de-zoning was inconsistent with NPF objectives, because its site was a classic infill site in the heart of Ashbourne – a site of the kind deemed by NPO3c to be suitable for residential development. However, Hogan J repeatedly expressed agreement with the High Court decision of Humphreys J. He had said of the NPF and RSES that *"largely the objectives are phrased in fairly general terms …. leaving some zone of discretion in actual implementation*." Notably, Hogan J said that if NPO3c *"had been made the equivalent of a mandatory statutory obligation so that it required every in-fill site of this kind to be zoned suitable for housing, then (Killegland's) case would have much to commend it".* But, Hogan J held, the relevant statutory provisions and NPF objectives could not be so read. He said:

> *"In the first instance, s.12(18) simply requires that the development plan is "consistent" with the "objectives" of the NPF. Like Humphreys J., I read this language as meaning consistent generally, as distinct from complying in every detailed and minor particular. The language of (NPO)3c is moreover generally precatory ("… a preferred approach…") rather than imposing a legally prescriptive standard which required every available infill site to be zoned for housing. This is further reflected in section 4.5 of the NPF which, as we have seen, speaks of a "target" of a "significant proportion of future urban development on infill/brownfield development sites" within existing settlements."*

288. I pause here to observe that

- For reasons I have stated, these passages of the judgment of Hogan J in **Killegland** must apply, *mutatis mutandis* to NPO3b.

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[540] The word "plan" does not appear in the judgment but is clearly intended.
[541] §422. Emphases added.
[542] Highlands Residents Association v An Bord Pleanála [2020] IEHC 622.
[543] §101 et seq.

- The juxtaposition – the contrasting - of general consistency with compliance *"in every detailed and minor particular"* derived from the facts of **Killegland** but there is a large spectrum of degrees of compliance between those points.
- Nonetheless, the predominant sense of this passage of the judgment in **Killegland** is that the requirement is one of general consistency as contrasted with detailed consistency.
- The Minister and the OPW do not in their submissions in these proceedings engage with Hogan J's chosen juxtaposition and contrast and his description of at least some NPOS and RSO's as *"generally precatory"*.
- Hogan J approximates "*precatory*" with *"a preferred approach…".* He approximates it also with the words *"aspirational"* and "*target*".
- The natural and ordinary meaning of the word "*precatory*" is the non-binding expression of a wish rather than an obligation. Mirriam-Webster states that the word traces to the Latin - *precari* ("to pray") - and *"has always referred to something in the nature of an entreaty or supplication."* [544]

289. Hogan J notably says that it is not required that every available infill site be zoned for housing. This must, it seems to me, have the following important implications applicable in the context of the 0/0 Objective Areas, in which any development would be predominantly, if not all but entirely, infill:

- choices may legitimately be made by planning authorities in making development plans as between infill sites to be zoned for housing and those not to be zoned for housing. Nor do I consider that anything turns for this purpose on whether the relevant objective is strictly to be considered a "zoning" objective – it is the substance that counts;
- as multiple such choices may be made as to a given development plan, it follows that the scope to make such choices is not confined to discrete single sites but can be made as to areas comprising multiple sites. In any event, the designation of a piece of land as a single site or as comprised of multiple sites cannot be a principled and exclusive basis for the identification of the areas as to which such choices may be made; and
- consistency with NPF and RSES objectives is to be judged by reference to Development Plan Area as a whole.

Considering consistency by reference to the Development Plan Area as a whole is also implicit in the concept of general consistency.

290. However there seems to me to be a further, and in this case important, implication of the observation by Hogan J that not every available infill site must be zoned for housing. It follows by analogy, but clearly it seems to me, that not every available infill, or indeed, other site in the area served by a public transport corridor must be made available for housing.

291. Hogan J continues in similar vein:

[544] Collins' Dictionary defines it as "of, involving, or expressing entreaty; supplicatory". The Encyclopaedia of Forms and Precedents describes precatory words as "expressing desire, belief, recommendation or hope".

> *"All of this again suggests that the NPF is in this respect as I have just said largely precatory and aspirational. It might well have been different if the development plan had shown a casual disregard throughout the county of the need to encourage in-fill development on brownfield and other sites immediately contiguous to the core areas of each urban settlement, but that particular case has never been advanced."*
>
> *"... One must also have regard to the fact that by contrast to the language of s.12(18) the Oireachtas used mandatory and prescriptive language in other parts of closely related sections. Thus, for example, as we have already noted, s.10(2A)(a) provides that a core strategy "shall" contain sufficient information to show that development plans are "consistent" with the NPF. The obligation to provide the information is thereby made mandatory ("shall"), but a more accommodating standard ("consistent") is provided in relation to the actual contents of the development plan itself."*[545]

292. Hogan J's reference to "*casual disregard*" is not the expression of a legal test of inconsistency with NPOs and RPOs. But it is illuminating of the notion of general consistency. At least equally illuminating are the words "*throughout the county*". They amplify the inference that the requirement is of consistency general in the functional area of the planning authority - as opposed to ubiquitous consistency in that area or consistency judged by reference only to a small or particular area of the functional area, or by reference only to a small or particular sub-area of the parts of the functional area to which the relevant NPF objective applies. It stands obviously to reason that NPF objectives as to compact development along transport corridors apply only to transport corridors and the areas served by them. The words "*throughout the county*" indicate that, in considering whether a development plan is generally consistent with the NPF (or the RSES) - it is wrong to focus narrowly on a small or even any particular part of the development plan area. What is required is consideration of the development plan area as a whole and its potential, as a whole and pursuant to the development plan as made by the planning authority, to achieve the objectives in question - while also pursuing other legitimate and even countervailing planning objectives and policies. Of course, that will require consideration of particular parts of the area and may result in OPR Recommendations and ministerial directions as to particular parts of the area. But what must precede, underlie and inform such a result is an overall, general, county-wide and contextual analysis.

293. More specifically here, the point is that consistency with objectives as to compact development along transport corridors is to be considered generally as to all transport corridors in the functional area taken collectively – not exclusively as to a discrete part of those transport corridors. It follows also that not every possible planning policy sacrifice is legally required to the undoubted priority of compact development along transport corridors. That is particularly so if the policy sacrifice is of aims of other NPOs and RPOs as to environment and heritage.

[545] Citing Humphreys J §146.

294. Hogan J took generally the same approach to the relevant RSES as he had taken to the NPF. Considering RPO4.1[546] which, *inter alia*, requires that development plan core strategies have regard to the infill/brownfield targets set in NPO3a-3c, he said:

> *"In many ways the RSES mirrors — albeit that it is phrased perhaps in even more general terms — the requirements of the NPF regarding spatial development; the need to zone appropriately in respect of projected housing need and the promotion of in-fill sites, thereby concentrating housing development where possible in existing urban settlements already possessed of the appropriate infrastructure. For my part, for all the reasons already expressed with regard to the corresponding objectives contained in the NPF, I do not consider that this amounts to some imperative requirement that all[547] in-fill sites (such as the present one) in existing urban areas must be zoned for housing development. It might be different if a development plan studiously avoided such zoning for in-fill sites throughout the county."*[548]

295. Clearly, the 0/0 Objective Areas fall into the category of *"existing urban settlements already possessed of the appropriate infrastructure"* – here, the DART. The words "*where possible*" in the context of the remainder of the judgment seem to me clearly to connote proper planning judgment as opposed to absolute physical or other possibility. And the gravamen of this passage is clearly that, even in urban areas possessed of the appropriate infrastructure, the RSES imposes no *"imperative requirement that all in-fill sites … must be zoned for housing development".* So, even ignoring what Hogan J had identified as the precatory quality of the objectives, any issue of non-compliance amounting to illegality would have to be considered on a *"throughout the county"* basis.

296. So, **Killegland** is authority that the issue of general consistency with NPF and RSES objectives must be considered on an overall basis as to the functional area generally of the planning authority to whose area the development plan relates. It does not require detailed and specific consistency or consistency in every part of the functional area – nor even every part of the functional area suited to that objective. It follows that a requirement of general consistency of the functional area generally with a particular NPF or RSES objective must be capable, at least in principle, of accommodating a situation in which, in a specific part of the functional area suited to the pursuit of that objective, the objective is nonetheless not pursued, or pursued in limited degree, by reason of the pursuit, in preference, of a different, valid and more or less incompatible objective of proper planning and sustainable development. The extent to which and proportionate means by which the competing objectives can be locally reconciled is, it seems to me, very much a matter of reasonable planning judgement for the planning authority.

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[546] It reads: In preparing core strategies for development plans, local authorities shall determine the hierarchy of settlements in accordance with the hierarchy, guiding principles and typology of settlements in the RSES, within the population projections set out in the National Planning Framework to ensure that towns grow at a sustainable and appropriate level, by setting out a rationale for land proposed to be zoned for residential, employment and mixed-use development across the Region. Core strategies shall also be developed having regard to the infill/brownfield targets set out in the National Planning Framework, National Policy Objectives 3a-3c.

[547] Emphasis in original.

[548] Emphasis added.

297. Though **Killegland** addresses specifically NPO3c, I have explained why its rationale applies equally to NPO3b. I have considered each of NSO1, NSO7, NPO11 and NPO35, RPO3.2 and RPO4.3 above and made certain observations thereon. Reconsidering them in light of my understanding of **Killegland** as expressed above, it does not seem to me that any require a different approach to that taken by Hogan J as to NPO3c and RPO4.1 - either as to their precatory nature or as to the requirement of general, as opposed to ubiquitous, consistency of development plans with those objectives.

298. The Supreme Court's summary of the decision of Hogan J records that he held that*, "for all the reasons expressed with regard to the corresponding objectives in the NPF, there is no imperative requirement mandated by the objectives of the RSES that all infill sites in existing urban areas must be zoned for housing."*[549] By analogy, and substituting "*public transport corridors*" for "*existing urban areas*", one can say that there is no imperative requirement mandated by the objectives of the NPF and the RSES that all sites, or infill sites along public transport corridors must be made available in the development plan for housing. I hasten to appreciate that no-one suggested unrestrained zoning of the 0/0 Objective Areas for housing.[550] But the underlying and central point is that ubiquitous compliance with each NPF and RSES objective is not required. Indeed, on any rational view of proper planning and sustainable development,(inter alia, having regard to the absurd examples given above) such ubiquitous compliance is not even possible.

299. The OPR cite **McGarrell**.[551] I do not see that McGarrell expands on **Killegland** on these issues. It raised, as here relevant, similar issues to **Killegland**.[552] McGarrell complained that, in adopting its Development Plan, Meath County Council had disadvantageously changed the zoning of its lands. Like Killegland, it argued that the new zonings were inconsistent with NPO3c and RPO3.2 of the RSES - in breach of ss.10(1A), 12(10) and 12(18) PDA 2000.[553] As in **Killegland**, Hogan J identified the question of *"the extent to which the operation of the NPF and the RSES is intended to be prescriptive".*[554] On the facts of McGarrell he held that the Council was not "*in breach of its obligation under s. 12(18) of the 2000 Act to ensure the general consistency of the new development plan with the provisions of the NPF".* Again, we see that the required consistency is "*general*" – as, indeed, the OPR itself acknowledges.

REASONS FOR THE IMPUGNED DECISIONS & ARE THEY SEVERABLE?

300. I take the opportunity to reject at this point the OPR's submission as to the issue of reasons for the Impugned Decisions that, as neither Mount Salus nor any other party in the public consultation on the draft Ministerial Direction made submissions on NPO35,[555] Mount Salus may not argue now that the issue of

[549] Supreme Court summaries are not part of the reasons for the decision. They are not authoritative and are provided to assist in understanding the Court's decision. However, in this aspect the summary well-summarises the decision.
[550] As stated earlier, the 0/0 Objective Areas are zoned for housing but the 0/0 Objective very significantly restrains the effect of such zoning.
[551] McGarrell Reilly Homes Ltd v Meath County Council [2023] IESC 40.
[552] The cases were heard by the Supreme Court sequentially and Hogan J gave judgment in both on the same day. The judgments cross-refer.
[553] Each set out earlier in this judgment.
[554] §72.
[555] "Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights."

compliance or non-compliance with NPO35 was a "*main issue*" requiring "*main reasons*"[556] for the Impugned Decisions. The OPR made similar points as to other NPOs and RPOs cited in their Impugned Decisions.[557] This is entirely unrealistic: the OPR and the Minister put the alleged imperatives of the NPOs and RPOs which they cited at the core of their Impugned Decisions. This is not to say, not least given their overlap in subject matter, that composite reasons would not suffice to explain the OPR's and the Minister's reliance on these NPOs and RPOs. As Humphreys J said in **Áine Kelly**,[558] the reasoning of a decision must be taken as a whole.

301. As Mount Salus correctly observed, by s.31AM(8) PDA 2000 and on the domino principle recognised in the **Cork County Council** case, an opinion of the OPR that the development plan *"fails to set out an overall strategy for the proper planning and sustainable development of the area concerned"* is essential to the validity of both the Impugned OPR Recommendation and the Impugned Ministerial Direction. Also, the Minister expressed that same opinion as a reason for his Direction. But such an opinion is, of itself, too general and conclusionary to survive challenge for want of reasons unless underpinned by more specific findings by reference to the requirements of s.10 PDA 2000 which identifies the mandatory components of a valid overall strategy. I agree with the Minister's view[559] that the substance of the absence of the overall strategy which he (and in my view the OPR) alleged lay in his opinion that the '0/0 Zone' was not consistent with NPF and RSES development objectives and that the validity of this opinion is central to the determination of these proceedings. However, as I have earlier stated and as I read the Impugned Decision and the documents relevant to their interpretation, this opinion relates to inconsistency with NPF and RSES objectives for compact growth with increased density specifically and discretely along that part of the Development Plan Area public transport corridors as lies in or serves[560] the 0/0 Objective Areas. It was formed despite the OPR's opinion, which I impute to the Minister, that the Development Plan as proffered by the Elected Members and even though containing the 0/0 Objective was generally consistent with the NPF and RSES objectives – including as to development along transport corridors.

302. Also, the Minister's reasons assert that the 0/0 Objective "*for significant parts of Killiney and Dalkey*" is "*not necessary or reasonable*" and "*is disproportionate, especially in the context of SLO130*."[561] As I have said, this is the language of irrationality on the part of DLRCC in its making the Development Plan inclusive of the 0/0 Objective. On that view, the question posed by the Minister himself for himself was not whether his view was reasonable that the Development Plan, if shorn of the 0/0 Objective, would suffice to protect the heritage of the 0/0 Objective Areas and their ACAs or whether his view was more reasonable than the view taken by the Elected Members: the proper question for the Minister was whether the Elected Members' view was unreasonable that the 0/0 Objective was required – or even just desirable - to protect that heritage in all the circumstances.

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[556] As to which standard see, for example, Áine Kelly v An Bord Pleanála [2024] IEHC 364 §92 and cases cited therein.
[557] OPR Written Submissions §52, 57, 63, 70.
[558] Kelly v An Bord Pleanála [2024] IEHC 364 §92, citing Monkstown Road v An Bord Pleanála [2022] IEHC 318, [2022] 5 JIC 3106 at §159; and Shadowmill v An Bord Pleanála [2023] IEHC 157, [2023] 3 JIC 3106 at §161.
[559] The Minister's Submissions §26 & §137.
[560] Primarily, Dalkey DART station lies outside but serves the northern parts of the 0/0 Objective Area.
[561] Emphases added.

303. The Minister's Impugned Decision, in its Reason I,[562] by invoking DLRCC's failure to comply with the OPR Recommendations and its failure to set out an overall strategy, was dependant for its validity on the validity of the OPR Recommendations in considering that the plan is inconsistent with NPF and RSES objectives for compact growth with increased density along public transport corridors. The Minister's Impugned Decision, in its Reason II[563] directly invoked the alleged inconsistency with those NPF and RSES objectives. In his Reason III,[564] the Minister directly invoked the alleged inconsistency with those NPF and RSES objectives as underpinning the alleged absence of "*an overall strategy*". All three reasons, at base, invoke the alleged inconsistency of the Development Plan with those NPOs and RPOs. So, leaving aside the formal 'domino effect' discussed above, and considering the Minister's Impugned Direction and the reasons and opinions underlying it in their own terms:

- just as for the OPR's opinion, they too all depend for their validity on the legality of the opinion that the plan is inconsistent with NPF and RSES objectives for compact growth along, specifically and discretely, that part of the Development Plan Area public transport corridors as lies in or serves the 0/0 Objective Areas.
- all his reasons and opinions are essentially repetitive and are not severable.

304. As to severability, and as **Murtagh**[565] has been mobilised against Mount Salus, I note that Owens J said in that case that:

- A decision may be made for a number of reasons: some may be valid and some invalid.
- Some reasons may be more important than others.
- It does not follow that an invalid reason will automatically result in an invalid decision.
- Decision-making often involves, but does not always involve, cumulative evaluation of relevant material. Cumulative reasoning may make it *"impossible to sort out the bad from the good."* [566]
- In a given decision, some evaluations may be by way of cumulative analysis and others may determine a decisive stand-alone issue.
- *"If it is clear from the terms of a decision that the decision-maker has made a stand-alone determination in a particular way on a decisive issue, then all conclusions on other matters which might have been decided differently are irrelevant. Errors of fact or law in coming to those conclusions do not affect the end result."*

I respectfully agree with Owens J – adding only the corollary that, in the presence of an invalid reason, it does not follow that a valid reason will automatically result in a valid decision.

305. But, as I have said, here the reasons listed by the Minister all invoke the alleged inconsistency with the NPF and RSES objectives cited above. The reasons listed are not discrete. They are entwined and intermingled. Indeed, they all boil down to a single reason: all in the end, directly or indirectly but essentially, invoke the objective of compact residential growth along public transport corridors. Looked at slightly differently, the underlying assertion of inconsistency with NPF and RSES objectives is proffered by

[562] As identified in the Minister's Submissions §18 & 140.
[563] Ibid.
[564] Ibid.
[565] Murtagh v An Bord Pleanála [2023] IEHC 345.
[566] §76.

the Minister's decision as the substantive source of all the reasons proffered and ties them all together. Clearly, the alleged inconsistency with those NPF and RSES objectives *"viewing the facts and circumstances objectively, 'demonstrably exerted a substantial influence on the relevant decision'"* – **Kennedy**.[567] In my view, no one of the Minister's reasons can be sensibly struck down without striking down the others: see generally **Fernleigh**, two **Ballyboden TTG** cases and **Jennings**.[568] Severance of an invalid reason in this case would present the legal porcupine, contemplated in **Talbot** and **O'Flynn Capital Partners**[569] as bristling with difficulties as soon as touched. This seems to me a case in which, assuming for argument that one reason is bad, they are "*inextricably mixed up*" – **Browne** and **R (Shell) v Lewisham**,[570] and the cumulative reasoning *"makes it impossible to sort out the bad from the good"* – **Murtagh**.

306. Finally and importantly, other than the OPR's cited statement that it was *"satisfied that a reasonable basis has been set out in your authority's draft Plan for the quantum of zoned development that appropriately reflects the housing target … and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport",* I have found in the relevant documents no attempt by the OPR or the Minister to assert that considering the Development Plan Area as a whole, the 0/0 Objective in its effect on the discrete section of transport corridor constituted by the 0/0 Objective Areas rendered the Development Plan, as to the totality of the transport corridors in the Development Plan Area as a whole, generally inconsistent with the relevant NPOs and RPOs in the sense contemplated by **Killegland**. Rather, I see a myopic focus on effects on the 0/0 Objective Areas themselves. My conclusion as to misdirection in law, as set out below, is fortified by this observation.

MISDIRECTION IN LAW

307. As I hope to have shown above, whether the Development Plan set out an overall strategy for the proper planning and sustainable development of the Plan Area fell to be considered by reference to the entire Plan Area. As concerns residential development along transport corridors, it fell to be considered by reference to the generality of all such transport corridors in the Plan Area as opposed to isolated consideration of a limited segment of a single important transport corridor. The Elected Members said in their reasons for maintaining the 0/0 Objective, and Mount Salus pleaded, that the 0/0 Objective relates only to a small part of the Development Plan Area.

308. Thus viewed, the case turns on the legality of the opinion that the Development Plan, though (as the OPR found) generally consistent with NPOs and RPOs for compact growth in that it provides for *"the*

[567] Kennedy v Minister for Agriculture [2022] IECA 165 §112, citing R (Shell UK Ltd) v Lewisham Borough Council.
[568] Fernleigh Residents Association & Anor v An Bord Pleanála [2023] IEHC 525 §30, Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66 §76; Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7, §§281-283; Jennings v An Bord Pleanála 2023 IEHC 14 §507 et seq.
[569] Talbot v An Bord Pleanála & Kildare County Council [2008] IESC 46, [2009] 1 IR 375; O'Flynn Capital Partners v Dún Laoghaire Rathdown County Council [2016] IEHC 480. See also Woolf, Jowell and Le Sueur on Judicial Review, 6th ed'n §5-099 et seq, and Moules on Environmental Judicial Review p203 et seq.
[570] Browne, Simons on Planning Law, 3rd ed'n §4-241 et seq, citing Lord Reid in Kingsway Investments (Kent) Ltd v Kent County Council [1971] AC 72; R(Shell UK Ltd) v Lewisham Borough Council [1988] 1 All ER 938.

quantum of zoned development that appropriately reflects the housing target … and that at plan implementation phase, will enable a focus on developing land best located in terms of infrastructure and public transport", is nonetheless inconsistent with those objectives as to the 0/0 Objective Area such as to breach the s.10(1A) PDA 2000 requirement of consistency with those objectives – specifically NPO3b, NPO11 and NPO35 as analysed above. Thus posed, and given the law as set down in **Killegland**, the question more or less answers itself, to the effect that the OPR and the Minister misdirected themselves in law. In law, all that is required is general consistency considered as to the overall development plan area as opposed to detailed and/or localised consistency. Once general consistency considered as to the overall development plan area is found, as it was here by the OPR, I cannot avoid the conclusion that the OPR and the Minister misdirected themselves in law in making their respective impugned decisions by failing to interpret the requirement of consistency as requiring analysis by reference to the entire development plan area and by reference to a criterion of general as opposed to localised or ubiquitous consistency.

309. In my view and as I have already intimated, **Killegland** cannot be distinguished merely on the basis that on its facts only a single small site was in issue, whereas the 0/0 Objective Areas are much larger. No doubt they are. But as is readily apparent from the Figures above, the 0/0 Objective Areas are still a very small part of DLRCC's functional area and even of the urban part of its functional area and they are in longitudinal terms a small part of the totality of the transport corridors in the DLRCC's functional area. The applicable principle is that the assessment of compliance must be made not in respect of the allegedly non-compliant area considered in isolation but must be made in respect of the allegedly non-compliant area considered in as part of the entire functional area. That does not mean that non-compliance as to a small area cannot render the Plan non-complaint within s.10(1A): it means that the frame of reference in which that issue is considered must be correct. And it was not.

310. Further, the OPR and the Minister in finding inconsistency of the Development Plan with NPF and RSES objectives and so illegal, erred in law in that they failed to properly interpret the NPF and RSES objectives upon which they relied in making their Impugned Decisions as non-prescriptive, precatory and aspirational, as required by **Killegland**.

311. In my view, the misdirection of law consisting in the failure of the OPR and the Minister to understand that general as opposed to detailed or ubiquitous consistency with precatory NPF and RSES objectives is the yardstick of legality/illegality set by s.10(1A) and **Killegland** resulted in their failure, erroneous in law, to assess such consistency by reference to DLRCC's functional area as a whole and by reference to all the transport corridors in that functional area as a whole. Instead, in forming their opinions, they erroneously focused discretely on their perception of the possibility of compact growth along that part of the DART public transport corridor in the 0/0 Objective Areas to the exclusion of the Development Plan's facilitation of compact growth along the public transport corridors in the Development Plan Area generally. Those other public transport corridor networks within the DLRCC functional area included:

- the remaining (roughly three quarters) of the DART corridor outside the 0/0 Objective Areas,
- the Luas public transport corridor, and
- at least possibly, the bus network.

Indeed, the great importance of the Luas and the bus networks are an inevitable commonplace of the Board's analysis of planning applications for intensive and large-scale multi-unit residential developments as served by public transport. And as has been seen, the NPF itself identifies the Luas a "*Key future growth enabler for Dublin"* at *Cherrywood …".*[571]

312. To be clear, I do not suggest that the best or greatest quantum of opportunities for residential development along the public transport corridors would not transpire to lie in the 0/0 Objective Areas: it might or might not. Nor do I say, even, that a conclusion that that the best or greatest quantum of such opportunities lie in the quarter represented by the 0/0 Objective Areas is essential to a conclusion of non-compliance with NPOs and/or RPOs. My point is that the analysis must be of the entire Development Plan Area and all its transport corridors before any conclusion might be drawn such as would support a direction. By reason of the identified misdirection in law, such analysis did not occur. The OPR and the Minister asked themselves the wrong question – a question which assessed the 0/0 Objective Areas divorced from their context as part of the entire development plan area and assessed the issue of residential development in that part of the DART Corridor as lies in the 0/0 Objective Areas divorced from its context as part of the transport corridors in the entire development plan area.

313. Accordingly, I will declare the invalidity of the Impugned Decisions of the Minister and the OPR.

OVERALL STRATEGY – S.10(2) PDA 2000 LIST OF MANDATORY DEVELOPMENT PLAN OBJECTIVES

314. At some cost of repetition, one can also view these matters by asking whether, as the State submits, *"A development plan can be considered to set out 'a strategy for the proper planning and sustainable development of the relevant area' only where that strategy complies with mandatory requirements under section 10".*[572] In **Tristor**, Clarke J said that "*the Minister must ask himself whether there is a significant failure to comply with … s. 10, … whether the plan actually has a strategy which is set out in it and which complies with the mandatory obligations provided for in s. 10(2) which apply to such plans."* As has been seen, s.10(2) lists subject matters which must be the subject of development plan objectives. When one considers that the first items on that long list are such central matters as zoning (including for residential use), infrastructure provision (including transport, energy and communication, water supplies, waste facilities and waste water services), the conservation and protection of the environment, the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population and the preservation of the character of the landscape,[573] it is easy to see why Clarke J clearly considered that list to be an important element of the setting out of the overall strategy. While amendment since has added subject matters, the s.10(2) list remains.

[571] NPF p37.
[572] State Written Submissions §136.
[573] I have taken the list from the unamended PDA 2000 to better reflect the list before Clarke J but the up-to-date amended list merely amplifies the point.

315. As to that list, there is no suggestion in the present case that the Development Plan fails to include objectives for *"(n) the promotion of sustainable settlement and transportation strategies in urban … areas … in particular, having regard to location, layout and design of new development".* The OPR explicitly acknowledges the Development Plan's general consistency with NPOs and RPOS to that end.

316. On the other hand, there can be no argument but that the 0/0 Objective is an objective for *"(g) the preservation of the character of architectural conservation areas".* It is also, likely, an objective, for some or all of the following:

> *"(c) the conservation and protection of the environment including, in particular, the archaeological and natural heritage;*
> *(d) the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population;*
> *(e) the preservation of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest;*
> *(f) the protection of structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest;*
> *(j) the preservation, improvement and extension of amenities and recreational amenities;"*[574]

As I have said earlier, one may also refer here to s.81 PDA 2000 which mandatorily requires objectives for the protection of ACAs and Protected Structures.

317. Remembering that **Tristor** holds that compliance with s.10(2) PDA 2000 is a necessary element of a lawful overall strategy within the meaning of s.10(1), I confess to finding it difficult to see how a conclusion of illegality by way of an absence of an overall strategy could have been properly grounded in s.10(2) by reference to the presence of the 0/0 Objective which is undeniably an objective for "*the preservation of the character of architectural conservation areas*". Indeed, and tellingly, the State did not so argue.

IRRATIONALITY & REASONS

318. I have on balance concluded that, as in my view the Impugned Decisions should be quashed for the reasons set out above, it is unnecessary to decide the rationality issue. Indeed, given my view that the legal premises of the Impugned Decisions were misconceived in law, it arguably would be incorrect to attempt to

[574] S.10(3) PDA 2000 allows that a development plan may indicate objectives for any of the purposes referred to in the First Schedule. Though it touches on much similar subject matter to the list above, is not necessary to recite any of its content here.

decide that issue. That said, it may be considered useful that I sketch out, obiter, some relevant considerations without deciding them and I am prepared to express the view that the case in irrationality was in my view appreciable.

319. It falls to be remembered that there was much in common between the OPR and the Minister on the one hand and the Elected Members on the other. Oversimplifying a little, it is in one sense striking how little was between them.

They agreed

- the necessity of protection of the heritage value of the 0/0 Objective Areas. The Minister went to some lengths to list those protections,
- that such protections would appreciably limit residential development along the relevant segment of the DART line, and
- that such protections should bend to allow some limited residential development along the DART Line.

They differed, in the end, as to

- the degree to which heritage protection should bend – albeit, as I have said, the logic of the position of the OPR and the Minister implies significant quantum of dense residential development along the DART line (less would be pointless from their point of view),
- the significance of the size of the 0/0 Objective Areas – and whether it fell to be considered in the context of the Development Plan Area as a whole – not least all its transport corridors, and
- whether there could be a presumption against additional buildings in the 0/0 Objective Areas subject to the exceptions allowed by the 0/0 Objective.

320. In my view, the rationality issue can be expressed, as well as in **Keegan**[575] terms of flying in the face of fundamental reason and common sense, in this particular case as a question whether properly viewed, the OPR and the Minister by their Impugned Decisions sought, rather than to remedy an illegality in the Development Plan, to enforce their view of what a mere difference of planning judgement as between options consistent with the NPF and so to act as lawgivers not law enforcers. The Minister's decision was that the 0/0 Objective was "*not reasonable*" and was "*disproportionate*" – in other words, irrational - and, on that basis unlawful so as to properly ground a s.31 direction. So, as I have said, the question becomes whether the Minister was irrational in deciding that the Elected Members were irrational. The hurdle of irrationality is high in both respects. It will readily be seen that this is a difficult and delicate question – even in conceptual terms.

321. And, as to the potential irrationality of DLRCC, that question falls to be considered by the Minister in light, *inter alia*, of

- the fact that DLRCC's maintenance of the 0/0 Objective is a statutory decision

[575] The State (Keegan) v The Stardust Victims' Compensation Tribunal [1986] IR 642.

- of a democratically constituted and constitutionally recognised deliberative assembly,
- as to the reconciliation of the countervailing and valid planning objectives of heritage protection and compact high density housing in urban transport corridors,
- in respect of a development plan area with which, and with the planning considerations as to which, the Elected Members are especially familiar,

- what I have identified as the considerable margin of appreciation available to a planning authority making a development plan in reconciling mandatory planning objectives and NPOs in tension;
- the fact that only general consistency as opposed to ubiquitous and detailed consistency with the relevant NPOS is required; and
- the fact that the 0/0 Objective was confined to a small area relative to Development Plan Area as a whole and its transport corridors as a whole, and the applicable quantified housing targets could be met elsewhere in the Development Plan Area such as to enable a focus on developing land best located in terms of public transport.[576]

322. It further bears observing that to the extent that the Elected Members were content to sacrifice, in greater degree than were the Minister and the OPR, the aim of dense residential development along the DART line, their motivation was clearly the same as that found in NPO52 and NPO60 and in s.10(2)(c),(d),(e)(f) and (g) PDA 2000 and in ss.10(1D) and 81 PDA 2000. These motivations were, as to the 0/0 Objective Areas, even considering those areas discretely (which is in any event the wrong way to consider the matter), valid planning policies and objectives which were at very least in tension with, and even on the view of the Minister and the OPR, needed reconciling with, the policies and objectives prioritised by the Minister and the OPR. But, as **Tristor** establishes, the Minister could not properly in law impose his reconciliation unless reasonably of the view that the Elected Members' reconciliation was illegal.

323. It seems to me illustratively useful to ask the question what would be the status of the 0/0 Objective in the absence of the various NPOs and RPOs on which the Minister and the OPR rely or, which is the same thing, in the absence of the DART Corridor? It seems to me that in such a circumstance it would be obvious beyond argument that the 0/0 Objective was

- consistent with NPOs 52 and 60,
- an objective of the kind deemed mandatory by those paragraphs of s.10(2) PDA 2000 I have set out above – notably s.10(2)(g) PDA 2000 for "*the preservation of the character of architectural conservation areas*, and
- consistent with the mandatory obligation imposed by s.10(1D) PDA 2000 of consistency with conservation and protection of the environment.

In that (admittedly artificial) circumstance it is impossible to see that the Minister could reasonably ground a direction in an opinion of inconsistency with NPF and RSES objectives. It is only on introducing to the analysis consideration of the DART Corridor and the various NPOs and RPOs on which the Minister and the OPR rely that any tension, becomes apparent between NPOs and RPOs, the resolution of which is required. One could reverse the experiment to the same effect – introducing first the DART Corridor and the NPOs and RPOs on

[576] OPR's s.31(AM)(3) Submission to DLRCC on Proposed Amendments to Draft Plan - 24/12/21 §1.2.

which the Minister relies and only thereafter the 0/0 Objective. The point is that the order makes no difference to the demonstration of a tension requiring resolution. Arguably, and given the undoubted potential for tensions between NPOs, this experiment also demonstrates the wisdom of the view taken in **Killegland** that the requirement is, at least as to many NPOS, of general as opposed to detailed consistency with NPOs and RPOs objectives.

324. One must also remember that development and other priorities of the various actors can change, not merely with location but with time and general circumstances. I confess to doubting that a conclusion that a planning authority has perpetrated an illegality can properly turn on the current and, over time perhaps variable, state of the Minister's priorities as between different NPOs. Such a position might well indeed render him a lawgiver, not a law enforcer.

325. In my view, given the extent of their agreement as described above, it is appreciably arguable that, whether one might call it irrationality in the form of an "unexplained leap in reasoning"[577] or a failure to give adequate reasons for the Direction, the OPR and the Minister failed to explain how the difference between them and DLRCC went beyond a difference of evaluative planning judgment as between legally permissible reconciliation of conflicting planning policies within the scope of DLRCC's discretion and tipped into illegality on the part of DLRCC.

326. But, as I have said, I refrain from deciding the irrationality point. It is likewise unnecessary to decide the allegation of failure to give adequate reasons for the Impugned Decisions. For the sake of clarity however I observe that it was necessary to properly identify and consider the severability of the reasons for the Impugned Decisions as doing so enabled the identification of the misdirection of law and its pervasive effect on the Impugned Decisions.

CONCLUSION

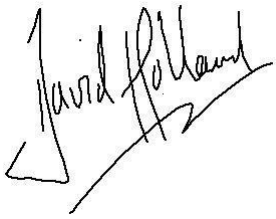
327. I emphasise that none of the foregoing is to suggest that the courts have any role in deciding what the proper planning policy for the areas in question should be. I cannot prefer architectural conservation over compact growth of housing along urban public transport corridors where, as in the 0/0 Objective Areas, those competing and legitimate aims are in tension. No more may I prefer compact growth of housing along public transport corridors to architectural conservation. Nor may I seek to balance or compromise these competing aims or make any planning judgements in those regards. The court's power, as between the competing views of these matters, is limited to seeking to ensure that the decision resolving that tension, in the form of the development plan, is made lawfully by the organ of government competent to make such decisions.

[577] Friends of the Earth and others v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin), [2024] PTSR 1293, [2024] All ER (D) 42 (May) §127, citing R (Wells) v Parole Board [2019] EWHC 2710 (Admin).

328. I have held that

- the opinion of both the OPR and the Minister that, in breach of s.10(1) PDA, the Development Plan fails to set out an overall strategy for the proper planning and sustainable development of the area is crucially based on
    - their opinion that, in breach of s.10(1A) PDA, the development objectives in the Development Plan are not consistent, as far as practicable, with NPO3b, NPO11 and NPO35, and RPO3.2 and RPO4.3
    - their having misdirected themselves in law as to the basis on which and standard by which such consistency must be judged. They failed to judge it by reference to the criteria of general consistency and by reference to the entire development plan area and the entire of the transport corridors in the development plan area. In this, they failed to ask themselves the correct question.
- I will accordingly declare the OPR's decision to issue its s.31AM(8) Notice invalid by reason of misdirection of law.
- Given the 'domino effect' described above, it follows that I will also declare the Minister's decision to issue his Impugned Direction invalid as based on that invalid s.31AM(8) Notice.
- In any event, apart from the 'domino effect' and accepting without finding that the criteria for the Minister's decision to issue his Impugned Direction are alternatives, the Minister's reasons are not in any event severable and the error described above permeates them all, such that I will on that basis also declare the Minister's decision to issue his Impugned Direction invalid.

329. As stated earlier, the Impugned Planning Permission is to be quashed and remitted to the Board and this judgment in essence addresses the terms on which, as to the content of the Development Plan, the Board will consider their decision on remittal. In that regard, and for the reasons set out above, I will declare the Impugned OPR Recommendations and the Impugned Ministerial Direction to be invalid. I will hear the parties as to other reliefs, orders and costs. In particular, the orders required should make explicit the basis as to Development Plan content, on which the Board will consider their decision on remittal. I invite the parties to seek agreement on these matters. I will list the matter for mention on 20 January 2024.



DAVID HOLLAND
15/1/25