OPINION OF COUNSEL

Re: Appeal against refusal of permission for 62 houses (reg. ref. P2042/26) at "*Falmore*", Falls Road, Shankill, Dublin 18.

Querist: J. Coffey Property (Falmore) Ltd.

Agents: Brock McClure Planning consultants.

Counsel: Eamon Galligan SC.

SCOPE OF OPINION AND FACTUAL BACKGROUND

1. Agents have requested me to advise in relation to the jurisdiction of An Coimisiún Pleanála (**ACP**) in determining an appeal against a refusal of planning permission for a development of 62 residential units arranged in four blocks at 'Falmore', Falls Road, Shankill, Dublin 18. The jurisdictional issue arises because the planning permission was refused for reasons which related, inter alia, to a material contravention of a zoning objective under the development plan. The application site ("***the site***") is subject to the zoning objective A1, which seeks "*to provide for new residential communities and sustainable neighbourhood infrastructure in accordance with approved local area plans or approved framework plans*." The Council intend to prepare and adopt, by way of variation to the development plan, a framework plan for the area of Rathmichael in which the site is located.

2. As matters stand, a draft framework plan has not been published by the Council. The core reason for refusal relates, in essence, the perceived prematurity of the proposed development pending the adoption of a framework

plan (though the term '*prematurity*' is not used) and that a decision to grant permission would set an undesirable precedent for other similar developments.

3. The reason for refusal is very long and I have taken the liberty of breaking it up into three paragraphs to make it easier to read. The full text of the single reason for refusal is as follows:

> *"1. Under the Dun Laoghaire-Rathdown County Development Plan , the site is subject to zoning objective A1, which seeks "to provide for new residential communities and sustainable neighbourhood infrastructure in accordance with approved Local Area Alans or approved Framework Plans." The site is located within the Rathmichael/Ferndale Local Area Plan boundary, for which a framework plan will be prepared.*
>
> *Section 2.6.1.3 Local Area Plan Plan-Making Programme of the Dún Laoghaire County Development Plan 2022-2028 notes that within the A1 zoned lands at Rath Michael there are a number of existing properties and "minor modifications and extensions to these properties can be considered in advance of the relevant local area plans." The proposed development, which comprises the construction of 62 units, having regard to its nature and scale, would not constitute "minor modifications and extensions to existing property. Accordingly, the proposed development would be contrary to the provisions of Section 2.6.1.3 of the Dún Laoghaire-Rathdown County Development Plan 2022-2028, would set an undesirable precedent for other similar developments, and would be materially contrary to the A1 zoning objective of the area, which seeks "to provide for new residential communities and sustainable neighbourhood infrastructure in accordance with approved local area plans or approved framework plans."*
>
> *It is considered that the proposed development undermines the intended planned and co-ordinated approach to residential development in the Rathmichael area as provided for in the Dún Laoghaire-Rathdown County Development Plan 2022-2028. Therefore any proposal that*

would be contrary to the proper planning and sustainable development of the area."

4. The sole reason for refusal set out above does not identify any concerns relating to the compliance of the proposed development with national or regional planning policy or, indeed, with any provisions of the development plan other than the zoning objective.

5. The principal concern of the Council would appear to be the prematurity of the proposed development pending the adoption of a framework plan which is to provide for the planning and delivery of infrastructure and services in the Rathmichael area. The Planning Report of the Council states:

> "*It is intended that. the framework plan will be given a statutory footing by way of a variation of the DLR County Development Plan 2022-2028, in accordance with Section 58 of the Planning and Development Act 2024. The framework plan will set out the spatial framework for the future development of the Rath Michael area to* ***ensure the coordinated planning and delivery of essential infrastructure and services*** *in tandem with population growth. A considerable body of background work has been undertaken and is currently being undertaken in order to publish an evidence-based draft framework plan for the Rathmichael area in the near future*." [Emphasis added]

6. While the purpose of the framework plan is to "*ensure the coordinated planning and delivery of essential infrastructure services"*, the planning authority does not identify any infrastructural deficit or inadequacy in terms of service provision in the context of the proposed development or the particular area of Rathmichael in which it is located.

7. The first party appeal notes that although the wider Rathmichael area lacks key services and infrastructure, this is not applicable to the subject site, which is adequately serviced in respect of water services, transport infrastructure, pedestrian infrastructure, and access to services and facilities. It is noted also

that the subject proposal provides for a new connection to Park na Silla Rise, which will provide connectivity for pedestrians and cyclists from the Rathmichael area towards Loughlinstown Hospital and the N11.

8. Furthermore, it is noted that the objective for a local area plan for Rathmichael/Ferndale Road, has been included in statutory development plans since 2004 but none has been prepared or adopted since that date.

9. It is clear from my review of the assessment in the Planning Report that the planning authority gave very careful consideration to the application and did not consider that there were any fundamental reasons for refusing planning permission, other than the requirement for a local area plan (LAP) or Framework Plan to have been adopted under the A1 zoning objective.

10. While the planning authority had some issues with some design details of the proposed development, it indicated that these matters could have been dealt with by way of a request for further information. None of the departments raised any objections to the proposal that could not be addressed in this way and the planning authority accepted that services were available. This was confirmed in relation to water services by a letter of confirmation of feasibility from Uisce Eireann (UE). The letter confirms that water and wastewater connections are feasible without infrastructure upgrade by UE. In order to complete the proposed wastewater connection, the network will have to be extended by approximately 94 m from Park na Silla Rise to the development site. The developer will be required to fund the extension works.

11. The Council's planning report expressly states that the density of development is appropriate having regard to the location of the site in proximity to public transport options, and existing services within Shankill Village.

12. It is noted that the comments from the Forward Planning section of the planning authority refer to the review of the area-based transport assessment (ABTA) that was undertaken for the Old Connacht and Rath Michael plan areas, with

the intention of preparing a new ABTA for the southeast area of the county. The Forward Planning Department states:

> "*This ABTA is pertinent to the proper planning and sustainable development of the Rathmichael area, where it is acknowledged that strategic and local transport deficiencies exist, which need to be addressed at an area-wide level and in a co-coordinated manner through the ABTA and plan-making process. The planned time frame for completion of the ABTA is to align with the preparation of the draft Rathmichael framework plan, which is in program to be placed on public display in 2027."*

13. The Forward Planning section also notes that "*the NTA has commenced a pre-feasibility study into potential light rail alignments serving lands to the south of Bride's Glen, including Rathmichael... Old Connaught, Fassaroe and Bray."*

14. The first party appeal notes that any proposed LUAS extension to the area does not have funding past a pre-feasibility stage. Although it is mentioned in the GDA Transport Strategy, it is stated that "*the alignment and the locations to be served between Bridget Lane and Bray have yet to be determined and will be subject to detailed design and planning work."*

15. The appeal makes the point that in the absence of any approved route, design parameters, or statutory consent for the proposed LUAS extension, it is not possible to meaningfully assess the scheme against the envisaged Lewis extension. The appeal submits that safeguarding for unidentified infrastructure should not preclude the delivery of residential development readily available for implementation at a time of urgent housing need.

16. The appeal seeks to justify a grant of planning permission in contravention of the development plan by reference to considerations under section 37(2)(b)(iii) of the PDA 2000, in particular, by reference to government policy under the National Planning Framework and ministerial guidelines. The appeal sets out

the key policy objectives of the revised National Planning Framework, April 2025, (NPF), insofar as they relate to the proposed development.

17. Reliance is also placed in the appeal to the Ministerial Guidelines entitled "NPF Implementation: Housing Growth Requirements", which were issued under section 28 of the PDA 2000 in July 2025. It is submitted that the proposal for 62 residential units on the subject site will contribute towards the achievement of the revised housing delivery targets within the jurisdiction of Dun Laoghaire-Rathdown County Council, as included in Appendix 1 of the Guidelines. The Council is required to deliver an additional 500 units, or 3,585 units in total per annum, within its functional area between 2025 and 2034. An additional 50% headroom must also be provided.

CONCLUSIONS ON THE JURISDICTION OF THE COMMISSION

18. While the A1 zoning of the application site supports the appropriateness of the location for residential development, the planning authority did not have power to grant planning permission in material contravention of the development plan, other than by following the material contravention procedure under section 34(6) of the 2000 Act. This procedure is rarely invoked in practice.

19. The planning authority was correct in its conclusion that the proposed development "*would be materially contrary to the A1 zoning objective of the area, which seeks 'to provide for new residential communities and Sustainable Neighbourhood Infrastructure in accordance with approved local area plans or approved framework plans."*

20. It is clear that the planning authority gave very careful consideration to the application and did not consider that there were any fundamental reasons for refusing planning permission, other than the requirement for a local area plan (LAP) or Framework Plan to have been adopted under the A1 zoning objective.

21. While the planning authority had some issues with some design details of the proposed development, it indicated that these matters could have been dealt with by way of a request for further information. None of the departments raised any objections to the proposal that could not be addressed in this way and the planning authority accepted that services were available. This was confirmed in relation to water services by a letter of confirmation of feasibility from Uisce Eireann (UE).

22. The Commission is obliged "*to determine the application as if it had been made to the Commission in the first instance*" (PDA, S. 37(1)(B)). The Commission is empowered "*to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates*" (Section 37(2)(a)).

23. In *Mulhaire v an Bord Pleanala* [2007] IEHC 478, at §30) it was held by the High Court that the requirements of Section 37 of the PDA 2000 are not cumulative and it is not necessary, therefore, that each of the four criteria specified therein be met before An Bord Pleanála can decide to grant planning permission in material contravention of the development plan: see *Simons on Planning Law* (third edition) page 502 at paragraph 6-305.

24. The position is explained by Simons J. at paragraph 43 of *Spencer Place Development Company v Dublin City Council* [2019], IEHC 384:

> *"An Bord Pleanála is also required 'to have regard' to the development plan. The Board is not, however, constrained by the development plan in the same way as is the planning authority. The Board can grant planning permission in material contravention without the necessity for invoking any special procedure. If, however, the planning authority at first instance had decided to refuse permission on the grounds that the proposed development materially contravenes the development plan, then* ***An Bord Pleanála can only grant planning permission if one of the four contingencies identified in section 37(2)(b) of the PDA 2000 is fulfilled."*** [Emphasis added]

25. The criteria to justify a grant of permission under sub-paragraph (iii) ofsub-section 37(2)(b)(iii) of the PDA 2000 are as follows:

> "(iii*) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government,"*

26. The appeal submitted on behalf of the first party appellant, sets out the relevant provisions of the Revised National Planning Framework (NPF) and ministerial guidelines issued under section 28 of the PDA 2000, which, in the opinion, of the appellant's planning consultants, would justify a grant of permission in accordance with the Commission's powers under section 37(2)(b)(iii) of the PDA 2000. These matters relate principally to the national planning policy objectives to increase delivery of housing in the context of the urgent housing demand nationally. The Commission has power to grant permission by reference to such matters in accordance with section 37(2)(b).

27. In terms of the suggested prematurity of a grant of permission pending the adoption of a framework plan as a variation to the Development Plan, the decision in *Element Power v An Bord Pleanala* [2017] IEHC 50 is relevant. The court found that the Commission's first reason for refusal for a wind farm, which was that the proposed development was premature pending the adoption of the required policy framework, was unreasonable as the respondent had an obligation to evaluate the planning application under the Wind Energy Development Guidelines 2006 and the two existing county development plans which were applicable. At §70 of his judgment, Haughton J stated:

> *"Furthermore, I accept the submission of the applicant that t**he Board's determination that the proposed development was premature** (pending the adoption of national and local wind energy strategies with a spatial dimension) **did represent a fettering of its discretion** to determine whether the location of the proposed development was in*

accordance with proper planning and sustainable development in that area.... In my view, in adopting reason 1, and the underlying reasoning of the inspector in that regard, the Board ***effectively foreclosed on full consideration and evaluation of the application.****"*

28. In my opinion, the Commission is required not fetter its "*full consideration and evaluation of the application"* in this case because a non-statutory plan is proposed and is likely to come into effect at some stage in the future and to be adopted as a variation to the development plan. The Commission has power to grant permission in material contravention of the A1 residential zoning objective, and it should not be constrained in evaluating the application, by a zoning objective which makes the development of housing contingent on the adoption of a local area plan or a non-statutory framework plan. The zoning objective recognises the appropriateness, in principle, of residential development at the location of the subject site.

29. In considering whether the proposed development is in accordance with proper planning and sustainable development, the Commission would necessarily be obliged to consider whether there are any material planning reasons as to why permission should be refused. It is significant in this context that the planning authority has not identified any material planning objections to the proposed development, other than the fact that the development would be in material contravention of the A1 residential zoning objective (because a non-statutory framework plan that has yet to be adopted).

30. In that regard, the fact that the proposed framework plan, which has not yet been published in draft form, is a non-statutory plan, or policy, is of some significance. While it is the intention of the planning authority that the future framework plan will be proposed as a variation to the statutory development plan, any such plan (which is not yet available in draft form) will have to be the subject of public consultation and, at the present point in time, the content of the framework plan cannot be determined and there is at best uncertainty as to what its provisions may contain.

31. In *Ebonwood v Meath County Council* [2004] 1 ILRM 305 at 318, Peart J stated:

> *"It is of the utmost importance that* ***the public at large and in particular those persons seeking to develop their lands or property should have certainty and precision as to the relevant criteria by which any application for permission will be judged,*** *and the circumstances in which compensation may or may not be payable by the planning authority. The first reference point in their consideration will be the provisions of the development plan.* ***If planning authorities were to be entitled to have regard not only to the development plan but also to anything which they might at some stage in the future consider they might include in some future development plan, uncertainty and confusion would abound.*** *The passage which I have quoted above from Environment and Planning Law by Yvonne Scannell puts the matter persuasively in the context of the public's right from a constitutional point of view of being involved in and being consulted in the making of a development plan. The public's right in that regard is effectively set at nought if a planning authority could have regard to considerations not forming part of the adopted development plan."*
>
> [Emphasis added]

32. While the requirement for a local area plan or framework plan is stipulated in the A1 residential zoning objective, the planning considerations that would be contained in any such framework plan have not yet been identified and therefore, do not form part of the adopted development plan. A planning application must be determined by reference to the development plan or other statutory plan that is in force at the date of determination of the application: see *Crofton Management Company CLG v An Bord Pleanala* [2022] IEHC 704, §200*;* [2023] IEHC 240, §39.

33. There is no concrete suggestion in the reports of the planning authority that the proposed development would in any way prejudice the implementation of a future framework plan or variation to the Development Plan. While the second-last sentence in the planning authority's reason for refusal states that *"it is considered that the proposed development undermines the intended plan-led*

and co-ordinated approach to residential development in the Rathmichael area as provided for in the Dun Laoghaire Rathdown County Development Plan 2022-2028", the assessment in the Planning Report does not identify any specific aspect of the development that would prejudice or undermine the implementation of a future framework plan or the provision of infrastructure in that context.

34. The probability of a non-statutory framework plan being adopted in the next couple of years should not provide a basis for any derogation from acting consistently with national policy objectives in relation to the delivery of housing to meet urgent housing demand, in circumstances where there is access to services currently and where the planning authority have no other objection to the proposed development (other than matters of detail which it has indicated could be addressed by way of a further information request). The thrust of the revised National Planning Framework and the recent Ministerial Guidelines entitled *'NPF Implementation: Housing Growth Requirements'* (2025), is to increase the rate of delivery of housing to meet the demand in that regard. Two of the national policy objectives are of particular note in that regard and are relevant to the jurisdiction of the Commission under section 37(2)(b)(iii):

> **National Policy Objective 42 -**
> *To target the delivery of housing to accommodate approximately 50,000 additional households per annum to 2040.*
>
> **National Policy Objective 43 -**
> *Prioritise the provision of new homes at locations that can support sustainable development and at an appropriate scale of provision relative to location.*

35. Under ministerial guidelines issued under section 28 of the PTA 2000, including, in particular, Dún Laoghaire-Rathdown County Council is now required to deliver an additional 500 units or 3,585 units in total per annum within the

county between 2025 and 2034 (see Guidelines, p.14, Appendix 1). An additional 50% headroom must also be provided.

36. In my opinion, these are material considerations for the Commission in considering whether a grant of planning permission is justified in relation to the proposed development, having regard to government policy and ministerial guidelines under section 37(2)(b)(iii) of the PDA 2000, including the Guidelines entitled *'NPF Implementation: Housing Growth Requirements'* (2025). The appeal submitted by Brock McClure sets out in more detail the contents of the objectives of government policy, including the Revised National Planning Framework, and ministerial guidelines issued under section 28 of the PDA 2000.

37. In conclusion, it is a matter for the Commission in the exercise of its expert planning judgment to determine whether the proposed development is in accordance with proper planning and sustainable development, having regard to the matters to which it is obliged to have regard under the PDA 2000. The only reason for refusal relates to the prematurity of the proposed development in the absence of a framework plan for Rathmichael. While the stated purpose of the proposed framework plan (which has yet to be published in draft form and is subject to public consultation) is to "*ensure the coordinated planning and delivery of essential infrastructure services"*, the planning authority has not identified any infrastructural deficit or inadequacy in terms of service provision in the context of the proposed development or the particular area of Rathmichael in which it is located. There is no fixed timeframe for the adoption of the proposed framework plan and the logic of the Council's decision to refuse planning permission, which it was obliged to do in accordance with the zoning objective for the site (without invoking the material contravention procedure), is that all residential development in the Rathmichael area should be stalled until such time as a framework plan has been prepared and adopted as a variation to the Development Plan, following public consultation. Such an approach would appear to be in clear conflict with the requirement for the Council to deliver an additional 500 units or 3,585 units in total per annum under the

Ministerial Guidelines entitled *'NPF Implementation: Housing Growth Requirements'* (2025)

38. From a legal perspective, the Commission has power to grant permission in accordance with section 37(2)(b)(iii) of the PDA 2000, by reference to Government policy objectives, including the national policy objectives for housing delivery under the revised NPF, and under ministerial guidelines issued on section 28 of the PTA 2000 including, in particular, the recent Ministerial Guidelines entitled 'NPF Implementation: Housing Growth Requirements' (2025).

Nothing further occurs at this time.

Eamon Galligan SC

16 November 2026