

Senior Executive Officer,  
Planning and Strategic Infrastructure Department,  
Fingal County Council,  
County Hall,  
Main Street,  
Swords,  
Co. Dublin,  
K67 X8Y2

Date: 21/12/2022  
Our Ref: SB JN 18199

Dear Sir or Madam,

**RE: SUBMISSION ON THE PROPOSED MATERIAL ALTERATIONS TO THE DRAFT FINGAL COUNTY DEVELOPMENT PLAN 2023-2029 ON BEHALF OF MKN PROPERTIES Limited IN REGARD TO LANDS AT FOSTERSTOWN NORTH, DUBLIN ROAD / R132, SWORDS, CO. DUBLIN**

## **1.0 INTRODUCTION**

On behalf of our client, MKN Properties Limited (MKN), 18 The Seapoint Building, 44/45 Clontarf Road, Dublin, we, John Spain Associates, 39 Fitzwilliam Place, Dublin 2, wish to make a submission in respect of the Proposed Material Alterations (PMA's) to the Draft Fingal County Development Plan 2023-2029 in relation to our client's lands at Fosterstown North, Dublin Road / R132, Swords, Co. Dublin.

The adjoining lands to the south are under the separate ownership of J. Murphy (Developments) Limited. This submission has been prepared in consultation with J. Murphy (Developments) Limited, who are making a separate submission in respect of their lands, having regard to the shared planning policy issues arising from the Draft Plan and the Proposed Material Alterations impacting both parties' lands at Fosterstown, Swords. This submission is accompanied by a letter prepared by McCann FitzGerald LLP (see Appendix 1), dealing with a number of legal aspects related to the subject matter of this submission.

As referred to in the letter from McCann FitzGerald LLP, under section 12(11) of the Planning Acts, it states:

*"In making the development plan under subsection (6) or (10), 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."*

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This is the Council's obligation at the point of making the Development Plan.

As set out in the accompanying letter from McCann Fitzgerald, in making the draft development plan and in proposing a number of material amendments, which are inconsistent with Section 28 ministerial guidelines, unless further amended, the adoption of the Development Plan will result in a breach of the Council's obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.

The key points set out in this submission in the context of the Proposed Material Alterations are summarised below, and include:

1. Omit the new map based objective on the subject lands as referred to in PA SH 8.5 in relation to density, which combined with the rezoning of part of the lands to 'OS', results in overly onerous / restrictive requirements, contrary to the proper planning and sustainable development of the lands.
2. Given the uncertainty in respect to the timescales for the preparation of an LAP for Swords, additional revised text is requested to ensure this does not hinder any development (including in relation to the lands at Fosterstown) coming forward.  
and

Other items at issue:

1. Request to omit site specific rezoning of part of the Fosterstown lands as OS

### ***Planning and Development Context***

Our client's lands are currently zoned 'RA - Residential Area' under the Fingal Development Plan 2017-2023 and form the northern part of the Fosterstown Masterplan area, situated to the south of the town centre of Swords, a Key Town in the Metropolitan Area. The subject site is bounded to the south by additional greenfield lands (in the separate ownership of J. Murphy (Developments) Limited) which are within the overall Masterplan area, separated from the subject site by an existing field boundary and an existing stream (Gaybrook Stream) along the southern boundary. The lands are located within the area subject to the Fosterstown Masterplan (2019), which was adopted by Fingal County Council in May 2019 and supports the delivery of residential development and supporting uses at this location.

The site is exceptionally well serviced by existing and planned public transport with high capacity, frequent services, and is located directly adjacent to a major public transport corridor being the Swords Quality Bus Corridor (QBC). A number of bus stops are located within c. 30m - 450m walking distance to the site, providing for a high capacity and frequent service to the city centre, along with direct links with Dublin Airport, Dublin City Centre, and UCD. This includes the Swords Express bus services (including routes 500, 501, 502, 503, 504, 505, 500X, and 501X), a range of Dublin Bus services and a GoAhead service (including routes the 33, 33a, 41, 41b, 41x and 101).

The subject site will also benefit from future major enhancements to public transport services to the area. These include the proposed MetroLink route located to the east of the R132 / Dublin Road (a Railway Order application was submitted to ABP in September 2022, ABP Ref.: NA29N.314724), with the proposed Fosterstown Station located directly to the east of our client's lands. In addition, BusConnects proposals, with a section of the Swords to City

Centre Bus Corridor scheme (application expect to be submitted to ABP in the short term) directly to the east of the site, along the R132 / Dublin Road.

**Figure 1.1: Subject Site (approximately outlined in red)**



Permission for a Strategic Housing Development on part of our client lands was granted by An Bord Pleanála on the 4<sup>th</sup> February 2021, and this decision is presently the subject of legal challenge. The development as granted by ABP consists of 265 no. units, together with a creche and associated site works.

A Strategic Housing Development application (ABP Ref.: 313331-22) Fosterstown North SHD was submitted to An Bord Pleanála on the 14<sup>th</sup> April 2022 for the adjoining Murphy lands and is currently awaiting a decision from the Board (i.e. the statutory timeframe of 16 weeks was not met). This proposed development comprises a Strategic Housing Development of 645 no. residential units, in 10 no. apartment buildings, with heights ranging from 4 no. storeys to 10 no. storeys, including undercroft / basement levels (for 6 no. of the buildings). The proposals include 1 no. community facility in Block 1, 1 no. childcare facility in Block 3, and 5 no. commercial units in Blocks 4 and 8.

### ***Summary Key Grounds of Submission***

The key requests made in this submission in respect of the Proposed Material Alterations are summarised below:

#### **Submission Request 1 – Omit Proposed Material Alterations Ref. PA SH 8.5 New Map Based Objective for lands at Fosterstown**

It is respectfully submitted that no reasoned planning or evidence based justification for the inclusion of a map based objective requiring a density restriction of 110-115 dwellings per hectare on the subject lands has been set out to support this PMA. Furthermore no evidenced based justification been provided for the rezoning of sections of the Fosterstown lands from 'RA' to 'OS'. Such a map-based objective on density would be contrary to national policy and S.28 Ministerial Guidelines (including the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, 2009, the Sustainable

Urban Housing: Design Standards for New Apartments, 2020) which promote increased densities at well served urban sites, particularly where they are adjacent to existing / planned high capacity public transport corridors.

We note the Fosterstown lands are the only development site zoned 'Residential Area' in the Fingal Administrative area where such a density restriction is applied. This is an inequitable and discriminatory approach and contrary to the proper planning and sustainable development of the area, especially given the lands are in close proximity to the planned MetroLink station at Fosterstown and BusConnects proposals, with a section of the Swords to City Centre Bus Corridor scheme directly to the east of the site, along the R132 / Dublin Road. Please see attached letter from McCann Fitzgerald LLP which addresses this point further.

The objective does not have regard to the recent planning history on the MKN lands whereby ABP have already adjudicated upon the acceptability of a density of 150 dwellings per hectare (on that part of the overall Fosterstown LAP lands furthest removed from the proposed Fosterstown Metro station).

It is also considered premature to apply this objective in advance of the preparation of the Local Area Plan for Swords, the Building Height Strategy and Density Study to be completed by FCC, as required under the Draft Development Plan, all of which will provide more detailed guidance in respect of the appropriate density for the subject lands. We respectfully request that the Planning Authority alter Draft Map Sheet 8 and omit the new map-based objective as referred to in PA SH 8.5.

It is considered the omission of the map based objective in respect of density, the reversion of the areas zoned 'OS' to 'RA' (as per the current Development Plan), will not detract from the requirement of the subject lands to demonstrate a high quality of design and layout in any new residential development, and at an appropriate density for its location along a public transport corridor, in line with the Development Plan (including Section 3.5.11.3, Policy SPQHP34, Sections 14.5.2 and 14.5.3 of the Draft Plan) and national planning policies and objectives.

We refer to the attached letter (Appendix 1) from McCann Fitzgerald LLP which sets out the proposed alteration is inconsistent with ministerial guidelines and its adoption will result in a breach of the Council's obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.

*The letter also states that 'subsection (1B) of section 28 sets out requirements that the Council must meet in explaining any failure to implement the policies and objectives of ministerial guidelines. Whilst Appendix 2 of the Draft Plan does refer to the Apartment Guidelines and the Sustainable Residential Development Guidelines, it does not, and nor do the proposed amendments to that appendix, explain why the policies favouring increased density described above were not and could not be implemented in respect of the Fosterstown Lands. Therefore the Council has also breached its obligations under subsection (1B).'*

**Submission Request 2 – Add text to make it clear that, pending preparation of new LAP's, planning applications for developments within the areas covered by the proposed LAP's, will be assessed on their merits against the policies and objectives of the County Development Plan.**

**Proposed Material Alterations Ref. PA CH 2.11 Amended Section 2.4.1 - in respect of the preparation of LAPs:** It is acknowledged that the Proposed Material Alterations include

for a Swords Local Area Plan reflecting the OPR recommendation on the Draft Plan and has regard to Section 19 of the Planning and Development Act 2000 (as amended).

**Proposed Amendment PA SH 8.8 and PA CH 2.10 Swords Local Area Plan:** Reflecting the CE Report, the proposed amendments include for the preparation of a Local Area Plan for Swords over the Plan Period, and the boundary for the LAP (which includes the lands at Fosterstown North) are indicated on Map Sheet 8 Swords.

Given the uncertainty in respect to the timescales for the preparation of an LAP for Swords, and to ensure this does not hinder any development coming forward, the following revised text for Section 2.4.1 is suggested (additional text in green):

*“Following adoption of the Development Plan, a list of LAPs and other strategic plans to be prepared over the lifetime of the Development Plan will be drafted by the Planning Department based on the Council’s priorities and subject to resources. Pending the preparation of Local Area Plans and other strategic plans for the relevant areas of the County, development at these locations will be guided by the policies and objectives of the County Development Plan and National and Regional Planning Policy and planning applications will be assessed on their merits having regard to the proper planning and sustainable development of the area.”*

In addition to the above items, our client made a previous submission on the Draft Plan as part of the consultation in May 2022 and raised serious concerns in respect of the rezoning of part of our client’s lands at Fosterstown North from ‘RA’ Residential Area to ‘OS’ Open Space. Whilst there is no proposed change to this zoning as part of the Proposed Material Alterations, the Chief Executive’s Report on the Draft Plan Public Consultation states the rezoning corresponds with the Green Infrastructure Report for the 2019 Swords Masterplans and the specific masterplan for Fosterstown. As highlighted in the previous submission, it is considered that this is an unreasonable approach and it will result in unnecessary restrictions on open space and vehicular access to our client’s lands. Such a policy is contrary to the proper planning and sustainable development of the site. This is further exacerbated by the above mentioned Proposed Material Alteration which seeks to restrict the density on the subject lands, notwithstanding their location opposite a planned MetroLink station.

It is respectfully submitted that the approach in respect of the lands at Fosterstown is not justified and is inconsistent with the approach taken by FCC in similar and nearby lands within Swords and the wider County. It is inequitable, discriminatory and contrary to proper planning and sustainable development to single out a particular development area for the zoning of part of the development area as open space. The burden of such impositions by FCC will be borne by purchasers of residential units on the subject lands and further exacerbate the affordability issues for purchasers as further areas of public open space will have to be provided over and above the zoned Open Spaces areas, in order to meet the Development Plan public open space standards. Such an objective is contrary to the proper planning and sustainable development of the site, as noted in the legal opinion by McCann Fitzgerald, *“is inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council’s obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines”*.

The de-zoning of the land clearly contravenes a policy and objective of the Development Plans Guidelines (2022) by failing to retain residential zoning on the lands. The Guidelines state at 4.4.1 that *‘It is a policy and objective of these Guidelines that zoned housing land in an existing development plan, that is serviced and can be developed for housing within the*

*life of the new development plan under preparation, should not be subject to de-zoning.’* Planning authorities are required under section 28(1) of the Planning Acts to have regard to Ministerial guidelines in the performance of their functions.

This is confirmed in the letter from McCann Fitzgerald LLP which states that *‘in de-zoning the Fosterstown Lands, the Council has breached Development Plans Guidelines for Planning Authorities (the “Development Plan Guidelines”, and in doing so has failed to fulfil its obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines. Further, in breach of subsection (1B) of section 28, the Council has failed to provide reasons explaining why it has formed the opinion that the policies and objectives of the Development Plans Guidelines cannot be implemented.’*

The following section of this document sets out the grounds of submission and supporting arguments for same in further detail, as they relate to specific proposed material alterations.

## **2.0 PROPOSED MATERIAL ALTERATIONS AND SUBMISSION REQUESTS**

### **Proposed Material Alterations No. PA SH 8.5 – New Map Based Objective for lands at Fosterstown**

The Proposed Material Alteration no. PA SH 8.5 includes a new map-based objective for lands at Fosterstown as follows:

*“Provide for well-designed housing at a density of 110-115 dwellings per hectare, which is in keeping with the masterplan and the enhancement of the character of the Key Town of Swords.”*

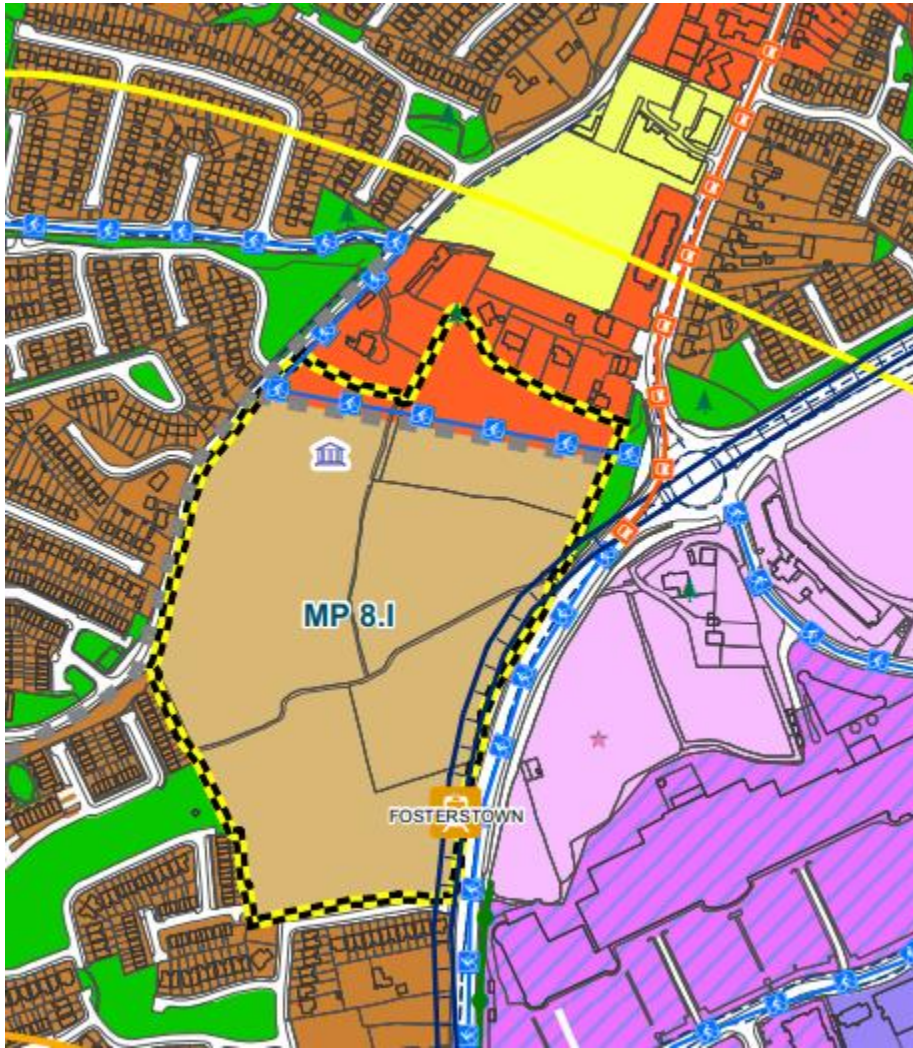
The proposed density restriction appears to reflect the net density indicated in the Fosterstown Masterplan 2019, however, no reasoned planning justification or evidence based approach for the inclusion of this map based objective as part of the Development Plan has been set out. It is the only residential zoned land in Fingal where such a restriction on density is proposed in the Development Plan, it is not proposed on any other lands in Swords which are subject to masterplans adopted at the same time, and it is considered that the adoption of such an approach in relation to density places a serious restriction on the potential residential yield of lands which are particularly well served by existing and proposed high quality public transport and can accommodate higher density apartment development to help address the ongoing housing shortage and meet demand levels.

As set out in further detail below, the map based objective would be contrary to Government policy which promotes increased densities at well served urban sites. The objective has no regard to the recent planning history of the overall Fosterstown Masterplan lands, and also it is considered premature to apply this objective in advance of the preparation of the Local Area Plan for Swords and the Building Height Strategy and Density Study to be completed by FCC, as set out in the Proposed Material Alterations to the raft Plan.



Figure 2.1: Extract from Draft Development Plan Sheet 8 Material Alterations





**Figure 2.2: Extract from current Fingal Development Plan 2017-2023 Sheet 8 – Fosterstown Masterplan Lands**

In terms of National Planning Policy, Project Ireland 2040: National Planning Framework (NPF) seeks to deliver on compact urban growth. The NPF includes a strong emphasis towards increased building heights and density in appropriate locations within existing urban centres and along public transport corridors, which the Core Strategy and land use zoning objective for the subject lands as set out in the Draft Plan encourages. The NPF also supports increased residential density in accordance with the principles of compact growth. Of relevance, Objectives 33 and 35 of the NPF seek to prioritise the provision of new homes at locations that can support sustainable development and seeks to increase densities in settlements, through a range of measures. Furthermore, the NPF signals a move away from rigidly applied, blanket planning standards, with objective 13 stating that in urban areas, planning and related standards will be based on 'performance criteria' to achieve well designed high quality outcomes, which a specific density restriction on the subject lands would be contrary to.

In relation to Section 28 Guidelines, the '*Urban Development and Building Height, Guidelines for Planning Authorities*' 2018 (Building Height Guidelines), '*Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities*' 2020 (Apartment Guidelines) and *Sustainable Residential Development in Urban Areas, Guidelines for Planning Authorities* (Sustainable Residential Development Guidelines) 2009



all support increases in density, at appropriate locations, in order to ensure the efficient use of zoned and serviced land.

In this regard we would refer to the requirements of SPPR 1 of the Urban Development & Building Height Guidelines which state:

*“In accordance with Government policy to support increased building height and density in locations with good public transport accessibility, particularly town/ city cores, planning authorities shall explicitly identify, through their statutory plans, areas where increased building height will be actively pursued for both redevelopment, regeneration and infill development to secure the objectives of the National Planning Framework and Regional Spatial and Economic Strategies and shall not provide for blanket numerical limitations on building height.”*

We also refer to the *Sustainable Urban Housing: Design Standards for New Apartments* (2020) (the “Apartment Guidelines”). Under the heading “Central and/or Accessible Urban Locations” the Apartment Guidelines note that such locations are generally suitable “for small- to large- scale (will vary subject to location) and higher density development (will also vary)”. The Apartment Guidelines define Central and/or Accessible Urban Locations as follows:

*“Such locations are generally suitable for small- to large-scale (will vary subject to location) and higher density development (will also vary), that may wholly comprise apartments, including:*

- Sites within walking distance (i.e. up to 15 minutes or 1,000-1,500m), of principal city centres, or significant employment locations, that may include hospitals and third-level institutions;*
- Sites within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m) to/from high capacity urban public transport stops (such as DART or Luas); and*
- Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) to/from high frequency (i.e. min 10 minute peak hour frequency) urban bus services.”*

The Fosterstown Lands are located adjacent to a Dublin Bus transport corridor with a frequent service (peak c. 10min) from the 33 and 41 bus routes. Other services include the 41x to University College Dublin and the Swords Express 500-X, 501 and 501-X to the city centre. The site is also located adjacent to the proposed BusConnects corridor along the R132 as well as 500m from the proposed MetroLink station at Fosterstown, and thus very clearly meets the criteria to be categorized as a ‘Central and/or Accessible Urban Location’. It is respectfully submitted that the subject lands at Fosterstown, as demonstrated by the current SHD application on the Murphy lands (Fosterstown North SHD) and the previous SHD permission granted for the MKN lands (Fosterstown SHD), offer an appropriate location for increased density (beyond 110-115 units per hectare) having regard to the availability of existing and planned high frequency, high capacity, public transport facilities and services provided within the area (as set out in Section 1 above), including the location of the future Bus Connects and the proposed MetroLink station in close proximity to the site. (See Figure 2.1 above). The location of the subject lands in the Key Town of Swords, contiguous to the built up area constitutes an opportunity for planned, compact and sustainable growth on an appropriately zoned site, which has strong physical and social infrastructure.

The proposed map-based objective is inconsistent with the planning history of the lands, given An Bord Pleanála granted permission (under ABP Ref.: 308366-20) on the 3<sup>rd</sup> of

February 2021 for a Strategic Housing Development for 265 no. units (as amended by Condition no. 3) on lands at Fosterstown North and Cremona, Forest Road, Swords, Co. Dublin. This SHD formed Phase 1 of the northern portion of the Fosterstown Masterplan lands and the permitted density was c. 150 units per hectare. (on what is considered that element of the site capable of accommodating the most modest density ratio). The Board's Inspector was satisfied that the lands constituted a 'Central and/or Accessible Urban Location' in accordance with the Apartment Guidelines. The letter from McCann Fitzgerald states that *'taking into consideration its obligation under section 12(11) of the Planning Acts to restrict its considerations when making the development plan to the proper planning and sustainable development of the area, the Council has no scope to depart from the conclusions of the Board on this issue.'*

Separately, a Strategic Housing Development application (ABP Ref.: 313331-22) was submitted to An Bord Pleanála on the 14th April 2022 for the adjoining Murphy lands and is currently awaiting a decision from the Board (i.e. the statutory timeframe of 16 weeks was not met). The SHD application proposes 645 no. residential units, with a proposed net density of c. 171 units per hectare.

The reasoning contained in the objective proposed to be inserted by Pa SH 8.5 is that limiting density would be *'in keeping with the masterplan and the enhancement of the character of the Key Town of Swords'*. Similar reasoning was also set out in the Chief Executive Report to justify the de zoning of parts of the Fosterstown Lands, stating it *'corresponds with the approach set out in the Green Infrastructure Report for the 2019 Swords Masterplans and for the specific masterplan for Fosterstown...'*. However, this is inadequate and relies on irrelevant considerations, namely the Fosterstown Masterplan. This is a non-statutory document and does not constitute a material change in circumstance. The proposed insertion of the map based objectives, along with the rezoning of the lands to OS, is at odds with the approach taken in previous development plans. The Council must identify a relevant and material change in circumstances to justify any new or greater burden on the lands.

In relation to Masterplans we note the draft development plan (pg 57 for example) states that; *"The Council will continue to implement the Masterplans currently in place at the time of adoption of the Development Plan"*. However, we would respectfully suggest that that the implementation of policies of non statutory plans, which themselves may conflict with national and regional policy is not an appropriate basis for the proper planning and sustainable development of the area and inclusion in a development plan.

Accordingly, we would respectfully request that a clarification would be provided by the Council that the referenced masterplans are non-statutory documents and do not form part of the County Development Plan and that the development plan does not confer any enhanced status on the masterplans, noting that these plans have not been put through the statutory development plan consultation process, including review by OPR.

The proposed imposition of a density cap on the Fosterstown lands, which has both recent planning history as well as a live SHD application, is in stark contrast to the approach taken by the Council with respect to an analogous situation at lands at Auburn House, Little Auburn & Streamstown.

At page 578, under the heading "Lands at Auburn House", the CE Report notes that a submissions was received in connection with lands at Auburn House, Little Auburn and Streamstown off the R107 Malahide Road requesting *"...inclusion of a special objective in the new County Plan that Auburn House and attendant grounds are only suited to extremely*

*low density and limited residential development and any development to be subject to proper protection of Auburn House and Attendant Grounds.”*

The Chief Executive’s response to that submission was as follows:

*“The lands at Auburn House have been zoned for residential development for many years. National policy on building heights and densities set out direction on the form of the redevelopment of the lands at this location. Auburn House and lands are the subject of a live SHD Planning Application, with a decision due in August 2022 (TA06F.313360 refers). The description of development is: ‘Preservation of Auburn House (a Protected Structure) and stables as 1 no. residential dwelling, conversion of stables to provide storage space for Auburn House, construction of 368 no. residential units (87 no. houses, 281 no. apartments), creche and associated site works.’ It would not be appropriate to insert a new Local Objective in relation to Auburn House, while this area is subject to a live planning application.”*

The parallels between the proposed material amendment and the request for a density objective at Auburn House are evident. The Chief Executive’s desire to avoid interference with the planning process before the Board in respect of the Auburn House SHD application and the respect for the long-term residential zoning of the site is notable. Unfortunately, the same restraint and respect is not in evidence with regard to the treatment of the Fosterstown lands, and accordingly we would respectfully request that the Council would adopt a consistent approach in such similar circumstances and omit this proposed material amendment.

Of particular relevance in this context is the pending application for permission for SHD made by Murphy Development (Board ref. ABP-313331-22). The Board’s decision on that application is awaited. This situation is analogous to the Auburn House SHD application. As noted above, the Chief Executive concluded that, *“It would not be appropriate to insert a new Local Objective in relation to Auburn House, while this area is subject to a live planning application.”* There is no reason for any difference in treatment with respect to the Fosterstown land.

It is also considered premature to apply this objective in advance of the preparation of the Local Area Plan for Swords (Proposed Material Alteration PA CH 2.10), in addition to the Building Height Strategy and Density Study (Proposed Material Alteration PA CH 3.3) to be completed by FCC, both of which are proposed material alterations reflecting recommendations by the Office of the Planning Regulator on the Draft Plan.

In particular the recommendation for the Building Height Strategy and Density Study for the County was made by the OPR having regard to SPPR 1 contained in the Urban Development and Building Heights Guidelines for Planning Authorities (2018) which states the *‘...planning authorities shall explicitly identify, through their statutory plans, area where increased building height will be actively pursued for both redevelopment, regeneration and infill development to secure the objectives of the National Planning Framework and Regional Spatial and Economic Strategies and **shall not provide for blanket numerical limitations on building height.**’* (Emphasis added). The Chief Executive’s Report on the Draft Plan Public Consultation in response to the OPR recommendations in respect of density is specific in stating that both the LAP and the building and density strategy will provide more detailed guidance on density:

- *‘...**proposed local level plans** specified in the Draft Plan **will serve to provide detailed guidance on density**, building heights and typologies for the future development of greenfield or edge of city/town locations.’* (Emphasis added)

- ***‘...the Chief Executive accepts that the preparation of a dedicated building height and density strategy based on the Core Strategy for Fingal would provide a useful guide for the public and developers as to appropriate heights and densities for development across the County and recommends that an objective be added to the draft plan to the effect that such a study is to be prepared during the lifetime of the Plan’ (Emphasis added)***

Thus, the now proposed inclusion of a map based objective restricting density to 110-115 per hectare on the Fosterstown lands is contrary to national policy, the recommendations of the OPR and is premature pending the county-wide building height and density study.

Overall, the proposed map-based objective in relation to density, in addition to the previous concerns raised on the rezoning of part of the lands from ‘RA’ to ‘OS’, results in inappropriate restrictions on the subject lands, and could result in the unnecessary loss of additional much needed housing to serve Swords, located on the MetroLink corridor contrary to Government policy. The approach taken in respect of both the map based density and rezoning of part of the lands to ‘OS’ is inconsistent with the approach taken elsewhere in Swords or the wider County. For example, both the Swords Masterplans for Barryparks and Crowcastle and Estuary West include density objectives, however, a similar map-based objective is not proposed as part of the new Development Plan, nor are areas within the undeveloped residentially zoned lands picked out and zoned for open space. It will impede the delivery of residential accommodation at an appropriate density at Fosterstown, where a current permission is subject to a Judicial Review challenge and a current application is pending a decision from the Board, rather than the proper planning and sustainable development of the area.

The approach taken represents an inequitable limitation on development of the lands at Fosterstown, with no rationale or justification stated for this highly restrictive approach.

The burden of such impositions by FCC will be borne by purchasers of residential units on the subject lands and further exacerbate the affordability issues for purchasers, as further areas of public open space will have to be provided over and above the zoned Open Spaces areas, in order to meet the Development Plan public open space standards. Such an objective is contrary to the proper planning and sustainable development of the site.

It is considered that neither the omission of the map based objective in respect of density or the reversion of the subject lands to residential zoning (as pertains in the current Development Plan) would detract from the ability of the subject lands to demonstrate a high quality of design and layout, including high quality public open space, in any new residential development (which has been demonstrated in the two SHD applications), and at an appropriate density for its location along a public transport corridor, in line with the Development Plan (including Section 3.5.11.3, Policy SPQHP34, Sections 14.5.2 and 14.5.3 of the Draft Plan) and national policies and objectives.

The Development Plan Guidelines for Planning Authorities (2022) are clear that in drafting the objectives in a development plan, a rigorous, evidence-based approach should be followed and there are a number of key factors; including the objective should be consistent with national policy and standards, any relevant Ministerial Guidelines, and the objectives should be internally consistent.

As set out in the Development Plan Guidelines, *“Planning authorities and An Bord Pleanála are required to have regard to guidelines issued under Section 28 of the Planning Act and are also required to apply any specific planning policy requirements (SPPRs) of guidelines,*



*in carrying out their functions<sup>2</sup>. Accordingly, SPPRs take precedence over any conflicting policies and objectives of existing development plans”. (page 6).*

*The letter provided by McCann Fitzgerald notes the proposed alteration is ‘inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council’s obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.*

*...subsection (1B) of section 28 sets out requirements that the Council must meet in explaining any failure to implement the policies and objectives of ministerial guidelines. Whilst Appendix 2 of the Draft Plan does refer to the Apartment Guidelines and the Sustainable Residential Development Guidelines, it does not, and nor do the proposed amendments to that appendix, explain why the policies favouring increased density described above were not and could not be implemented in respect of the Fosterstown Lands. Therefore, the Council has also breached its obligations under subsection (1B).’*

Having regard to the above, we request that the following amendments to the Draft Plan be considered.

**Submission Request 1 – PA SH 8.5 Map Based Objective for Lands at Fosterstown (Amended/additional text in green, omitted text shown in red with a strikethrough)**

Having regard to the justification set out above, we respectfully request that the Planning Authority alter Draft Map Sheet 8 by the omission of the new map based objective as referred to in PA SH 8.5 and by the reversion of the zoning of the areas zoned ‘OS’ back to ‘RA’ as pertains in the current Fingal County Development Plan 2017-2023.

~~“Provide for well-designed housing at a density of 110-115 dwellings per hectare, which is in keeping with the masterplan and the enhancement of the character of the Key Town of Swords.”~~

**Proposed Material Alterations No. PA CH 2.10, PA CH 2.11 and PA SH 8.8 – Swords Local Area Plan**

The Proposed Material Alteration no. PA CH 2.10 amends Table 2.16 to add Swords to the schedule of Local Area Plans (LAPs) to be commenced over the Plan period. PA SH 8.8 indicates the boundary for the Swords Local Area Plan on the Draft Map Sheet 8 associated with the changes to Table 2.16. It is acknowledged that this reflects the OPR recommendation and has regard to section 19 of the Planning and Development Act 2000, as amended, which sets out the requirement to make local area plans (LAPs) for designated towns of in excess of 5,000 population.

The proposed alteration to Section 2.4.1 (PA CH 2.11) sets out that following adoption of the Development Plan, a list of LAPs and other strategic plans to be prepared over the lifetime of the Development Plan will be drafted by the Planning Department based on the Council’s priorities and subject to resources. Given the uncertainty in timeframes, it is important that this does not hinder development coming forward in advance of the preparation and adoption of the LAP. It is noted that Proposed Alteration PA CH 2.16 includes additional text in respect of Urban Framework Plans (UFP) to clarify pending the preparation of UFP’s, any development will be ‘guided by the policies and objectives of the County Development Plan and National and Regional Planning Policy and planning applications will be assessed on their merits having regard to the proper planning and sustainable development of the area.’ It is considered similar text should be included in the Development Plan in respect of the LAPs for the avoidance of any doubt, which is

particularly relevant to Swords where existing services and infrastructure are in place and the issue of prematurity does not arise.

Having regard to the above, we request that the following amendments to the Draft Plan be considered.

**Submission Request 2 – PA SH 2.11 Amended Section 2.4.1 in respect of the preparation of LAPs (Amended/additional text in green, omitted text shown in red with a strikethrough)**

Having regard to the justification set out above, we respectfully request that the following revised text is included as part of the amended Section 2.4.1:

*“Following adoption of the Development Plan, a list of LAPs and other strategic plans to be prepared over the lifetime of the Development Plan will be drafted by the Planning Department based on the Council’s priorities and subject to resources.*

*Pending the preparation of Local Area Plans and other strategic plans for the relevant areas of the County, development at these locations will be guided by the policies and objectives of the County Development Plan and National and Regional Planning Policy and planning applications will be assessed on their merits having regard to the proper planning and sustainable development of the area.”*

### **3.0 CONCLUSION**

This submission on the draft Fingal Development Plan 2023-2029 has been prepared on behalf of our client MKN Properties Limited in relation to our client’s lands at Fosterstown North, Dublin Road / R132, Swords, Co. Dublin.

The specific requests made in this submission are set out in the tables in Section 2 of this submission relating to specific chapter(s) of the Draft Plan, to allow for ease of review and assessment.

In summary, it is respectfully submitted that having regard to policies contained in the Draft Development Plan for compact development and to provide a greater scale of residential accommodation at sustainable densities, the key concerns relate to the imposition of a new map based objective restricting density, in addition to the presence of the ‘OS’ Open Space zoning, which will unnecessarily hinder the future development proposals on these lands. It is therefore respectfully requested that the map based objective proposed in respect of the subject lands at Fosterstown be omitted, and the zoning of part of the lands to open space be reversed.

The removal of the map-based objective in respect of density and the reversal of the OS zoning will not detract from the ability of the subject lands to deliver a high quality development, with an appropriate density for its location, in line with the FCC Development Plan and national policies.

Finally, we set out below the conclusions reached in the legal opinion of our client’s solicitor’s, McCann Fitzgerald LLP.

1. In de-zoning the Fosterstown Lands, the Council has breached the Development Plan Guidelines and in doing so has failed to fulfil its obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines. Further, in breach of subsection (1B) of

- section 28, the Council has failed to provide reasons explaining why it has formed the opinion that the policies and objectives of the Development Plan Guidelines cannot be implemented.
2. Proposed amendment PA SH 8.5 is inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council's obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.
  3. Insofar as reasons for de-zoning the Fosterstown Lands and for the insertion of the proposed amendment are discernible, they are inadequate and demonstrate reliance on irrelevant considerations, namely the masterplans.
  4. The de-zoning of the Fosterstown Lands and the insertion of the proposed amendment breach the proper planning and sustainable development of the area and contradict the Board's conclusions on that issue with regard to the Fosterstown Lands.
  5. There has been no material change in circumstance to justify the de-zoning of the Fosterstown Lands and the insertion of the proposed amendment.
  6. The Council's treatment of the Fosterstown Lands amounts to unlawful discrimination where other lands in the Fingal area with the same characteristics have retained their "RA" zoning and where there has been no attempt to insert density caps at other lands which are subject to masterplans.
  7. The de-zoning of the Fosterstown Lands and the proposed amendment fail to respect the site activation policies expressed in measures such as the Residential Zoned Land Tax.
  8. The Council has targeted the Fosterstown Lands in an unlawful manner in order to undermine the MKN SHD Permission and/or to gain a benefit in terms of additional levies from our clients.
  9. The decision to de-zone the Fosterstown Lands and to insert a site specific objective limiting density is unreasonable and discriminatory insofar as it is inconsistent with the Chief Executive's approach to other lands where there are live SHD planning applications, and there is no discernible reason for any difference in treatment.

We would be grateful if you consider the contents of this submission when considering the proposed material alterations and the adoption of the Fingal County Development Plan 2023-2029.

Yours sincerely,



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**John Spain**

*Managing Director John Spain Associates .*

*Attached Appendix 1: Letter from McCann Fitzgerald LLP*

**APPENDIX 1**  
**Letter from McCann Fitzgerald LLP**



**McCann FitzGerald LLP**

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**MCCANN FITZGERALD**

OUR REF

YOUR REF

DATE

BNMS\60472415.4

20 December 2022

FAO: Planning and Strategic Infrastructure Department,  
Fingal County Council,  
County Hall,  
Main Street,  
Swords,  
Co. Dublin,  
K67 X8Y2

**Our Clients: MKN Properties Limited and J. Murphy (Developments) Limited**

**Submission on proposed material amendments to the Draft Fingal Development Plan 2023-2029**

Dear Colleagues,

We write to you on behalf of our clients MKN Properties Limited (“MKN”) and J. Murphy (Developments) Limited (“**Murphy Developments**”) regarding the Draft Fingal Development Plan 2023-2029 (the “**Draft Plan**”) and the Proposed Amendments thereto. This letter accompanies two separate submissions prepared by John Spain Associates (“**JSA**”), and should be read and considered in conjunction with those submissions.

Our two clients are the owner of lands at Fosterstown, Swords (the “**Fosterstown Lands**”). We wish to address the manner in which the zoning of those lands is treated in the Draft Plan and in proposed material amendments thereto.

Before considering those issues, we set out below the relevant background regarding the preparation of the Draft Plan as it relates to the Fosterstown Lands.

**Background**

On 24 February 2022, the Chief Executive of Fingal County Council (the “**Council**”) published the Draft Plan, which comprises of a written statement accompanied by, amongst other things, a number

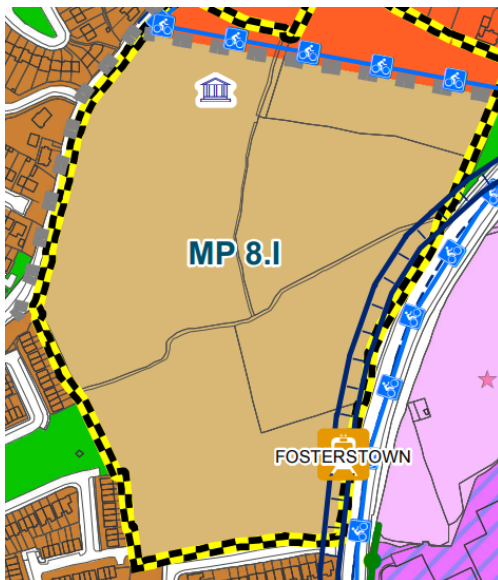
Stephen Holst (Managing Partner), Catherine Deane (Chair), Terence McCrann, Roderick Bourke, Niall Powderly, Kevin Kelly, Hilary Marren, Eamonn O’Hanrahan, Barry Devereux, Helen Kilroy, Judith Lawless, James Murphy, David Lydon, David Byers, Colm Fanning, Paul Lavery, Alan Fuller, Michelle Doyle, Hugh Beattie, Fergus Gillen, Valerie Lawlor, Mark White, Rosaleen Byrne, Eamon de Valera, Joe Fay, Ben Gaffikin, Donal O Raghallaigh, Philip Andrews, Barrett Chapman, Mary Brassil, Audrey Byrne, Shane Fahy, Georgina O’Riordan, Adrian Farrell, Michael Murphy, Aidan Lawlor, Darragh Murphy, Brian Quigley, Conor O’Dwyer, Stephen FitzSimons, David Hurley, Philip Murphy, Fiona O’Beirne, Garreth O’Brien, Gary McSharry, Alan Heuston, Josh Hogan, Richard Leonard, Rory O’Malley, Lisa Smyth, Brendan Slattery, Tom Dane, Catherine Derrig, Megan Hooper, Shane Sweeney, Adam Finlay, Iain Ferguson, Jennifer Halpin, Stuart McCarron, Stephen Proctor, Michael Coonan, Emily Mac Nicholas, Brendan Murphy, Shane O’Brien, Éamon Ó Cuív, Eleanor Cunningham, Gill Lohan, Ciara Ryan, Niall Best, Richard Gill, Douglas McMahon, Laura Treacy, Laura Deignan, Stephen Fuller, Niall McDowell, John Neeson, David O’Dea, Orlaith Sheehy, Sean Carr, Morgan Dunne, Donal Hamilton, Ian Payne.

**Consultants:** Catherine Austin, Deirdre Barnicle, Seán Barton, Eleanor MacDonagh (FCA), Anna Moran, Peter Osborne, Tony Spratt (ACA).

of draft maps setting out zoning objectives and specific objectives for the parts of the County to which each map relates. Draft map no. 8 concerns the area of Swords, including the Fosterstown Lands.

In the current Fingal Development Plan 2017-2023 (the “**2017-2023 Plan**”), map no. 8 concerns the same area. The zoning objectives for the map area are indicated by coloured shading. On map no. 8 of the 2017-2023 Plan, the entirety of the Fosterstown Lands are shaded a light brown, which the legend indicates means “RA – Residential Area” with the objective to “[p]rovide for new residential communities subject to the provision of the necessary social and physical infrastructure”.

In draft map no. 8 of the Draft Plan, the shading of the Fosterstown Lands has changed so that parts are shaded a bright green, which according to the map legend means “OS – Open Space” with the objective to “[p]reserve and provide for open space and recreational amenities”. The remainder of the Fosterstown Lands are shaded in the same manner as in the current 2017-2023 Plan, indicating that they are zoned “RA – Residential Area”. For ease of reference, we include an excerpt of map no. 8 from the current 2017-2023 Plan, and draft map no.8 from the Draft Plan, showing the Fosterstown Lands:



Map no. 8 (2017-2023 Plan)



Draft map no. 8 (Draft Plan)

Chapter 13 of the written statement of the Draft Plan is entitled “Land Use Zoning”. Section 13.5 of that chapter addresses “Zoning Objectives, Vision and Use Classes”, and includes a series of sub-headings corresponding to the zoning objectives indicated on the draft zoning maps accompanying the Draft Plan written statement.

Under the heading “Zoning Objective “RA” Residential Area”, in addition to setting out the “Objective” and “Vision” for the zoning objective, there is a table entitled “Use Classes Related to Zoning Objective”. The table is divided into uses which are “Permitted in Principle” and those which are “Not Permitted” (although, it appears these terms are not defined in the written statement of the Draft Plan). The uses listed under “Permitted in Principle” includes “Residential”.

A similar table is found under the heading “Zoning Objective ‘OS’ Open Space”. The table indicates that a short list of uses are “Permitted in Principle” on lands zoned OS. Those are: “Community Facility”, “Golf Course”, “Open Space”, and “Recreational/Sports Facility”. By contrast, a long list of

uses are “Not Permitted”, including “Residential”, “Residential Care Home/Retirement Home” and “Residential Institution”.

The net effect of draft map no. 8 as it relates to the Fosterstown Lands is that areas of those lands are now proposed to be zoned “OS”. As just explained, while residential use is permitted in principle on lands zoned RA, it is not permitted on lands OS. Accordingly, parts of the Fosterstown Lands have effectively been “de-zoned” with respect to residential use.

Further, not only does the de-zoning of the Fosterstown Lands mean that residential development is not permitted on parts of the lands, it also impacts on our clients’ ability to meet public open space requirements as part of residential development on the remainder of the lands. This is because in Chapter 4 of the Draft Plan, entitled “Community Infrastructure and Open Space”, it is stated at section 4.5.2.3:

“It is the intention of the Council, however, to ensure, except under exceptional circumstances, public open space provision is not less than 10% of a development site area. This provision recognises the contribution residential open space makes to multi-functional urban Green Infrastructure and nature-based solutions such as Sustainable Urban Drainage (SuDS), biodiversity and active travel. The development site area cannot include lands zoned RU, GB, OS or HA.” (Emphasis added)

On 12 May 2022, JSA made a submission on the Draft Plan on behalf of MKN (the “**MKN submission**”). That submission highlighted the foregoing, and noted that:

- The de-zoning of aspects of the Fosterstown Lands to OS will result in a loss of a significant quantity of net developable area with open space in excess of requirements within the MKN landholding being required and less space for much needed housing units;
- Alternatively, it will result in a requirement for the developer to pay substantial additional levies to the Planning Authority in respect of any shortfall in open space;
- The approach in the Draft Plan is unreasonable and represents an unacceptable infringement of MKN’s property rights;
- It amounts, in effect, to the ‘double counting’ the public open space requirements for any development on the land;
- No reasoned justification for rezoning the Fosterstown Lands has been set out;
- The burden will be borne by purchasers of residential units on the Fosterstown Lands and further exacerbate the affordability issues for purchasers;
- The Draft Plan policy is contrary to the proper planning and sustainable development of the site;
- The Fosterstown Lands are the only site zoned “RA” in Swords and also in the entire County that is treated in this manner in respect of an additional open space zoning, and no justification or rationale has been set out for the discriminatory treatment of the Fosterstown site in this respect.

The MKN submission requested that the entirety of the Fosterstown Lands remain as “RA” Residential zoned lands which is consistent with the approach taken by Fingal County Council (the “Council”) in similar and nearby lands within Swords.

The MKN submission was accompanied by a letter from RMC Solicitors reserving MKN’s legal position in the event that the proposed de-zoning of the Fosterstown Lands went ahead.

On 12 May 2022, JSA made a separate submission on behalf of Murphy Developments (the “**Murphy submission**”) in substantially the same terms as the MKN submission in relation to the de-zoning of the Fosterstown Lands. In addition to the arguments included in the MKN submission, the Murphy submission notes that the “OS” zoning on the Fosterstown Lands conflicts with the Fosterstown Masterplan’s key transport and movement objectives, which illustrate a vehicular access connecting the southern part of the Fosterstown Lands to the adjoining northern part of the lands.

The Murphy submission was accompanied by a letter from B. Vincent Hoey & Co. Solicitors reserving Murphy Developments’ legal position in the event that the proposed de-zoning of the Fosterstown Lands went ahead.

On 28 July 2022, the Chief Executive of the Council published a report on the Draft Plan public consultation (the “**CE Report**”) which summarised and responded to submissions received during the public consultation process. With regard to submissions concerning the OS zoning on the Fosterstown Lands, the Chief Executive responded as follows:

“Finally, with regard to the designation of areas of Open Space within residentially zoned areas at Fosterstown, it should be noted that this rezoning corresponds with the approach set out in the Green Infrastructure Report for the 2019 Swords Masterplans and for the specific masterplan for Fosterstown which forms part of the Swords Masterplans. This approach seeks to provide for a central green corridor while protecting the existing waterways on the site. It is considered appropriate that these key objectives for the overall development of these lands are reflected in the overall land use zoning for the area.”

The Council considered the Chief Executive’s report on the Draft Plan public consultation and, at a series of Special Meetings held in September and October 2022, resolved to amend the Draft Plan. The proposed material alterations were published on 11 November 2022. Of particular relevance to the Fosterstown Lands is proposed amendment PA SH 8.5 to map no. 8 (the “**proposed amendment**”):

“Include a new map-based local objective for lands at Fosterstown as follows:

*Provide for well-designed housing at a density of 110-115 dwellings per hectare, which is in keeping with the masterplan and the enhancement of the character of the Key Town of Swords.*”

That proposed amendment arose as a result of a motion from Cllr. Dean Mulligan. Cllr. Mulligan’s motion (numbered 555) was heard at a Council meeting on 13 October 2022. It is unclear from the materials available on the Council’s website whether further written justification for the proposed amendment was provided, beyond the text of the proposed objective which states that the density range included is in keeping with the non-statutory masterplan for the area and the enhancement of the character of the Key Town of Swords.

A video recording of the meeting of 13 October 2022 is available online. At that meeting, Ms Roisin Burke, Senior Planner for the Council, stated that there was no need to replicate the density limits of the masterplan in the development plan, and that a map based objective was not required in this



instance. Cllr. Mulligan explained his motivation for introducing the motion, stating that masterplans are not legally binding documents and that the development plan was the “only legally binding document”. Cllr. Mulligan said he was “trying to secure an appropriate density on this site” and that the density range was a compromise in comparison to surrounding sites.

Proposed amendment PA SH 8.5 appears on draft map no. 8 as follows:



We now wish to address proposed amendment PA SH 8.5 as well as the manner in which our clients’ lands have been de-zoned.

### Legislative Context

Before setting out our submission on the Draft Plan and the proposed amendment, we remind the Council of some of its key obligations under the Planning and Development Act 2000 (the “**Planning Acts**”) regarding the preparation and making of a development plan.

Section 28(1) of the Planning Acts provides that the Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under the Planning Acts, and planning authorities shall have regard to those guidelines in the performance of their functions.

Subsection (1A) of section 28 then elaborates on that general duty, stating:

“Without prejudice to the generality of subsection (1) and for the purposes of that subsection a planning authority in having regard to the guidelines issued by the Minister under that subsection, shall –

(a) consider the policies and objectives of the Minister contained in the guidelines when preparing and making the draft development plan and the development plan, and

(b) append a statement to the draft development plan and the development plan which shall include the information referred to in subsection (1B).”

Subsection (1B) of section 28 states that the statement referred to in subsection (1A)(b) shall include information which demonstrates:

“(a) how the planning authority has implemented the policies and objectives of the Minister contained in the guidelines when considering their application to the area or part of the area of the draft development plan and the development plan, or

(b) if applicable, that the planning authority has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why the policies and objectives of the Minister have not been so implemented.”

We also refer to section 12(11) of the Planning Acts, which states:

“In making the development plan under subsection (6) or (10), 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.”

This is the Council’s obligation at the point of making the development plan.

## Submission

1. **In de-zoning the Fosterstown Lands, the Council has breached *Development Plans, Guidelines for Planning Authorities* (the “Development Plan Guidelines”), and in doing so has failed to fulfil its obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines. Further, in breach of subsection (1B) of section 28, the Council has failed to provide reasons explaining why it has formed the opinion that the policies and objectives of the Development Plan Guidelines cannot be implemented.**

In June 2022, the Minister issued the Development Plan Guidelines under section 28 of the Planning Acts. On 1 July 2022, the Department of Housing, Local Government and Heritage issued a circular (NRUP 03/2022) to, among others, the Directors of Services for Planning for each City and County Council. That circular draws attention to the Development Plan Guidelines and summarises key policies and objectives of the Guidelines. The Guidelines therefore pre-date the CE Report, and were specifically drawn to the attention of the Council.

The Guidelines state at 4.4.1 that:

“It is a policy and objective of these Guidelines that zoned housing land in an existing development plan, that is serviced and can be developed for housing within the life of the new development plan under preparation, should not be subject to de-zoning.”

Further, the circular referred to above summarises key policies and objectives of the Guidelines, stating:

“The Guidelines confirm that zoned lands that are serviced and available for new housing construction within the life of the Plan should be retained as such, rather than be ‘de-zoned’.”

As set out above, planning authorities are required under section 28(1) of the Planning Acts to have regard to Ministerial guidelines in the performance of their functions. Further, subsection (1A)(a) of section 28 provides that in having regard to ministerial guidelines, planning authorities are required to consider the objectives and policies of such guidelines when preparing and making the draft development plan and the development plan.

The de-zoning of parts of the Fosterstown Lands from “RA” to “OS” clearly contravenes a policy and objective of the Development Plan Guidelines by failing to retain residential zoning on the lands. This, in turn, is a breach of the Council’s obligations under section 28 to have regard to the Development Plan Guidelines, and to consider the objectives and policies of the Guidelines when preparing and making the draft development plan.

Subsection (1B) of section 28 of the Planning Acts makes clear that the obligation to “consider” and “have regard to” ministerial guidelines is not a trivial one. That subsection sets out certain information which must be included in a statement appended to the draft development plan and the development plan, which must demonstrate how the planning authority has implemented the policies and objectives contained in ministerial guidelines when considering their application to the area or part of the area of the draft development plan and the development plan. Further, subsection (1B)(b) requires that the planning authority demonstrates:

“if applicable, that [it] has formed the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement certain policies and objectives of the Minister contained in the guidelines when considering the application of those policies in the area or part of the area of the draft development plan or the development plan and shall give reasons for the forming of the opinion and why the policies and objectives of the Minister have not been so implemented”

Appendix 2 of the Draft Plan is entitled “Implementation of Ministerial Guidelines”. That Appendix makes no reference to the Development Plan Guidelines and none of the proposed material amendments to Appendix 2, published in November 2022, address those Guidelines. Therefore, some five months after the Development Plan Guidelines were published, the Council has failed to explain how it has implemented the policies and objectives of those Guidelines and has also failed to explain its reasons for not doing so, as required by subsection (1B)(b).

2. **Proposed amendment PA SH 8.5 is inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council’s obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.**

As noted above, amendment PA SH 8.5 inserts a site-specific objective on the Fosterstown Lands limiting density to a certain range. In that regard, the proposed amendment is

inconsistent with ministerial guidelines issued under section 28 of the Planning Acts promoting increased density at appropriate locations.

In particular we refer to the *Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages)* (2009) (the “**Sustainable Residential Development Guidelines**”). Under the heading “Public transport corridors”, the Sustainable Residential Development Guidelines state that “it is important that land use planning underpins the efficiency of public transport services by sustainable settlement patterns – including higher densities – on lands within existing or planned transport corridors.” The Guidelines go on to state that *minimum* net densities should be applied to such lands.

We also refer to the *Sustainable Urban Housing: Design Standards for New Apartments* (2020) (the “**Apartment Guidelines**”). Under the heading “Central and/or Accessible Urban Locations” the Apartment Guidelines note that such locations are generally suitable “for small- to large-scale (will vary subject to location) and higher density development (will also vary)”.

By way of context, the Apartment Guidelines define Central and/or Accessible Urban Locations as follows:

“Such locations are generally suitable for small- to large-scale (will vary subject to location) and higher density development (will also vary), that may wholly comprise apartments, including:

- Sites within walking distance (i.e. up to 15 minutes or 1,000-1,500m), of principal city centres, or significant employment locations, that may include hospitals and third-level institutions;
- Sites within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m) to/from high capacity urban public transport stops (such as DART or Luas); and
- Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) to/from high frequency (i.e. min 10 minute peak hour frequency) urban bus services.”

The Fosterstown Lands are currently located adjacent to a Dublin Bus transport corridor with a frequent service (peak c. 10min) from the 33 and 41 bus routes. Other services include the 41x to University College Dublin and the Swords Express 500-X, 501 and 501-X to the city centre. The site is also located adjacent to the proposed BusConnects corridor along the R132 as well as 500m from the proposed MetroLink station at Fosterstown.

Further, An Bord Pleanála (the “**Board**”) has previously formed the view that the Fosterstown Lands fall under the category of ‘Public Transport Corridor’ in granting permission to MKN for strategic housing development at Fosterstown North on 3 February 2021 (see Inspector’s report regarding Board ref. ABP-308366-20) (the “**MKN SHD Permission**”). Similarly, the Board’s Inspector was satisfied that the lands at Fosterstown North constituted a “Central and/or Accessible Urban Location”. Accordingly, the imposition of an objective setting a maximum density range is at odds with the ministerial guidelines just cited.

In those circumstances, proposed amendment PA SH 8.5 is inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council’s obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.

As noted above, subsection (1B) of section 28 sets out requirements that the Council must meet in explaining any failure to implement the policies and objectives of ministerial guidelines. Whilst Appendix 2 of the Draft Plan does refer to the Apartment Guidelines and the Sustainable Residential Development Guidelines, it does not, and nor do the proposed amendments to that appendix, explain why the policies favouring increased density described above were not and could not be implemented in respect of the Fosterstown Lands. Therefore, the Council has also breached its obligations under subsection (1B).

**3. Insofar as reasons for de-zoning the Fosterstown Lands and for the insertion of the proposed amendment are discernible, they are inadequate and demonstrate reliance on irrelevant considerations, namely the Swords Masterplans, and particularly the Fosterstown Masterplan (collectively “the masterplans”).**

As set out above, subsection (1B) of section 28 of the Planning Acts sets out the formal and substantive requirements that the Council must meet in explaining any failure to implement the policies and objectives of ministerial guidelines. The Council has signally failed to meet those requirements with regard to its breach of ministerial guidelines.

Without prejudice to that point, it is also clear that, insofar as reasons for de-zoning the Fosterstown Lands and for the insertion of the proposed amendment are discernible, they are inadequate and reveal reliance on irrelevant considerations.

The CE Report justifies the de-zoning of parts of the Fosterstown Lands by stating that it:

“... corresponds with the approach set out in the Green Infrastructure Report for the 2019 Swords Masterplans and for the specific masterplan for Fosterstown which forms part of the Swords Masterplans. This approach seeks to provide for a central green corridor while protecting the existing waterways on the site. It is considered appropriate that these key objectives for the overall development of these lands are reflected in the overall land use zoning for the area.”

Similarly, the reasoning contained in the objective proposed to be inserted by PA SH 8.5 is that limiting density would be “in keeping with the masterplan and the enhancement of the character of the Key Town of Swords.”

Subsection (1B) of section 28 requires that reasons must be provided for forming the opinion that it is not possible, because of the nature and characteristics of the area or part of the area of the development plan, to implement policies and objectives of ministerial guidelines and why the policies and objectives of the Minister have not been so implemented. For the avoidance of doubt, these reasons cannot be located in a chief executive’s report on the draft plan consultation, and nor can they be found in the text of a proposed amendment, rather they must be set out in an appendix to the draft plan and the development plan itself. Nonetheless, even if the reasons set out in the CE Report and in the text of the proposed amendment are tested against the requirements of subsection (1B) they are clearly inadequate.

The standard set out in subsection (1B) is a high one: it must be explained why it is *not possible* to implement the policies and objectives of ministerial guidelines because of the nature and characteristics of the area or part of the area of the development plan. The only reason provided for breaching the “no residential de-zoning” policy and objective of the

Development Plan Guidelines is that de-zoning the Fosterstown Lands corresponds with the approach set out in the masterplans. Plainly, this does not relate to the nature and characteristics of part of the area of the development plan and nor does the existence of a non-statutory masterplan render it impossible for the Council to implement the policy and objective of the Development Plan Guidelines to not de-zone residential serviced land.

Similarly, the justification in the text of the site-specific objective to be inserted by the proposed amendment is that it would be “in keeping with the masterplan”. Again, this does not relate to the nature and characteristics of part of the area of the development plan. Indeed, as noted above, at the Council meeting of 13 October 2022, Ms Roisin Burke, Senior Planner for the Council, stated that a map based objective was not required in this instance. In those circumstances, it cannot be argued that it is “not possible” to implement the policies and objectives of ministerial guidelines promoting higher densities.

Accordingly, such reasons as are discernible for the de-zoning of the Fosterstown Lands and for the insertion of the proposed amendment do not meet the statutory requirements set out in subsection (1B) of section 28 and are inadequate.

Furthermore, insofar as the Council considers itself bound by the contents of the masterplans, which have no basis in statute, in preparing and making the draft development plan and the development plan, and in justifying its breach of the policies and objectives of ministerial guidelines, it has taken into account irrelevant considerations.

Section 12(11) of the Planning Acts provides that in making a development plan the members are restricted to considering certain matters, namely: 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. The masterplans are not relevant considerations for the purposes of section 12(11) and the Council’s error in taking them into account is further compounded by the fact that the reliance on the masterplans has led the Council to breach the policies and objectives of ministerial guidelines, and in turn the requirements of section 28 of the Planning Acts.

**4. The de-zoning of the Fosterstown Lands and the insertion of the proposed amendment breach the proper planning and sustainable development of the area and contradict the Board’s conclusions on that issue with regard to the Fosterstown Lands.**

As noted above, the MKN SHD Permission was granted to MKN by the Board on 3 February 2021. In granting the MKN SHD Permission, the Board specifically considered the proper planning and sustainable development of the area, concluding as follows:

“The Board considered that, subject to compliance with the conditions set out below that the proposed development would constitute an acceptable quantum and density of development in this accessible urban location, would not seriously injure the residential or visual amenities of the area, would be acceptable in terms of urban design, height and quantum of development and would be acceptable in terms of pedestrian safety. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.”



The Board's Inspector concluded as follows with regard to the quantum of public open space on the site:

"While I note the concerns of the Planning Authority in relation to this area of open space, I consider the overall quantum acceptable. I also note the need for the phased development of these lands, and as such the proposal to have a portion of the proposed open space as a temporary space is appropriate, with a view to providing replacement open space at a future point. The applicant's phasing proposals state that Phase 2 will consist of the inter alia the completion of the riparian corridor resulting in c. 8,300 sqm of public open space."

Accordingly, the MKN SHD Permission unequivocally determines that the proposed SHD development on the site, and the quantum of public open space provided in that development, would constitute an acceptable quantum and density of development in this accessible urban location and would be consistent with the proper planning and sustainable development of the area. Taking into consideration its obligation under section 12(11) of the Planning Acts to restrict its considerations when making the development plan to the proper planning and sustainable development of the area, the Council has no scope to depart from the conclusions of the Board on this issue.

5. **There has been no material change in circumstance to justify the de-zoning of the Fosterstown Lands and the insertion of the proposed amendment.**

The justification provided in the CE Report for de-zoning parts of the Fosterstown Lands to "OS" was "to provide for a central green corridor while protecting the existing waterways on the site". However, there has been no material change in circumstance on the Fosterstown Lands that justifies the introduction of "OS" zoning on the lands. The Council saw fit to zone the entirety of the Fosterstown Lands "RA" in the current 2017-2023 Plan. The same zoning adhered in the previous 2011-2027 Plan. In the 2005-2011 Plan, the Lands also lacked any "OS" zoning and were zoned "RS1" with the objective "To provide for new residential communities in accordance with approved local area plans and subject to the provision of the necessary social and physical infrastructure."

Similarly, the proposed amendment and the insertion of the site specific objective limiting density is at odds with the approach taken in previous development plans where no such objective was included on the Fosterstown Lands.

Our clients cannot understand this striking departure from the approach taken by the Council in its development plans over a period of some 17 years. The Council must identify a relevant and material change in circumstances to justify any new or greater burden on our clients and their lands. Absent that, our clients are entitled to expect consistency.

For the avoidance of doubt, we reiterate that the introduction of a non-statutory masterplan during the course of the 2017-2023 Plan is not a relevant consideration and does not constitute a material change in circumstance justifying the de-zoning of the Fosterstown Lands.

6. **The Council’s treatment of the Fosterstown Lands amounts to unlawful discrimination where other lands in the Fingal area with the same characteristics have retained their “RA” zoning and where there has been no attempt to insert density caps at other lands which are subject to masterplans.**

As noted previously, the CE Report attempts to justify the de-zoning of the Fosterstown lands by claiming it is necessary to provide for a central green corridor on the lands. However, the Council has not seen to fit to introduce “OS” zoning on other lands zoned “RA” in the Fingal area with similar lines of trees to the Fosterstown Lands.

The MKN submission refers to lands at Moorestown, Swords and Mabestown, Malahide, both of which have retained “RA” zoning over the entirety of the lands with no “OS” zoning introduced, despite sharing similar characteristics to the Fosterstown Lands. In this regard the de-zoning of the Fosterstown Lands constitutes unlawful discrimination against our clients.

An excerpt from the MKN submission is included below for ease of reference:



Figures 3.4 Residential lands at Moorestown, Swords



Figures 3.5 RA zoned lands at Mabestown, Malahide,

Furthermore, while masterplans were prepared for other areas of Swords, which include similar density ranges to the range included in the Fosterstown masterplan, there are no similar objectives inserted with respect to those lands in the Draft Plan. For example, the

Barrysparks and Crowcastle Masterplan states that it is a “Key Built Form Objective” for the lands to provide residential accommodation at a net density of 95-105 units per hectare. However, there is no specific objective to this effect inserted for those lands. The proposed amendment is, therefore, also discriminatory.

**7. The de-zoning of the Fosterstown Lands and the proposed amendment fail to respect the site activation policies expressed in measures such as the Residential Zoned Land Tax.**

To the extent that the de-zoning of the Fosterstown Lands and the proposed amendment’s introduction of a density cap could cause delays in the initiation of residential development on the lands, the approach taken in the Draft Plan runs contrary to the policy in favour of activation of sites for residential development. This policy underpins the Residential Zoned Land Tax, which was introduced this year and is intended to replace the Vacant Site Levy.

The site activation policy is clearly expressed in the *Residential Zoned Land Tax - Guidelines for Planning Authorities* (2022) (the “**RZLT Guidelines**”) which state:

“The principal purpose of the residential zoned development land tax is to encourage the timely activation of zoned and serviced residential development land for housing, rather than to raise revenue.”

The RZLT Guidelines were issued under section 28 of the Planning Acts, and accordingly the Council is obliged to have regard to the Guidelines and consider their policies and objectives when preparing and making the Draft Plan and the development plan.

**8. The Council has targeted the Fosterstown Lands in an unlawful manner in order to undermine the MKN SHD Permission, to restrict the density of future applications for planning permission and/or to gain a benefit in terms of additional levies from our clients.**

As noted above, the Board granted the MKN SHD Permission to MKN on 3 February 2021. The Board’s Inspector’s report records the Council’s recommendation that the Board refuse permission for reasons including the following:

“The open space serving the proposed development, by virtue of the deficiency in usable spaces provided, the temporary nature of the unprotected public open space bounded by the proposed Fosterstown Access Road/Spine Road and the absence of sufficient play space to serve the community in the proposed development, is contrary to the quantitative and qualitative standards for open space set out in the Fingal Development Plan 2017-2023 (Table 12.5 Open Space Hierarchy and Accessibility), would fail to provide a satisfactory level of amenity for residents of the proposed development and would, therefore, be contrary to the proper planning and sustainable development of the area.”

The views of elected members as summarised in the Inspector’s Report are revealing. Some relevant examples include the following:

- “Material Contravention of the Masterplan (May 2019 with widespread support) and Development Plan (i.e. too dense at 150 UpH, too high at this location especially along Forest Road should be 2-3 storey).”
- “School not being provided as per Masterplan.”
- “If permitted the Council should consider its options to stop a bad decision i.e. JR similar to adjacent Council (please do not let this development go ahead in its current form)”
- “If permitted this proposal will eradicate confidence in the planning system i.e. Masterplans and LAP’s.”

The opposition of the elected members to the MKN SHD Permission, and in particular the proposed density of the development, the open space provision and its alleged non-compliance with the masterplans, is therefore on record.

The Council will be aware that the MKN SHD Permission is currently the subject of legal challenge (*O’Reilly & Ors. v. An Bord Pleanála & Ors.* High Court Record No. 2021/245 JR). Should the Board’s decision to grant the MKN SHD Permission be quashed, the Board may be required to reconsider MKN’s application for permission and to do so in light of the legal and planning context adhering at the time it comes to consider the application anew. Therefore, it is clear that the de-zoning of the Fosterstown Lands and the proposed amendment are an attempt to interfere with the process before the Board so that, if the Board comes to reconsider the application for MKN SHD Permission, it may be forced to refuse permission due to the changes in zoning on the site, and the insertion of an objective capping density.

Further, the MKN submission notes that the de-zoning of parts of the Fosterstown Lands from “RA” to “OS” will have a negative impact with regard to our client’s ability to comply with the open space requirements for residential development on the remainder of the lands. As outlined in the MKN submission, this will result in a loss of a significant quantity of net developable area on the Fosterstown Lands. Alternatively, our client may have to pay substantial levies in lieu of public open space, despite the fact there would be substantial public open space available within the Fosterstown Lands, as land zoned OS cannot be considered as part of a calculation of public open space. Such a motive for de-zoning the lands is unlawful, and does not relate to the proper planning and sustainable development of the lands.

9. **The decision to de-zone the Fosterstown Lands and to insert a site-specific objective limiting density is unreasonable and discriminatory insofar as it is inconsistent with the Chief Executive’s approach to other lands where there are live SHD planning applications, and there is no discernible reason for any difference in treatment.**

The CE Report is divided into five parts. Part four addresses “Submissions relating to the Draft Development Plan Map Sheets”. At page 578, under the heading “Lands at Auburn House”, the CE Report notes that a submission was received in connection with lands at Auburn House, Little Auburn and Streamstown off the R107 Malahide Road requesting “...inclusion of a special objective in the new County Plan that Auburn House and attendant

grounds are only suited to extremely low density and limited residential development and any development to be subject to proper protection of Auburn House and Attendant Grounds.”

The Chief Executive’s response to that submission was as follows:

“The lands at Auburn House have been zoned for residential development for many years. National policy on building heights and densities set out direction on the form of the redevelopment of the lands at this location. Auburn House and lands are the subject of a live SHD Planning Application, with a decision due in August 2022 (TA06F.313360 refers). The description of development is: ‘Preservation of Auburn House (a Protected Structure) and stables as 1 no. residential dwelling, conversion of stables to provide storage space for Auburn House, construction of 368 no. residential units (87 no. houses, 281 no. apartments), creche and associated site works.’ It would not be appropriate to insert a new Local Objective in relation to Auburn House, while this area is subject to a live planning application.”

The parallels between the proposed amendment and the request for a density objective at Auburn House are evident. The Chief Executive’s desire to avoid interference with the planning process before the Board in respect of the Auburn House SHD application is laudable, and correct. Further, the Chief Executive’s respect for the long-term residential zoning of the site is notable. Unfortunately, the same restraint and respect is not in evidence with regard to the treatment of the Fosterstown Lands. Of particular relevance in this context is the pending application for permission for SHD made by Murphy Development (Board ref. ABP-313331-22). The Board’s decision on that application is awaited. This situation is analogous to the Auburn House SHD application. As noted above, the Chief Executive concluded that, “It would not be appropriate to insert a new Local Objective in relation to Auburn House, while this area is subject to a live planning application.” There is no reason for any difference in treatment with respect to the Fosterstown Lands.

Similarly, as noted above at submission no. 7, the MKN SHD Permission is under legal challenge, and, in the event that challenge is successful, the Board may be required to reconsider MKN’s application for MKN SHD Permission anew. In those circumstances, the de-zoning of the Fosterstown Lands and the insertion of a density cap is an impermissible attempt to interfere with any future consideration of the application by the Board. This is totally at variance with the Chief Executive’s response to the submission regarding the lands at Auburn House.

In circumstances where there is no discernible reason for the difference of treatment just described, the decision to de-zone the Fosterstown Lands is unreasonable and discriminatory. If adopted, the proposed amendment is similarly unreasonable and discriminatory.

## Conclusion

Our submissions on the Draft Plan and the proposed amendments thereto are summarised below:

1. In de-zoning the Fosterstown Lands, the Council has breached the Development Plan Guidelines and in doing so has failed to fulfil its obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of



such guidelines. Further, in breach of subsection (1B) of section 28, the Council has failed to provide reasons explaining why it has formed the opinion that the policies and objectives of the Development Plan Guidelines cannot be implemented.

2. Proposed amendment PA SH 8.5 is inconsistent with ministerial guidelines, and its adoption will result in a breach of the Council's obligations under section 28 of the Planning Acts to have regard to ministerial guidelines, and to consider the policies and objectives of such guidelines.
3. Insofar as reasons for de-zoning the Fosterstown Lands and for the insertion of the proposed amendment are discernible, they are inadequate and demonstrate reliance on irrelevant considerations, namely the masterplans.
4. The de-zoning of the Fosterstown Lands and the insertion of the proposed amendment breach the proper planning and sustainable development of the area and contradict the Board's conclusions on that issue with regard to the Fosterstown Lands.
5. There has been no material change in circumstance to justify the de-zoning of the Fosterstown Lands and the insertion of the proposed amendment.
6. The Council's treatment of the Fosterstown Lands amounts to unlawful discrimination where other lands in the Fingal area with the same characteristics have retained their "RA" zoning and where there has been no attempt to insert density caps at other lands which are subject to masterplans.
7. The de-zoning of the Fosterstown Lands and the proposed amendment fail to respect the site activation policies expressed in measures such as the Residential Zoned Land Tax.
8. The Council has targeted the Fosterstown Lands in an unlawful manner in order to undermine the MKN SHD Permission and/or to gain a benefit in terms of additional levies from our clients.
9. The decision to de-zone the Fosterstown Lands and to insert a site specific objective limiting density is unreasonable and discriminatory insofar as it is inconsistent with the Chief Executive's approach to other lands where there are live SHD planning applications, and there is no discernible reason for any difference in treatment.

In light of the foregoing, we urge the Council to remove the "OS" zoning on the Fosterstown Lands, and to reject proposed amendment PA SH 8.5.

For the avoidance of doubt, we are instructed by our clients to reserve their right to seek relief by way of judicial review should the Council proceed with the proposed amendment and the de-zoning of the Fosterstown Lands.

Yours faithfully

*(sent by email, so bears no signature)*

**McCann FitzGerald LLP**